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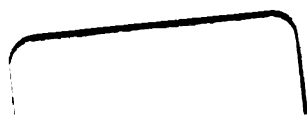
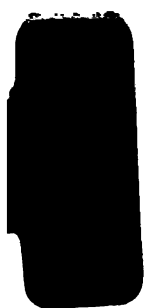
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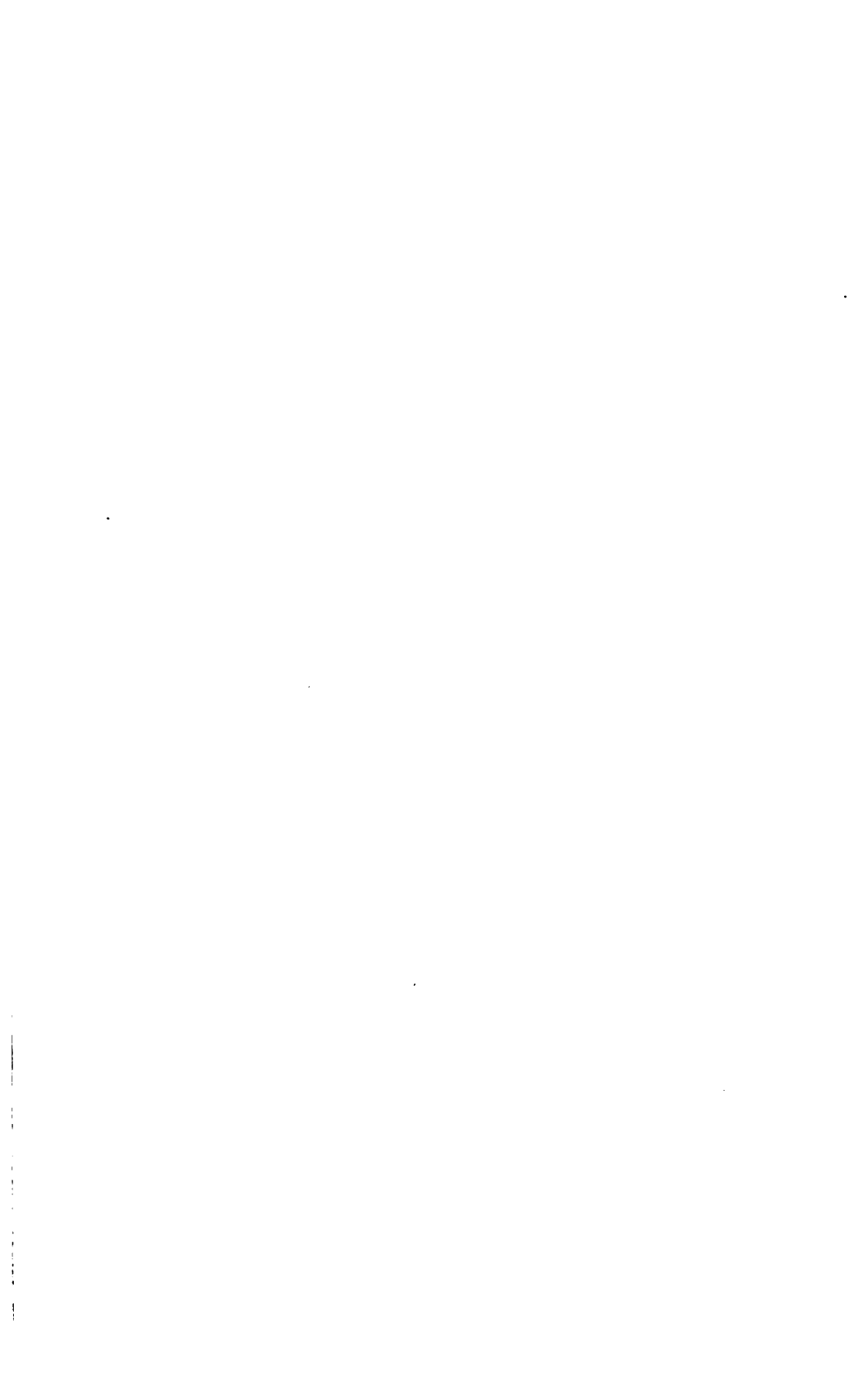


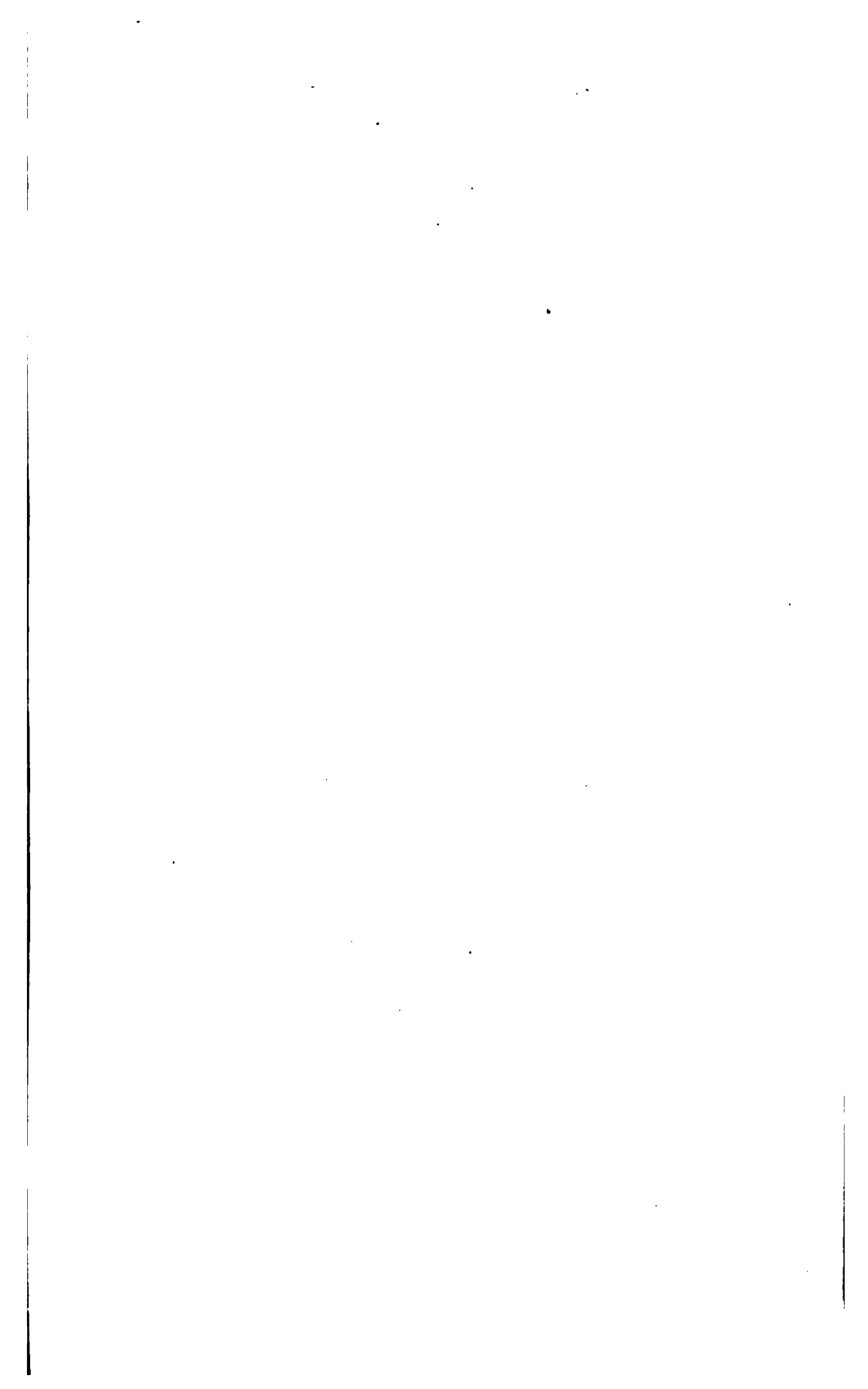


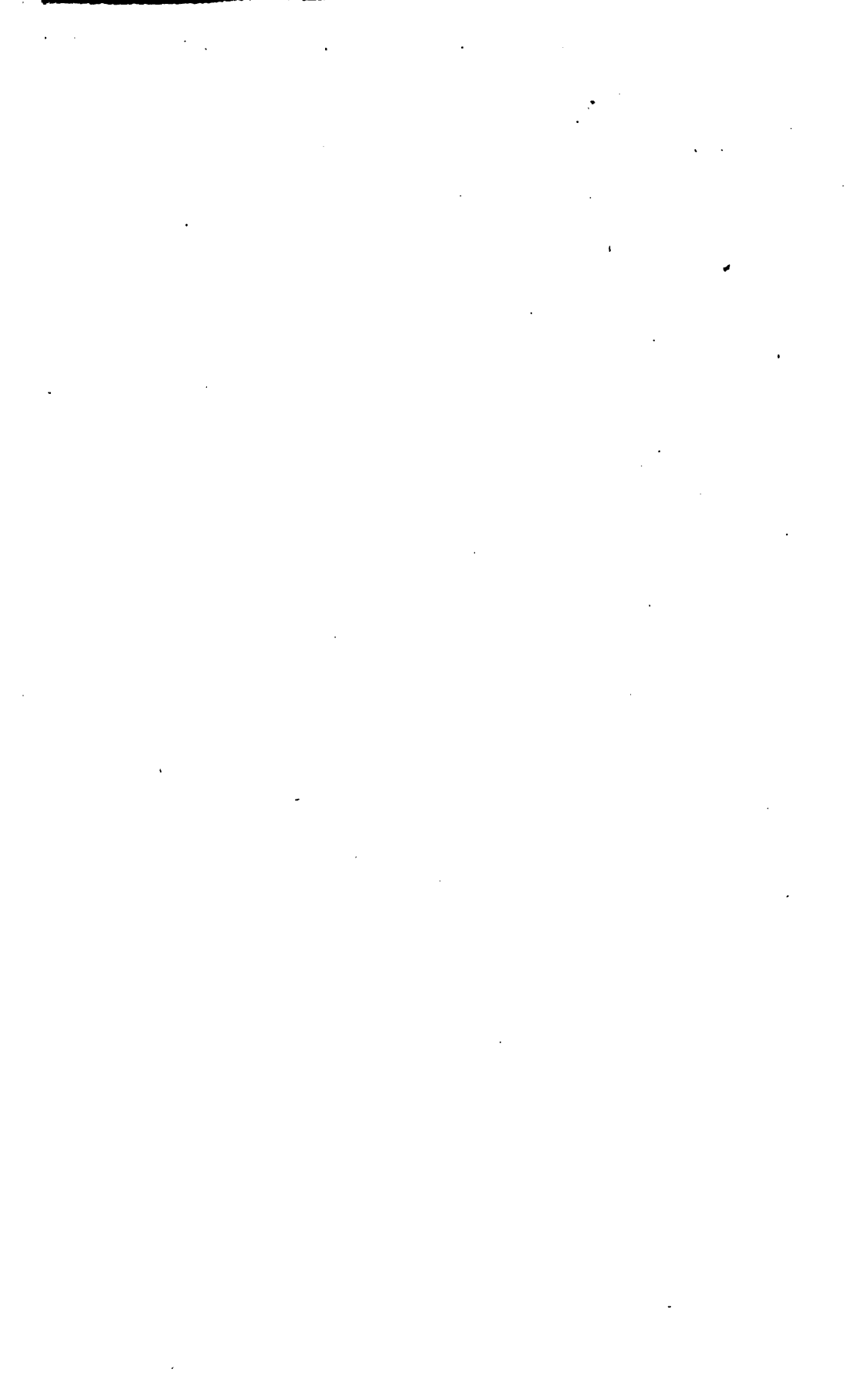


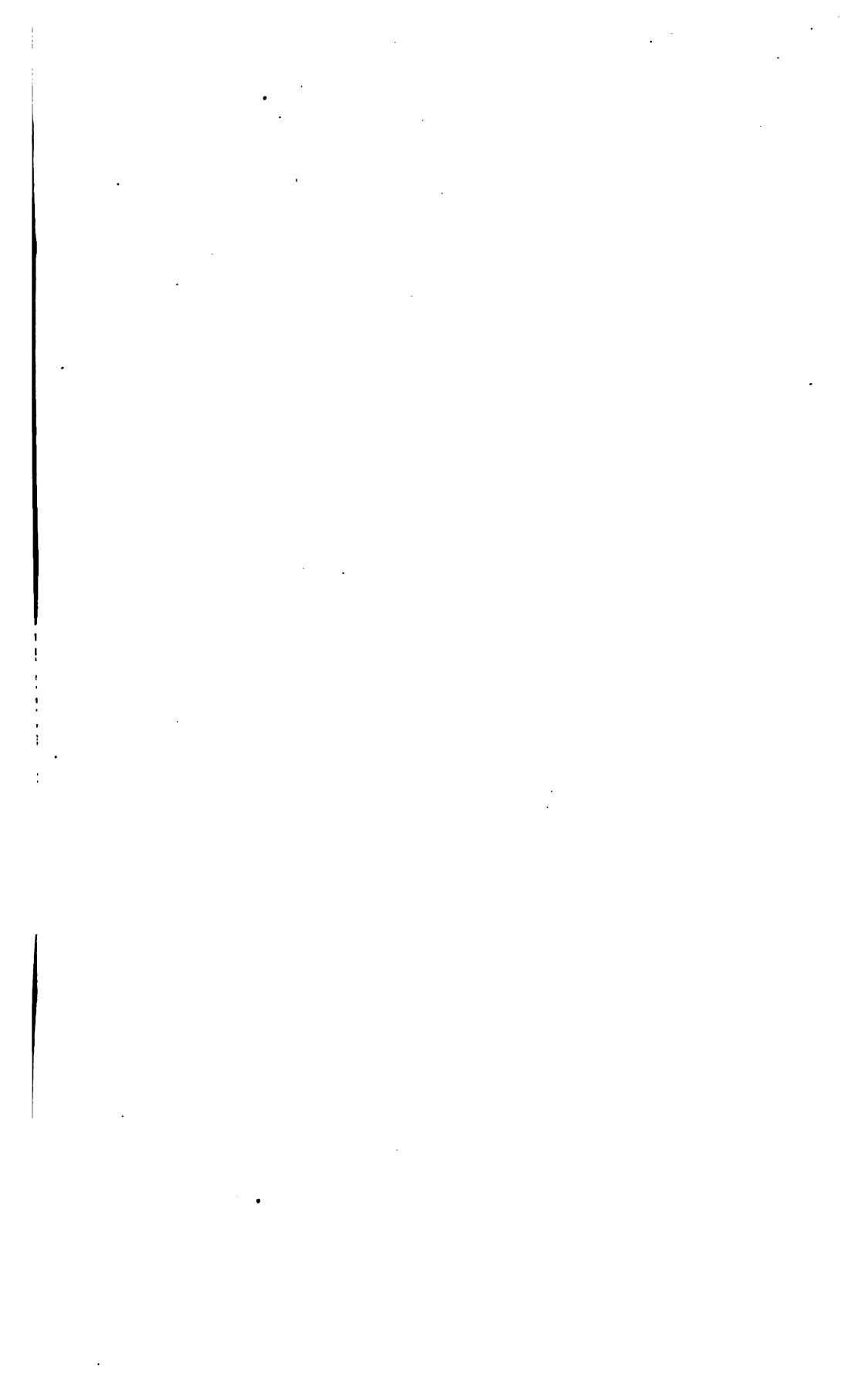
















THE  
LAWYERS REPORTS  
ANNOTATED

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BOOK II.

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ALL CURRENT CASES OF GENERAL VALUE AND  
IMPORTANCE WITH FULL ANNOTATION

ROBERT DESTY, EDITOR,

EDMUND H. SMITH, BURDETT A.  
RICH, ASSISTANTS.

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# LAWYERS' REPORTS,

## ANNOTATED.

### NEW YORK SUPREME COURT.

#### PEOPLE of the State OF NEW YORK v. NORTH RIVER SUGAR REFINING CO.

1. The formation of the "Sugar Trust" (denominated the "Sugar Refineries Company")—an unincorporated association composed of a board of trustees created under a deed of trust executed in the names of certain sugar refining corporations and partnerships, owning nearly all the sugar refineries in the country, with the expressed object of promoting economy of administration and reducing the cost of refining, and promoting the interests of all parties to the deed in all lawful ways, in accordance with the terms of which such partnerships were turned into corporations, and the stock of all the corporations was then transferred to such trustees, in lieu of which they issued trust certificates to the stockholders of the several corporations—is to be considered as the corporate act of the corporations concerned, and not simply the individual act of the stockholders.
2. Such trust, being in effect the uniting of all the corporations concerned into a practical con-

solidation or partnership, not authorized by their charters or effected under the statutes in reference to consolidation of corporations, is *ultra vires* and warrants the forfeiture of corporate existence.

3. The combination in question—being the centralization of corporate franchises in a single, irresponsible power, furnished with every delegated facility for regulating and controlling at will, throughout the country, the production and price of a particular and necessary article of commerce, viz.: refined sugar—creates a monopoly in a legal sense, is detrimental to the public, and is consequently unlawful.
4. Hence, held, that one of the corporations which had entered into such combination, was by reason thereof liable to forfeiture and dissolution at the suit of the People, for abuse of its powers and for the exercise of privileges or franchises not conferred upon it by law.

(January 9, 1899.)

**A**CTION in the nature of *quo warranto*, for forfeiture of corporate rights and dissolution of a corporation. Tried at a Circuit of

**NOTE.**—*Agreements to stifle competition in trade are void.* All agreements, in whatever form, to stifle fair competition are void. *Gardiner v. Morse*, 25 Maine, 140; *James v. Fulcro*, 5 Tex. 512; *Hunt v. Frost*, 4 Cush. 54; *Hook v. Turner*, 22 Mo. 338; *Jones v. Caswell*, 3 Johns. Cas. 29; *Thompson v. Davies*, 11 Johns. 112; *Ingram v. Ingram*, 4 Jones, L. 188; *Martin v. Ranellet*, 5 Rich. L. 541; *Brisbane v. Adams*, 3 N. Y. 129; *Atchison v. Mallon*, 43 N. Y. 147; *Gibbs v. Smith*, 115 Mass. 562; *Marsh v. Chicago, R. I. & P. R. Co.* (Iowa) 39 N. W. Rep. 643. A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief; and the same proposition, in one form of expression and another, is laid down in all the criminal law. *Blish, Cr. L. § 172*; *Desty, Cr. L. § 3*; *Chitty, Cr. L. § 1138*; *Archb. Cr. Pr.* 1830. See also *Reg. v. Kenrick*, 5 Q. B. 46; *State v. Stewart*, 59 Vt. 273, 4 New Eng. Rep. 378; *Com. v. Carls*, *Bright*, (Pa.) 53; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173. If two persons in actual competition intend bidding for an article, then if they agree that one shall abstain from bidding and the profits shall be divided, the courts will not enforce their bargain. *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Jenkins v. Frink*, 30 Cal. 58; *Loyd v. Malone*, 23 Ill. 43; *Wooton v. Hinkle*, 30 Mo. 590; *Sharp v. Wright*, 33 Barb. 236; *People v. Stephens*, 71 N. Y. 527; *Singer Mfg. Co. v. Yarger*, 2 McNary, 583. An agreement by several commercial firms, by which they bound themselves for the term of three months not to sell any India cotton bagging, except with the consent of the majority of their number, was held unlawful in *India Bagging Assn. v. Rock*, 14 La. Ann. 164. And see *Stanley v. Allen*, 5 Denio, 434; *Craft v. McConoughy*, 79 Ill. 246; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 663.

Although a corporation is not dissolved by insolvency, the appointment of a receiver, or by a lease of the corporate property (*People v. Northern R. Co.* 42 N. Y. 217; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Com. v. Central Paa. R. Co.* 62 Pa. 506), yet when it is consolidated with another under authority of law, or when under such authority it transfers its franchises, it is dissolved. *Bishop v. Brainerd*, 28 Conn. 289; *Shields v. Ohio*, 95 U. S. 819 (24 L. ed. 387). *Conspiracies to injure trade.* Conspiracies to injure trade were indictable at common law. *Rex v. Cope*, 1 Strange, 144; *Rex v. De Bereuger*, 3 Maule & S. 68; *Rex v. Norris*, 2 Ld. Ken. 800; *Reg. v. Gurney*, 11 Cox. Cr. Cas. 414; *Levi v. Levi*, 6 Car. & P. 238. A "corner" when accomplished by confederation, to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful. *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173; *People v. Melvin*, 2 Wheeler, Cr. Cas. 232. In one aspect, all contracts in conflict with the law or public policy are within the scope of contracts partaking of unlawful conspiracy; they are combinations of two or more persons, which is the idea of a conspiracy, to do what the law or public policy forbids. *Bishop, Cont. § 62*. Any agreement between large dealers, meant to control the market and obtain exorbitant prices, is an unlawful conspiracy against trade, and void. *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 246; *Fairbank v. Leary*, 40 Wls. 637; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 663, 672. And see *Collins v. Locke*, L. R. 4 App. Cas. 674; *Western Union Teleg. Co. v. Chicago & P. R. Co.* 36 Ill. 246; *Western Union Teleg. Co. v. American Union Teleg. Co.* 65 Ga. 160; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 72 Ill. 380. Conspiracies which involve mischief to the public are indictable, although neither the object sought to be accomplished, nor the means used for its accomplishment, is criminal. *Com. v. Ward*, 1 Mass. 473; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54; *State v. Burnham*, 15 N. H. 398. No agreement for defrauding the public can be valid. *People v. Stephens*, 71 N. Y. 527. A contract

the Supreme Court in and for the City and County of New York, before Barrett, J., and a jury. At the close of the testimony each party moved the court to direct a verdict in its favor. *The motion of the defendant was denied, and that of the plaintiff granted, in the following opinion—and thereupon a verdict was directed for the plaintiff.*

The facts, and questions presented, are stated in the opinion.

*Messrs. Charles F. Tabor, Atty-Gen., and Roger A. Pryor for the People.*

*Messrs. Charles P. Daly, James C. Carter and John E. Parsons for defendant.*

**Barrett, J.:**

The questions to be decided in this case are, whether the acts complained of are corporate acts, and if so, whether such corporate acts are grounds of forfeiture within section 1798 of the Code of Civil Procedure. The People rest their case primarily upon the second and fifth subdivisions of this section, claiming under the second subdivision that the defendant has "become liable to be dissolved by the abuse of its powers," and under the fifth that it has exercised privileges or franchises not conferred upon it by law.

The act complained of in this connection is the defendant's participation in a combination between the owners of certain sugar refineries. The combination comprises all the sugar refineries in this State and with a few exceptions in the United States. This vast combination is

denounced by the people as a public menace, as preventive of competition and as tending to control prices and create a monopoly. It is defended by the corporation as the mere individual act of its stockholders, in no wise binding upon it, and at all events as a harmless association constituting nothing more serious than an unusually large partnership; in other words, a lawful blending of individual interests in a joint arrangement for mutual protection and benefit.

The first question, then, to be considered is whether the corporation as such has entered into this combination; for if it has not, clearly it cannot be deprived of its franchises because of independent and several acts, however illegal, of its stockholders. To a proper appreciation and solution of this question, the precise facts must be gleaned and the foundation of the transaction minutely analyzed. Such analysis will also and necessarily throw a clear light upon the purposes of the project, and thus aid in the solution of the second question, namely: whether the combination is the innocent association claimed by the defendant or the unlawful one charged by the plaintiff.

Let us then consider the foundation of the combination. It rests upon a written agreement, which has been styled the "trust deed." At the time this deed was prepared, sugar refineries in this State and country were variously organized. Some were simple partnerships; others corporations. Evidently the first step contemplated by the author of the scheme was harmony in the fundamental business basis of

which embodies any indictable confederation, whether to injure the public or an individual, is void against law; and, short of this, one merely tending to the same mischief is void as against public policy. Where two or more parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or where it was against public policy, or contrary to good morals, no one of them can maintain a suit thereagainst any other. *York v. Merritt, 77 N. C. 213; Wight v. Rindskopf, 43 Wis. 344.* All confederacies whatsoever, which wrongfully prejudice a third person, are highly criminal at common law. *State v. Stewart, 4 New Eng. Rep. 378, 59 Vt. 273; 2 Russ. Cr. 674.* No one is authorized to unlawfully destroy or hinder the lawful business of another for the purpose of helping himself. *People v. Petheram (Mich.) 7 West. Rep. 592.* A conspiracy is not the subject of a civil action until a third person has suffered a damage from something done under it. Then, and not before, he may sue; and the wrong inflicted, not the combination to do it, is the real foundation of the action. *Saville v. Roberts, 1 Ld. Raym. 374, 378; Hutchins v. Hutchins, 7 Hill, 104, 108; Herron v. Hughes, 25 Cal. 555.*

*Contracts creating monopolies are void.* Bargains devised to compel individuals or corporations to pay undue prices for anything, or to create a monopoly, are void. *Marsh v. Russell, 66 N. Y. 238; Kelly v. Devlin, 58 How. Pr. 487; Woodruff v. Berry, 40 Ark. 251; Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434.* Monopolies are against common right, and are unconstitutional and void. *Norwich Gas-Light Co. v. Norwich City Gas Co., 25 Conn. 19; Chicago v. Rumpff, 45 Ill. 40; Hudson v. Thorne, 7 Paige, 261; Slaughter-House Cases, 83 U. S. 15 Wall. 102 (21 L. ed. 417).* It has been held that granting such a privilege is a violation of the Fourteenth Amendment of the Constitution of the United States. *Live Stock D. & B. Assn. v. Crescent City, L. S. L. & S. H. Co., 1 Abb. (U. S.) 388.* Under the Fourteenth Amendment, every citizen of the United States should be able to plead his citizenship of the Republic as a protection against any similar invasion of his privileges and immunities. *Slaughter-House Cases, 83 U. S. 16 Wall. 106 (21 L. ed. 418).* They are contrary to public policy. *Rex v. Waddington, 1 East, 167; 2 L. R. A.*

*Case of the Monopolies, 11 Coke, 84 b.* Where there is restraint on the one hand, there is monopoly on the other, and monopolies are odious to the law; so that, upon this ground also, if indeed it is not deemed identical with the other, the law of this subject proceeds. *Arnott v. Pittston & E. Coal Co., 68 N. Y. 569; Skrainka v. Scharringhausen, 8 Mo. App. 522; Craft v. McCounoughy, 79 Ill. 346; Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 190.* "The odious nature of monopoly has become more apparent as commerce has increased. The danger to be apprehended from the accumulation of wealth and power in the hands of great corporations, and the abuses by which large capitalists may so combine as to relax or destroy competition in trade, are matters of public concern, and the essential question is one of monopoly and of injury to the public." *Skrainka v. Scharringhausen, 8 Mo. App. 522.* A contract which creates a monopoly is in violation of the Constitution, which declares that "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." If such is the effect of the contract, it is forbidden by the Constitution, and no legislation can give validity to it. *Brenham v. Brenham, Water Co., 67 Tex. 561.* There are three inseparable incidents to every monopoly: (1) the price of the same commodity will be raised; (2) that after the grant the commodity is not so good and marketable as before; (3) that it tends to impoverishment of divers artisans, artificers and others. *Case of the Monopolies, 11 Coke, 87 a.* An exclusive privilege granted to a few individuals and their successors incorporated into a society, and prohibiting all others from exercising the same privilege, violates the fundamental rights of citizens willing to conform to the constitutional regulations and restrictions of business. *Slaughter-House Case, 1 Woods, 21.* And so as to conspiracy to monopolize, by fraudulent means, any particular business staple, so as to force a sale at exorbitant prices, such as coal. *Rex v. Norris, 2 Ld. Kenyon, 300; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173.*

*Contracts void as in restraint of trade.* See *Leslie v. Lorrillard, 1 L. R. A. 453, 110 N. Y. 519.*

*Contracts in nature of monopolies void.* See *Gulf, Colo. & S. F. R. Co. v. Texas, 1 L. R. A. 549.*

each refinery. The combination never could have been successfully created upon the basis of a special or quasi partnership arrangement between partnerships and corporations. It was necessary, therefore, either to turn the corporations into partnerships or the partnerships into corporations.

It did not require the astute mind that prepared this most original instrument to perceive that an aggregation of partnerships, with the dangers resulting from death and the exercise of individual power, would never effect safe and permanent cohesion. Accordingly we find, as one of the first provisions in the deed, and as the basis of the so called trust structure, a condition in substance that the partnerships shall all be turned into corporations. This in fact was done; and thus several of these corporations were organized for the express purpose of creating the very shares of capital stock through which the combination was to be formed. Partners took on corporate garb, became shareholders, and as such fitted themselves to enter the combination within the terms of the deed. Having thus provided for uniformity of corporate existence, the deed specifies what is to be done by each of the corporations—formed or to be formed. The corporations already formed agree for themselves, and the partnerships agree for those corporations which they are to form, that all the shares of the capital stock of all the corporations shall be transferred to a board consisting of eleven persons (named in the deed) as trustees, to be held by them and their successors, strictly as joint tenants, subject to the purposes set forth in the deed. These purposes are declared to be:

1. To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit.
2. To give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar.
3. To furnish protection against unlawful combinations of labor.
4. To protect against inducements to lower the standard of refined sugars.
5. Generally to promote the interests of the parties hereto in all lawful and suitable ways.

The board is authorized to make by-laws, to appoint from its members a president, vice-president, treasurer and committees, and to prescribe their duties and powers. The board is thus clothed with a power coextensive with the specified objects of the agreement, as applied to the business of each refinery; and it may confer the executive working of that power upon a president or vice-president.

Having thus formed the trust, named the trustees, and specified their powers, the deed proceeds to indicate the persons for whom the trust is created and the duties of the trustees with regard to such persons. The *cestuis que trustent* are, of course, the entire body of stockholders of the aggregated corporations. It will be observed that these stockholders do not sell a single share of their stock; yet they transfer the entire block to eleven gentlemen, who are thereafter to stand in their shoes. They would, naturally, look for some acknowledgment

from their trustees of the receipt of their shares and of the obligations which the trust imposes. The deed proceeds to furnish this in the shape of what are termed trust certificates. These certificates are not to exceed \$50,000,000, and are to be divided in 500,000 shares, each of \$100; they are to be divided by the eleven trustees among the several refineries, in due proportion to the value of their respective plants; and the refineries are then to subdivide the blocks of certificates, so assigned to them, among the *cestuis que trustent* in proportion to the stock of the corporation which each *cestui que trust* held prior to the transfer to the trust board.

The form of the trust certificate is precisely like the certificate of stock in a corporation. The eleven trustees are not named, but are styled "The Sugar Refineries' Company," and each certificate specifies that it is issued under and subject to the provisions of the trust deed. The usual blank form of assignment and power of attorney is indorsed upon this certificate, with an addendum to the effect that the assignee, by accepting the transfer, assents to the terms of the trust deed.

To avoid confusion of thought, and to distinguish clearly between the eleven trustees constituted by the deed and the trustees of the various corporations, we will hereafter speak of the former as the "trust board" or "the trustees," and of the latter as "the directors."

Upon the acceptance of the trust certificate the original corporate shareholder ceases to hold any further relations with his particular corporation, and thenceforward he is treated as a shareholder in the trust board. He can no longer receive a dividend from his particular corporation, nor indeed can the latter ever again declare a dividend. Each corporation is thereafter bound by a special provision in the deed to pay over the profits arising from its business to the trust board. No discretion on that head is left in the directors of the various corporations; they cannot use any part of such profits for betterments or improved machinery, or increased capacity—certainly not without the consent of the trust board—but must pay over all the profits directly to the trustees. Nor can even the latter declare a dividend upon the trust certificates allotted to the shareholders of any one corporation payable out of the profits received from such corporation. On the contrary, their duty is to blend all the profits received from all the corporations into one grand mass, and from that aggregation of profits declare such dividends as they in their judgment deem appropriate, to be proportionately distributed to the holder of each trust certificate.

To emphasize these positions it may be well to quote the precise language of the deed.

#### PROFITS:

The profits arising from the business of each corporation shall be paid over by it to the board hereby created; and the aggregate of said profits, or such amounts as may be designated for dividends, shall be proportionately distributed by said board, at such time as it may determine, to the holders of the certificates issued by said board for capital stock, as hereinbefore provided.

Thus it will be seen that these dividends are

not to be declared or distributed upon the aggregate capital stock of the corporations, which is to be turned over to and held by the trustees, but upon what might not inaptly, in view of these peculiar facts, be termed the trust board's capital stock, namely: the trust certificates.

Thus we have a series of corporations existing and transacting business under the forms of law, without real membership or genuinely qualified direction—mere abstract figments of statutory creation—without life in the concrete or underlying association. Every share of stock has been practically surrendered and vital membership resigned. With the transfer to the eleven trustees, the shareholders cease to occupy the position of *cestuis que trustent* with regard to the directors of the various corporations. In lieu thereof, they accept substituted membership in an unincorporated board, and an entirely new, independent and exclusive trust relation with the trustees of that board.

Nor are the trustees, as transferees of the capital stock of the various corporations, in any just sense genuine members thereof. They have no beneficial interest therein. Dividends are not declarable thereon, and, if they were, would not be payable to them in their own right nor as trustees for the shareholders in the particular corporation which had earned the dividend. Nor could the owners of the trust certificates, "proportionately distributed" to such corporate shareholders, follow such dividend and require the trustees to account to them therefor. Whatever dividends are to be declared by the trustees must be so declared and paid from the aggregate fund; and whatever rights the holders of such trust certificates may have as against the trustees, can only be enforced by the totality of certificate holders or a representative of that body.

Again; the relation existing under the deed between the trustees of the trust and the directors of the corporations is not, as we have seen, the usual relation of shareholders and directors, but a strict contract relation. Ordinarily, the directors of a corporation may use their honest judgment with regard to dividends, and also as to the judicious application of profits. Here, however, the deed treats the directors of the various corporations as mere agents of the trust board, and in unqualified terms requires them to "pay over the profits." The effect of this would be the same, even if individual members of the trust board were also shareholders in the corporations. As such individuals, they would transfer their shares to the board and accept from the board their due proportion of the trust certificates. The board, as a board, takes all the shares of all the corporations, and the corporate shareholders, whether members of the trust board or not, by transferring their shares to these trustees, and accepting from the latter trust certificates, in effect, abandon their corporations, relinquish their powers as shareholders, resign their functions as corporators, and look solely to the trust board for future guidance, control and profit.

It is the first time in the history of corporations that we have heard of a double trust in their management and control—one set of trustees elected formally to manage the corporate affairs and a second set created to manage the first—the shareholders in seventeen corpora-

tions leaving their functions with regard to their regular directors to be thought out and performed for them by what amounts to a board of guardians.

Let us now look at the situation of the directors of the various corporations as pointed out in the deed.

The statute requires that each director shall be a stockholder. Consequently, each director must own at least one share. But the deed requires the transfer to the trustees of every share in every corporation. Now, these trustees certainly cannot, under the terms of their trust, sell or pledge a single share of the stock thus held by them. This stock in their hands is substantially dead. It evidences no individual right. It measures no proportionate interest. In fact, it serves in the future no purpose whatever, except to furnish the trust board with formal voting power to control the direction of all the corporations. It would seem to be impossible, therefore, to qualify the board of directors in the various corporations. The draughtsman, however, attempted to provide for this difficulty by the following provision:

"The said board may transfer, from time to time, to such persons as it may be desired to constitute trustees, or directors, or other officers of corporations, so many of the shares as may be necessary for that purpose, to be held by them subject to the provisions of this instrument. Such transfers may be executed by the president and treasurer of the board in behalf of, and as attorneys for, the board for that purpose, and to be retransferred when so requested by the board."

Here there is no pretense of a sale. The "necessary" shares may be transferred to such persons as the board may desire to constitute directors, to be held by such directors "subject to the provisions" of the trust deed, and to be "retransferred" when so requested by the board. This clearly bears out my previous observation that these corporations exist as creatures of the law, and are conducting business under its authority without a single genuinely qualified director—in fact, without directors at all in the ordinary and legal sense. Every director in every one of the corporations is necessarily the mere creature and agent of the trust board. The share of stock put in his name is not his property, nor can a dividend ever be declared upon it—to him or to anyone else. For that very share a trust certificate has, in fact, already been issued to him or to someone else.

Plainly, then, the holding of this lifeless share of stock by the director without beneficial interest and at the will of the board—"to be retransferred when requested"—is not a compliance with the statutory requirements that the directors shall "respectively be stockholders in such company."

There is further evidence upon the face of the deed of the difficulties which surrounded the execution of the contemplated project. Each refinery might have had debts, and all probably had assets outside of its plant. It would have been impracticable to issue trust certificates in proportion to the capital stock of each company, for one company might be capitalized for much more than its real value, while another might be capitalized for less, and still another for its precise value. It was necessary,



therefore, to distribute the trust certificates in proportion to the real value of each property. But here again there was a difficulty growing out of the complexity of mortgages upon the realty, floating debt and the possession of raw material and other personal property. It was clear that the interests in the trust board, which were to be substituted for the corporate shares, must be proportioned upon the realty, fixtures and machinery of each company (freed from debt), exclusive of the transmutable stock and other personal property; in other words, upon the naked plant. Accordingly, provision is made in the deed that each refinery and the corporation to which it belongs shall be freed from liability and indebtedness, by the parties interested in it; or such parties, if the board shall approve, may provide in cash for such indebtedness or liability, leaving the same to stand at the pleasure of the board. So much for the debts. Then as to the assets other than the plant: provision is made for their appraisal by five of the eleven trustees, and the values thus fixed are to be paid in cash by the trust board to the treasurer of each corporation. Of course all this involved the necessity of providing the trust board with the means of raising money, and it was, undoubtedly, with this view that under the head of fiscal arrangements authority was given to raise the necessary funds by mortgage, "to be made by the corporations, or either, any or all of them, on their property, and by such other means as shall be satisfactory to such board."

This covers, in a general way, the methods adopted by the parties to produce cohesion as between themselves. But they did not stop there. Provision is made for the gathering in of every other existing refinery ("in every instance to be incorporated"); and, in fact, four others have joined the combination since the deed was signed by the original partnerships and corporations; and the evidence shows that in the entire country but five sugar refineries of the character in question remain outside of the combination. The trust board is also provided with additional means for adding recruits to the combination, and to facilitate general adhesion thereto. It was with this view that the 15 per cent of the trust certificates allotted to each refinery was to be reserved, "subject to be disposed of by the board" for—among other purposes—the "acquisition of other refineries to become parties to this deed;" and lest the accretions of membership should exhaust this 15 per cent, as well as what might be derived through the exercise of the other powers of the board, the means is afforded of, "from time to time," increasing the trust certificates even beyond the \$50,000,000. It is not strange that this extraordinary document should close with a provision for strict secrecy—that "the said deed shall not be shown or delivered to any corporation, firm, person or persons whatsoever, except by the express direction and order of the board."

We now come to the legal question: Is this a combination of corporations, or merely a combination of stockholders? The defendant claims that unless authority to sign the trust deed, given by the directors of each corporation at a regular board meeting, is affirmatively

proved, the acts complained of are not corporate acts. This contention ignores the fact, proved in the case, that the corporate acts provided for by the deed have actually been performed by the corporations and that the deed has in fact been put in execution. The proof shows that the deed was actually signed by the firms whose names appear to be appended thereto; and as to the corporations by persons professing to represent them; that the firms were turned into corporations, pursuant to the requirements of the deed; that the shares of capital stock of all the corporations (including the four that have since come in) were, with a single exception, transferred to the trust board; that the trust board has issued and distributed the trust certificates; and that a dividend of 2½ per cent has actually been declared and paid upon such certificates.

Where did the trust board obtain the money with which to make that dividend? Necessarily from each corporation, under the provision that the profits arising from the business of each corporation shall be paid over by it to the board hereby created. Such certainly is the fair implication from the fact of the receipt by the trust board of the necessary funds from the various corporations in connection with a deed purporting to be signed by their officers and containing this provision. Thus the corporations acted upon the deed and performed one of the most vital duties imposed upon them thereby.

Further, it appears that all the capital stock of all the corporations was actually transferred to the trust board, not, as we have already seen, in severalty nor as tenants in common, but as joint tenants. That at once, necessarily, disqualified every director in every corporation, unless indeed a single share was reserved or transferred to each of such directors under the authority of the clause of the trust deed to which we have referred. If that was done—and as these directors have continued to perform their ordinary functions, we must assume that it was done—then the deed again became an executed contract, and the directors held their offices or continued to perform their duties by the force of its provisions.

Still further, we find a strong implication that mortgages were placed upon the property of some of the corporations, by corporate act, pursuant to the provisions of the deed.

In the case of this particular defendant the stockholders after resolving to join the combination changed their mind and determined to revoke previous action looking to that end. Thereupon, Mr. Searles, who is one of the eleven members of the trust board, offered them \$325,000 in cash for their stock, with the additional privilege of working up all the raw material on hand and making what they could out of it. This was accepted and the bargain carried out. Mr. Searles received the shares representing the naked plant, denuded of stock, raw material and other assets, and the shareholders received \$325,000 and what they had made out of everything save the plant. Now, Mr. Searles was not acting for himself alone, but evidently for the persons as well who had signed the deed. He tells us how the \$325,000 was raised as follows:

Q. Whose money paid this \$825,000?

A. Three gentlemen who were trustees of certain funds paid for the stock.

Q. What funds?

A. Funds received by them (these three gentlemen trustees) for mortgages and other matters connected with the organization.

Q. What organization?

A. The Sugar Refineries Company.

Q. What we call the board, you mean?

A. Yes.

Now, as the only mortgages connected with the organization were mortgages upon the property of the corporations, it would seem to follow that the defendants' stock was, in effect, purchased under the provision of the deed authorizing the raising of funds "by mortgage to be made by the corporations, or either, any or all of them on their property." It is apparent that this was corporate combination. It was a purchase for such corporate combination of corporate property by corporate means.

It also appears in connection with this particular defendant, that Mr. Searles, immediately after the purchase of the stock, became its president and treasurer, put in new directors, and, at once, for reasons satisfactory to himself, discontinued the business. From that hour to this the defendants' refinery has been closed, and yet a dividend has been declared upon the very trust certificates which were issued to Mr. Searles by the board, upon the transfer to it of the defendants' capital stock. Mr. Searles, as president and treasurer of the defendant knew of that dividend, and, as one of the trust board, helped to declare it. He knew, also, that it was realized from the profits of the going corporations, and that the defendant had not contributed a penny to the fund from which it was to be paid.

It really seems unnecessary to dwell further upon this subject. The accumulation of evidence points irresistibly to the complete practical identity of shareholders and corporations; and it is quite impossible to sever the acts of the persons solely interested in these corporations from that of the corporations themselves. The purpose to effect corporate combination cannot be disguised. The form of the contract veil was thin enough, but the acts under it sweep away the gauze and leave the corporate body unclouded and in full view. Mr. Searles was indeed substantially right when he told us that after his purchase of the defendant's entire stock he "was the North River Sugar Refinery Company."

The law on the subject is in harmony with the fact. According to the Act of 1848, the signers of the original certificate of incorporation and their successors "are a body politic and corporate, in fact and in name, by the name stated in such certificate." Who are the successors of these original signers? The shareholders, of course. The entire body of shareholders thus constitute the corporation. "A corporation or a body politic or a body incorporate," says Mr. Kyd, "is a collection of many individuals united into one body under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual." 1 Kyd, Corp. 18.

2 L. R. A.

It is really an association of persons, and the word *corporation* is but a collective name for the incorporators or members. 1 Morawetz, Corp. §§ 1, 227, 474; *People v. Watertown Assessors*, 1 Hill, 620.

The shareholders, vested with the corporate powers, are the body corporate, corporation or company. Taylor, Corp. § 50.

Chief Justice Marshall, in *Providence Bank v. Billings*, 29 U. S. 4 Pet. 562 [7 L. ed. 939], said that the great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. Mr. Morawetz puts it clearly when he says that "While a corporation may, from one point of view, be considered as an entity, without regard to the incorporators who compose it, the fact remains self evident that a corporation is not in reality a person or thing distinct from its constituent parts" (§ 1). And so the acts of the collective body are the acts of the corporation, and, if unlawful, will work a forfeiture.

In *People v. Kingston & M. Turnpike Road Co.* 23 Wend. 205, Chief Justice Nelson, in a *quo warranto* proceeding, declared that "Though the proceedings be against the corporate body, it is the acts or omissions of the individual incorporators that is the subject of the judgment of the court."

And this is entirely reasonable. For what is the corporation apart from the whole body of the members or stockholders, clothed with the statutory franchises? Merely a name. When the whole body of stockholders offend the law of the corporate being, the corporation offends. And who is punished by forfeiture or dissolution because of such offending? Not the mere corporate name, but the persons who have actually offended and who have thereby forfeited the franchise which they possessed under that corporate name. The directors are but the agents of the corporation to manage its affairs and carry out the purpose and object of its formation. They are only authorized to do such things as are directly or impliedly directed or authorized by the charter. *Abbott v. American Hard Rubber Co.* 83 Barb. 591, citing *Ang. & A. Corp.* § 280.

The directors of this defendant could not have bound the corporation by an assent to the deed in question. That deed involved momentous changes in the life and destiny of the corporation, and in the relations of its shareholders, which were entirely foreign to the general management of its business. Such changes are essentially for the consideration of the incorporators themselves, and their united act in the premises (purporting both in the agreement itself and in all the surrounding circumstances to be corporate) is plainly the act of the artificial body composed in the concrete of themselves.

Having thus concluded that the acts under consideration were corporate acts, the remaining question is, Were they illegal? This question may be divided into two branches: First, had the corporations authority to enter into any partnership arrangement, however innocent in itself—such, for example, as would have been perfectly lawful between individuals? Second, was this combination of the latter character or was it inherently unlawful—such, for example

again, as would have been unlawful between individuals?

The answer to the question as presented in the first branch must be in the negative. It cannot be doubted that the arrangement in question amounted to a partnership between these corporations or a substantial consolidation. Such was the effect of the massing of all the stock of all the corporations and the correlative massing of all the profits of all the corporations. The intention was clearly to share both profits and losses. Such, too, was the effect of uniting all the corporations under practically a single control.

It is well settled that corporations cannot consolidate their funds or form a partnership unless authorized by express grant or necessary implication; nor can they enter into any arrangement amounting to a practical consolidation or co-partnership. *Ang & A. § 272; Taylor, §§ 805, 419, 420; Green's Brice, 416; 1 Morawetz, 376-421, and cases there cited; New York & S. Canal Co. v. Fulton Bank, 7 Wend. 412; Whittenton Mills v. Upton, 10 Gray, 582; Marine Bank v. Ogden, 29 Ill. 248.*

In the *Fulton Bank Case*, Chief Justice Savage said that "General principles are against the power of corporations to do such acts. They have no powers but such as are granted and such as are necessarily incident to the grant made to them. Corporations at common law have certain powers, but not such as would authorize the forming of a partnership or the consolidation of two companies into one."

It was doubtless because of the recognition of this principle that the Acts of 1867 (chap. 960) and 1884 (chap. 867) were passed authorizing consolidations in a certain specified manner and under fixed conditions. The corporations whose conduct we are considering have not taken advantage of these Acts, doubtless because such Acts are limited to corporations organized "under any general or special law of this State"—the promoters of the present combination evidently desiring to combine all the refinery corporations in the Union—and they have sought, by the scheme under review, to effect a far broader and deeper purpose than mere corporate consolidation under these Acts. In doing so, they have plainly abused their powers and have exercised privileges not conferred upon them by law. As legal conclusions, forfeiture of the defendant's franchise and dissolution justly follow.

Mr. Morawetz states the rule with precision (2 Morawetz, Corp. § 1024): "A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter, or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize, is unlawful; and if the doing of such act is an injury to the public, it may be sufficient ground of forfeiture."

The same rule is laid down in *Kent, Taylor, Waterman, Kyd, Angel & Ames and Green's Brice. 2 Kent, 312; Taylor, §§ 289, 457, 459; 2 Waterman, § 427; Kyd, § 479 et seq.; Ang. & A. §§ 774, 775, 776; Green's Brice, 703, 709, 3d ed. 787.*

Waterman says that "The State is not required to prove an actual injury; it is sufficient cause of forfeiture if the act be such as in the

nature of things is calculated to produce injury." The cases all hold the same doctrine, laying down the general rule that the corporate franchises are granted upon a trust or condition that the corporate privileges shall not be abused; that the corporation undertakes and agrees, upon condition of forfeiture, that it will so manage and conduct its affairs that it shall not become dangerous or hazardous to the safety of the State or community in and with which it transacts business (*Ward v. Farwell, 97 Ill. 593*); and that the franchise may be forfeited and the corporation dissolved for acts *ultra vires*, or for a breach of the trust condition and perversion of the objects of the grant. *Chicago L. Ins. Co. v. Needles, 113 U. S. 574 [28 L. ed. 1084]; People v. Dispensary & H. Society, 7 Lans. 306; People v. Bristol & R. Turnpike Road Co., 23 Wend. 235; People v. Fishkill & B. Pl. Road Co., 27 Barb. 445; State v. Milwaukee, L. S. & W. R. Co. 45 Wis. 590; Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 1, 106, 121.*

These rules rest upon the inherent right of sovereignty. The franchises, whether resulting from general or special laws, are grants from the sovereignty of the people. Benefit to the country at large, from the objects for which the corporations are created, constitute the consideration, and in most cases the sole consideration, of the grant. *Chief Justice Marshall in Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 637 [4 L. ed. 629].*

It therefore follows logically that when those objects are perverted, when the country suffers injury instead of receiving benefit, the State, because of such misuser, may withdraw the privileges and resume its franchises.

We might rest upon the conclusion thus arrived at, for it is sufficient to entitle the People to a verdict. As, however, the second branch of the question was fully argued and is fairly up, it becomes my duty to consider it. At the outset, let me say that the modification by modern jurists of some of the rules laid down in the old English cases is fully recognized. The liberty of contracting is the most important factor of commercial life, and it should only be abridged when it is clear that the public must be injuriously affected by its unrestrained exercise in a particular case. Freedom of all kinds may be abused and commercial freedom, as well as any other, may degenerate into license. The development of judicial thought in regard to contracts in restraint of trade has been especially marked. The ancient doctrine upon that head has been weakened and modified to such a degree that but little, if any of it, is left.

In *Diamond Match Company v. Roebor, 9 Cent. Rep. 181, 106 N. Y. 478*, it was held that "A party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."

It was also held that a restraint of trade was not general, but partial, though covering the whole country with the exception of Nevada and Montana. Indeed, excessive competition may sometimes result in actual injury to the public, and anti-competitive contracts to avert

personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable and are condemned as against public policy. *Horner v. Graves*, 7 Bing. 735.

But all the cases, ancient and modern, agree that a combination, the tendency of which is to prevent general competition and to control prices, is detrimental to the public and consequently unlawful. This seems to be conceded by one of the learned counsel for the defendant. Judge Daly sums up the result of his examination of the cases in these words: "That combinations are unlawful, the design and effect of which necessarily is to give the party combining a monopoly more or less, for any length of time, of the manufacture or sale of a commodity . . . or to regulate and control the price of a commodity . . . or to secure any pecuniary advantage in restraint of trade which would be injurious to the community."

Now it seems to me to be entirely clear that the agreement which has been previously analyzed, brings this case conspicuously within the above rule. It is not a case where a few individuals in a limited locality have united for mutual protection against ruinous competition. It is the case of great capitalists uniting their enormous wealth in mighty corporations and utilizing the franchises granted to them by the people to oppress the people. First, they utilize the corporate franchises to guard themselves against the dangers incident to personal association; and second, they centralize these franchises in a single, gigantic and irresponsible power furnished with every delegated facility for regulating and controlling at will, not only in the State but throughout the entire country, the production and price of a particular and necessary article of commerce. When I say an irresponsible power, I mean no reflection upon the gentlemen personally in whom the power is vested. I mean a body of individuals, who, in their trust capacity, are entirely outside of the corporate being, and are subject to no legislative authority.

Combinations that were pigmies in comparison with the present have been repeatedly denounced by the courts and pronounced to be unlawful, as tending to breed monopolies. *Hooker v. Vandewater*, 4 Denio, 849; *Stanton v. Allen*, 5 Denio, 434; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 186; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 872; *Craft v. McConoughy*, 79 Ill. 848; *Hoffman v. Brooks*, 11 Week. Law Bull. 358).

In *Hooker v. Vandewater* it was held that an agreement between the proprietors of five lines of boats, engaged in the business of forwarders on the Erie and Oswego Canals, to run for the remainder of the season at certain rates for freight and passage then agreed upon, and to divide the net earnings among themselves in certain proportions, was a conspiracy to commit an act injurious to trade and consequently void. The object expressed in the agreement was the "establishing and maintaining fair and uniform rates of freight and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same." Of this Jewett, J., observed: "The object of the agreement, as expressed in the written contract, was plausible enough, but it was impossible to conceal

the real intention." He adds that "The great, if not the sole, object of the agreement was to destroy rivalry and keep up the price to certain rates fixed by themselves."

*Stanton v. Allen* was a very similar case where the court, without considering the conspiracy statute, held that the agreement was void at common law as contravening public policy and injurious to the interest of the State."

In *Morris Run Coal Company v. Barclay Coal Company* the combining mines were not the only ones in the region, much less in the country. It appeared that there was another mine in the region not within the combination, but that the product of that mine could only reach the market (sought to be controlled) by tidewater. It also appeared that there were other mines in two other counties of the State, though the quantities taken from them were small. Still, the court held that the combination was not only illegal but a criminal offense. The common-law origin of this doctrine was dwelt upon—that while an individual may do many things to oppress others, which though morally wrong are not the subject of legal discipline, he cannot lawfully combine with another to do the same things. The wrong which when done by the individual cannot be redressed, becomes a conspiracy the moment it is effected by two or more in combination. As the learned Judge (Agnew) observed, "The combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baneful influences."

In *Central Ohio Salt Company v. Guthrie*, the agreement was between the producers of salt in a limited locality. The court held the agreement void, although the price of the commodity had not been unreasonably advanced. The tendency of the agreement was sufficient; the court remarked that it was "no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *Craft v. McConoughy* the agreement was between all the grain producers in but a single town. It was held to be void, the court saying that "While the agreement upon its face would seem to indicate that the parties had formed a copartnership for trading in grain, yet from the terms of the contract and the other proof in the record, it is apparent that the true object was to form a secret combination and enable the parties, by secret and fraudulent means, to control the price of grain." There is no distinguishing significance, however, in the use of the word *fraudulent* in this connection, as the only fraud in the case was the general fraud upon the public involved in making purchases of land and property to aid the combination and render it invincible. This case, too, is directly opposed to the ingenious distinction sought to be made between a limited product and things capable of being produced in indefinite quantities.

*Hoffman v. Brooks* is also an instructive and well reasoned case. The combination there

was between sellers of tobacco for the purpose of destroying competition among themselves. It was held to be unlawful, the court using this pointed language: "The presumption is always against the validity of such agreements." And they will not be enforced "when they include all those engaged in any business in a large city or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods to which the hope of gain makes human ingenuity so fruitful, to strangle competition outright and breed monopolies."

The cases where anti-competitive agreements were upheld had none of the distinguishing characteristics of monopoly, but were plainly fair contracts entered into for mutual protection, and were not injurious to the public; such, for instance, as *Ontario Salt Co. v. Merchants' Salt Co.* 18 Grant, Ch. 540; *Wickens v. Evans*, 8 Younge & J. 818; *Mogul Steamship Co. v. McGregor*, L. R. 15 Q. B. Div. 478; *Skrainka v. Scharringhausen*, 8 Mo. App. 523.

In the *Canadian Case* first cited the learned Vice Chancellor declared that "It was out of the question to say that the agreement had for its object the creation of a monopoly, as the parties were not the only persons engaged in the production of salt in the province," and, after examining the particular facts of that case, he adds: "What is this more than two persons carrying on the same trade binding themselves not to undersell each other?"

*Wickens v. Evans* was still freer from the element of monopoly. The agreement was confined to three trunk makers, who divided England into three districts, each taking one and limiting himself to one. The court said that the restraint of trade was but partial, and that there was no monopoly except as between the three parties, "because every other man may come into their districts and vend his goods."

The *Mogul Steamship Company Case*, though cited by the defendant, seems to be strongly against its contention. The action was in equity, and an injunction to restrain the wrong was refused. Lord Coleridge placed his judgment entirely upon the adequacy of the legal remedy and the consequent impropriety of equitable interference. But, assuming the allegations of the bill to be true (which question of fact was not then passed upon), he denounced the so called "conference" as a criminal and indictable conspiracy, and therefore actionable. "It is also clear," he observed, "that supposing the allegations here could be established in point of fact, the damages in such a case might be extremely heavy. They might be what are called exemplary, or vindictive, damages; such, indeed, as it might severely tax the resources of the conference to pay. That, I think, cannot be denied."

It seems that the plaintiffs acted on this suggestion of Lord Coleridge, and brought an action at law, in which, however, they were again unsuccessful. The judgment here was also pronounced by Lord Coleridge (57 L. J. Q. B. D. 541), who ruled that as there was no evidence of malice or personal ill will, the plaintiffs could not recover. The learned Chief Justice held that the "conference" was not unlawful merely because it offered a rebate of

5 per cent upon all freights paid by those shippers who shipped their cargoes on board conference vessels alone, to the exclusion of the plaintiffs' vessels. "It seems to me," said Lord Coleridge, "that it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent off their bills at Christmas, on condition of their customers dealing with them and with them alone."

Even there, however, Lord Coleridge said that if there had been personal malice or ill will, he did not doubt that the action would lie.

In the *Missouri Case* cited the agreement was upheld because the restraint was partial. "The partial nature of the restraint in the case before us," said the court, "seems to be not colorable, but real. The agreement is amongst the quarry men of one district of one city, and it does not appear that it embraces all of them. The contract is not of such a nature that it is apparent from its terms that it tends to deprive men of employment, unduly raise prices, cause a monopoly or put an end to competition." While the judgment in this case sustained the agreement, because it was inoffensive as thus limited, the opinion of the court is exceedingly strong in its condemnation of agreements tending to monopoly. "So far," continues the court, "as the odious nature of monopoly is concerned, that has become more apparent as commerce has increased. The danger to be apprehended from the accumulation of wealth and power in the hands of great corporations, and the abuses by which large capitalists may so combine as to relax or destroy competition in trade, are matters of public concern, and the essential question is one of monopoly and of injury to the public."

The same danger is clearly pointed out by our own court of appeals in the late case of *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456, where Gray, J., speaking of agreements in restraint of trade, observed: "In later times the danger in such agreements seems only readily to exist when corporations are parties to them, for their means and strength would better enable them to buy off rivalry and create monopolies." And again, speaking of corporations, "If allowed to engage, without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to monopolize the avenues to that industry in which they are engaged, they become a public menace—against which public policy and statutes design protection."

The principles established by these cases seem to cover and fully meet the main position taken in support of the present agreement. There are, however, one or two minor considerations which should be noticed: The first is, that this agreement seems to avoid the pitfall of many of the cases, by carefully omitting any specific authority to fix prices. Such authority, however, is plainly covered by the enormous general power conferred upon the trust board. The greater includes the less, and any specification on this head would have been superfluous. Even Mr. Carter finally yielded this point. "I agree," he says, "in the broadest manner, that the power exists there to fix a

price eventually; it is for the interests of the parties to fix the prices."

The truth is, that under the agreement the trust board can direct the business movements of these seventeen or eighteen corporations, as absolutely as the general of a great army can direct the movements of its various *corps d'armée*.

But a director may rebel, says the learned counsel.

Well, even in war there is a bare possibility that a corps commander may disobey the orders of his chief, but discipline and change of military agency speedily follow. There is still less likelihood of mutiny in boards of directors who practically take office under the trust board (and subject to the provisions of the trust deed), who are appointed by the trust chiefs, and removed by a mere retransfer of stock "upon request," at any time, and above all who are spurred to active and zealous obedience by the hope—nay, by the substantial certainty—of gain, for there is nothing whatever to prevent the trustees from filling these corporate boards with their own members, or with other holders of their own trust certificates.

The trust board is indeed clothed with power far in excess of the ordinary stockholders of a corporation. It is in substance both stockholders and directors, and this union of force embraces every share of stock and every director in every corporation. What need then for specific detail in the general delegation of power? The board, under this executed deed, can close every refinery at will, close some and open others, limit the purchase of raw material (thus jeopardizing and in a considerable degree controlling its production), artificially limit the production of refined sugar, enhance the price to enrich themselves and their associates at the public expense, and depress the price when necessary to crush out and impoverish a foolhardy rival; in brief, can come as near to creating an absolute monopoly as is possible under the social, political and economic conditions of to-day.

We are told that this cannot be accomplished with regard to an article like sugar which can be indefinitely produced by the application of capital and labor, and that monopoly is possible only where the supply of the article is restricted by nature. This position has been maintained in an argument of exceeding brilliancy, which I confess to have enjoyed as one always enjoys a persuasive manner of presentation. But while the argument was most ingenious it was neither sound nor—I say it with respect—plausible. Of course a monopoly in the strict, technical and absolute sense cannot be thus created, but a monopoly in the legal sense can. The monopoly with which the law deals is not limited to the strict equivalent of royal grants or people's patents. Any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will enhance, prices to the detriment of the public, is a legal monopoly. And this rule is applicable to every monopoly whether the supply be restricted by nature or susceptible of indefinite production. The difficulty of effecting the unlawful purpose may be greater in the one case than in the other, but it is never im-

possible. Nor need it be permanent or complete. It is enough that it may be even temporarily and partially successful. The question in the end is, Does it inevitably tend to public injury?

Why, then, does not this trust board combine all of these unlawful purposes with ample power of accomplishment? Theoretically, it cannot prevent other capitalists from coming forward and utilizing their means in combination with labor, but practically it can. The struggle would be unequal, and except under powerful, unusual and extraordinary conditions, impossible. A vast harvest could be reaped at the expense of the public before the foundation of the competitive edifice could be thoroughly laid.

Nor could the power of the combination be defeated by outside forces. The undue enhancing of prices might draw to the locality the attention of the foreign commercial world. But the argument here overlooks the Laws of the United States and the duties imposed by those laws upon imports. It overlooks, too, the expense of transportation and handling, and the delays incident thereto. The harvest could again be reaped at the public expense before the advent of competition, and that harvest could then be utilized, by the sudden lowering of prices, to the repression of the foreign competitor. Such, at least, is the tendency of the combination, and such its practical power.

The defendant's whole argument on this head is based upon theory rather than fact, just as its earlier argument, with regard to the corporation, is based upon legal form rather than substance.

The doctrines of political economy which have been pressed upon us are based upon normal conditions, and have no bearing whatever upon combinations organized for the express purpose of surmounting and subverting those conditions.

Lastly, this appeal to the law is criticised as an interference with a natural state of things. The unnatural thing is said to be the law, when it attempts to check the natural order. Unfortunately for this argument, it is the combination which has resorted to what it calls the unnatural thing. It was not content with natural partnerships or associations of individuals, but resorted to the device of corporate artificiality to effect its ends. Having asked and accepted the favor of the law, it cannot complain that it is taken to task for grossly offending its letter and spirit.

Fortunately, the law is able to protect itself against abuses of the privileges which it grants. And while further legislation, both preventive and disciplinary, may be suitable to check and punish exceptional wrongs, yet there is existing, to use the phrase of a distinguished English Judge in a noted case, "plain law and plain sense" enough to deal with corporate abuses like the present—abuses which, if allowed to thrive and become general, must inevitably lead to the oppression of the people and ultimately to the subversion of their political rights.

Again, the legal results justly follow—for forfeiture and dissolution.

Let me say, in conclusion, that it would

quite unnecessarily belittle the discussion of this momentous question to consider the minor charges presented by the People. The judgment should rest upon the broad and main

issue. There it rests with a sense of fitting proportion; and there it should be left.

*For these reasons, the defendant's motion must be denied, and the plaintiff's granted.*

## PENNSYLVANIA SUPREME COURT.

### APPEAL OF JENNINGS *et al.*

(....Pa.....)

In a limited partnership, for the manufacture and sale of steel, the majority of the partners have no authority to change the location of the works, against the will of the minority.

(October 29, 1886.)

**A**PPEAL by defendants, from a decree of the Common Pleas of Armstrong County, continuing an injunction. *Affirmed.*

The bill for the injunction was brought by Joseph G. Beale, a member of the firm of Jennings, Beale & Co., Limited, against the other members, viz.: Benjamin F. Jennings, John Davis, Robert Flenniken and T. D. Jennings.

The certificate of association of the partnership contained the following clause:

*Third.* The character of the business to be conducted by the said association is the manufacture and sale of steel, and generally the transaction of all matters pertaining to said business, and the location of the said business and the principal office or place of business is in the Borough of Leechburg, in the County of Armstrong, and State of Pennsylvania, and a branch office is in the City of Pittsburgh, County of Allegheny, and State aforesaid.

Further facts, and question presented, appear from the opinion of the court below (Neale and Mehard, *JJ.*) which was as follows:

"The facts in this case present but a single question. It is whether the majority of the co-

partnership of Jennings, Beale & Co., Limited, have authority to change the location of their works, against the will of the minority.

The partnership was formed for the manufacture and sale of steel, and the location of their works was stated in their certificate of association to be Leechburg, Armstrong County, Pa.

It seems evident that the location of works for the manufacture of steel is not a matter of indifference. Any business to be successful must be properly surrounded. This is so much the case with the manufacture of steel that few places in our whole land are adapted for it, and therefore few are chosen for such works. This being a palpable truth, a court, in construing an instrument intended as the basis of such a copartnership, could not regard the place mentioned for the location of the works as a matter of indifference, or in any other light than a material element in the contract of the parties. If that be true, it could of course be changed only with the consent of all the members.

If a majority were determined to abandon the works in Leechburg, and erect new works in some part of Allegheny County, it would plainly be a new enterprise; and yet no distinction in principle can, to our minds, be made between that and what is here proposed.

The majority of Jennings, Beale & Co., Limited, are about to remove part of their works from Leechburg to some place in Allegheny County, with a view to the removal of the entire works thither in the future. Thus they

NOTE.—Limited partnerships exist only under warrant of statute. Statutes authorizing limited partnerships must be strictly complied with. *Conrow v. Gravenstine* (Pa.) 2 Cent. Rep. 372. And in case they are not complied with, the fact that the parties acted in good faith is immaterial. *Lineweaver v. Slagle*, 2 Cent. Rep. 617, 64 Md. 465. So where contributions to the capital are required to be made in cash, commercial securities, no matter how valuable or how easily converted into cash, cannot be accepted as a substitute. *Haviland v. Chace*, 39 Barb. 283; *Pierce v. Bryant*, 5 Allen, 91; *Haggerty v. Foster*, 103 Mass. 17; *Richardson v. Hogg*, 38 Pa. 153; *Van Ingen v. Whitman*, 62 N. Y. 513. In Missouri, under the statute of that State, an agreement to contribute a certain sum in cash on a certain day subsequent to the formation of the partnership was held sufficient, but the statement to be recorded should aver the exact time at which payment is to be made. *Selden v. Hall*, 4 West. Rep. 782, 21 Mo. App. 432. Under the New York and Massachusetts Statutes the payments must be made in cash prior to the formation of the partnership, while under the Statute of Missouri the special partner may contribute a certain sum in cash prior to, and a certain sum in cash subsequent to, the formation of the partnership. *Selden v. Hall*, 4 West. Rep. 783, 21 Mo. App. 432. So under the Massachusetts Statute the limited partnership is deemed formed upon the statement being duly recorded (*Haggerty v. Foster*, 103 Mass. 19); and so in New York. *Van Ingen v. Whitman*, 62 N. Y. 515. A certificate which states that the intended special partner has contributed a certain special sum in cash, and a certain value in goods is insufficient. *Re Merrill*, 12 Blatchf. 221, 13 Nat. Bankr. Reg. 91.

A general description of the extent of the property, or a lumping valuation, is not such a schedule as the statute requires. *Maloney v. Bruce*, 94 Pa. 249. The affidavit to accompany the certificate need not follow the exact words of the statute if the facts required by law are averred. *Johnson v. McDonald*, 2 Abb. Pr. 290. Articles to create a limited partnership under the statute, not showing full names of all members, how subscriptions are to be paid, location of business, etc., are wholly insufficient, and the subscribers are personally liable as ordinary partners. *Pears v. Barnes* (Pa.) 1 Cent. Rep. 509; *Clement v. British Am. Assur. Co.* 2 New Eng. Rep. 57, 141 Mass. 298; *Lancaster v. Choate*, 5 Allen, 530; *Bement v. Phila. I. B. Mach. Co.* 12 Phila. 494; *Re Terry*, 5 Biss. 110; *Argall v. Smith*, 3 Denio, 435, 6 Hill, 479; *Beers v. Reynolds*, 11 N. Y. 97; *Andrews v. Schott*, 10 Pa. 47; *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Vandike v. Rosskam*, 67 Pa. 330; *Levy v. Lock*, 5 Daly, 46, 47 How. Pr. 394; *Durant v. Abendroth*, 9 Jones & S. 53, 69 N. Y. 148; *Pfmann v. Henkel*, 1 Bradw. 145.

Although statutes creating limited corporations are to be strictly construed, yet it has been held that such acts are to receive a reasonable construction. So, where the county clerk fails to record the certificate of formation of a limited partnership when duly filed with him for record, this of itself will not render a special partner liable as a general partner. *Manhattan Co. v. Lalmbeer*, 11 Cent. Rep. 820, 106 N. Y. 573. The liability under the statute, it seems, attaches for noncompliance only upon failure on the part of the members to do an act which they or some one of them is required to perform, and not upon failure of a public officer to do his duty in the premises. *Id.*; *Frost v. Beckman*, 1 Johns. Ch. 228; *Henkel v. Heyman*, 91 Ill. 93; *Pfmann v. Henkel*, 1 Bradw. 145.

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would undertake a venture to which the plaintiff never committed himself, and would destroy the works they have agreed to operate.

In our opinion this is such a departure from the enterprise contemplated in the agreement of the parties, that constitutes such an irreparable injury to the property and right of the plaintiff, as entitles him to the injunction heretofore granted. The injunction is therefore continued until the further order of the court.

A decree having been entered in accordance with the opinion, the defendants brought this appeal.

*Messrs. Jennings & Willson and W. D. Patton*, for appellants:

In all ordinary matters of partnership business, the majority has complete control.

*Peacock v. Cummings*, 46 Pa. 484; *Bates*, Partn. § 482.

In the absence of an express stipulation, a majority must decide as to the disposal of the partnership property.

*Peacock v. Cummings, supra*.

The terms of the certificate, providing as they do only for the location of the "business and the principal office or place of business" and "branch office," do not cover the location of the "works."

See opinion of Attorney General Lear, in *Meredith & Tate, Formation & Regulation of Corporations*, p. 127, to the effect that the place of business designated in the certificate "is where the corporation functions are performed, where the stockholders hold their election, and the directors manage and direct the business of the corporation. It is not necessarily where the employes do their work."

*Messrs. McCain & Lenson and Buffington & Buffington*, for appellees:

In matters of administration of the business of a partnership the majority must of necessity control; but the tearing down and removing an entire manufactory is outside of the general management of the firm and cannot be forced upon the minority.

*Zabriskie v. Hackensack etc. R. Co.* 18 N. J. Eq. 178; *Natusch v. Irving*, 2 Coop. Ch. 358. See *Gow*, Partn. 8d ed. Appendix, 398; *Const v. Harris*, Turn. & Russ. 496; *Lindley*, Partn. 2d Am. ed. pp. 316-319.

*Lindley on Partnership*, Vol. 2, p. 412; and *Clements v. Norris*, L. R. 8 Ch. Div. 129, are authority for the importance to be attached to the place of business in a contract of partnership.

**Per Curiam:**

*Decrees affirmed, at costs of appellants.*

**BALTIMORE & OHIO EMPLOYEES' RELIEF ASSOCIATION, *Pff. in Err.***

v.

**William B. POST.**

1. A railroad employes' relief association cannot be bound by the declaration of a paymaster of the railroad company, that a certain employe's dues to the association had been deducted from the pay due him from the railroad company, so as to be rendered liable to such employe for benefits, where the railroad company

2 L. R. A.

was authorized to deduct dues only after using notified that the employe had been admitted to membership and it had not been so notified, and the pay roll on which the deduction, if any, was made had been made out by someone other than the paymaster.

2. A railroad paymaster, to whom is entrusted merely the ministerial duty of paying, without discretion, to employes the amounts appearing to be due them by the pay rolls furnished him, is a servant, not an agent, of the railroad company.

3. In an action to recover benefits from the relief association, testimony of its medical examiner that the plaintiff had not been examined by him may be admitted as tending to show that plaintiff had not become a member.

4. Mortality tables have no connection with a suit for weekly benefits, and the admission thereof in evidence is erroneous.

5. Benefits accruing after commencement of suit are not recoverable in an action of assumpsit for benefits.

6. The measure of damages in such action is the sum stipulated by the constitution and by-laws, and it is error to leave the amount thereof to the consciences of the jury.

7. An injury which incapacitates a member from the particular labor at which he was employed, but which permits him to earn as much at some other employment, will not entitle him to benefits for a "total inability to labor."

8. Receipts by the plaintiff for benefits as a former member are not admissible to show the rules and regulations of the association.

(October 20, 1888.)

**ERROR** to the Common Pleas of Washington County, to review a judgment in favor of the plaintiff below in an action of assumpsit to recover membership benefits from a railroad employes' relief association. *Reversed.*

The assignments of error were: (1) the admission of declarations of the railroad paymaster; (2 and 8) portions of the charge submitting the question of the plaintiff's membership in the defendant association by virtue of a deduction of his dues from his wages, based upon declarations of the paymaster; (4 and 5) the exclusion of testimony of the medical examiner of the defendant, that the plaintiff had not been examined by him for admission to membership; (6) the admission in evidence of "Combined Experience Mortality Tables;" (7) the refusal to instruct that the action did not cover any demand for benefits accruing subsequent to commencement of suit; (8 and 9) the submission to the jury of the question whether plaintiff was under a permanent total inability to labor; (10) the portion of the charge relating to the measure of damages; (11) the instruction by the court that the words "total inability to labor," as used in the constitution and by-laws, did not mean a total incapacity to engage in any labor and earn a livelihood thereby, but such labor as the plaintiff was engaged in just before and at the time he was injured; (12) the exclusion of an offer in evidence by defendant of receipts of the plaintiff for benefits as a former member, to show by clauses in the printed form, certain rules and regulations of the defendant claimed to throw light upon the true construction of the words "total inability to labor."



**Mrs. A. W. & M. C. Acheson** for plaintiff in error.

**Mr. H. M. Dungan** for defendant in error.

**Paxson, J.**, delivered the opinion of the court:

The plaintiff below was in the employ of the Baltimore & Ohio Railroad Company, and while so employed received a personal injury by which he lost his left arm, and thereby was prevented from performing any manual labor for a number of weeks. The defendant is a corporation chartered by the State of Maryland. In its Act of incorporation its objects are stated to be "to extend relief in case of sickness, injury, old age and death to the employes of the Baltimore & Ohio Railroad Company, and their families, and also to the employes of such other railroad companies as this association may permit to participate in its benefits, and to the families of such employes; to receive deposits on interest from said employes and their wives, and to loan them money at lawful rates of interest, in order to provide them with or to improve homesteads, and, generally, to promote their welfare." The members of the association are divided into several classes, and graded as respects their benefits. The details are not important.

The plaintiff claimed that he was a member of the defendant company at the time he was injured, and entitled to the benefits provided by its charter and by-laws. The defendant denies that he was a member, and that he had ever paid anything in the way of dues or assessments. The plaintiff then brought this action of assumpsit to recover "the amounts of the benefits to which he became entitled upon the payment of the assessment as aforesaid." It will thus be seen that the matter of his membership was a vital question in the plaintiff's case. The by-laws provide that "Employes are entitled to the benefits of the association only from the date of perfecting their application for membership." Upon the trial below the plaintiff produced no certificate of membership, nor any written evidence of any kind showing that he was a member of the association. He testified that he had signed an application to be admitted as a member, but he had never been notified of his admission; nor had he ever been examined by the company's physician, or taken any of the steps required by the rules regarding admission. He further testified, under objection, that when he came to receive his monthly pay for January, 1888, the pay-master of the railroad company informed him that his dues to the defendant company had been deducted. Samuel Mackey, a witness for plaintiff, also testified that he was present, and heard the above statement by the pay-master.

This was all the evidence in the case to show that plaintiff was a member of the company, and upon this he was allowed to recover and hold a verdict for \$3,541.

The admission of the declarations of the pay-master form the subject of the first assignment of error. I quote the language of the assignment:

"The court erred in overruling the defendant's objection to and admitting the following offer of evidence made by the plaintiff below: 2 L. R. A.

(William B. Post, the plaintiff, on the stand. Witness had just stated that when he was paid his wages for January, 1888, by the pay-master of the Baltimore & Ohio Railroad Company, there was a shortage in the amount received by him.) 'Did you ask for an explanation at the time that this payment was made to you?' The purpose is to show that at the time the plaintiff was paid his wages for the month of January, 1888, there was deducted from those wages an amount of money which the paymaster said was deducted by reason of the plaintiff's membership in the defendant association. This was objected to, the objection was overruled, and a bill sealed. The witness then proceeded: 'Q. What explanation was given, if any? A. The paymaster told me that the reason my pay was short was because the insurance money was deducted from it.'"

This declaration was received and allowed to go to the jury as proof of the fact of plaintiff's membership. Moreover, it was the only proof in the case. I may observe just here, in passing, that, in point of fact, there was no deduction from his wages on account of dues to the association. If the fact depended on oral testimony, I would not state it in this positive manner. The pay roll itself was produced upon the trial in the court below, and shows upon its face that no such reduction had been made; but that, on the contrary, it arose from a discrepancy in regard to time—the plaintiff claiming he had made more time than the company's time book showed. There was also proof, uncontradicted, that plaintiff's application had never been acted upon, and that he had never been admitted to membership. The admission of the pay-master's declarations, however, must be considered, in view of the case as it stood at the time they were offered.

There was no proof produced by the plaintiff at any stage of the cause that the pay-master had any authority to make such a declaration, or that he was authorized to make any deduction from plaintiff's wages on account of dues to the defendant company, or that he was an agent, officer, or even a servant of the company. He was merely the servant of the Baltimore & Ohio Railroad Company, another and distinct corporation. The latter company has no power to admit a man to membership in the defendant corporation, yet what the railroad company could not do one of its employes has practically done, and that by a mere loose declaration which, if made by him, he had no authority to make, and which bound no one but himself.

Such result can only come from an error somewhere. That it has its source in the erroneous admission of the pay-master's declaration is very plain to our view. It is true the plaintiff put in evidence, subsequent to the ruling of the court upon this question, the constitution and by-laws of the defendant company. It is there provided that "All the contributions due by the members of this society shall be paid in advance, by being deducted from the monthly wages due them by either of the companies aforesaid, and every person signing these rules hereby assents to such reduction." From this it was argued that the railroad company had the right to deduct the dues from the plaintiff's wages; that the paymaster was the

company's agent for that purpose; and that his declarations while in the performance of that duty were competent evidence of the fact of such deduction.

The whole of this proposition is unsound. In the first place the railroad company could only deduct dues from members. This could only be done after being officially notified by defendant company that the employé had been admitted to membership. Without such notice, a deduction of dues from one of its employés would have been merely an unlawful act, which would bind no one but itself. In the second place, the fact, if it be so, that the railroad company was the agent of the defendant company to collect the dues from the employés of the former, does not constitute the pay-master its agent for any purpose, much less to bind it by his declarations. Considering, for the sake of the argument, that he was an agent of the railroad company, and that his declarations might bind his employer, it by no means follows that they would bind another corporation which had never employed him, probably did not know of his existence. But the declarations in question would not have bound the railroad company, for the reason that he had no authority to make them, nor were they properly in the course of his employment. No more dangerous kind of evidence exists than this, and no case could more fully illustrate its danger than the one in hand.

The uncontradicted evidence showed that the pay-master had nothing to do with deductions for dues; that he did not handle the amount of such deductions—the money therefore did not pass through his hands; that whatever deductions were made from the pay rolls were made by other officers; that he had nothing to do with the data from which the pay roll was made up, or the method of reaching that result; that when the pay rolls were made up by the proper officers, and sent to him, his duty, and his only duty, was to pay the men the balance due them—so that the declaration of this pay-master was as to what someone else had done at some other time and some other place. As the railroad company was only an agent for a specific purpose, it could not bind its principal, the defendant company, by an act done without the scope of its authority. Its authority only extends to the single act of collecting dues from the members of the association. If it collected dues from a stranger without any notification from the association that he was a member, it might bind itself; but it could not thereby bind the association, force upon it a member which it had not accepted, and render it liable to him for benefits. Authority must be shown to make the collection, or a subsequent ratification of the unauthorized act. *Twelfth St. Market Co. v. Jackson*, 103 Pa. 269; *Kerns v. Piper*, 4 Watts, 222; *Hackney v. Alleghany Co. Mut. Ins. Co.* 4 Pa. 185; *Roaney v. Oulbertson*, 21 Pa. 507; *Greene v. Lycoming F. Ins. Co.* 81 Pa. 887.

Neither authority nor ratification is to be found within the four corners of the record. An agent's authority cannot be shown by his own declarations. *Grim v. Bonnell*, 78 Pa. 152; *Whiting v. Lake*, 91 Pa. 849.

A party who avails himself of the act of an  
2 L. R. A.

agent must, in order to give in evidence his declarations to charge his principal, prove the authority under which the agent acted; the burden of proof lies on him to establish the agency, and the extent of it. *Hays v. Lynn*, 7 Watts, 525; *American L. Ins. & Trust Co. v. Shultz*, 82 Pa. 46.

But the pay master was not even the agent of the railroad company. He was a mere servant. The distinction between these classes of employés is sometimes lost sight of, and, when it is, injustice is likely to follow. The distinction is well stated by Dr. Wharton in his book on Evidence: "We must remember that a servant moves within a limited orbit, one far more limited than that of an agent; and that consequently the admissions of a servant are more jealously guarded than are those of an agent. An agent is authorized to exercise discretion. When a servant is authorized to use discretion then he ceases to be a servant, and becomes an agent. Those dealing with a mere servant, knowing him to be such, know that, except in the immediate discharge of a mechanical duty, he is not authorized to bind his master by his admissions, hence, ordinarily, a master, except within such range, is not so bound." 2 Whart. Ev. § 1182.

The pay-master in this case was clothed with no discretion. He was a mere servant to perform a purely ministerial duty, viz.: to pay the men the amount respectively appearing to be due them from the railroad company by the monthly pay rolls sent to him for that purpose. He had no authority to withhold any portion, for any purpose, of the amount designated in the pay roll. Having no discretion, no duties to perform that were not ministerial, he cannot be said to be the agent of the company in any proper sense. He was an employé, and with certain defined duties, just as are the brakemen, switch tenders, engineers, firemen, and the thousands of other employés who are always to be found in the service of a great railroad company. To dignify such employés by the name of "agents" would not only be grotesque, but a serious innovation in the law as it has always been understood. And if we go further, and hold the employer responsible for all the loose declarations of this army of servants, it is not difficult to see endless confusion and injustice as the result.

In *Fairlie v. Hastings*, 10 Ves. Jr. 126, it was said by Sir William Grant, in discussing this subject: "An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constituted the agreement of the principal; or the representations or statements may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make the statement or representation. So, with regard to acts done, the words with which these acts are accompanied frequently tend to determine their quality. The party therefore, to be bound by the act, must be affected by the words. But, except in the one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may

have some relation to the business in which the person making that assertion was employed as agent . . . If any fact material to the interests of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."

In the case in hand the fact to be proved was that the railroad company had deducted plaintiff's dues from his January pay. No attempt to prove this in a legitimate way was made. The pay-master was a competent witness, and, if he had knowledge of the matter, could have been called and sworn. Instead of doing so, the plaintiff was allowed to prove his declarations, not as to anything he had done, but what some other person had done some time before. The danger of admitting such loose declarations is shown by the fact found by the jury (that the dues had been deducted) in the face of clear, uncontradicted evidence to the contrary. What an agent says in the course of his employment, and within his authority, is evidence against his employer, because it thus becomes the act of his principal. Thus, if A is the agent of B to make a contract for the latter, what A says in regard to the contract, as the time it is being made, is a part of the contract. It is the equivalent of the sayings or acknowledgments of the principal. They may be explanatory of the agreement, or determine the quality of the act which they accompany, and therefore must be binding on the principal, as the act or agreement itself. The declarations or admissions of an agent in such cases are admissible, not for the purpose of establishing the truth of the facts stated, but as representations by which the principal is as much bound as if he made them himself, and which are equally binding, whether the fact be true or false (1 Phill. Ev. 73; *Hannay v. Stewart*, 6 Watts, 487); and where a principal is bound for the acts or declarations of his agent, it is generally for the reason that said acts or declarations have led up to, or been the inducements to, or explain, or qualify, or form part of, some contract, or have caused some act to be done upon the faith thereof.

It has been seen that the declarations of the pay-master related to a past occurrence over which he had no control. In *Fawcett v. Bigley*, 59 Pa. 411, the defendant's barges broke from their moorings, ran into the plaintiff's barges, and destroyed one of them and its cargo. Declarations of the agent of the defendant, who had charge of his barges, made within an hour after the accident, could not be given in evidence to charge the defendant. To the same point are *Pennsylvania Railroad Company v. Books*, 57 Pa. 339; *Patton v. Minesinger*, 25 Pa. 393; *Bigley v. Williams*, 80 Pa. 107.

Nor is the declaration of an existing fact by an agent necessarily admissible. It depends upon its circumstances to make it so. It must be strictly within the line of the authority of the agent. *Hanover Water Co. v. Ashland Iron Co.* 84 Pa. 279; *Fairlie v. Hastings*, *supra*.

We need not pursue this branch of the case further. We are clearly of the opinion that it was error to admit the declarations of the pay-master.

This disposes of the first assignment of error.

The second and third are also sustained.

3 L. R. A.

Aside from the declarations referred to, there was nothing to sustain these portions of the charge of the learned Judge.

We think the evidence of Dr. Doener should have been received. See fourth and fifth assignments. He was the medical examiner of the defendant company, and the evidence was offered by the latter as links in the chain, to show that plaintiff had never become a member of the association. When such loose declarations had been admitted to prove its membership, surely the defendant company had the right to show that he had never been examined by the medical official, as required by the rules, and that he had never been accepted as a member.

It was also error to admit in evidence the "Combined Experience Mortality Tables" (sixth assignment). The plaintiff was suing for weekly benefits, and the mortality tables had nothing to do with the case.

We also sustain the seventh assignment. The court was asked to instruct the jury that "Under the pleading in the case the plaintiff's action does not cover any demand for any benefits accruing subsequent to the commencement of the suit." This was refused. The action was in assumpsit for the benefits, and only such could be recovered in this action as were due at the time the writ issued.

In this connection we may refer to the question of the measure of damages. The learned Judge charges the jury that "There is no fixed rule by which damages can be ascertained in a case of this kind. You will carefully consider this question, and do that which your consciences will approve of as an act of justice to both parties, and then neither will have a right to complain." This was clearly error, as it left the jury no standard save their own consciences, which is too uncertain for practical purposes. As the plaintiff sued for his benefits, it is clear that the measure of damages would be the stipulated sum he was entitled to under the charter and by-laws of the company, provided his membership was established. The declaration was not for the refusal of the company to admit him to membership, but, as before stated to recover his benefits as a member, and the breach was a mere refusal to pay them. If this verdict is allowed to stand, I see nothing to prevent a recovery for benefits accruing subsequent to the commencement of this action.

We also think the court below erred in its construction of the words "total inability to labor," contained in the constitution and by-laws. This was a relief association, not an accident insurance company. Its object was to relieve its members during the time when they were unable to work by reason of injury or sickness; hence, if a member was injured in such a way that he could no longer earn a livelihood at the particular labor at which he was employed at the time of the accident, yet was capable of earning as much or more money in some other employment, it was certainly not the object of the association, as expressed by its charter and by-laws, that he should remain idle and draw benefits all his life. The evidence shows that the plaintiff was taken back into the employ of the railroad company about two months after his injury, and was so retained

until after a second discharge—the first of which was, according to his own testimony, for drunkenness, and the second for inattention to his duties.

The twelfth assignment is not sustained.  
*Judgment reversed.*

Albert G. GREEN *et al.*, *Plffs. in Err.*,  
v.

John S. RICK, for Use of Richard Wenrich,  
Exr. of Magdalena Peiffer, Deceased.

(....Pa....)

1. Where one of the joint obligors on a bond, secured by a mortgage on property which is subsequently conveyed by such obligors subject to the mortgage, stands by and permits the grantee of the land to pay the mortgage debt to the person named in the mortgage, after it had been decided by the court, to such obligor's knowledge, that such person was not entitled thereto and was not the real owner of the mortgage, all the joint obligors will be affected by such act of their co-obligor and will not be released, by such erroneous payment, from their joint personal liability to the actual owner of the bond and mortgage.

2. The doctrine of *lis pendens* applies only to a purchaser, *pendente lite*, of the property in litigation; hence, the purchaser of mortgaged premises will not, under that doctrine, be affected with notice of a pending suit, involving simply the title to the mortgage, not to the land.

3. The doctrine of *lis pendens* affects only those who purchase from parties to the suit.

(October 1, 1886.)

**ERROR** to the Common Pleas of Berks County, to review a judgment in favor of

the plaintiff in an action of debt on bond, against Albert G. Green, Joshua Keely and Fannie A. Keely, his wife, and the Northwest Building & Savings Association. *Reversed as to the Building Association, affirmed as to the other parties.*

On April 1, 1881, A. G. Green and Joshua Keely and Fannie A. Keely, his wife, borrowed from John S. Rick the sum of \$1,100 and gave to him a bond for that amount. At the same time they borrowed from another party the sum of \$900, and to secure both bonds executed to Rick individually a mortgage of even date for \$2,000 upon real estate owned in common by the said A. G. Green and Fannie A. Keely. The \$1,100 loaned by Rick belonged to one Magdalena Peiffer, who by a deed of trust dated March 18, 1878, had transferred her property to Rick upon certain trusts therein designated.

On June 30, 1881, Mrs. Peiffer executed a deed revoking the deed of trust, and on July 12, 1881, gave Rick actual notice of such revocation.

On August 31, 1881, Mrs. Peiffer filed a bill in equity averring Rick's refusal to surrender the trust property and praying for a decree directing him to do so. In that bill the said bond was specifically described as part of the trust property.

On February 3, 1883, the court made a decree as prayed for in the said bill and ordered Rick to surrender the said trust property to Mrs. Peiffer.

On April 14, 1884, this decree was affirmed by this court. *Rick's Appeal*, 105 Pa. 528. Mr. Green was aware of all these transactions, being Rick's counsel. Mr. and Mrs. Keely were ignorant of them and supposed that the \$1,100 belonged to Rick individually.

*NOTE.—Lis pendens; doctrine of.* The general and established rule is that a *lis pendens*—a pending suit in equity—duly prosecuted, and not collusive, is notice to the purchaser of the property in dispute from a party to the litigation, so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed. 2 Pom. Eq. Jur. 74; Real Estate Sav. Inst. v. Collonious, 68 Mo. 290; Turner v. Babb, 60 Mo. 342; O'Reilly v. Nicholson, 45 Mo. 160; Blanchard v. Ware, 43 Iowa, 530, 37 Iowa, 305; Holman v. Patterson, 29 Ark. 357; Brundage v. Biggs, 25 Ohio St. 652; Seabrook v. Brady, 47 Ga. 650; Douglass v. McCrackin, 52 Ga. 506; Tharpe v. Dunlap, 4 Meisk. 674; Salisbury v. Morris, 7 Lans. 359; Cook v. Mancius, 5 Johns. Ch. 89; Sedgwick v. Cleveland, 7 Paige, 287; Van Hook v. Throckmorton, 8 Paige, 33; Skeel v. Spraker, 8 Paige, 182; Hayden v. Bucklin, 9 Paige, 512; Jackson v. Losee, 4 Sandf. Ch. 381; Jackson v. Andrews, 7 Wend. 152; White v. Carpenter, 2 Paige, 217; Parks v. Jackson, 11 Wend. 442; Hopkins v. McLaren, 4 Cow. 667; Griffith v. Griffith, 1 Hoffm. Ch. 153; Leitch v. Wells, 48 Barb. 637, 48 N. Y. 585; Chapman v. West, 17 N. Y. 125; Patterson v. Brown, 32 N. Y. 81; Mitchell v. Smith, 53 N. Y. 413; Ayrault v. Murphy, 54 N. Y. 203; Harrington v. Slade, 22 Barb. 161; Pratt v. Hoag, 5 Duer. 631; Norton v. Birge, 35 Conn. 250; Borrowscale v. Tuttle, 5 Allen, 377; Haven v. Adams, 8 Allen, 303; Beeckman v. Montgomery, 14 N. J. Eq. 106; McPheison v. Housel, 13 N. J. Eq. 290; Hersey v. Turbett, 27 Pa. 418; Boulden v. Lanahan, 20 Md. 200; Inloes v. Harvey, 11 Md. 519; Tongue v. Morton, 6 Har. & J. 21; Edwards v. Banksmithe, 35 Ga. 213; Brandon v. Cabiness, 10 Ala. 155; Chaudron v. Magee, 8 Ala. 570; Hoole v. Atty-Gen. 22 Ala. 190; Ashley v. Cunningham, 16 Ark. 168; Whiting v. Beebe, 12 Ark. 421, 564; Gosson v. Donaldson, 18 B. Mon. 230; Owings v. Myers, 3 Bibb, 278; Roberts v. Fleming, 53 Ill. 190, 198; Jackson v. Warren, 33 Ill. 331; Gilman v. Hamilton, 16 Ill. 225; Kern v. Hazleriger, 11 Ind. 443; Truitt v. Truitt, 38 Ind. 16; Green v. White, 7 Blackf. 242; McGregor v. McGregor, 21 Iowa, 441; Knowles

v. Rablin, 20 Iowa, 101; Loomis v. Riley, 24 Ill. 307; Cooley v. Brayton, 16 Iowa, 10; Culpepper v. Aston, 2 Ch. Cas. 115, 231; Preston v. Tubbin, 1 Vern. 286; Sorrell v. Carpenter, 2 P. Wms. 432; Garth v. Ward, 2 Atk. 174; Law v. Law, 3 P. Wms. 392; Higgins v. Shaw, 2 Dr. & War. 356; Tredway v. McDonald, 51 Iowa, 663.

*The rule rooted in public policy.* The effect of the successful litigation in subordinating the title of a purchaser, pending litigation, to the rights of the complainant, as established in the suit, is not derived from legislation. It is a doctrine of courts of equity, and rests, not upon the principles of the court with regard to notice, but, on the necessity that the decision of the court should be binding not only on the litigant parties, but also upon those who acquire title from them during the pendency of the suit. Murray v. Lyburn, 2 Johns. Ch. 441; Haughwout v. Murphy, 22 N. J. Eq. 544; Bellamy v. Sabine, 1 De G. & J. 568; Metcalfe v. Pulvertoft, 2 Ves. & B. 205; Walden v. Bodley, 30 U. S. 9 How. 49 (13 L. ed. 42). The rule largely has its roots in public policy and does not rest on the equitable doctrine of notice binding on the conscience. The doctrine is not peculiar to courts of equity. In the old real actions, the judgment bound the lands, notwithstanding any alienation by the defendant *pendente lite*; and it cannot be claimed that this is on any other ground than that stated. The rules of the English Equity Courts on this point are fully recognized in the jurisdiction of this State. Lamont v. Cheshire, 65 N. Y. 37.

*Alienation pending suit void.* The rule rests upon the presumption that every man is attentive to what passes in the courts of his State, and is founded upon public policy, as to alienation and transfer of title. Leitch v. Wells, 48 N. Y. 608. See Hopkins v. McLaren, 4 Cow. 667; Murray v. Blatchford, 1 Wend. 683; Jackson v. Andrews, 7 Wend. 152; Parks v. Jackson, 11 Wend. 442; Jackson v. Losee, 4 Sandf. Ch. 381; White v. Carpenter, 2 Paige, 217; Swett v. Poor, 11 Mass. 549. Alienation pending a suit is

In the mean time, on November 6, 1892 A. G. Green and Joshua Keely and Fannie A. Keely, his wife, conveyed the mortgaged property to the Northwest Building & Savings Association, subject to pay the mortgage, and a sum sufficient to pay the said bonds and mortgage was deducted from the purchase money. The officers of the building association on Dec. 8, 1893, gave to John S. Rick a check for \$1,151.75, the amount due on the \$1,100 bond, and to A. G. Green a check for \$931.44, the amount due on the \$900 bond, of which Green had become the owner by assignment. Rick produced the mortgage, which stood in his name individually, and satisfied it of record, and the mortgage and bonds were delivered to the building association. The \$1,100 bond had the following unsigned indorsement in the handwriting of A. G. Green, Rick's counsel:

"This bond I hold as trustee and in trust for Magdalena Peiffer, who furnished the money to invest for her."

After the affirmance of the decree directing Rick to account for the trust property, he filed his account, charging himself, *inter alia*, with the \$1,151.75 received in payment of the bond. Mrs. Peiffer having died, her administrator *pendente lite* filed exceptions to this account, alleging, *inter alia*, that Rick was without power to receive this payment; but the auditor reported a decree charging Rick with it and finding a balance therefor due by Rick to Mrs. Peiffer of \$1,093.03. The present plaintiff, Mrs. Peiffer's executor, thereupon accepted this decree, caused judgment to be entered on it,

and proceeded to enforce its collection by issuing an attachment against Rick, but failing to collect the money, repudiated the transaction and brought this suit on the \$1,100 bond in the name of John S. Rick, to his use against A. G. Green and Joshua Keely and Fannie A. Keely, his wife, the original obligors, to require payment the second time.

As the land owned by the building association was primarily liable for payment of the debt, the building association was notified by Green and Keely to defend the action, and was admitted to defend by the court. The building association accordingly pleaded its interest in the suit as primary debtor, and averred that it had made payment to Rick of the \$1,100 bond without knowledge that Mrs. Peiffer owned the moneys secured, and without knowledge of the deed of trust or revocation. The plaintiff traversed this averment and averred that the building association at the time of payment had knowledge and notice that Rick had no right to receive payment. The original obligors pleaded payment simply.

On the trial the plaintiff offered the bond and rested. The building association then proved payment to Rick as above described, and proved affirmatively that at the time of payment it had no knowledge that any person other than A. G. Green and John S. Rick had any interest in the mortgage of the moneys secured thereby.

To contradict this evidence the plaintiff offered in evidence the indorsement on the \$1,100 bond, without any evidence that the officers of the building association saw or knew of the in-

void, though the purchaser pays a full consideration; if he had only constructive notice, the conveyance is inoperative. *Roberts v. Jackson*, 1 Wend. 48; *Meux v. Anthony*, 11 Ark. 422, 52 Am. Dec. 230. The conveyance is so far a nullity that it cannot avail the party against the title established by the pending suit. *Jackson v. Andrews*, 7 Wend. 154. The voluntary alienation of property pending suit, by a defendant therein, is not permitted to affect the rights of the parties to the suit; and every person purchasing *pendente lite* is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in priority. *Arnold v. Providence Lumber Co.* 1 New Eng. Rep. 45, 15 R. L. 15; *Norton v. Birge*, 35 Conn. 259. See *Brightman v. Brightman*, 1 R. L. 119; *Sedgwick v. Cleveland*, 7 Paige, 257; *Harmon v. Byram*, 11 W. Va. 511; *Lawrence v. Lane*, 9 Ill. 354; *Kern v. Hazlett*, 11 Ind. 443; *Murray v. Blatchford*, 1 Wend. 533.

*Effect of purchase pendente lite.* A purchase made of property actually in litigation, *pendente lite*, although for a valuable consideration and without any express or implied notice, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit. *White v. Carpenter*, 2 Paige, 217; *Leitch v. Wells*, 48 N. Y. 603. See *Griffith v. Griffith*, 1 Hoffm. Ch. 153; *Hayden v. Bucklin*, 9 Paige, 512. The pendency of a suit involving the legal title to the property will not affect the holder of an antecedently acquired equity so as to prevent his clothing himself with the legal title. *Parks v. Jackson*, 11 Wend. 442; *Gibler v. Trimble*, 14 Ohio, 323; *Clarkson v. Morgan*, 6 B. Mon. 441; *Fogarty v. Sparks*, 22 Cal. 142; *Irvin v. Smith*, 17 Ohio, 226. Every species of notice is ineffectual as a restraint on existing rights, and can only operate on those rights which are subsequently acquired. But the institution of a suit for the recovery of a specific property or demand is notice only to those who acquire an interest in the subject matter in controversy after the suit is instituted, and by purchase or grant from the parties or privies. *Hunt v. Haven*, 52 N. H. 172. See *Stuyvesant v. Hall*, 2 Barb. Ch. 151.

*Reason for the rule.* The reason of the rule is that if it were not applied there would be no end to any suit, the justice of the court would be evaded, and

great hardship and inconvenience to the suitor would ensue. See *Murray v. Lyburn*, 2 Johns. Ch. 441. To bring home to every purchaser the charge of actual notice of the suit must, from the very nature of the case, be in a great degree impracticable. *Parks v. Jackson*, 11 Wend. 459. Notwithstanding the rule in its application sometimes produces hardships, nevertheless it is the duty of the court to enforce it. *Lindsay v. Diefendorf*, 43 How. Pr. 399; *Cleveland v. Boerum*, 8 Abb. Pr. 236; *O'Reilly v. Nicholson*, 45 Mo. 167.

*Former rule.* Formerly the commencement of a suit in equity was of itself constructive notice to subsequent purchasers, and they were bound by the decree, and if defendant aliened pending the writ the judgment would overreach such alienation (*Sheridan v. Andrews*, 49 N. Y. 431); and the nature and character of the suit was necessarily ascertained from the pleadings. *Mills v. Bliss*, 55 N. Y. 142.

*When initiated.* At common law *lis pendens* commenced on the day when the writ bore teste, while in chancery it did not exist until the subpoena was served. 2 Pom. Eq. Jur. 74. See *Newman v. Chapman*, 2 Rand. 63; *Hunt v. Haven*, 52 N. H. 162; *Shaw v. Padley*, 64 Mo. 519; *Samuels v. Shelton*, 48 Mo. 444; *Goodwin v. McGehee*, 15 Ala. 232; *Edwards v. Banks*, 35 Ga. 213; *Lytle v. Pope*, 11 B. Mon. 297; *Haughwout v. Murphy*, 22 N. J. Eq. 545; *Lyle v. Bradford*, 7 T. B. Mon. 116; *Bacon v. Gardner*, 23 Miss. 60; *Chaudron v. McGee*, 8 Ala. 570. The *lis pendens* will become operative upon the equivalent of service, as a voluntary appearance. *Majors v. Cowell*, 51 Cal. 484; *Bailey v. McGinniss*, 57 Mo. 382. The commencement of an action by the service of the summons does not create a *lis pendens* affecting third persons, not parties to the action. The filing of the complaint is necessary for that purpose. *Leitch v. Wells*, 48 N. Y. 594. See *Hayden v. Bucklin*, 9 Paige, 512.

*Doctrine, when applies.* The doctrine of *lis pendens* applies only where a third person attempts to intrude into a controversy, by acquiring an interest in the matter in litigation pending the suit. *Hopkins v. McLaren*, 4 Cow. 678. It is error to suppose that the doctrine of *lis pendens* is applicable alone to suits in equity, although it is so held in the case



dorsement at the time of payment. The court admitted this offer. (Third specification of error.)

The plaintiff then offered in evidence the record of the suit of Magdalena Peiffer against John S. Rick, without any evidence that the officers of the building association knew of the suit or of the matters in litigation at the time of payment. The court admitted this offer. (Fourth specification of error.)

The defendant then offered in evidence the account of John S. Rick, filed in pursuance of the decree entered in the equity suit after its affirmance, showing that Rick continued in the management of the estate until after the affirmance of the decree by the supreme court; that in said account he charged himself with the moneys paid on this bond by the building association; and that the plaintiff ratified the action of Rick in receiving these moneys, by causing a judgment to be entered against Rick for the said moneys, and by taking steps to enforce its payment. The court rejected this offer. (Seventh specification of error.)

The remaining specifications of error relate to the charge of the court and the answers to the points based upon the facts above recited. The court took the case from the jury and directed a verdict for the plaintiff.

*Messrs. H. A. Zieber, W. P. Bard and Isaac Hiestor* for plaintiffs in error.

*Messrs. Geo. F. Baer, Jeff Snyder and Cyrus G. Derr* for defendant in error.

**Clark, J.**, delivered the opinion of the court: In *Rick's Appeal*, 105 Pa. 528, it was dis-

tinctly held that the deed of trust executed March 16, 1878, by Magdalena Peiffer to John S. Rick was a mere instrument of agency, and was therefore revocable at pleasure; that the deed of June 80, 1881, and notice thereof, on the 12th of July following, was in effect a complete cancellation of that conveyance, and that all rights arising under the trust thereby ceased. It is true, the deed contained no express power of revocation, but, as it was in the nature of a letter of attorney only, it might be revoked at will. The proceeding by bill in equity was simply in enforcement of the rights accrued under the revocation; the decree of the court was an adjudication in form of what did exist in fact.

This being so, the bond in suit was on December 8, 1883, properly payable to Magdalena Peiffer, and not to John S. Rick, in whose name it was executed. The obligation upon which the money was payable was signed by A. G. Green, Joshua Keely and Fannie Keely; it was a joint obligation; it secured the debt, not of any one, but of all the obligors together; the joint relation was voluntarily assumed and each owed to the other the exercise of good faith for their joint interest. All the obligors were principal debtors; a confidential relation existed between them; each owed a duty to the others to disclose anything affecting the joint interest; and each represented the others, in matters relating to the payment and discharge of their joint liability.

The deed to the building association was "under and subject" to the lien of the mortgage, and the conveyance in this form created

of *King v. Bill*, 28 Conn. 543; yet, as was observed by the Supreme Court of Missouri in *O'Reilly v. Nicholson*, 45 Mo. 107, the rule is older in law than in equity, and was adopted from the common-law courts "for the better and more regular administration of justice in the court of chancery." *Mollwrath v. Hollander*, 73 Mo. 112, 30 Am. Dec. 486. See *Turner v. Babb*, 60 Mo. 842; *Real Estate Sav. Inst. v. Collinhaus*, 63 Mo. 290. The principles apply to choses in action. *Murray v. Lylburn*, 2 Johns. Ch. 441; *Warren County v. Marcy*, 97 U. S. 106 (24 L. ed. 951). The institution of a suit for the recovery of a specific property or demand is notice only to those who acquire an interest in the subject matter in controversy after the suit is instituted, by purchase or grant from the parties or privies. *Hunt v. Haven*, 52 N. H. 172; *French v. Loyal Co.*, 5 Leigh, 67; *Stuyvesant v. Hone*, 1 Sandf. Ch. 419; *Parks v. Jackson*, 11 Wend. 442; *Trimble v. Boothby*, 14 Ohio, 109; *Gibler v. Trimble*, Id. 323.

*Prosecution of its pendens as notice.* A *lis pendens* duly prosecuted is notice to all the world, and a final judgment or decree overreaches purchases made pending suit. *Murray v. Ballou*, 1 Johns. Ch. 568; *Hamlin v. Bevans*, 7 Ohio, pt. 1, 161, 18 Am. Dec. 628; *Parks v. Jackson*, 11 Wend. 451. It is notice to a purchaser so as to affect and bind his interest by the decree. *Jackson v. Andrews*, 7 Wend. 158; *Griswold v. Miller*, 15 Barb. 522; *Leitch v. Wells*, 48 Barb. 643; *Lockwood v. Bates*, 1 Del. Ch. 447; *Norton v. Birge*, 35 Conn. 259; *Hunt v. Haven*, 52 N. H. 173; *Edwards v. Banksmith*, 35 Ga. 215; *Kellogg v. Fench*, 23 Wis. 25; *Warren County v. Marcy*, 97 U. S. 106 (24 L. ed. 951); *Boynton v. Rawson*, Clarke, Ch. 590; *Roberts v. Jackson*, 1 Wend. 478; *Bennet v. Williams*, 5 Ohio, 422; *Jackson v. Dickinson*, 15 Johns. 809; *Murray v. Lylburn*, 2 Johns. Ch. 444. It is constructive notice in equity although there be no actual notice. *Smith v. Cottrell*, 94 Ind. 381. The effect of *lis pendens* as notice seems to depend upon the fact of a vigorous prosecution. *Fox v. Reeder*, 23 Ohio St. 187, 22 Am. Rep. 628. The plaintiff is bound to prosecute his action diligently to retain his lien or it will cease like that of a dormant execution. "If he abandons the pursuit or lingers by the way before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance." *Murray v.*

*Lylburn*, 2 Johns. Ch. 441; *Skeel v. Spraker*, 8 Paige, 180. See *Edmeston v. Lyde*, 1 Paige, 637; *Myrick v. Selden*, 36 Barb. 22; *Hawes v. Orr*, 10 Bush, 431; *McGregor v. McGregor*, 21 Iowa, 441; *Fox v. Reeder*, 23 Ohio St. 181; *Herrington v. McCollum*, 73 Ill. 476; *Herrington v. Herrington*, 27 Mo. 50; *Wade, Notice*, 359; *Watson v. Wilson*, 2 Dana, 407; *Erhman v. Kendrick*, 1 Met. (Ky.) 150; *Clarkson v. Morgan*, 6 B. Mon. 441; *Gossom v. Donaldson*, 18 B. Mon. 237.

*As constructive notice.* The rule declaring that the *lis pendens* was constructive notice to the purchaser was borrowed from equity and, after some changes, incorporated into the statute. *Sears v. Hyer*, 1 Paige, 488; *Corwin v. Bensley*, 43 Cal. 262; *Parks v. Jackson*, 11 Wend. 442; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Bishop of Winchester v. Paine*, 11 Ves. Jr. 197; 1 Story, Eq. § 406. A *lis pendens* filed under the statute only relates to and affects voluntary alienations of property, pending a suit in respect to it, by or from the defendant in the action. It is constructive notice to any such grantee or the persons dealing with the defendant in the action, and has nothing to do with independent parties asserting their own adverse rights in respect to the property. *Becker v. Howard*, 4 Hun, 361, 6 Thomp. & C. 604. See *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Herrington v. Slade*, 22 Barb. 161; *Sears v. Hyer*, 1 Paige, 488.

*Notice of what.* The rule is that notice arising from a bill filed is notice of what that bill contains and nothing more, and should not be extended beyond the property which is the subject of the suit. If land is affected by collateral proceedings in a cause where the bill itself does not affect it, actual notice of such proceedings must be proven, to charge a purchaser. *Griffith v. Griffith*, Hoffm. 559. See *Carr v. Cullaghan*, 3 Litt. 365; *Frakes v. Brown*, 2 Blackf. 25; *Edmonds v. Crenehaw*, 1 McCord, Ch. 24. A purchaser of real estate while a suit is pending concerning it is bound by the result of the suit, when, at the time of the purchase, the nature of the claim upon the property was disclosed by the pleadings. *Wilson v. Heflin*, 81 Ind. 41; *Kern v. Hazlerigg*, 11 Ind. 443; *Britz v. Johnson*, 65 Ind. 561; *Leitch v. Wells*, 48 N. Y. 565. As to real estate, partnership property, or personal property, see *Murray v. Lylburn*, 2 Johns. Ch. 441.

a covenant on part of the grantees to indemnify the grantor against the mortgage debt. *Davis App. 89 Pa. 273; Taylor v. Mayer*, 98 Pa. 43.

If the association failed to pay, and the mortgagors discharged, the debt, any one of them might receive the money on the indemnity and release the covenant.

Albert G. Green, being the counsel for Rick, had actual knowledge of the revocation of the deed, of the notice to Rick, of the proceedings in equity, and of the decree; he knew that the money was of right payable to Mrs. Peiffer; he was present in person when the money was paid by the building association and was party to the misapplication of it; it was his plain legal duty for his own interest, as well as for the protection of the others jointly bound with him in the bond, to disclose the facts which were peculiarly within his knowledge at the time of the payment. If he failed in the discharge of his duty in this respect, and either inadvertently or designedly permitted the money to be misapplied, his co-obligors must charge the consequences of this default to the party who made it. The reasonable rule of the law is that one person is not to be prejudiced by the unauthorized acts and declarations of another; but there are exceptions to the rule, where there is a joint interest or liability between several, voluntarily assumed. In such cases each will be presumed to act and speak for the whole. *Clark v. Morrison*, 35 Pa. 453.

There is evidence, also, notwithstanding the denial of the fact, from which the jury might well have found that the building association knew that the bond was held in trust for Magdalena Peiffer. That fact was plainly noted on the back of the bond, which was then and there present, and actually passed into the hands of the association at the time; but there is no evidence that they had any knowledge of the revocation of the trust.

The doctrine of *lis pendens* we think is not applicable in this case. The building association did not buy the bond and mortgage; it bought the land, and the title to the land was not in litigation. The bill in equity controverted the title to the bond and mortgage, and in buying the land the rightful ownership of the mortgage upon it was not involved. Its existence was admitted and the conveyance was under and subject to it.

The whole doctrine of *lis pendens*, in this country, is said to be founded upon the opinion of Chancellor Kent in *Murray v. Ballou*, 1 Johns. Ch. 586: "The established rule," says the Chancellor, "is that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed."

Where a purchase is made of property actually in litigation *pendente lite* upon a valuable consideration, and without express or implied notice, in point of fact, the purchaser is affected in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit. Story, Eq. Jur. § 405.

The principle applies generally in suits brought in law or equity for the purpose of determining the title to real property (*Harvey v. Turbett*, 27 Pa. 418); but it is not confined to 3 L. R. A.

actions involving title to realty. It is applicable in certain cases involving the title to choses in action, excepting commercial paper not due.

In *Diamond v. Lawrence County*, 87 Pa. 353, it was held that the pendency of a suit between a county and a railroad company, in regard to bonds issued by the county, in payments of its subscription to the stock of the company, is notice to all the world of the facts alleged in the pleadings therein.

Also in *Murray v. Lyburn*, 2 Johns. Ch. 441, the principle was held to apply to choses in action, as well as to real estate, and to entitle a *cestui que trust*, whose land had been fraudulently disposed of by the trustee, during the pendency of a suit brought against him, not merely to the land itself, but to the mortgages or other securities taken for the purchase money against purchasers or assignees claiming title thereto, as well as the assignments made whilst the suit was pending.

If, therefore, Rick had sold this bond and mortgage to the building association, pending the proceedings on the bill in equity, the principle of *lis pendens* would apply without doubt; but we are not aware that the doctrine has ever been carried to cases where the party to be affected by it was not strictly a purchaser, *pendente lite*, of the property in litigation. See Wade, Notice, 360.

In this case it was the land that was sold, not the mortgage; and it was the title to the latter only that was involved in the suit.

There is another reason why *lis pendens* has no application here: those persons only are charged with notice or affected by *lis pendens* who purchase from parties to the suit. *Stuyvesant v. Hone*, 1 Sandf. Ch. 419; *Parks v. Jackson*, 11 Wend. 442; Wade, Notice, 369, and other cases there cited.

The land was conveyed to the building association, not by Rick, but by the Keelys and Green, who were not parties to the suit.

The building association purchased the land subject to the mortgage, payment of which they assumed; they had a right to suppose, in the absence of any notice to the contrary, that the ownership of the mortgage was as it appeared upon the record. They paid the money in good faith upon this assumption. They were innocent of the injury to Mrs. Peiffer, and are entitled to protection. When one of two innocent persons must suffer loss by the default of a third person, if their rights are otherwise equal, that one should bear it who put it into the power of the defaulter to inflict the loss. As between Magdalena Peiffer and the building association, who would both appear to be innocent parties, the loss, if one must be borne, should therefore fall on Mrs. Peiffer who originally placed Rick in a position to inflict it. The pendency of the proceedings on the bill gave no notice, imposed no duty, and restricted no right, which would subject the building association to the decree. In this condition of the case, the payment of the money discharged the mortgage, and the security it afforded was lost.

But upon what grounds shall the plaintiff deny her right to judgment against the defendants *in personam*? As to the defendants in this case, who knew, or must be assumed to have known, of the revocation of this trust, there was no payment of this debt. Payment to



Rick was as to them no payment at all. Although the mortgage may be discharged, the debt still remains, and the debtors by whose default the money miscarried are still liable for payment thereof. This suit is on the bond, and we see no good reason why the judgment against the defendants should not be sustained. Where the lien of a mortgage is released or discharged, the debt which it was made to secure stands upon its own footing for the balance unpaid as if no mortgage had ever existed. But whether the mortgage was discharged in this case was sought to be ascertained on the trial on the bond. The building association voluntarily came into court and asked leave to defend *pro interesse suo*. An issue was framed as between the plaintiff and the building association involving the question of the good faith payment of the mortgage. Defendants pleaded payment, and the entire matters at issue were submitted to the jury in the same trial.

The verdict for plaintiff, although general in form, is equivalent to a verdict against the defendants for the amount of the bond and against the building association, on the issue raised by the special pleas filed in their own behalf. We find no evidence which will justify the judgment against the building association on this issue. There is not the slightest evidence of notice on part of the association, nor is there any rule of law or of equity which, under the facts in this case, would restrict their rights to have this lien discharged.

*The judgment entered against the Building Association is therefore reversed; but the judgment against Albert G. Green, Joshua Keely and Fannie Keely, the defendants, is affirmed.*

A. J. HAWS, *Plff. in Err.*,

ST. PAUL FIRE & MARINE INSURANCE CO.

**An insurance policy** insuring horses, with other personal property, as "all contained in above described barn," against fire and lightning, and in which there is a general printed clause providing that the policy does not cover or insure personal property of any kind while removed from the particular building therein described,—does not cover a horse killed by lightning while in a field at pasture.

(Paxon, Green and Williams, JJ., dissent.)

(October 20, 1888.)

**ERROR** to the Common Pleas of Mercer County, to review a judgment in favor of the defendant, *non obstante veredicto*, after a verdict for plaintiff in an action on an insurance policy. *Affirmed.*

The question upon which judgment was rendered, is set forth in the following opinion of the court below:

"The question reserved is whether plaintiff is entitled to recover in view of the following part of the insurance policy: 'This policy does not cover or insure personal property of any kind while removed from the particular building herein described, or kept or used in any other place or location, unless otherwise specified in this policy.' The property insured was a horse, the building in the policy described and in which the horse was contained, as stated

in the policy, was a barn on plaintiff's farm in Hempfield Township, Mercer County, Pa.; the horse, having been removed from the barn, was in a field when killed. It was not within the insurance of the policy at that time. This case is not covered by the decision in *Haws v. Philadelphia Fire Association*, 5 Cent. Rep. 113, 114 Pa. 431.

"The questions there considered, as stated in the opinion, were: (1) What was meant by the expression in the lightning clause attached to the policy, 'subject to the terms and conditions referred to'—and (2) Was the clause 'contained in his two story frame barn,' etc., intended as a contract that the policy should cease to cover the property insured the moment it left the barn? But neither question can arise under the policy sued on in this action, for both are answered by the explicit clause above quoted.

"Judgment is therefore directed for defendant, *non obstante veredicto.*"

*Messrs. E. P. Gillespie and Samuel Griffith & Son* for plaintiff in error.

*Messrs. S. F. Thompson and Samuel Redmond* for defendant in error.

**Clark, J.**, delivered the opinion of the court:

This action was brought upon a policy of insurance of the St. Paul Fire & Marine Insurance Company to recover for the loss of a sucking colt, killed by lightning.

The plaintiff, A. J. Haws, is the owner of a stock farm in Mercer County, upon which was erected a frame barn. The policy of insurance is dated March 19, 1883; and the company, by its terms, agreed to insure the plaintiff against loss or damage by fire, to an amount not exceeding \$2,500, on the barn and its contents. The property insured is classified and recited in the policy; the last item being \$1,000 on horses, not to exceed \$300 on any one horse; and, as part of the general description of the personal property, it is added in writing, "all contained in above described barn." There is a clause in the printed parts of the policy to the effect that the company shall not be liable for loss by lightning or explosions of any kind, unless fire ensues, and then for the loss of damage by fire only. But there is a clause written in the policy to a different effect, as follows: "This will also cover loss or damage by lightning, whether fire ensues or not." In such a case the written clause will, of course, be taken to express the real intention of the parties. The settled rule, as we said in *Grandin v. Rochester German Insurance Company*, 107 Pa. 36, is that where the written and printed portion of a paper are repugnant to each other the printed form must yield to the deliberate written expressions—citing *Harper v. New York City Insurance Company*, 23 N. Y. 443.

There was about \$2,500 of concurrent insurance, and in addition \$10,000 on horses alone. On the night of the 8th of June, 1885, plaintiff's brood mares and this sucking colt were killed by lightning while in the field at pasture. Proofs were made claiming \$100 for the loss of the colt; \$100 having been paid by the company carrying the concurrent insurance.

The policy contains a general printed clause in the following words: "This policy does not cover or insure personal property of any kind

while removed from the particular building herein described, or kept or used in any other place or location, unless otherwise specified in the policy."

The company contends that, as the colt was not in the barn at the time of the casualty, it was not embraced within the terms and conditions of the policy, and that, therefore, there can be no recovery. The plaintiff maintains, however, that the clause last quoted was inconsistent with the manifest purpose of the policy in respect of the insurance of horses; that to give it full effect is to deny the owner the ordinary use of the property, as well as the privilege of pasturage, which in the summer months at least, is well known to constitute the chief food supply; that the clause in question is in the printed form, and is repugnant to the general purpose of the parties, as manifested in the written portion of the policy. We cannot adopt the plaintiff's view of his case. The manifest and obvious purpose of the parties, we think, was to place the insurance on the barn and its contents, as specified in the policy.

In *Hawes v. Philadelphia Fire Association*, 5 Cent. Rep. 713, 114 Pa. 431, which is much relied upon by the plaintiff in error, there was no such clause in the policy as quoted above, and the insurance was upon horses alone. The horses, it is true, were described as "contained in his new two-story frame barn," etc., but this was held to be mere matter of description, and that such a description did not constitute a condition which would relieve the company from obligation the moment the horse left the barn.

This case is also readily distinguished from *American Central Insurance Company v. Hawes*, 9 Cent. Rep. 413, where the insurance was also on horses only, and it was provided as follows: "This policy shall be void and of no effect if the property insured be moved to any other building or location from that described herein."

In both of these cases the opinion of the court proceeds upon the ground that, as the insurance was upon horses alone, and the contract was inserted into a printed form designed for the insurance of a different class of property, it could not have been in contemplation of the parties that the animals were insured only when the animals were inside the barn. In this case, however, the restrictive clause is not a mere matter of description. It is a plain, direct provision, applicable alike to all the personal property embraced in the policy, and consistent with the obvious general purpose of the parties to insure the barn and its contents. It may be that such a provision interferes with the ordinary use of the property; but the same may be said of the "buggies, sleighs, wagons, harness, whips, robes, blankets, bells, farmers' tools and utensils of every description," which do not appear to have been kept in store, but for the ordinary and common use of the owner.

**S. L. R. A.**

For anything that appears, the insurer, on the one hand, may have relied upon the location or structure, or upon the appliances attached to the building, as a protection from lightning, and estimated his risk accordingly; or the owner, on the other hand, knowing the fact that barns are, for some reason not well understood, more liable to injury from lightning than other buildings, and that the risk from this cause attaches as well to the contents as to the building itself, contemplated an indemnity only as against this extraordinary risk. However this may be, in view of the explicit and plain language of the policy, we are constrained to hold that the restriction applies to the horses as well as to the other property embraced in the policy.

*Judgment affirmed.*

**Paxson, J., dissenting:**

I regret that a broader view has not been taken of this case. We have decided in a number of instances that where a policy of insurance contains a printed clause which is not applicable to the particular class of insurance covered by the policy, such clause is not binding upon the assured in case of loss. The reason for this ruling is that it could not have been in the contemplation of the parties at the time the contract of insurance was made. *Hawes v. Philadelphia Fire Assn.* 5 Cent. Rep. 713, 114 Pa. 431.

We accordingly hold in that case that an insurance of a horse as "contained in an assured's pasture-field," covered the horse when in the assured's pasture-field. The reason of this is plain. The only season of the year when horses are exposed to lightning is in the summer, when it is well known that farmers' horses are in the field for a considerable portion of the time; hence, it is not reasonable to suppose that the parties to the contract intended that a printed form in a fire policy, intended to apply to a different matter, should be applied to defeat the insurance.

In the case in hand the insurance was of personal property contained in a barn, with lightning clause added. The policy was in the usual form, with a clause that the policy should not cover any of the property while removed from the barn. This was all well enough for the inanimate property in the barn. But the lightning clause was intended for the horses. No one insures hay, grain and farming implements from lightning. I concede that the clause against removal technically covers the horses; but I still think that, as to the horses insured against lightning, it was never intended to apply, and was not and could not have been in the contemplation of the parties at the time of the making of the contract, assuming them to have been reasonable beings capable of making a contract.

I would reverse this case.

**Green and Williams, JJ., request me to say that they concur in the foregoing.**

## MICHIGAN SUPREME COURT.

Anthony SCHNEIDER  
v.  
City of DETROIT, *Appt.*

(...Mich....)

1. **Municipal corporations** in Michigan, in which State they are held not to be liable for damages occasioned by grading or otherwise improving streets, have no power to erect a bridge in a street over a railroad, under their general authority to grade, make, repair, and improve streets, and are liable for damages to property fronting on the street, occasioned by such a bridge, and damages which would be caused by such a bridge must be provided for under the power of eminent domain.
2. **Power to erect a street bridge** for the purpose of crossing a railroad is not conferred upon the City of Detroit by § 33 of its Charter (Local Acts 1883, Act No. 326), which empowers it to construct, grade, improve and extend streets, or by § 33, which empowers it to construct bridges with a view to proper drainage, or by any other statutory provision; and the city is therefore liable for damages to abutting private property, occasioned by such bridge and its approaches.
3. **The admission of testimony** relative to the injury of property by the flow of water is not injurious where the charge of the court confines the jury to the sole question of damage caused by the obstruction of the street in front of the property.

(November 1, 1888.)

**ERROR** to the Circuit Court for Wayne County, to review a judgment in favor of the plaintiff in an action against the City of Detroit for damages to abutting property occasioned by the erection of a bridge in a street. *Affirmed.*

The facts are stated in the opinion.

**Mr. John W. McGrath** for defendant, appellant.

**Messrs. Corliss, Andrus & Leete** for plaintiff, appellee.

**Champlin, J.**, delivered the opinion of the court:

The plaintiff is the owner of two lots in the City of Detroit, each thirty feet in width, extending from Lafferty Street easterly one hundred and twenty feet, to Thirteenth Street, upon which two cottages were erected fronting on Lafferty Street, prior to the opening of Thirteenth Street, in 1881. In 1881 the proper proceedings were had, and Thirteenth Street was opened in the rear of plaintiff's lots, about sixteen feet in width being taken from these lots therefor, by condemnation proceedings, for which he was fully paid the damages

awarded. This gave to plaintiff two frontages—one on Lafferty and the other on Thirteenth Street.

At the time Thirteenth Street was opened it was projected across the right of way and tracks of the Michigan Central Railroad Company for which it was awarded damages. The roadbed and tracks of the railroad company is from five to eight feet lower than the natural level of the land in Thirteenth Street at the point of crossing, and there are twelve distinct and separate railroad tracks, crossing the line of Thirteenth Street, in use and operation. The distance of plaintiff's premises from the railroad is about one hundred feet.

No crossing having been made prior to 1885, in that year by mutual agreement as to expense of construction the Common Council of the City of Detroit, by proper and appropriate proceedings, declared and determined that a bridge over the tracks of said Michigan Central Railroad Company, on Thirteenth Street, was and is a public necessity; and thereupon such proceedings were had that a bridge was constructed over and across the railroad track at the joint expense of the railroad company and the city; and all of the proceedings in the opening of said Thirteenth Street, and in the erection and construction of the bridge, and of the approaches thereto, were in accordance with the resolutions and proceedings of the common council, and regular, but without the consent of the plaintiff. The southerly approach to the bridge commences south of and extends past the plaintiff's premises upon an ascending grade, occupying thirty-two feet in width of the street, which is sixty feet in width. It is carried up with stone abutments, filled between, and the westerly abutment is thirteen feet from the east line of plaintiff's premises, and is from six to eight feet in height in front of his lots, with an iron fence about three feet in height surmounting the abutment.

Plaintiff showed that the Thirteenth Street frontage of his lots was the most desirable, and that by reason of the obstruction caused by the bridge the use of such frontage was impracticable, and against defendant's objection he was permitted to show that his premises were damaged by the flow of surface water upon them. This testimony as to damage caused by surface water was inadmissible, under the declaration, which counted solely upon the deprivation of the use of the highway caused by the obstruction.

The defendant offered to prove that prior to the construction of the bridge no grade had been established in this portion of Thirteenth Street, but on plaintiff's objection such testimony was excluded as being irrelevant and im-

**NOTE.**—*Municipal corporations; powers generally.* Municipal corporations can only exercise such powers as are expressly granted in their charter, or such as may be necessary and proper to carry the express powers into effect, including such as are indispensably necessary to the declared objects and governmental purposes for which such corporations are created; and any reasonable doubt as to the existence of a power claimed to be conferred by the charter will be resolved against the corporation. *Birmingham & P. M. St. R. Co. v. Birmingham St. R. Co.* 79 Ala. 445; *Bluffton v. Studabaker*, 3 West.

Rep. 830, 106 Ind. 129; *Knox City v. Thompson*, 2 West. Rep. 166, 19 Mo. App. 523; *Worley v. Columbia*, 4 West. Rep. 340, 88 Mo. 106; *Knox City v. White*, 2 West. Rep. 167, 19 Mo. App. 523; *Bloomfield v. Charter Oak Nat. Bank*, 121 U.S. 121 (30 L. ed. 923); *Portland v. Schmidt*, 13 Or. 17. Their acts within their charter powers may bind the people; but where they transcend these powers their acts are nugatory. *Mather v. Ottawa*, 2 West. Rep. 46, 114 Ill. 660. The grant of power to municipal corporations must be strictly construed. *National Water Works Co. v. Kansas City*, 2 West. Rep. 533, 20 Mo. App. 237.

material. The Circuit Judge, after reciting the facts, charged the jury as follows:

"Now, gentlemen of the jury, as far as the streets are concerned, and the grading of the streets, there is no question but that the City of Detroit has the right to establish grades, and to change grades. The city has the right to make use of the streets for the common and ordinary purposes for which streets are used; but the city has no right to practically destroy the street in front of a man's house; and the question here is as to whether this street in front of the plaintiff's lot is not practically destroyed. Now, I shall hold, as a matter of law, that this space of about thirteen feet between the plaintiff's lot and this abutment or approach to the bridge, this wall being built up there eight or ten feet high—that practically destroys the street as far as the plaintiff's lots are concerned. It only leaves him a space of about thirteen feet. Now the City of Detroit has constructed this; and, having done this, I shall charge you, gentlemen of the jury, in this case, that the only question for you to determine is as to whether the plaintiff's property has depreciated in price, and as to whether the putting of this street in the condition in which it is admitted now to be—as to whether that has depreciated the value of the plaintiff's property. If it did depreciate it—if the practical destruction of this street, as far as this property is concerned; if this condition of affairs has depreciated the plaintiff's property—why, then, gentlemen of the jury, he is entitled to recover for such depreciation. So if you find that the construction of this bridge has depreciated the value of the plaintiff's property, then the next question for you to determine will be the amount of damages. Upon this question I have very little to say, and very little is necessary to be said. He is entitled to recover the difference between what his property was worth prior to the construction of that bridge there, and what it was worth after the bridge was constructed and Thirteenth Street left in the condition in which it has been since the construction of the bridge. So that, gentlemen of the jury, if you find that the property was depreciated by the construction of this bridge, you want to ascertain what the difference in the value of the property before and after was, and the plaintiff is entitled to recover what the difference is. I am requested by the counsel for the defendant to charge you that, under the declaration and pleadings in this case, the plaintiff is not entitled to recover. I shall refuse to give you that request, and I shall leave the question to you as to whether this property was depreciated; if it was, it is for you to say how much it was depreciated in value."

The jury returned a verdict for the plaintiff.

If the Common Council of the City of Detroit had authority to construct the bridge over the railroad track, all their proceedings having been regular, and the bridge and approaches having been erected according to the plans adopted, the city is not liable in this action. This was settled as the law in this State in *Pontiac v. Carter*, 82 Mich. 114, in an exhaustive opinion by *Mr. Justice Cooley*, and concurred in by the whole court. It has been thirteen years since that opinion was delivered, and the law should not be overturned without the clearest

conviction that the opinion then delivered was wrong, and that justice requires that it should be reversed. No new arguments have been advanced in behalf of the liability of the municipality in such cases; and while we are aware that, in particular instances, the rule then adopted may operate harshly, yet in a majority of cases it does not do so; and in many cities and villages public improvements could not be made without bankrupting the treasury, or imposing grievous taxation upon the property of citizens at large.

The declaration in this case does not question the authority of the common council, but virtually concedes the fact. It says: "That heretofore, and for a long space of time, to wit: for the space of twenty years last past, and at the time of the injuries herein complained of, the said defendant was and still is a municipal body corporate and politic, and a city under the laws of the State of Michigan, and as such has supervision and control of the streets and highways within the limits of the city."

The Charter of the City of Detroit provides that the common council shall have power to establish, open, widen, extend streets and avenues within the city, and to grade, pave, repair and otherwise improve said streets and highways. Local Acts 1883, Act No. 326, § 83, chap. 7.

Having determined to open and extend Thirteenth Street across the railroad company's track, and condemn the right of way therefor, is the authority necessarily implied that the council may cross the railroad at grade, or under or over the railroad tracks? They are given power to establish the grade without restriction, upon streets where no prior grade has been established.

Section 88 of the same chapter authorizes the common council to establish, construct, repair, enlarge and discontinue, within the streets, avenues, etc., in said city such bridges, etc., as the common council may see fit, with a view to the proper sewerage and drainage of said city. This is the only section of the charter conferring in express terms authority upon the common council to erect a bridge within a street; and here such authority is restricted to the purposes of sewerage or drainage, and does not extend to the purpose of securing a safe crossing of a railroad track by erecting a bridge in the street.

"Bridges are usually part of the street or highway, and in this country the power of municipal corporations to build them, and their authority over them, are wholly statutory, and their duties in respect to them are either prescribed by statute, or spring from their powers. There is no common-law responsibility on municipal corporations in respect to the repair of bridges within their limits; but where bridges are part of the streets, and built by the municipal authorities under powers given them by the Legislature, they are liable for defects therein on the same principles, and to the same extent, as for defective streets." 2 Dillon, Mun. Corp. § 728 (579).

The duty attaching to the City of Detroit to keep these bridges over the railroads in repair, and the liability for injuries arising from their default, aside from the expense incurred in erecting them, challenges the closest investigation to

ascertain if any statutory authority exists in the common council to erect such bridges in the streets. It may safely be asserted that there is no express authority; and section 88, above referred to, by granting express authority to construct bridges within streets for certain specified purposes, by the well known canon of construction would seem to exclude the authority for any other purpose. Is the authority implied from the section conferring power to grade, improve, or extend streets? It is familiar law that a municipal corporation possesses and can exercise no powers which are not granted in express terms, or those which are necessarily or fairly implied in or are incident to the powers expressly granted, or those which are essential to the declared objects and purposes of the corporation. 1 Dillon, Mun. Corp. § 89 (55).

I do not think it is either expressly given or necessarily implied by the terms of the charter. The construction of bridges over railroads is not the ordinary or usual method of grading streets. The exercise of the power to erect such bridges in streets would necessarily involve quite an amount of abutting property in damages, and some entirely in destruction, for any beneficial use or enjoyment. Such consequences cannot be brought under the general power to grade streets, but must be provided for under the power of eminent domain. Private property cannot be appropriated for the public use without the necessity therefor is first determined by a jury under our Constitution, and compensation awarded and paid. Doubtless the method of crossing a railroad by a viaduct is safer than a crossing at grade; and upon streets which are recognized thoroughfares, over which

the public are almost constantly passing, such bridges would greatly conduce to the public safety and convenience, and it would be wise for the Legislature to confer upon municipalities the authority to erect such structures in the streets, and condemn private property for that purpose, if necessary; but, until this is done by special enactment, I do not think it can be done under the power now conferred by the general authority to grade, make, repair and improve streets. It follows that the city authorities had no right to erect the bridge in the street in question, so as to injure plaintiff in the usual and ordinary enjoyment of his property; and the city is liable to him for the injury for which he has complained, in damages.

The testimony which was admitted, relative to the injury by the flow of water upon plaintiff's premises, was not injurious to defendant under the charge of the court, which confined the jury to the sole question of the depreciation caused by the obstruction of the street in front of plaintiff's property. Under the view I have advanced above, of the want of authority in the city to construct the bridge, the rejection of the testimony offered by defendant, above mentioned, was not erroneous.

*The judgment will be affirmed.*

**Campbell, J.**, concurring:

I agree in the result arrived at by my brother **Champlin**; but I have no doubt the city may build bridges where necessary for a safe passage, subject always to the payment of damages when they injure private property, as was done here.

**Sherwood, Ch. J., Morse and Long, JJ.**, concurred.

## KANSAS SUPREME COURT.

**OSAGE CITY et al., Plffs. in Err.,**  
v.

**Margaret LARKINS, a Minor, by Next Friend.**

(....Kan....)

1. Where the alleys of a city have been dedicated to the public, no further action is required by the city to open them for public use.
2. An alley retains its character as an alley, although the lots on both sides thereof are owned by one person, and it is so intersected by a railroad as to make it practically impassable.
3. Where a dangerous piece of machinery is placed in an alley by the owner of abut-

ting lots, and is allowed to remain for years, both the individual and corporation are guilty of negligence; and both are liable for injuries sustained by a child under nine years, who was hurt upon such machinery.

(November 10, 1888.)

**ERROR** to the District Court for Osage County (Spilman, J.), to review a judgment against the defendants in an action for damages for a personal injury. *Affirmed.* (Commissioners' decision.)

Statement by **Holt, C.:**

On the 24th day of August, 1888, Margaret

\*Head notes by **Holt, C.**

**NOTE.**—Dedication of highways, streets and alleys to public use. All highways, whether open roads, cross roads, lanes, or pent roads, are public highways. French v. Barre, 2 New Eng. Rep. 808, 58 Vt. 537. The streets of a town or city are public highways, but all public highways are not streets. Tucker v. Conrad, 1 West. Rep. 281, 108 Ind. 349. Where an alley is opened at the public expense, it becomes part of the system of streets and alleys of the city; and its use is a public use, and should be so judicially declared without submitting the question to the jury. Savannah v. Hancock, 8 West. Rep. 248, 91 Mo. 54. A dedication to public use is "when one being the owner of lands, consents, ei-

ther expressly or by his actions, that it may be used by the public for a particular purpose." Brown v. Gunn, 75 Ga. 441. The requisites of a dedication are the intention of the owner to dedicate, with an act or acts in pursuance thereof, and an acceptance on the part of the public. Morse v. Zeize, 84 Minn. 85. The owner of the fee in an alleyway over which is a right of way may erect a building over said way, if in so doing he does not interfere with the right of way. Sutton v. Groll, 4 Cent. Rep. 251, 42 N. J. Eq. 213.

**Dedication of land for street purposes.** See Adams v. Chicago, B. & N. R. Co. 1 L. R. A. 493; Diamond Match Co. v. Ontonagon (Mich.), 40 N. W. Rep. 448; Meier v. Portland C. R. Co. (Oreg.) 1 L. R. A. 354.

9 L. R. A.

Larkins, defendant in error, received the injury for which this action was brought. She was on her way from her father's house, in Osage City, in an adjoining block, to pick up cobs and coal alongside the track of the Atchison, Topeka & Santa Fé Railroad, near the elevator of Adams, one of the defendants. She carried a sack in which to gather the cobs and coal, one end of which was wound around her arm, and was swinging it to and fro when she passed over the tumbling-rod of defendant Adams. In some way the sack was caught upon this rod, and she was thrown down upon it, and her left arm was broken and terribly crushed, her thumb broken on her right hand, her right arm sustained a fracture termed a "green-stick" fracture, and she was otherwise cut, lacerated and bruised. Her left arm was amputated near the shoulder, and her right thumb near the hand. Otherwise she sustained no permanent or constitutional injury. At the time of the accident she was nearly nine years old.

The place where she received the injury was an alley in the City of Osage City. The block through which this alley ran was cut into two unequal parts by the right of way of the Santa Fé Railroad, entering at the southeast corner of the block, and extending through it in a northwesterly direction. The main track and two side tracks were on the right of way. The roadbeds were separated, and each raised about two and a half or three feet above the ordinary level of the ground, and no crossings had been made where the tracks crossed the alley. The length of the alley from the roadbed eastward to the street was sixty-five feet. There were no sidewalks on the south and east sides of this tract. All the block east of the railroad was owned by Adams, and uninclosed, except a fence around a small pond of water on Adams' land. The water in the pond was used in running the engine at the elevator. The elevator of Adams was on the south side of the alley, and the hay press just opposite, on the north side. The machinery of the hay press was connected with the engine of the elevator by this tumbling-rod. In driving the teams to the elevator they passed over a portion of this block, and a part of the raised way leading into the elevator was extended into the alley. A part of the rod was covered by this raised way. After it came out of the raised way it was not cased or boxed.

At the trial a verdict and judgment thereon was rendered for plaintiff for \$4,000 against the City of Osage City and Asher Adams. They both seek to have the judgment reviewed in this court.

**Mr. A. J. Utley**, for City of Osage City, plaintiff in error:

A city is not required or bound to keep all its streets in good repair, under all circumstances. It is only bound to keep such streets and such parts of streets in repair as are necessary for the convenience and use of the traveling public.

*Basett v. St. Joseph*, 53 Mo. 303, 304. See also *Brown v. Glasgow*, 57 Mo. 158; *Craig v. Sedalia*, 63 Mo. 418; *Wellington v. Gregson*, 81 Kan. 103; *Manchester v. Ericsson*, 105 U. S. 347 (26 L. ed. 1099); *Henderson v. Sandefur*, 11 Bush (Ky.) 550; *Dillon, Mun. Corp.* § 753; 2 L. R. A.

*Titus v. Northbridge*, 97 Mass. 253; *Blake v. Newfield*, 68 Maine, 365.

A person must be in the highway for the purposes of travel, in order to be entitled to recover damages on account of its insufficiency.

*Sykes v. Pavlet*, 48 Vt. 446; *Blodgett v. Boston*, 8 Allen, 287; *Tighe v. Lowell*, 119 Mass. 472; *Lyons v. Brookline*, 119 Mass. 491; *Wheeler v. Westport*, 80 Wis. 393.

The mere fact of establishing a highway does not of itself so open it to the public as to render the town liable for accidents that may occur to travelers thereon.

*Blaisdell v. Portland*, 89 Maine, 118.

The obligation to keep a street in repair is to keep it in such a state that the ordinary and expected travel may pass with reasonable ease and safety.

*McMahon v. Second Avenue R. Co.* 11 Hun, 847, affirmed, 75 N. Y. 281. See also *Trite v. Kansas City*, 84 Mo. 689; *Joliet v. Verley*, 35 Ill. 58.

An alley is not a public highway in the same sense that a street is a public highway; and the city is not held to the same strict rules in reference to the care of an alley, or the prevention of the placing of obstructions therein, that it is in reference to streets. Alleys are for the accommodation of abutting owners, and the public has no general right of way through them.

See *Bagley v. People*, 43 Mich. 355, 356; *Paul v. Detroit*, 32 Mich. 111; *Boecher v. People*, 33 Mich. 291; *Tillman v. People*, 12 Mich. 401.

**Messrs. Thomson & Heiser** for Adams, plaintiff in error.

**Messrs. H. B. Hughbanks and B. F. Hendrix**, for defendant in error:

A city falls in its duty when it permits a nuisance to be erected and maintained on a street or alley within the city limits.

See *Dillon, Mun. Corp.* § 790, and cases there cited.

Neither can a city allow others to erect a nuisance on property over which it has control.

2 *Thompson, Neg.* 741, and cases there cited.

If Adams had been a contractor with the city for the purpose of putting in a sewer, the city would be liable on account of his negligence.

*Morgan v. Ill. & St. L. Bridge Co.* 7 Cent. L. J. pp. 811-818; *Chicago v. Robbins*, 67 U. S. 2 Black, 418-429 (17 L. ed. 298-304); *Dillon, Mun. Corp.* 792, 795; *Norwich v. Breed*, 30 Conn. 539; *Parker v. Macon*, 89 Ga. 725; *Stout v. Sioux City & P. R. Co.* 2 Dill. C. Ct. 294; *Keffe v. Milwaukee & St. P. R. Co.* 31 Minn. 207; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657 (21 L. ed. 745); *Sheel v. Appleton*, 49 Wis. 125; *Goodno v. Oshkosh*, 28 Wis. 300.

Adams was bound to exercise due care; and that due care must have been reasonable under all the circumstances in the case.

*Sheel v. Appleton*, 49 Wis. 125; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657 (21 L. ed. 745).

Our Registry Laws settle the point as to the dedication of the alley to public use.

*Franklin County v. Lathrop*, 9 Kan. 461; *Comp. Laws* 1862, p. 119, § 6; *Gen. Stat.* 1868, p. 618, § 6; *Comp. Laws* 1885, p. 594, chap. 78, § 6.

Any person walking on a street has a right to use any portion of it not already in use (*Smith*

*v. Leavenworth*, 15 Kan. 81; *Gould v. Topeka*, 32 Kan. 485; *Jansen v. Atchison*, 16 Kan. 358; *Fort Scott v. Brothers*, 20 Kan. 455; and the same rule applies to an alley.

*Osage City v. Brown*, 27 Kan. 74; *Maulby v. Leavenworth*, 28 Kan. 745; 2 Dillon, Mun. Corp. § 1016; *Atchison v. King*, 9 Kan. 550; *Blake v. St. Louis*, 40 Mo. 569; *Orwig v. Sedalia*, 63 Mo. 417; *Schweichhardt v. St. Louis*, 2 Mo. App. 571; *Rice v. Des Moines*, 40 Iowa, 633; *N. Y. City v. Sheffield*, 71 U. S. 4 Wall. 189 (18 L. ed. 416); *Hovee v. Plainfield*, 41 N. H. 135; *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37.

**Holt, C.**, delivered the following opinion:

Both of the defendants allege several errors at the trial. We will premise this opinion by stating, under the facts in the case as shown by the record, that if the city is liable by reason of its negligence in permitting the tumbling-rod of defendant Adams to remain as an obstruction in an alley, then he would also be liable. Of the many assignments of error the only ones we care to notice are those referring to the rulings upon the admission and rejection of evidence, and the instructions of the jury relating to the question of whether the place where the little girl was hurt was in fact an alley in the City of Osage City which the public had the right to use.

The filing and recording of the plat of the city, duly made, acknowledged and certified, without further action on the part of the city, made this parcel of land an alley, and vested the fee in the county for public use. The defendants argue that, although it might be an alley, yet the city had never attempted to open and improve it, or mark its boundaries, and therefore was not liable for injuries that occurred in traveling over it. They claim that until a city attempts to make streets or alleys suitable for public travel, and thus invite the public to use them, it is not liable for injuries upon such unimproved or unopened streets or alleys; and, further, when it does improve them, it is only compelled to improve those parts of the street or alley which are necessary for traveling, and cite a list of authorities to sustain their contention. They claim that in this instance one of the defendants, Asher Adams, owned the land on both sides of this alley; that it was obstructed by the roadbeds of the Atchison, Topeka & Santa Fé Railroad, so as to render it practically impassable for general travel, and therefore it was used solely for his own benefit as a means of ingress and egress from his elevator and hay press; and as he never fenced it, or laid it off, but used it indiscriminately with the other part of the block south of the railroad, it never acquired the public character usually given alleys. They claim, further, that a city is not under the same obligations to open and improve an alley that it is a street; that the object and purpose of a street is for the general travel of the public, while an alley is used primarily for the convenience of the abutting land owners; and, when the land abutting an alley is all owned by one individual, he has the right to obstruct the same, and use it as his own property, and cite a list of Michigan authorities referring to alleys in the City of Detroit.

2 L. R. A.

We cannot agree with the claim of defendants, nor do we believe that the authorities they cite sustain the propositions advanced. Alleys in the City of Detroit were not dedicated in the way that alleys are in Kansas. The dedication of an alley in this State has the same force and is in the same terms as the dedication of a street. It may be, and probably is, a fact that the interests of the public do not require that an alley should be kept in the same condition as a street; and it is probably true that they are largely used for the convenience of the abutting lot owners, and certainly have less use as a public thoroughfare than the streets in a city; yet they are dedicated to public use. Public money may be expended upon them to improve them, and they can be used by the public generally. The abutting lot owners have no such control over them as to exclude the general public from their enjoyment; and an accident happening in an alley used for public travel, occasioned by an obstruction therein, might make the city liable for the injury so sustained.

In this instance it is claimed that this alley was not publicly and formally opened. Our statute does not require any formal opening of a street or alley where there has been a dedication. The simple fact of dedication makes it a public way. It is claimed, however, that until there is some work done to invite the public to travel over a street or alley, the traveler uses the street or alley at his own peril. We think that that contention, whether sound or not, has no bearing on this case.

The testimony shows that this portion of this alley was comparatively smooth ground, and that this obstruction was not one that existed from the natural formation of the land, but was placed there by the defendant Adams, and allowed to remain for years with the knowledge of the City of Osage City. It was a dangerous obstruction placed upon an alley dedicated to the public; and, while it would not probably have been permitted to remain on a public street or alley which was in constant use by the public as a thoroughfare, yet it was upon public ground which the public had the right to travel. It is this particular fact in the case that makes the authorities cited by the defendants inapplicable. It was not the failure of the city to open the alley, and keep it in repair, that the plaintiff complains of as causing the injury sustained, but it was its negligence in allowing this trap to remain for so long a time in an alley dedicated to the public, and over which any person had the right to travel. This child, under nine years of age, did not sustain the injury complained of by reason of the natural roughness and unevenness of the ground, but by falling upon a dangerous piece of machinery which had been permitted to remain uncased and unprotected for years in an alley of this city. This action was tried upon this theory, and the instructions given, and rulings upon the introduction and rejection of evidence, were all consistent with it. This was correct.

We find no material error in the trial of this case, and recommend that the judgment be affirmed.

**Per Curiam:**

*It is so ordered;* all the Justices concurring.



OTTAWA, OSAGE CITY & COUNCIL  
GROVE R. CO., *Plff. in Err.*,

v.

Andrew LARSEN.

(....Kan....)

1. A railroad company may, under the provisions of the statute and under the authority of a city ordinance, construct and operate its railroad in a public street in a legal and proper manner, making such alterations in the surface of the street necessary to the construction and operation of its road, and which do not necessarily impair the usefulness of the street, without being liable to abutting lot owners or others for damages; but such a company cannot, any more than an individual, wrongfully and unnecessarily block up or obstruct a street, without being liable therefor.

2. Subdivision 4, § 47, chap. 28, Comp. Laws 1885, is not in contravention to section 4, art. 12, of the Constitution of the State, or to the Fifth Amendment to the Constitution of the United States; as the constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but indirectly or consequentially injured.

3. Where a corporation, owning land adjoining a city, lays out and plats its land as an addition to the city, and dedicates the streets for public use, with the condition that it reserves to itself, its successors or assigns, the right to use and occupy the streets for the purpose of operating a railroad, such reservation does not relieve the corporation from construct-

ing, operating and maintaining its line of railroad in a legal and proper manner.

(November 10, 1886.)

**ERROR** to the District Court for Osage County (Spilman, J.), to review a ruling sustaining a demurrer to portions of an answer in an action against a railroad company, to recover damages by reason of the construction of a railroad in a public street in front of the plaintiff's land. *Overruled in part.*

Statement by *Horton, Ch. J.*:

On the 28th day of May, 1886, Andrew Larsen filed his petition against the Ottawa, Osage City & Council Grove Railroad Company, in the District Court of Osage County.

The petition alleged: "That he is the owner of lots Nos. 6, 7, 8 and 9, in block 81, and lots Nos. 4 and 5, in block 38, all in Osage Carbon Company's Second Addition to Osage City, in Osage County, State of Kansas. That said Second Addition is duly platted of record, and the streets and alleys thereof, including F Street, are duly and lawfully dedicated and opened to the public as such streets and alleys; and that the portion of said Second Addition embracing plaintiff's said lots is within the corporate limits of said Osage City. That plaintiff selected, purchased, and improved and occupied and cultivated, and now occupies and cultivates, said lands, with reference to and for the purpose of his comfort, convenience

## \*Head notes by the Court.

**NOTE.**—*Right to use of public streets by railroads.* A city, by virtue merely of the right to lay out, open and alter, repair and amend streets cannot grant the right to construct a railway in one of its streets for private gain. *People's Pass. R. Co. v. Memphis City R. Co.* 77 U. S. 10 Wall. 58 (19 L. ed. 844). The power of regulating their use as public property rests with the Legislature. *Portland & W. V. R. Co. v. Portland*, 14 Or. 188. A municipal corporation takes the title to streets dedicated to it by the owner in trust; and it cannot, nor can the State, appropriate the street to the laying of a railroad track. *St. Paul & P. R. Co. v. Schurmeir*, 74 U. S. 7 Wall. 272 (19 L. ed. 74). Appropriating a public street to use for an ordinary commercial railroad is not a proper street use. *Adams v. Chicago, B. & N. R. Co.* 1 L. R. A. 468. A private corporation has no right to impose a permanent structure on a highway, and thereby sequester to its exclusive use for its exclusive profit any portion thereof, in the absence of either legislative or municipal permission. *Stamford v. Stamford Horse R. Co.* 1 L. R. A. 376. A Maryland corporation authorized by Act of Congress to extend its road into the District of Columbia has no right to use the streets of Washington except such as are expressly designated by Congress for that purpose. *District of Columbia v. Baltimore & P. R. Co.* 114 U. S. 458 (29 L. ed. 216).

*Dedication, subject to use by railway.* A dedication of land as a highway may be made subject to a right to designate a portion thereof for use for railroad purposes; and when so designated the public use will be suspended so long as the portion is devoted to such purposes. *Ayers v. Pennsylvania R. Co.* 3 Cent. Rep. 842, 48 N. J. L. 44. See *Meier v. Portland Cable R. Co.* 1 L. R. A. 856, note.

*Leave and license granted by municipal corporation.* A city may grant a right of way in its streets to a railway company under the Code, and no ordinance is necessary for that purpose. *Merchants Union Barb Wire Co. v. Chicago etc. R. Co.* 70 Iowa, 106. The operation of a railroad by steam motor does not impose additional servitude on a city street. *Newell v. Minneapolis etc. R. Co.* 35 Minn. 112. In Illinois, by the General Incorporation Law, power is conferred on the Common Council to authorize railroad tracks to be laid in streets. *Chicago Dock & Canal Co. v. Gurrity*, 12 L. R. A.

*West. Rep.* 670, 115 Ill. 155. In Iowa, streets may be occupied by railway tracks, without the consent of the adjacent proprietor and without compensation. There is no substantial difference between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein. *Barney v. Keokuk*, 94 U. S. 324 (24 L. ed. 234). In Kansas, the city council has no authority to grant to a railroad company a right of way over private property or over a proposed extension of a street which has not yet been opened or extended. *Wichita & W. R. Co. v. Fecheimer*, 36 Kan. 48. In Pennsylvania, the power of a railroad company to appropriate and use a street or highway for its tracks must be given expressly or by necessary implication. *Pa. R. Co. v. Mish*, 4 Cent. Rep. 271, 115 Pa. 514.

*Injury to owners is damnum absque injuria.* In some of the States it is held that where the authorities of a municipal corporation are vested by charter with the exclusive control over its streets, and in pursuance of such power, permission is granted to locate railway tracks along a street, the owners or occupants of property fronting such street cannot enjoin the laying of such tracks, nor recover any damage or compensation for such use of a street. *Moses v. Pittsburgh etc. R. Co.* 21 Ill. 516; *Now Albany & S. R. Co. v. O'Daily*, 13 Ind. 353; *Dubach v. Hannibal & St. J. R. Co.* 4 West. Rep. 688, 59 Mo. 482. In the case of constructing the track of a railroad through the streets of a city by the permission of the common council, the lands forming the street wherein the track is laid are not to be deemed "taken" from the adjoining owners for the construction of the road. They still continue streets, for the use, benefit and accommodation of the public at large. *Drake v. Hudson R. Co.* 7 Barb. 503. Injury to individual owners of land by the authorized construction of a railroad through a street, the title to which is in the people of the State, is *damnum absque injuria*, and gives them no right of action against the company. *Corey v. Buffalo etc. R. Co.* 23 Barb. 482.

*Leave and license will not authorize a nuisance.* The supervisors cannot by license authorize a railroad company to construct or maintain a nuisance in the public street. *Sullivan v. Royer*, 72 Cal. 249, even though the damages are inappreciable. *Humphrey v. Irvin (Pa.)* 4 Cent. Rep. 687. See *Adams v. Chicago etc. R. Co.* 1 L. R. A. 468, note.

and profit, and the comfort and convenience of his family, and as his and his family's homestead. That, in furtherance and pursuance of said purposes, he has improved said lands with fences, family residence, barns, and other necessary buildings, with fruit, ornamental and other trees, shrubs and plants—all at an aggregate expense to him of \$800.

And plaintiff says: "That the defendant is a railroad corporation, duly organized under the laws of the State of Kansas, owning, constructing, occupying and operating a standard gauge railroad, known and styled the 'Ottawa, Osage City & Council Grove Railroad.' That said railroad is by defendant located, constructed and operated on and along the whole of F Street, in said Second Addition to Osage City, length and breadth, and on and along the south line and front of said lots Nos. 6, 7, 8 and 9, in said block 31, and on and along the north line and front of said lots 4 and 5, in block 38, of said Second Addition. That in constructing, locating and operating said railroad on and along said street, and upon and along said lines and fronts of said lands of plaintiff, defendant has dug and excavated large and deep ditches along and upon said street, and along and upon the said lines and fronts of plaintiff's said lands, and raised and builded a great elevation along and upon said street, and along and upon the said lines and fronts of said lands of plaintiff; and has laid, fixed and fastened along and upon the top of said elevation, for the whole length thereof, the ties and track of said railroad. That thereby defendant has wholly occupied and destroyed said F Street, length and breadth, and particularly on and along said lines and fronts of plaintiff's said lands as such streets and highways; and that said defendant has not repaired, amended or restored said street, or any part thereof, or sought, undertaken or attempted to repair, amend or restore said street, or any part thereof, to its original or to any condition, state or degree of usefulness or availability as such street or public highway; and plaintiff further says that said street on and along said lines and fronts of his said lands is the only means of ingress or egress to his said lands, or appertaining in any way thereto.

"And he further says that the location, construction and operation of said railroad by said defendant, as hereinbefore complained of, has destroyed, injured and impaired his said fences, dwelling house, barns and other buildings and improvements on said lands, and rendered them useless, untenable and unavailable; and has rendered said lands and premises unfit, undesirable and untenable for the uses and conveniences and comforts aforesaid; to his damage in the sum of \$1,000. Wherefore, he prays judgment against said defendant for said sum of \$1,000, his damages so as aforesaid sustained."

On the 18th day of December, 1886, the following amended answer was filed by the railroad company.

"Now comes the defendant, and for its amended answer to the plaintiff's petition denies each and every material allegation therein contained, except as hereinafter directly admitted.

"(2) For a second and further defense the defendant admits that it is a corporation, and is 2 L. R. A.

engaged in the operation of a railroad into and through the County of Osage, and over and upon F Street, in the Osage Carbon Company's Second Addition to the City of Osage City, in said county; and the defendant says that the Osage Carbon Company is a corporation, duly created and existing under the laws of the State of Kansas, and as such corporation was on and prior to the 18th day of May, 1882, the owner of the lands on which said F Street is now located. That on the 18th day of May, A. D. 1882, the said the Osage Carbon Company, caused said lands to be platted as its Second Addition to the City of Osage City, in said county; and by the terms of said platting it donated said F Street, and other streets in said platted addition, for public uses, for streets, with the express understanding, and upon the express condition, that the right of the surface only should be contemplated as dedicated for the public use as streets; and that the said the Osage Carbon Company, its successors or assigns, or any person or company acting under its authority, should forever have the right to use or occupy said F Street, or any of said streets in said Second Addition, for the purpose of operating any railroad, switches or side tracks upon said F Street, or any of the other of said streets in said addition.

"And this defendant further says that the said the Osage Carbon Company has assigned to said defendant the right to construct, operate, and maintain its line of railroad over and upon said F Street, and has duly authorized the construction and operation of said railroad in the manner in which the same is constructed and operated by said defendant; and the defendant further says that the said plaintiff purchased the lots described in his said petition, subject to the rights so as aforesaid reserved by the said the Osage Carbon Company, and heretofore assigned to this defendant, as aforesaid, to construct, operate, and maintain a line of railroad over and upon said F Street.

"(3) For a third and further defense, the defendant admits that it is a corporation, and is engaged in the operation of a railroad into and through the County of Osage, and over and upon F Street, in the City of Osage City, in Osage County, State of Kansas; and the defendant says that the said city ordinance No. 166, entitled 'An Ordinance Granting the Right of Way to the Ottawa, Osage City & Council Grove Railroad Company, through the City of Osage City, Osage County, State of Kansas,' which was passed and approved October 31, 1885, and which was duly published, and was at the times complained of in plaintiff's petition and is a valid ordinance of said city, granted to the said defendant a right of way to construct, operate and maintain its railroad track, and such turnouts, switches and side tracks as are essential and necessary to the transaction of the business of said company upon said F Street, and the right to make drains along the said F Street, and to run cars, trains and engines upon such right of way; and, under the authority conferred by said ordinance, this defendant has, in a proper and legal manner, constructed its track on said F Street, in said city, and runs its cars, trains and engines upon said street, and made necessary alterations of the surface of the street, and has not unnecessarily

impaired the usefulness of said street for public travel and access to the abutting lots."

On the 18th day of December, 1886, the plaintiff filed the following demurrer:

"Comes the plaintiff, and, for reasons appearing on the face thereof, demurs to the second and third defenses in defendant's answer set out, for the reasons following, to wit: (1) that said second and third defenses, and neither of them, state facts sufficient to constitute a defense to plaintiff's petition, or any cause of action therein stated. Wherefore, plaintiff repeats the prayer of his petition."

Upon the hearing of the demurrer, the court sustained the same as to the second and third defenses contained in the railroad company's answer. To the ruling of the court in sustaining the demurrer the company excepted, and brings the case here.

**Messrs. Robert Dunlap, Geo. R. Peck and A. A. Hurd**, for plaintiff in error:

A railroad company may, under the provisions of the statute and under the authority of a city ordinance, construct its railroad in a public street in a proper manner, making such alterations in the surface of such street necessary to the construction of such railroad, and which do not necessarily impair the usefulness of such street, without being liable to abutting lot owners for damages.

See Kan. Comp. Laws 1885, chap. 219, § 47, subd. 4; *People v. N. Y. Cent. & H. R. R. Co.* 74 N. Y. 805; *Atchison & N. R. Co. v. Garfield*, 10 Kan. 552.

So, again, if parties under authority of the Legislature construct public works which without such authority would create a private nuisance, the authority is a sufficient defense to any action for such private nuisance; the private nuisance ceases to be a wrong, and becomes an act rightful under the law.

See *Northern Transp. Co. v. Chicago*, 99 U. S. 635 (25 L. ed. 836); *London, B. & S. O. R. Co. v. Truman*, L. R. 11 App. Cas. 45; *Hammer-smith & O. R. Co. v. Brand*, L. R. 4 H. L. 196; *Geddis v. Proprietors of Bann Reservoir*, L. R. 3 App. Cas. 455; *Ricket v. Metropolitan R. Co.* L. R. 2 H. L. 175.

The prevailing doctrine in the federal courts, and of all the States with the exception of Ohio and Kentucky, is that such changes in the grade of a street may be made by the municipality without compensating the land owner for damages suffered, unless the statute so provides.

See 2 Dill. Mun. Corp. 3d ed. §§ 989, 990-992, and notes; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 857, and note; *Hill v. Boston*, 122 Mass. 878; *O'Connor v. Pittsburgh*, 18 Pa. 189; *Kellinger v. Forty-Second Street etc. R. Co.* 50 N. Y. 209.

The right of eminent domain—that is, the right to take private property for public uses—is a right inherent in the State; it requires no constitutional recognition, as it is an attribute of sovereignty.

*Miss & B. Rio. Boom Co. v. Patterson*, 98 U. S. 406 (25 L. ed. 207); *U. S. v. Jones*, 109 U. S. 513 (27 L. ed. 1015); *Geisy v. Cincinnati, W. & Z. R. Co.* 4 Ohio St. 809; *Central Branch U. P. R. Co. v. Atchison etc. R. Co.* 28 Kan. 453.

Where an act is authorized by law, it is not an 2 L. R. A.

injury in legal contemplation, although damage may result therefrom.

*Columbia Del. Bridge Co. v. Geisse*, 35 N. J. L. 558, 563, 564.

Section 18 in the Bill of Rights in the Kansas Constitution can have no effect on the exercise of the right of eminent domain, and certainly cannot affect the question as to whether compensation should be made or not.

*Gilchrist v. Schmüdling*, 12 Kan. 271. See also *Patrick v. Cross Roads Comrs.* 4 McCord, L. 541.

The judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers.

*Veazie Bank v. Fenno*, 75 U. S. 8 Wall. 543 (19 L. ed. 487); *Spencer v. Merchant*, 125 U. S. 855 (31 L. ed. 767).

The provision in the Fifth Amendment to the Federal Constitution, declaring that private property shall not be taken for public use without just compensation, is only a limitation on the power of the United States, and is not applicable to the Legislatures of the several States.

*Barron v. Baltimore*, 32 U. S. 7 Pet. 243 (8 L. ed. 672); *Withers v. Buckley*, 61 U. S. 20 How. 84 (15 L. ed. 816).

A railroad is not an unreasonable obstruction to the free use of a street, but rather a new and improved method of using the same and germane to its principal object as a passage way, to which the genius of the law will readily accommodate itself.

*Mills, Em. Dom. § 201; Duenger v. Chicago & G. T. R. Co.* 98 Ind. 157, 158; *Barney v. Keokuk*, 94 U. S. 340, 341 (24 L. ed. 228, 229); *Briggs v. Lewiston & A. Horse R. Co.* 4 New Eng. Rep. 546, 70 Maine, 363, 32 Am. & Eng. R. R. Cas. 167, 168.

The authorities of a city having the right to make changes in the grades of streets, are authorized to direct such changes to be made by a railroad company for the use of its tracks, and no damages will be allowed for such changes.

*Mills, Em. Dom. § 199; Briggs v. Lewiston & A. Horse R. Co.* 4 New Eng. Rep. 546, 70 Maine, 363, 32 Am. & Eng. R. R. Cas. 167-169; *Statten v. Des Moines Valley R. Co.* 29 Iowa, 149, 155, 156; *Uline v. N. Y. Cent. etc. R. Co.* 3 Cent. Rep. 116, 101 N. Y. 108; *Newport & C. Bridge Co. v. Foote*, 9 Bush (Ky.) 264; *Wolfe v. Covington & L. R. Co.* 15 B. Mon. 404.

Under legislative authority to construct its railroad along or upon a street, the company in the location of the same may lay such a number of tracks as are essential to the convenient transaction of its business, and for that purpose may make any necessary alteration in the grade or surface of the highway.

*Mills, Em. Dom. § 200; Com. v. Hartford & N. H. R. Co.* 14 Gray, 379; *Conklin v. N. Y. O. & W. R. Co.* 8 Cent. Rep. 194, 102 N. Y. 107, 110; *Bolton v. Short Route R. Co.* (Ky.) 32 Am. & Eng. R. R. Cas. 256; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Hatch v. Vt. Cent. R. Co.* 25 Vt. 49; *Richardson v. Vt. Cent. R. Co.* 25 Vt. 465; *Phila. & T. R. Co's Case*, 6 Whart. 25, 36 Am. Dec. 202, 209.

Consequential injury to property is not a "taking" in the constitutional sense and com-

pensation need not be made; and damages to property owners from the change of grade or alterations in the surface of a street is not a taking of property.

Cooley, Const. Lim. 5th ed. pp. 475, 672, 673.

The impairment of access to premises is not a taking of property, and does not entitle the land owner to compensation.

*Toule v. Eastern R. Co.* 17 N. H. 519; *Whit-  
tier v. Portland & K. R. Co.* 38 Maine, 27; *Kel-  
linger v. Forty-Second Street etc. R. Co.* 50 N.  
Y. 206; *Rochelle v. Chicago etc. R. Co.* 33 Minn.  
201, 17 Am. & Eng. R. R. Cas. 192; *Boston &  
W. R. Co. v. Old Colony R. Co.* 12 Cush. 605;  
*Coster v. Albany*, 48 N. Y. 899; *McLouchlin v.  
Charlotte & S. C. R. Co.* 5 Rich. L. (S. C.), 583;  
*Northern Transp. Co. v. Chicago*, 99 U. S. 635  
(25 L. ed. 386). See generally, *Barr v. Oskalo-  
wa*, 45 Iowa, 275.

The doctrine of *Story v. New York Elevated  
Railroad Company*, 90 N. Y. 122, even in New  
York was only intended to apply to elevated  
railroads which require the placing of structures  
in and over the traveled thoroughfare. It does  
not apply to the construction of a railroad upon  
the ground in a street or highway, and the  
consequent changing of grade necessary thereto.

See *Conklin v. N. Y. O. & W. R. Co.* 102 N.  
Y. 112, 3 Cent. Rep. 194.

**Mr. H. K. McConnell**, for defendant in  
error:

The statutes regulating the platting of cities,  
towns and additions thereto are favorable to  
and in the interest of the town proprietor.

Kan. Comp. Laws 1885, chap. 78, §§ 1-5.

The town proprietor takes the benefit of the  
statutes allowing and regulating the platting  
of towns, cities and additions *cum onere*.

*Wood v. National Water Works Co.* 33 Kan.  
590; 2 Dill. Mun. Corp. 3d ed. §§ 623 note 2, 640.

To secure the right to sell platted lots of  
land there must first be platted and conveyed  
absolutely to the county proper streets and  
alleys.

Kan. Comp. Laws 1885, chap. 78, §§ 1-5; *Wood  
v. National Water Works Co.* 33 Kan. 590; *Tous-  
ley v. Galena Min. & S. Co.* 24 Kan. 328.

Streets and alleys have a twofold character:  
that of public and private easements. As  
highways they belong to the public. As ave-  
nues of ingress and egress to and from private  
abutting property they are the private indi-  
vidual property of the abutter.

2 Dill. Mun. Corp. 3d ed. §§ 660, 661; *Tiede-  
man, Real Prop.* § 842; *Philbrick v. Ewing*,  
97 Mass. 183; *Pope v. O'Hara*, 48 N. Y. 455;  
*Parrot v. Cincinnati etc. R. Co.* 10 Ohio St. 630;  
*Smith v. Leavenworth*, 15 Kan. 81; *Molitor v.  
Sheldon*, 87 Kan. 245.

An abutting lot owner has a private property  
in the streets and alleys bounding his lots as  
means of ingress and egress which may not be  
taken or impaired without compensation being  
first made.

*Atchison & N. R. Co. v. Garbide*, 10 Kan.  
552; *Central Branch U. P. R. Co. v. Twins*, 23  
Kan. 585; *Kansas City & O. R. Co. v. Ilicks*,  
30 Kan. 292; *Central Branch U. P. R. Co. v.  
Andrews*, 30 Kan. 590; *Kansas City & E. R.  
Co. v. Kiegele*, 32 Kan. 608; *Lahr v. Metropol-  
itan El. R. Co.* 6 Cent. Rep. 871, 104 N. Y. 268;  
*Terre Haute & L. R. Co. v. Biswell*, 6 West.  
Rep. 253, 108 Ind. 113; *Pittsburgh & Union R.  
2 L. R. A.*

*Co. v. McOutcheon (Pa.)* 5 Cent. Rep. 755;  
*Grafton v. Baltimore & O. R. Co.* 21 Fed. Rep.  
809; *Mollandin v. Union Pac. R. Co.* 14 Fed.  
Rep. 394; *Ward v. Detroit, M. & M. R. Co.*  
(Mich.) 28 N. W. Rep. 783; *McClean v. Chicago  
etc. R. Co.* 67 Iowa, 568; *Omaha & R. V. R.  
Co. v. Rogers*, 16 Neb. 117; *Buchner v. Chicago  
etc. R. Co.* 60 Wis. 264; *Burlington & M. R.  
Co. v. Reinhackle*, 15 Neb. 279; *Gottschalk v.  
Chicago etc. R. Co.* 14 Neb. 550; *Hastings &  
G. I. R. Co. v. Ingalls*, 15 Neb. 123; *Hanson v.  
Chicago etc. R. Co.* 61 Iowa, 588; *Buchner v.  
Chicago etc. R. Co.* 56 Wis. 403; *Mulholland v.  
Des Moines etc. R. Co.* 60 Iowa, 740; *Brakken  
v. Minneapolis & St. L. R. Co.* 29 Minn. 41;  
*Drady v. Des Moines & Ft. D. R. Co.* 57 Iowa,  
393; *Carli v. Stillwater, St. R. & T. Co.* 28  
Minn. 873; *Stanley v. Davenport*, 54 Iowa,  
463; *Cleburne v. Gulf, C. & S. P. R. Co.* 66  
Tex. 457; *Rensselaer v. Leopold*, 3 West. Rep.  
874, 106 Ind. 29; *Denver v. Beyer*, 7 Colo. 113;  
*Redinger v. Marquette & W. R. Co.* (Mich.) 28  
N. W. Rep. 775; *Zell v. First Universalist Soci-  
ety (Pa.)* 12 Cent. Rep. 148; *Haynes v. Thomas*,  
7 Ind. 38; *Indianapolis v. Croas*, 7 Ind. 9; *Oran-  
ford v. Delaware*, 7 Ohio St. 459, 469.

Subdivision 4 of section 47 of chapter 23,  
Compiled Laws of Kansas, 1885, is in contra-  
vention of the Fifth Amendment to the Con-  
stitution of the United States and void because  
it authorizes the taking and appropriating of  
private property for public use and does not  
provide for the ascertainment or payment of  
damages or compensation therefor.

It is also in contravention of section 4, article  
12 of the Constitution of the State of Kansas,  
which reads: "No right of way shall be appro-  
priated to the use of any corporation, until full  
compensation therefor be first made in money,  
or secured by a deposit of money, to the owner,  
irrespective of any benefit from any improve-  
ment proposed by such corporation."

*Hunt v. Smith*, 9 Kan. 137; *Mo. K. & T. R.  
Co. v. Ward*, 10 Kan. 353; *Shawnee County v.  
Beckwith*, 10 Kan. 603; *St. Joseph & D. O. R.  
Co. v. Callender*, 18 Kan. 496.

The Osage Carbon Company could not valid-  
ly reserve for itself and assigns, in the platting  
of the addition, the right to use and occupy F  
Street for the purpose of constructing and  
operating a railroad, as such a reservation is  
beyond its charter powers and void.

Cooley, Const. Lim. 5th ed. pp. 488, 489; 1  
Dill. Mun. Corp. 3d ed. par. 447.

Such a reservation is against public policy  
and void.

*Wood v. Nat. Water Works Co.* 33 Kan. 590,  
and cases there cited; *Tousley v. Galena Min.  
& S. Co.* 24 Kan. 328; *Brown v. Manning*,  
Ohio, 298; *Redinger v. Marquette & W. R.*  
(Mich.) 28 N. W. Rep. 775.

**Horton, Ch. J.**, delivered the opinion  
the court:

This was an action commenced by Andrew  
Larsen against the Ottawa, Osage City &  
Council Grove Railroad Company, to recover  
\$1,000 damages, on account of the location,  
construction and operation of its road upon a  
public street in an addition to Osage City, in  
front of lots owned and occupied by him.

In its answer for a third defense, the railroad  
company admitted that it was a corporation,

engaged in the operation of a railroad through Osage County, and over and upon F Street in the City of Osage City; but alleged that the city, by ordinance No. 166, entitled "An Ordinance Granting the Right of Way to the Ottawa, Osage City & Council Grove Railroad Company, through the City of Osage" (which was duly approved and published), granted to the company the right to construct, operate and maintain its railroad and track, and such turnouts, switches, and side tracks as were essential and necessary to the transaction of the business of the company upon F Street, and the right to maintain drains along F Street, and run cars, engines and trains upon its right of way; that, under the authority conferred by the ordinance, the company had in the proper and legal manner constructed its track on F Street, in the city, and run its cars, trains and engines upon said street, and made the necessary alterations of the surface of said street, but had not necessarily impaired the usefulness of the street for public travel and access to abutting lots; that the City of Osage City was an incorporated city of the State, and that the lots set forth in block 40 of the Osage Carbon Company's Second Addition to the City of Osage City, and F Street, which abutted said lots, and on which defendant's railroad was constructed, were within the corporate limits of said city.

The district court sustained a demurrer to this part of the answer, upon the ground that it did not state facts sufficient to constitute any defense to the petition of Larsen.

Subdivision 4, § 47, chap. 28, Compiled Laws 1885, reads: "Every railway corporation shall, in addition to the powers hereinbefore conferred, have power . . . to construct its road across, along or upon any stream of water, water-course, street, highway, plankroad or turnpike which the route of its road shall intersect or touch; but the company shall restore the stream, water-course, street, highway, plankroad or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness. Nothing herein contained shall be construed to authorize the construction of any railway not already located in, upon or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city." See, also, section 65, chap. 19, Compiled Laws 1885, giving cities of the second class the power to provide for the passage of railroads over or upon streets and public grounds.

In *Atchison & N. Railroad Company v. Gar-side*, 10 Kan. 552, it was decided that "A railway company having authority from the city may construct and operate its road over streets and public grounds without compensation to the abutting lot owners for the use of the same, and without being liable to such lot owners for consequential damages arising from noise, smoke, offensive vapors, sparks, fires, shaking of the ground, and other inconveniences and annoyances, where the railroad is operated in a legal and proper manner; and in fact it may so construct and operate its road without being liable to said lot owner for any damage, where the road is constructed and operated in a legal and proper manner."

It was decided in *Methodist-Episcopal Church* 2 L. R. A.

*v. Wyandotte*, 81 Kan. 721, that, in the absence of a statute creating a liability, "An action will not lie against a city for damages for the injury to adjoining property caused by a change having been lawfully made by the city authorities in the grade of a public street." 3 Dill. Mun. Corp. § 990; *Hedrick v. Olathe*, 80 Kan. 848.

In *Heller v. Atchison Railroad Company*, 28 Kan. 625, it was said: "The Legislature, as the representative of the public, has plenary power over streets and highways, and, as a general rule, full discretion as to opening, improving and vacating the same."

A railroad laid out over or on a public street or highway, so as to obstruct it, without express statutory authority or necessary implication, is a nuisance; and the company laying and operating such a road is liable, by indictment or otherwise, for creating and maintaining a nuisance; hence, the answer properly alleged the express authority of the railroad company to construct, operate and maintain its road upon the street described in the petition; and also that the road was "constructed and operated in a legal and proper manner," so as not to unnecessarily impair the usefulness of the street for public travel and access to abutting lots. If all the facts stated in the third defense are true, then the plaintiff is not entitled to recover, as the facts alleged are a full and sufficient answer to the petition.

Counsel for Larsen contend, however, that said subdivision 4, § 47, chap. 28, is in contravention of section 4, art. 12, of the Constitution of the State; and also of the Fifth Amendment of the Constitution of the United States; and therefore that the statute is void.

Such is not the case. The constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but only indirectly or consequentially injured; and an Act or an ordinance authorizing the construction of a railroad, or other work of public nature, upon a public street or highway, the fee of which is in the public, is not unconstitutional because it does not provide for compensation for injuries to abutting lot or land owners. *Radcliffe v. Brooklyn*, 4 N. Y. 105; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289; *Northern Transp. Co. v. Chicago*, 99 U. S. 635 [25 L. ed. 336]; *Chicago etc. R. Co. v. Joliet*, 79 Ill. 35; *Conklin v. New York, O. & W. R. Co.* 102 N. Y. 107, 8 Cent. Rep. 194. See also *Hedrick v. Olathe*, *supra*.

Counsel for Larsen claim, however, that under *Atchison Railroad Company v. Gar-side*, *supra*; *Central Branch Railroad Company v. Twine*, 28 Kan. 585; and *Central Branch Railroad Company v. Andrews*, 28 Kan. 702, and 80 Kan. 550, the plaintiff is entitled to recover *pro tanto* for any impairment or partial destruction of ingress or egress to his lots.

In the *Gar-side Case* it is said: "Therefore, in a case like the one at bar, where the railroad company has the legal right to construct and operate its road over certain grounds, we do not think that the company can by so doing be held liable for any damages of any kind, where it constructs and operates its road in a legal and proper manner. It can be held liable only where it constructs and operates its road

in an illegal, improper or wrongful manner. The plaintiff may, we think, recover for the third kind of damages. But, before he can do so, he must show, among other things, that the levee is a street or highway, as he has alleged; that the railroad company wrongfully and unnecessarily blocked up and obstructed the said street or highway; and that the plaintiff received actual injury from such obstruction. And the injury must be special as to him, and not such as affects the public in general. Of course, the railroad company can have no legal right to permanently block up the street; and it can have no legal right to temporarily block up or obstruct a street, except where it necessarily does so in the lawful and proper use of its road. It can pass and re-pass with its engines and cars the same as individuals may with their vehicles, and for such passing and re-passing it cannot, of course, be liable to anyone; but it has no more right to obstruct the street than an individual has, and it may make itself liable for obstructing a street the same as an individual may."

In the *Twine Case* the damages were allowed for completely obstructing access to an adjoining lot.

In the *Andrews Case* damages were allowed upon the ground that the lot owner considered the complete obstruction by the railroad company as a permanent taking and appropriation of the alley.

In all of these cases it was asserted that a railroad company had no legal right to block up or wholly obstruct a street. These decisions, however, are to the effect only that a railroad company has no more right to obstruct the street than an individual has, and it may make itself liable for wrongfully and unnecessarily obstructing a street the same as an individual. To illustrate: an individual may drive his carriage or other vehicle up and down a street; but if he wrongfully and unnecessarily blocks up the street with his carriage or vehicle,

so that it cannot be used for other vehicles, or for persons passing and repassing, he will be liable to anyone damaged thereby. This court has held the same way in regard to the passing and repassing of engines and cars upon a street, where the railroad company has a legal right to construct and operate its road. It has, however, gone no further. The *pro tanto* theory has never been adopted. Indirect and general injuries give the lot owner in this case no actionable damages. *Heller v. Atchison etc. R. Co. supra.*

Counsel refer to the decisions of several courts, which, to some extent, support the court below in sustaining the demurrer. These decisions, as in Ohio, are contrary to the law elsewhere declared; and in the other States are upon statutes or constitutional provisions widely differing from ours. In passing, we may add that the Legislature, in 1881, enacted a statute for property owners to recover damages, where the grade of a street has been changed to their injury. Comp. Laws 1885, chap. 18, § 18. This statute does not apply in any way to this case.

As to the second defense alleged in the answer, we do not think it important or material. The reservation to the Osage Carbon Company, its successors and assigns, to use and occupy the street for the purpose of operating a railroad, merely reserved to that company, if it reserved anything, the right to construct, operate and maintain its line of railroad over and upon the street in a proper and legal manner. All of this is alleged to have been done, in the third defense of the answer; and therefore the court below committed no error in sustaining the demurrer to the second defense. *Wood v. National Water Works Co.* 83 Kan. 590.

*The ruling and judgment of the District Court sustaining the demurrer to the third defense will be overruled, and the cause remanded for further proceedings in accordance with the views herein expressed; all the Justices concurring.*

## KENTUCKY COURT OF APPEALS.

### HARTFORD FIRE INSURANCE CO.,

*Appt.,*

*v.*

Margaret HAAS *et al.*

.....Ky.....)

1. A policy of insurance cannot be reformed to cover the interests of children of the insured, merely because the insured supposed he was insuring their interests as well as his own, when nothing was said at the time of the insurance as to the nature and extent of the interest insured.

2. Where an agent, having power to effect

insurance without even consulting the home office, was fully apprised of the ignorance of the person insured, who was an illiterate German woman, unable to read or write the English language, and who knew all about the nature and extent of her title, a policy issued by him on her property will not be void because she is not the absolute and unconditional owner, although it contained a stipulation that it should be void in that event.

3. An agent issuing an insurance policy with full power to do so without even consulting the home office, will be regarded, so far as concerns his knowledge as to the title of the property insured,

NOTE.—Insurance policy; reformation of. The equity jurisdiction is applied where necessary and proper to the reformation of contracts of insurance. *Harris v. Columbiana County Mut. Ins. Co.* 18 Ohio, 116; *Firemans Ins. Co. v. Powell*, 13 B. Mon. 811. Equity will interpose, not only in cases of fraud, but also of mistake, where a policy is drawn up in a form different from the application. *National F. Ins. Co. v. Crane*, 16 Md. 263; *Collett v. Morrison*, 12 Eng. L. & Eq. 171; *Hearne v. New Eng. Mut. M. Ins. Co.* 87 U. S. 20 Wall. 421 (23 L. ed. 397); *Kerr, Fraud & M.*

2 J. R. A.

419. The mistake must, however, be mutual, as a policy of insurance cannot be reformed for mistake of the insured alone. *Cooper v. Farmers Mut. F. Ins. Co.* 50 Pa. 307; *Brooks v. Kensington*, 2 Kay & J. 788; *Eaton v. Bennett*, 84 Beav. 194. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. *Mortimer v. Shortall*, 2 Dru. & W. 872; *Sells v. Sells*, 1 Drew. & S. 42. Where the minds of the parties have not met there is no contract and hence none to be rectified. *Bentley v. Mackay*, 31 L. J. Ch. 709; *Baldwin v. Mildeberger*, 3

as if he was in fact the principal, and it is immaterial that his knowledge may have been acquired in business transactions entirely disconnected with the matter of insurance.

4. The interest of a widow in property insured may include a claim against the property for payment of incumbrances, although barred by statute. The insurer, not being a creditor of the estate, or interested in any manner in the property itself, cannot plead the statutory bar against such claim.
5. Where after equitable issues as to reformation of the policy had been tried and determined against the plaintiff, the court proceeded without objection to render judgment for the plaintiff for the value of her interest in the property, it is too late after judgment to move to transfer the case to the ordinary docket.

(November 20, 1888.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Daviess County in Chancery (Little, J.), in a suit for the reformation of a fire insurance policy and for recovery thereon. *Affirmed.*

This suit was brought by Margaret Haas and her children, against the Hartford Fire Insurance Company. The court below refused to reform the contract of insurance and dismissed the petition as to the children, but rendered judgment for Mrs. Haas against the defendant for \$1,364. From this judgment the defendant appealed, and the children filed a cross appeal.

An action at law had been previously brought by Mrs. Haas against the insurance company on the same policy, in which action there was a trial resulting in a verdict for the plaintiff; but a new trial was granted the defendant by the trial court, whereupon the plaintiff dismissed the action without prejudice; and thereafter this suit in equity was commenced.

The questions presented, and the facts connected therewith, are stated in the opinion.

**Mr. Edward W. Himes**, for the insurance company, appellant:

Where the contract is as the insurer understood that it was to be, the fact that the insured intended that it should be different, or did not understand its effect as written, does not authorize the chancellor to reform the policy.

*Wood, Insurance*, §§ 480, 481; *Guernsey v. Am. Ins. Co.* 17 Minn. 104; *Cooper v. Farmers Mut. F. Ins. Co.* 50 Pa. 807; *Dryce v. Lorillard F. Ins. Co.* 55 N. Y. 240.

The minds of the parties did not meet, and there was therefore in reality no contract. One party understood the matter one way, and the other another.

See *Wood, Insurance*, § 1.

The acceptance of the policy without any representations as to title or any statement of the specific interest of the assured amounts to a declaration on his part that his interest is absolute.

*Hall*, 170; *Coles v. Bowne*, 10 Paige, 534; *Calverley v. Williams*, 1 Ves. Jr. 211.

A policy of insurance may be reformed, although the insured has held the policy until after a loss, in silence and in ignorance—from omission to read the policy or from a careless reading—of the necessity for such reformation. *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige, 378; *Palmer v. Hartford F. Ins. Co.* 4 New Eng. Rep. 470, 54 Conn. 504. A court of equity has authority to reform a contract, where there has been an omission of a material word or stipulation by mistake. *Andrews v. Essex F. & M. Ins. Co.* 2

L. R. A.

*Lasher v. St. Joseph F. & M. Ins. Co.* 86 N. Y. 428; *Moss v. Franklin Ins. Co.* 68 Mo. 127.

The knowledge of the agent is not in every case the knowledge of the company.

*Galbraith v. Arlington Mut. L. Ins. Co.* 12 Bush, 29; *Western Assur. Co. v. Rector* (Ky.) 3 S. W. Rep. 415, 8 Ky. Law. Rep.—. See also *Agriault, Ins. Co. v. Montague*, 88 Mich. 548; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202.

*Messrs. Owen & Ellis*, for Mrs. Haas and children, appellees:

If there has been a mistake in issuing the policy, the court will, on proper application, correct it.

*Franklin F. Ins. Co. v. Hewitt*, 3 B. Mon. 231; *Firemans Ins. Co. v. Powell*, 13 B. Mon. 312; *May, Insurance*, §§ 565, 566.

When an agent takes charge of the application or assumes without advice from the insured to write up the policy, then the company will be bound; and if mistakes are made, it is the company's misfortune.

*May v. Buckeye Mut. Ins. Co.* 25 Wis. 291; *Washington F. Ins. Co. v. Kelly*, 32 Md. 421; *Lycoming F. Ins. Co. v. Jackson*, 83 Ill. 303.

**Pryor, J.**, delivered the opinion of the court:

Margaret Haas and her children were the owners of a brick building in the Town of Owensboro, upon which insurance was obtained by her for the sum of \$2,000 in the Hartford Insurance Company. The premium paid was \$32, and the insurance was against loss or damage resulting from fire. The fee was in the children of Mrs. Haas, her interest being confined to her dower and a lien for a purchase money note that had been taken up by her after the death of her husband out of her own means. The policy of insurance is issued in the name of Margaret Haas, without reference to her interest or that of her children, and contains a stipulation to the effect that "If the assured is not the absolute and unconditional owner of the property insured, or if said property be a building, and the assured is not the owner of the land in fee simple on which the building stands, and this fact is not expressed in the written portion of the policy," etc., "then, and in every such case, the policy shall be void."

The building was destroyed by fire, and the appellant, the insurance company, contests the right of recovery on two grounds: 1, the assured was not the owner in fee of the property insured, and failed to disclose her interest; 2, the house became vacant during the life of the policy, and was unoccupied when destroyed—the policy providing that in such a state of case the liability of the company should terminate.

The appellee, Mrs. Haas, ascertaining the character of defense relied on, filed her petition in equity seeking to reform the policy, al-

*Mason*, 10; 1 Story, Eq. § 159. And a policy of insurance is within the principle; but a court ought to be extremely cautious in the exercise of such an authority. It ought to withhold its aid where the mistake is not made out by the clearest evidence. *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 657. If a party fails, through mistake, to obtain such a policy as he is entitled to by an existing valid contract, equity will relieve, although the mistake arose through ignorance of law. *Oliver v. Mutual Commercial M. Ins. Co.* 2 Curt. 277.



leging that the contract of insurance, as made with the agent, was to insure, not only her interest, but that of her children, and, by mistake, the provision for the children was omitted; and seeks to recover such a sum as she may be entitled to under the contract. The averment with reference to the character of the contract, as well as the mistake in its execution, was traversed by the company, and the defenses already alluded to relied on to defeat any recovery.

That the appellant supposed she was insuring the interest her children had, as well as her own, is evident; but from the testimony it seems there was nothing said as to the nature and extent of the interest insured; and the chancellor could not well enlarge the liability of the company by inserting a provision in the policy for the benefit of the children, when the only reason assigned for so doing consists in the belief by the mother that she had insured their interest in the property as well as her own.

The question then arises: Is the policy or contract of insurance void, because of the failure of Mrs. Haas to state the real nature of her title? There is no pretense that the assured made any representations, false or otherwise. In regard to the property she was insuring, or her interest in it. She seems to have acted in the best of faith, believing that she had the right to insure the house at its full value, and was entitled to receive from the company its fair cash value in the event it was destroyed by fire during the life of the policy. So we have a case where the assured had an insurable interest; but, having failed to state that she had less than a fee simple title, it is urged that the entire contract is void.

The importance of disclosing the nature of the interest of the assured in the subject matter insured cannot be overlooked; and such a stipulation in the contract will be enforced, because binding on all the parties, although the assured may have regarded it as nonessential at the time of entering into the contract, or have been ignorant, in the absence of some fraud practiced upon him, that the policy contained such a stipulation. The evidence in this case shows, however, that the assured was an illiterate German woman, unable to write or read the English language, and dependent upon those with whom she contracted for the necessary information touching such a business transaction as that of insuring her property. She did not know the difference between a title in fee and a dower interest, and was entirely ignorant of what the policy contained. In this condition, as the proof clearly shows, she relied on the general agent of this company to inform her, or rather to instruct her, as to the nature of her rights. She had been insuring with the same agent for ten or twelve years, and often in the same company, paying her annual insurance upon the entire cash value of the property insured.

This agent was invested with a general and plenary power, not only to solicit, but to effect, insurance, without even consulting the home office. He lived in the same town with the appellee, was fully apprised of her ignorance in regard to this business matter, sought and solicited her to insure her property, and, as the tes-

timony shows, knew all about the nature and extent of her title. He knew this from having an actual examination made by those competent to investigate such a question; and now, to hold that these parties, under such circumstances, were dealing at arm's length, and for that reason declare the policy void, would be a mere mockery of justice, and give to this derelict company the earnings for years of this confiding German woman, when the company or its agents knew that if the property was destroyed by fire it would render the policy void. The agent states, and it is doubtless true, he had forgotten the fact of investigating the title; yet the facts are so conclusive on that subject as to leave no doubt on this branch of the case.

Nor do we understand that the agent is attempting to shield the company from liability; but his connection with the transaction must be treated as if this woman was dealing directly with the principal at the home office, and not with the agent. If the principal knew the extent of the appellee's interest, and had insured the property without any fraud or misrepresentation by her of her title, could any chancellor, under the circumstances, deny her relief to the extent of her insurable interest.

In *May on Insurance*, § 148, p. 161, it is said: "It has, in fact, been very generally held that knowledge by or notice to the agent of the inaccuracy of a statement in the application upon which a policy is issued, after such notice or knowledge, binds the company, and prevents them from availing themselves of the inaccuracy as a defense. And this is true, even though the policy provide that where the application is made through an agent of the company, the applicant shall be responsible for such agent's representations."

In this case there was no application made in writing. The subagent, or the agent of the principal agent, appeared and solicited a renewal of the policy; and it was then signed and filled up at the agent's office and delivered to the appellee. We are not disposed to adjudge that such contracts, shingled over with stipulations that are practically deceptive, if not inserted for that purpose, are binding on the ignorant and illiterate, when guilty of no fraud or misrepresentation, but have trusted alone to the superior knowledge of the agent, who undertakes to make such an application or to issue such a policy as will meet the requirements of the company he represents. The statements embodied in a policy issued under such circumstances, if false or erroneous, should be regarded as the act of the insurer. "The modern decisions," says Mr. May, in his work on Insurance, "fully sustain this proposition, and are founded in reason and justice." *May, Ins. 165; Rowley v. Empire Ins. Co. 36 N. Y. 550.*

It is urged by the appellant that as the knowledge acquired by the agent, of the nature of appellee's title, was derived in the prosecution or transaction of business engagements entirely disconnected with the matter of insurance therefore the knowledge of the agent should not be held that of the principal. We think it immaterial in what manner the information was acquired. Whether in the course of his employment as agent, or otherwise, he had personal knowledge of the fact the fee to the

property was in the children of the assured; and the appellee should not be made the victim of this neglect on the part of the agent and the insurance company obtain the benefits of the toil and labor of this woman for years, in raising the means with which to keep up her insurance. Here the agent was the sole judge as to whether he would issue the policy. He was not required to consult his principal before making the contract of insurance complete, and his acts should be regarded as if he was in fact the principal. *Harriman v. Queen Ins. Co.* 49 Wis. 71.

The interest, therefore, that the appellee had in this insured property was secured by this policy.

The extent of that interest is another question involved. That, as widow, she had a dower interest, will not be controverted; and it further appears that she relieved the property from the lien of a purchase money note out of her own means, and held it against the estate. The appellant, in order to defeat this claim, has relied on the statutory bar, as if the appellee was attempting by a suit in equity to enforce the lien against the protest of her infant children. Whether the children could defeat a recovery by the mother, by reason of the lapse of time, we will not stop to inquire. The company is not a creditor of the estate, or interested in any manner in the property itself. It is liable to the extent of appellee's interest in the house or building destroyed, and the plea of limitation is not in the way of a recovery.

There are several issues of fact raised by the pleadings and proof—one as to the value of the property, and another in regard to the property having been left vacant. The view

taken by the court below is sustained by the testimony on the several issues.

It is also complained that the court below erred in refusing to transfer the case to the ordinary docket, after having adjudged that the contract could not be reformed, and the widow could only recover to the extent of her interest. It appears that, after the equitable issues had been tried, the court, without objection, proceeded to render judgment for the appellee for the value of her interest which, including the lien note, amounted to \$1,864, with interest.

After this judgment had been rendered, the appellant for the first time moved to transfer the case. It was then too late. Nor was it necessary for the trial court, the case being in equity, to separate, in his findings, the law from the facts; and, if it had been, the law, as well as the facts presented, has been fully considered. The appellee, in her proof of loss and in an ordinary action that was for some reason dismissed, swore that she held the fee simple title; and it is argued that this should estop her from a recovery in this case. We have already, in effect, determined this branch of the case. It is plain that no fraud, misrepresentation or bad faith is to be attributed to the appellee, and equally certain that she failed to comprehend the character of her title, and labored under the belief, until this issue was raised by the company, that she had obtained a policy that covered fully the cash value of the entire building. In this she was mistaken; but there is no reason in law, equity or justice for denying her right to recover the value of her own interest in the subject matter of her contract. This having been adjudged to her by the chancellor, his judgment is now affirmed on the original and cross appeal.

## NEBRASKA SUPREME COURT.

MISSOURI PACIFIC R. CO., *Plff. in Err.*,  
v.

Nellie A. LEWIS, Admrx.

(.....Neb.....)

1. L. died in Kansas, from injuries there, for which it is claimed that, if death had not ensued, the Missouri Pacific Railway Company, the party inflicting them, would have been liable to an action for damages. The statute of that State provides that an action may be brought against

the party by the personal representative of the deceased. The widow, appointed under the Laws of Nebraska administratrix of L., brought in the circuit court of this State a suit against the railway company. *Held*, that the suit can be maintained, the right of action not being limited by the statute to a personal representative of the deceased appointed in Kansas, and amenable to her jurisdiction. See *Dennick v. Central R. Co.* 108 U. S. 11 [38 L. ed. 439].

2. The distribution of money, if recovered by

### \*Head notes by the Court.

**NOTE.**—Master and servant; care required. The ordinary care demanded of the railroad company to protect its employes, is that degree of care which ordinarily prudent men, in operating railroads, would exercise under similar circumstances. *Huhn v. Mo. Pac. R. Co.* 10 West. Rep. 405, 92 Mo. 440. The question of negligence on the part of the company cannot be resolved alone upon the fact as to the number of roads whose guard rails are or are not blocked, nor upon the relative safety of such roads. These are facts for the consideration of the jury. *Huhn v. Mo. Pac. R. Co.* 10 West. Rep. 405, 92 Mo. 440; *Mauerman v. Siermeris*, 71 Mo. 101; *Rugel v. Mo. Pac. R. Co.* 75 Mo. 854. Negligence on the part of the servant in such cases does not necessarily arise from his knowledge of the defect, but is a question of fact to be determined from such knowledge, and the other circumstances in evidence. *Huhn v. Mo. Pac. R. Co.* 10 West. Rep. 405, 92 Mo. 440.

92 Mo. 440, citing *Stoddard v. St. Louis etc. R. Co.* 65 Mo. 814; *Devlin v. Wabash etc. R. Co.* 4 West. Rep. 84, 87 Mo. 545; *Colorado Cent. R. Co. v. Ogden*, 3 Colo. 100; *Lesure v. Graniteville Mfg. Co.* 18 S. C. 276; *Perigo v. Chicago etc. R. Co.* 56 Iowa, 328; *Hawley v. Northern Cent. R. Co.* 82 N. Y. 570.

*Death of servant caused by neglect to block frogs and guard rails.* Where a yardmaster was killed by a moving train, through the alleged negligence of the company to block the track and guard rail in the yard, and by treason herof his foot was caught in the rail of a switch, it is for the jury to determine whether at the time of the accident, deceased, having knowledge of the absence of the block, was acting as a prudent man under the circumstances. His mere knowledge of the unsafe condition of the guard rail would not defeat a recovery. *Huhn v. Mo. Pac. R. Co.* 10 West. Rep. 405, 92 Mo. 440. If the instrumentality furnished for the service is obviously and immediately dangerous, so that a man of common prudence would refuse

the widow from the railway company, might be enforced by the courts of this State in the manner prescribed by the Statute of Kansas. *Id.*

3. The judgment of the County Court of W. County, Nebraska, granting letters of administration to the widow, the sole assets of the estate consisting of the claim against the railway company,—*held, coram judice*, and upheld.
4. The construction and operation of a railroad without blocking its frogs and switches is not negligence *per se*, of which a court will take judicial notice upon proof of the fact of such construction and operating, and failure to block the frogs and switches only.
5. In an action by an administratrix against a railroad company for damages for the death of her husband, where it was alleged in the petition that in constructing its line of railroad the defendant negligently failed to block its switches and frogs, by means of which the deceased, a brakeman employed by defendant, in coupling cars stepped his foot between the rails and a switch and became fastened there, by reason of which he was run over by the cars and killed,—*held*, that the plaintiff could not recover without the evidence of practical men that unprotected frogs and switches are inherently unsafe and dangerous when prudently and carefully worked and managed, and that blocking them materially lessens the danger of their use and management, and that such was generally recognized by those engaged in the construction and operation of railroads in the country or vicinity by the adoption and use of such improvement, or of evidence equivalent.

(November 23, 1888.)

**ERROR** to the District Court of Lancaster County (Field, J.), to review a judgment in favor of the plaintiff below in an action for damages for the death of the plaintiff's husband, alleged to have been caused by the negligence of the defendant railroad company. *Reversed.*

The facts, and questions presented, are stated in the opinion.

*Messrs. B. P. Waggener and A. R. Talbot* for plaintiff in error.

*Mr. W. H. Eller* for defendant in error.

**Cobb, J.**, delivered the opinion of the court:

This cause comes to this court by petition in error from the District Court of Lancaster County. The plaintiff in the court below is the widow and administratrix of Joseph B. Lewis, deceased. The plaintiff's petition alleges that the defendant is a corporation duly organized and existing by the Laws of the States of Nebraska and Kansas, engaged in

running and operating a line of railroad from Lincoln, Neb., to and through Parsons, Kan., at which place the defendant had used and operated a number of side tracks for making up trains, both of freight and passenger cars, and employed a number of hands in and about the switching and changing of cars of the defendant, and other cars used and controlled by it, from one track to another, in and about the yards of the defendant; that the defendant used a number of switch engines in handling and changing its cars; that with each of said engines there was employed a crew of hands consisting of a conductor or yard master, an engineer, a fireman, and from one to three brakemen, under the direct control of the conductor or yard master; that in the construction of the switches and yard of the defendant, and in laying the tracks, the defendant carelessly and negligently, at or near the passenger depot at Parsons, and within 100 feet of the platform, put in for use what is known as a "frog," and negligently failed to protect the same against the danger of its employes stepping into it unnoticed; that on April 1, 1886, the defendant employed the deceased, Joseph B. Lewis, as brakeman in and about its yards at Parsons, which employment required deceased to perform his duties at night as well as in daytime; that deceased was a stranger in Parsons, and unacquainted with the dangerous condition of the frogs in the side tracks of the yard; that while so employed, on the night of April 8, 1886, at 11 P. M., while discharging duty as brakeman, under direction of the conductor, at the place where the frog was unprotected, without knowledge of its unsafe condition, and without carelessness or negligence on his part, the deceased attempted to make a coupling of two cars standing over the frog, and stepped one foot into the frog, which immediately became fast, and was unable to extricate it; he gave prompt signal to stop the approaching cars, in plain view of the conductor and engineer, in ample time to have prevented injury; that the cars were backed on to and over deceased, crushing his limbs and body, from which he soon after died. That he was a stout and able-bodied man, twenty-four years of age, capable of earning, and did earn, from \$30 to \$75 per month; that after the death of deceased the plaintiff was duly appointed administratrix of his estate by the County Court of Washington County, Neb., and prior to this suit letters of administration were issued to her.

She further alleges that the deceased left no

to use it, the master cannot be held liable for the resulting damage; but where the servant in obedience to the requirement of the master, incurs the risk, where it is reasonably probable the machinery may be safely used, the rule is different. *Huhn v. Mo. Pac. R. Co.* 10 West. Rep. 465, 82 Mo. 440; *Patterson v. Pittsburg & C. R. Co.* 78 Pa. 359.

*Statute remedy for death of person caused by negligence.* The action for damages for injuries causing death by defendant's negligence was unknown to the common law. It is of statutory origin, and being in derogation of common law, must be strictly construed. *Stewart v. Terre Haute & I. R. Co.* 1 West. Rep. 152, 103 Ind. 44. In Illinois, plaintiff must allege and prove that deceased left a widow and children, or next of kin, a failure to show which defeats the action. *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400. At common law the action died with the person. *Eden v. Lexington & F. R. Co.* 14 B. Mon. 254. In Indiana for the death of a child the action must be brought by the father, mother or

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guardian (*Pittsburgh etc. R. Co. v. Vining*, 27 Ind. 512); and complainant must negative contributory fault. *Indianapolis etc. R. Co. v. Keely*, 23 Ind. 138. When a state statute gives a remedy for a death caused by negligence and provides that the action shall be brought by the representatives of deceased, the personal representative appointed in another State may bring the action in the State where he was appointed. *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; *Smith v. Bull*, 17 Wend. 822; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Story, Conf. L.* § 538, 553; *Bissell v. Michigan Southern & N. I. R. Co.* 22 N. Y. 258; *McCormick v. Pa. Cent. R. Co.* 42 N. Y. 303; *Home Ins. Co. v. Pa. R. Co.* 11 Hun, 182. On the subject generally, see *St. Louis, I. M. & S. R. Co. v. McCormick*, 1 L. R. A. 804. The letters of administration granted by the surrogate are conclusive of his authority to bring the action. *Roderigas v. East River Sav. Inst.* 63 N. Y. 460; *Kelly v. West*, 80 N. Y. 139.

estate, excepting a few hundred dollars in personal property; that she was his wife at the time of his death and remains his widow; that she has no separate estate of her own; that by his death she has lost her means of support and is in destitute circumstances; that since his death there has been born to them a daughter, Josephine B. Lewis, who, with plaintiff, is next of kin to deceased; that said minor child is living, and is dependent on plaintiff for support; that by the reason of the death of her said husband by the carelessness, negligence and wrongful acts of defendant, she has sustained damages in \$5,000, for which she sues.

The defendant answered both generally and specially, and moved the court for judgment on the issue under the pleadings, which was overruled, with leave to the plaintiff to amend her petition by setting up the Kansas Statute as the cause of action, which amendment was made by the additional paragraph, that "The plaintiff further alleges that some time prior to April 8, 1886, to wit: on the — day of — A. D. 18—, the Legislature of the State of Kansas, by an Act duly passed and approved for that purpose, and which said Act was then in full force and operation, gave, clothed and empowered the said Nellie A. Lewis, widow of the said Joseph B. Lewis, deceased, with authority to bring and maintain an action for damages resulting from his injuries aforesaid in any sum not exceeding \$10,000, which statute, in its general provisions, is similar to the Statute of the State of Nebraska in the remedy provided therein, and conforms thereto. A copy of a section of said Act is hereto attached, marked 'A,' and made a part thereof, as follows:

"(§ 4233) 422. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury by the same act or omission. The action must be commenced in two years. The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The defendant filed its answer to the amended petition, (1) denying all allegations not expressly admitted, and (2) denying that it constructed the tracks or switches referred to; (3) admitting that Joseph B. Lewis was injured at Parsons, Kan., April 8, 1886, and about the same date died in Kansas; that prior to that date he was married; and that at his death Nellie A. Lewis was his wife, and as his widow survives him; and that since said date said child has been born as alleged; (4) denying specially that the plaintiff was legally appointed administratrix of his estate, and alleging that the County Court of Washington County, Neb., had no authority or jurisdiction to appoint an administratrix of said estate; and that the proceedings were illegal and void, and did not confer authority on the plaintiff to institute or prosecute this action against the defendant; and that this court has no jurisdiction of the subject; (5) denying specially that the Statutes of Nebraska and Kansas are substantially the

same; that under the Statute of Kansas the widow of deceased inherited one half of the personal property of the deceased, absolutely, and the fund provided by said statute was intended as a trust fund to be disposed of under the Laws of the State of Kansas; and the said statute, referred to, could not and cannot be enforced beyond the jurisdiction of the courts of the State of Kansas; (6) alleging that all injuries received by the said Joseph B. Lewis at the time stated in the petition were the result of carelessness and negligence on his part, and but for such carelessness and negligence at the time and under the circumstances he would not have been injured.

There was a trial to a jury, with a verdict for the plaintiff. Defendant's motion for a new trial being overruled, the cause is brought to this court on the following assignments of errors:

1. The court erred in admitting over the defendant's objection the testimony of Mrs. Nellie A. Lewis.

2. The court erred in admitting any testimony whatever to be introduced by the plaintiff below over defendant's objection, because the court had no jurisdiction in the case, and because there was no showing in the petition that the alleged negligence caused the injury to the deceased, and because it was not alleged in said petition that it was usual or customary, or that it was the duty of the defendant, to protect the switches or frogs mentioned in said petition from employees stepping into them unnoticed.

3. The court erred in admitting in evidence the papers presented as the original proceedings under which it is claimed the plaintiff below was administratrix, marked "Exhibit B," and in the bill of exceptions over defendant's objections.

4. The court erred in hearing said cause upon the pleadings, and in taking jurisdiction of the case.

5. The court erred in admitting in evidence, and allowing the same to be read in said cause, section 422 of the Statutes of Kansas, marked "Exhibit C," over the objection of the defendant.

6. The court erred in admitting in evidence article 1 of section 1 of the Statutes of Kansas, relative to letters testamentary and of administration, over the objection of the defendant.

7. The court erred in admitting in evidence section 1 of chapter 37 of the Statutes of Kansas, over the objection of the defendant.

8. The court erred in admitting in evidence section 29 of chapter 84 of the Statutes of Kansas, entitled, "Railroads," over the objection of the defendant.

9. The court erred in admitting the evidence of H. D. Maynard, over the objection of the defendant, as to what his collaborer and fellow servant, Lynch, did with his lantern, and how the witness signaled at night, and as to what the signal up and down with the lantern means.

10. The court erred in admitting, over the objection of the defendant, in evidence section 23 of the standard signals of subdivision No. 7, under duties of conductors, engineers, and train men, of subdivisions 9 and 23, governing the employees of the Missouri Pacific Railway Company.

11. The court erred in overruling the defendant's motion for judgment on the pleadings, to which ruling the defendant then and there excepted.

12. The court erred in permitting the plaintiff to amend her petition by pleading the Statutes of Kansas, as shown in her amended petition.

13. The court erred in overruling the defendant's demurrer to the amended petition as filed by the plaintiff below, to which ruling the defendant duly excepted.

14. The court erred in refusing to give paragraphs 1, 16, 13, 11, 5, 17 of the instructions asked for by the defendant.

15. The court erred in giving paragraphs 1, 3, 4, 5, 6, 8, 9, 13, 14, 16, 17, 20, 21, 22, 23, 24, 25 of the instructions asked for by the plaintiff.

16. The verdict is not sustained by the evidence.

17. The court erred in overruling the motion for a new trial.

The first point insisted on by counsel for plaintiff in error is that the action was improperly brought in the State of Nebraska, it having accrued in the State of Kansas, and, not being transitory, it should have been prosecuted in the courts of the State of Kansas, and not elsewhere. Many authorities are cited in support of this position. Many of them may be distinguished as wanting analogy to the case at bar, but the time at our disposal will not admit of a general examination for that purpose. It is admitted that the cases of *Woodard v. Michigan Southern Railway Company*, 10 Ohio St. 121; *Armstrong v. Beadle*, 5 Sawy. 484; and probably *Anderson v. Milwaukee Railway Company*, 37 Wis. 321, support the principle here contended for.

The same may be said of *Whitford v. Panama Railway Company*, 23 N. Y. 470.

But the later cases of *Dennick v. Central Railway Company*, 103 U. S. 11 [26 L. ed. 439]; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; *Morris v. Chicago Railway Company*, 65 Iowa, 727; *Stockman v. Terre Haute Railway Company*, 15 Mo. App. 503—which are in all respects analogous with the case at bar, hold to the contrary.

Mr. Justice Thompson, delivering the opinion in the case last cited, without reference to that of *Vawter v. Missouri Pacific Railway Company*, 84 Mo. 379, says:

"The question is now, we believe, presented for the first time in this State. The decisions presented in other States are shown to be conflicting. These statutes are of recent origin. The question of their extraterritorial force has presented itself to various courts of the Union as a question of first impression; and, reasoning on various grounds, for the most part of a technical nature, they have arrived at different conclusions. In this conflict of authority, we are quite at liberty to adopt the view which seems best to consist with the policy of our legislation, and with that spirit of comity which ought to subsist between different States of the Union. We accordingly hold that this action was well brought."

It is quite certain that the precise question is before this court for the first time; and I am willing to adopt the language of the court. 3 L. R. A.

above quoted, as it expresses the conclusion I have come to after a careful examination of all the authorities accessible.

The first ground of error, set out in the petition in error, is not insisted on by counsel, and will be regarded as abandoned.

The second assignment is argued in the brief, and presents a question of difficulty. The cause of action set out in the petition is, substantially, that plaintiff's decedent was under the general employment of the defendant as a brakeman, to work in and about its yards. That in the construction of the switches and yards and laying of the tracks, the defendant carelessly and negligently put in for use what is known as a "switch and frog," and grossly, carelessly and negligently failed to protect the switch and frog against the danger of its employes stepping into the same, unnoticed. That the deceased was a stranger, and unacquainted with the dangerous condition of the switches and frogs of the yard tracks. That while in the employ of defendant, April 8, 1886, at 11 P. M., in the night time, while discharging duties as brakeman under the immediate direction of the yard master, at the place where the switch and frog were unprotected, and without knowledge of its unsafe condition, and without carelessness or negligence on his part, the deceased attempted to make a coupling of two cars standing over the frog, and stepped one foot between the rails of the track, near the frog and switch, which immediately became so fastened that he was unable to extricate it. He gave signal to stop the approaching cars, in plain view and hearing of the conductor and engineer, which was given in ample time to have stopped the approaching engine, and to prevent the injury. That the cars were backed on to and over him violently, crushing his limbs and body, from the effects of which he died.

Counsel for plaintiff in error contend that the allegations of the defendant in error fail to state a cause of action in not setting up that it was usual, or customary, or required by some rule of the company, or by statute, or that an obligation rested on the defendant, to block or secure the frog or switch of the track against accident and danger. It is matter of law that it is the obligation of a railroad company to furnish to its employes, whose duty it is to handle the means of transportation, such tools and machinery, tracks, side tracks, and switches, as are reasonably safe, and adapted to the purpose to be used, and in good repair; so that, while the petition fails to allege that it was customary, or usual, or required by some rule of the company, or by statute, to block or secure the frog or switch in the track, I incline to the view that the allegation of the petition, "that in the construction of the switches and yard of the said defendant, and in the laying of the tracks thereof, the defendant carelessly and negligently . . . put in for use of said company what is known among railroad operatives as a 'switch and frog,' and grossly, carelessly and negligently failed to protect said switch and frog against the danger of their employes stepping into the same unnoticed"—under our liberal system of pleading, may, after verdict, be held as equivalent to an allegation that it was the duty of the defendant to block the frogs and

switches of its yards and tracks, and that, having failed to do so, the use of the frog and switch was unsafe to those required to use them.

As to the third assignment, though it is not insisted upon by counsel in their brief, I will say that, having held that the plaintiff below might bring her action in this State for the alleged injuries and death of her husband in another State, it necessarily follows that she may qualify herself to bring such action by taking out letters of administration in this State. And again, I do not think that in any event her appointment as administratrix of the deceased could be attacked collaterally.

The next point urged by the plaintiff in error is that arising under the sixteenth assignment, that "The verdict is not sustained by the evidence."

The first witness on the trial, to prove the cause of action, H. D. Maynard, testified in substance that he was engaged generally in the service of defendant; had been employed in several capacities at various times, such as yard master, foreman, fireman, conductor and switchman; that he resides at Parsons, Kan., and resided there in April, 1886; that on April 8, 1886, he was foreman of the yard engine; and that there were two yard engines then at work belonging to defendant; witness was at that time engaged in night work; that Lewis and Lynch were working with him, and McLaughlyn was fireman; witness' engine was on the east side; that Lewis (plaintiff's decedent) was with witness, and had been with him one night and up to half past 10 or 11 o'clock the following night; that he was not employed by witness' authority, but that of someone else, and was working with witness for the Missouri Pacific Railroad Company; that the same company was operating the yard on the east and west sides of the passenger depot at Parsons; that Kearney was fireman of the other engine, working on the other side of the yard; that about 11 o'clock P. M., April 8, 1886, witness was switching, and just before Lewis was injured, the engine was on the west side of the yard, attached to two loaded cars; witness was around there to weigh the cars on the scales just south of the depot (the witness explained from a drawing the relative position of his engine with the two box cars, and his own position, standing immediately west of the depot, and in front of waiting room door; that Lewis and Lynch were with him, pointing out on the plat where the unattached car stood); that it stood about half way between the depot and the eating house on the main track, about thirty-five feet from here down to there (the points specified by the witness to the jury).

In answer to question, Is it not about twenty feet?—the witness said "he did not know exactly, and would not be positive as to the distance."

Q. As you stood at the point at the door of the gentlemen's waiting room, what order did you give as to operating the engine?

A. I gave a signal to back up, north.

Q. What did you do?

A. When the engine started to come out of there, the two helpers started down—Lewis and Lynch.

Q. Where did they start for?

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A. Towards the detached car that stood on the main track. I stood there until the engine had almost passed, then stepped down behind the engine, to throw the switch, so it could back down on to the scale, which is immediately south of here.

Q. What did you say to them before stepping to throw the switch?

A. I said: "Boys, we will couple on to that car, and back down and weigh the two we have hold of, and bring them around the horn."

Q. Explain what you mean by "bringing them around the horn."

A. It is bringing them up north around the depot to the cut-off, and back down on the east side, to place them in the south bound train, which I had partly made up on the track off from the main, in the city yard, back.

Q. After you threw the switch, what did you do?

A. I didn't throw the switch, I started in to do it.

Q. By a jurymen. This is a split switch, is it not?

A. Yes.

Q. From where you stepped from the gentlemen's waiting room, could you see Lewis?

A. After I stepped from the engine?

Q. Yes.

A. No.

Q. Now state what was in the way?

A. The engine and cars.

Q. As the engine and cars moved on down, what was the next thing you did?

A. After I stepped off behind the engine?

Q. Yes, after you stepped off to throw the switch.

A. I heard somebody "holler" and stepped back.

Q. To where?

A. Back on to the platform.

Q. On what platform, the depot?

A. On the west side of depot platform.

Q. Had the train passed you when you stepped back?

A. It had gone past me north; yes.

Q. About what was the speed of the train, as it passed north?

A. Oh, it was going about a mile an hour, I guess.

Q. That is what you call very slow, is it not?

A. Yes.

Q. At the time Lewis commenced to work with you, had you any conversation with him as to his experience as a switchman?

A. He told me he never had much experience in the yards; that was when he come to work.

Q. What kind of a hand did he make, as to ability, and to do the work you wanted him to do?

A. He was considered a pretty good man alongside of the other one. He was a better man than the other one.

Q. During the night before, that he worked with you, where did you work generally?

A. We worked generally on the east side.

Q. When he said to you that he had not had much experience, did you show him some of the intricacies of the work?

A. Yes, I did.

Q. Had he done any work on the west side prior to this?

A. Not to my knowledge. I couldn't say whether he had or not.

Q. During the night before, had you a pretty steady night's job?

A. We had not done much the night before, only to let trains into the yard.

Q. You had not done much at making up trains?

A. No sir.

Q. Referring back to the time you stepped on the platform, you say you heard someone "holler?"

A. Yes sir.

Q. What was there about that which particularly attracted attention?

A. I thought that we had run over one of the soldiers.

Q. Were there soldiers there at the time?

A. A few.

Q. Were there any soldiers in the vicinity of your work?

A. They were all over the engine.

Q. Do you mean to say they were in the cab?

A. Yes sir; and upon the boiler.

Q. State why the soldiers were in the cab?

A. It was on account of the strike, I suppose.

Q. To keep them from killing the engine?

A. That was the intention, I believe.

Q. There was no violence from force, was there, that night, from strikers?

A. None that I saw.

Q. When you stepped on the platform, what did you see?

A. A lot of soldiers standing there.

Q. Who also besides the soldiers?

A. I saw the man Lynch.

Q. What was he doing at the time?

A. He "hollered" a couple of times, and swung his lantern.

Q. Lynch belonged to your crew?

A. Yes sir.

Q. What did he do with his lantern?

A. He was swinging it round, miscellaneously.

Q. Was he swinging it up and down?

A. He was swinging it in every direction.

Q. Now you may state how you signal at night.

A. With a lantern?

Q. Yes. What does a signal up and down with a lantern mean?

A. It meant to go ahead with us there at that time.

Q. What is the signal when the lantern is swung round and round?

A. To back up.

Q. When the signals are given in the manner you have said Lynch gave them, what does that indicate?

A. It indicates to stop. They generally do, until they understand what they want.

Q. Do you always stop on a mixed signal?

A. Of course that would be for an engineer to say.

Q. And then is it the custom and rule?

A. If they don't understand the signal they don't move at all.

Q. Where did you next go?

A. I went and picked the young man up.

Q. You may state with what Lynch and Lewis were provided when they entered your

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service. State what the company furnished them to work with that night.

A. A lamp and a switch key; and it was customary at the time to furnish them with one of those Bishop's couplers, but whether they had one at the time or not I could not say.

Q. What had Lewis, as a matter of fact, if you know, when he started back to the unattached car?

A. He had his lantern.

Q. Was it lighted?

A. It was.

Q. Was it a dark night, or otherwise?

A. I don't know; it was about the average.

Q. Do you know if it was the dark of the moon, or the light?

A. I could not say.

Q. What other light was there that you were using in your work?

A. We had some switch light.

Q. Where was it?

A. They were on the opposite side from the depot.

Q. Were they bright or dark?

A. Green and red.

Q. Do they emit light to a person walking along without other aid?

A. No sir.

Q. They do not intend to emit light?

A. No sir.

Q. Had your engine a head light or not?

A. Yes sir.

Q. Was it lighted?

A. Yes sir.

Q. Did you notice any other lights about the depot?

A. There was some depot lights hanging up on the side of the wall.

Q. Do they give light to the track or not?

A. They do somewhat, right there.

Q. Would they give light down on the track, or is it dark there?

A. I don't know whether they would show any light where he was or not. [The plaintiff offered an Almanac of 1886, showing that the moon set at 10.57 on that night.]

Examination resumed:

Q. When you arrived where Lewis was lying, what did you see?

A. I saw Lewis, with his lantern beside him, not lighted.

Q. How was he fixed; which direction from the front door of the passenger depot did you find him?

A. From the west waiting room of the passenger depot I found him north, probably seventy-five or one hundred feet.

Q. About opposite the end of what building?

A. It was almost opposite the dining hall and lunch counter.

Q. How far north did you find him from where the south end of the unattached car stood when he went to couple it?

A. In the neighborhood of five or six feet from where the car stood to where he lay.

Q. It may have been a little more?

A. I cannot say, positively.

Q. In what position did he lie?

A. On his face, his left shoulder under or against the wheel; that is, the north wheel on the south pair of trucks of the car.

Q. Was that between the platform and the inside rail?



A. He lay right on the two rails, his head outside of the rail next to the platform.

Q. How about most of his body?

A. Most all of his body was under the car.

Q. Did the car pass over his legs?

A. I could not say; I did not see the car pass over them.

Q. State where his right foot was?

A. The right foot was drawn down between the ball of the rail.

Q. Which rail?

A. The two rails there; it is a split switch; right in the heel of the split switch.

Q. Was his shoe on or off?

A. Off.

Q. Did you see his shoe?

A. I did, off his foot.

Q. What was the appearance, injured or otherwise?

A. The counter of the shoe was mashed in, the heel was mashed in and broken down.

Q. Where did you find the shoe with reference to his right foot?

A. It lay about two feet from his foot, two feet south from his foot, in the direction from which he came.

Q. Do you know the width of the two rails at that point?

A. Seven inches in the clear.

Q. State what you did.

A. I got down there to take him out from under the car, and found his right hand doubled up under his body, his left hand drawn down between, and dragged into, the parts of the switch, by the wheels, I suppose, as it was crushed some.

Q. Where did the trucks stand at the time you got down there?

A. The north pair of wheels on the south truck was resting right against his left shoulder.

Q. Which one of these wheels, the farthest north or south?

A. The north wheel rested against his left shoulder.

Q. And where was his foot in reference to the other wheel; was it the other way?

A. Down in behind, to the south.

Q. Then his feet were to the south and his head to the north?

A. One was to the south, the other to the west.

Q. How was that foot fixed that was to the west?

A. Lying right there in the middle of the track.

Q. Was the leg whole or broken?

A. I think it was broken, but am not positive.

Q. How did you find the cars, coupled or uncoupled?

A. Coupled together, as I intended to have them.

Q. How did you remove the cars from his body?

A. I cut the car off just coupled, and backed the two that the engine had hold of.

Q. Did you with the engine, or otherwise?

A. With the engine. He still lay there, alive and conscious. Spoke to me by name, and asked me to take the car off of him. I took him out of there. Had to work a few minutes to get him out. Put him on a stretcher, and took him to the gentlemen's waiting room a

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few minutes only, till the company's physician came, when he was removed to his boarding-house.

Q. Was he still conscious when you moved him?

A. I couldn't say. I stayed as long as I could, close on to the midnight passenger train. My other man left me alone, and I had to leave him to the doctor and the soldiers. He talked a little and left a message to his wife. I never saw him again, and he died the next morning.

Q. As I understand, the car that stood over him was one of the loaded cars?

A. It was a merchandise car that I was putting into the train.

Q. It was not the car you went north to get?

A. It was the car I was moving on to couple at that time—the car that stood out there at the time.

Q. How did you get the car from his body; with the engine?

A. No sir. I picked him out the best I could, his arm first, without moving the car, and then had to move the car by hand to get his leg out, and then pushed the car away, and got him off.

On cross examination by defendant's attorney:

Q. How far was Lewis found from the frog of that switch?

A. About twenty feet.

Q. Then he was not in any manner injured by the frog?

A. No sir.

Q. The switch there was in the same condition as the switches throughout that yard, and, so far as you know, in perfect order and condition?

A. Yes sir.

Q. *By plaintiff's counsel.* State whether the switch there was blocked or not.

A. No sir.

Q. Where his foot was, about how far apart were the rails?

A. Right where he was caught, and was when I found him, was about seven or eight inches.

Q. *By plaintiff's counsel.* How deep was it?

A. The depth of a rail; about six inches.

Q. The track there was surfaced up with cinders, smooth and level, so that persons walking through the yard on duty would necessarily see what kind of switches there were?

A. Yes sir.

Q. Was it a part of his duty to throw those switches?

A. Yes sir.

Q. Do you know of his having done so during the time he was there?

A. He threw the same kind of switches, made and protected the same way, down on the other side.

The witness also testified in reply to—

Q. How long have you been in the railroad business, and have worked where?

A. Ten or twelve years; at Sedalia, Mo., and Parsons, Kansas.

Q. Did you ever know of switches of this kind being blocked?

A. I never saw any of them blocked yet.

Q. Is it practicable to block them?

A. It never has been, to my knowledge.

Q. State whether the working of the switch has an effect on the block.

A. Yes sir; the points are right the reverse on a split switch from a stub switch, and putting a block in behind it, and throwing the switch around, would make a crack in there . . .

Q. State from your examination there, how this man was caught, if you can.

A. It was my opinion that he stepped in to make the coupling; made it all right; and in stepping out the break beam caught his heel, and threw him down.

Q. At the rear end of each of these cars is a break beam that hangs down to within about how far to the rail?

A. Five or six inches.

Q. That beam swings loose there?

A. Yes sir.

Q. How far did this car drag him from where he fell to where you found him?

A. Not to exceed six feet, I don't know as it was that far.

Q. His head was in what direction?

A. To the north.

Q. Was that the way the train backed?

A. I had hold of the cars on the front, north end, of my engine.

J. A. Kearney, on the part of the plaintiff, corroborated the previous testimony.

The deposition of N. C. Bingham, on the part of the plaintiff, stated that he was a corporal of the Kansas National Guard. That, at the time of the accident, he was standing twelve or fifteen feet from deceased, watching him. Witness showed his position, and that of deceased, on the plat. That the engine and cars backed up to the car to be coupled. That Lewis went in to couple them. The cars backed up against him, pulled him down under the wheels. The trucks and the engine ran over him, and the brakeman standing there gave the signal to the engineer, and he pulled forward again. The trucks of the car coupled on to run over him. Then they backed again, and run one pair of trucks of the car coupled on top of him, and the train stopped. They uncoupled the cars, pulled them away, then run the car off his body by hand, picked him up, laid him on the platform, got a stretcher, and took him into the depot.

I quote from his further examination:

Q. State the part of the car that struck him, if you can?

A. As near as I saw, I suppose it was the brake beam.

Q. What part of his body did it strike?

A. Struck him on the leg, below the knee.

Q. In what position was he standing?

A. With his back towards the cars attached to the engine.

Q. What next after that?

A. When it caught him, it kind of twisted him down, right on the track, then the trucks passed over him.

Q. What particular part of his body did the truck strike?

A. It looked as though it was right across his hips.

Q. After being struck, how far was he carried along before he fell?

A. He was not carried any distance at all, just pulled him right down . . .

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Q. What light, if any, had Lewis, and what became of it?

A. I do not remember of seeing any lantern.

The depositions of Leroy Robinson and H. F. DeWolf were also read in evidence on the trial. They were members of the Kansas National Guard, and were present at the occurrence of the accident. Their position was about the same as that of the deponent, Bingham, and their testimony corroborates his in all material evidence, except that Robinson stated deceased had a lighted lantern in his hand when he went in to couple the cars; that his lantern went out, and he ballooned, and went down immediately upon the car striking him.

The petition alleges negligence, in leaving the switches and frogs of tracks and side tracks unblocked, by which decedent, whose duty it was to couple cars, in attempting to make a coupling of cars standing immediately over one of the unprotected frogs, stepped one foot between the rails of the track, near the frog and switch, which became fast so that he was unable to extricate it, etc. The evidence fails to establish these allegations in two important respects. It is held in this opinion, substantially, that, under the present system of pleading, an allegation that the defendant, in constructing its railroad, negligently failed to protect its switches and frogs by blocks, might be construed equivalent to an allegation of negligence on the part of the railroad company to construct and operate its road without protecting its frogs and switches in that manner. This, I think, is justified by the spirit and meaning of the Code; but there is no principle nor practice which would justify us in dispensing with proof of facts from which a court or jury might infer that such failure to block the switches and frogs is negligence.

Evidence of those of practical knowledge that unprotected frogs and switches are inherently unsafe and dangerous, when prudently and carefully worked and managed, and that blocking them materially lessens the danger of their use and management, and that such safeguard was generally recognized by those engaged in operating railroads by the use of such improvements, would tend to establish the allegation that the continued and persistent use of unprotected switches by a railroad corporation is negligence on its part. It is quite possible that such allegations may be proved in some other way, but, if so, our attention has not been called to it. It is scarcely necessary to say that no evidence of the above character appears in the record. The only evidence looking to it is that the frogs and switches of the defendant's railroad were unblocked. In this important particular, then, the evidence fails to sustain the verdict; and if the defendant is not shown to have been guilty of negligence in failing to block its frogs and switches, it is not possible for the plaintiff to maintain her action under the pleadings, for this is the sole allegation of negligence contained in the petition.

As there must be a new trial, it is not deemed advisable to examine the other errors assigned and discussed by counsel, or to further comment on the evidence.

*The judgment of the District Court is reversed, and the cause remanded to that Court, for further proceedings in accordance with law.*

The other Judges concur.

## TEXAS SUPREME COURT.

MISSOURI PACIFIC R. CO., *App't*,

v.

J. N. FAGAN *et al*.

(....Tex....)

1. The custom of a railroad in delivering stock at destination, cannot be stated by a witness where it is not shown that the custom is uniform, reasonable and notorious, and he does not testify to the facts constituting the custom.
2. A shipper of stock may give an opinion as to what the value of stock would have been at destination if it had not been injured in transportation.
3. A custom of railroads not to receive for transportation any livestock, unless under certain conditions modifying their common-law liability, would be contrary to law and public policy.
4. A common carrier has no right to demand of a shipper a waiver of his rights, as a condition precedent to receiving freight.
5. A carrier has the duty to feed and water stock during transportation, and cannot transfer it to the shipper by a custom requiring him to go along on the same train with the stock, to feed and water them at his own risk and expense.
6. Evidence of a custom requiring the owner of stock to hold railroads harmless against ordinary delays in taking up freight is inadmissible, because if the law held the railroad harmless the custom was not necessary; if the law held it liable the custom could not repeal or suspend the law.
7. A custom cannot require that a shipper should expressly agree, as a condition precedent to his right to damages for injury to stock during transportation, that he would give notice before removing the stock.
8. A custom requiring a shipper to agree, as a condition of shipment, that his measure of damages should not be more than the cash value of the stock shipped at the place of shipment is illegal.
9. Where a contract of shipment is in

NOTE.—Carriers of live stock; duty and obligations of. The carrier, among his other duties, is primarily bound to provide food and water, a place for sleeping, and, if necessary, a place for exercise. Ill. Cent. R. Co. v. Adams, 42 Ill. 474; Toledo, W. & W. R. Co. v. Thompson, 71 Ill. 434; Dunn v. Hannibal & St. J. R. Co. 68 Mo. 263; Harris v. Northern Ind. R. Co. 20 N. Y. 232; Cragin v. N. Y. Cent. R. Co. 51 N. Y. 61; Taft v. Vale R. Co. v. Giles, 23 L. J. Q. B. 43; Great Northern R. Co. v. Swaffield, L. R. 9 Exch. 132. But he may transfer such duty to the owner by express contract. South & N. Ala. R. Co. v. Henlein, 52 Ala. 606; Heineman v. Grand Trunk R. Co. 81 How. Pr. 430; Cragin v. N. Y. Cent. R. Co. 51 N. Y. 61. He may even then become liable for failure to furnish proper facilities to the consignor for such purposes. Wabash etc. R. Co. v. Pratt, 15 Ill. App. 177. If a railroad company accepts bogs for transportation, which, from the crowded manner in which they are necessarily carried upon its cars, are liable to die from overheating, it is the duty of the agents of the road to apply water to them externally when it is found necessary to prevent such overheating; and if they fail to do so the company will be liable. Ill. Cent. R. Co. v. Adams, 42 Ill. 474; Toledo, W. & W. R. Co. v. Thompson, 71 Ill. 434; Toledo, W. & W. R. Co. v. Hamilton, 76 Ill. 83.

Liability for loss or damage by negligence. If the carrier intrusted with a living animal of any description for transportation should suffer it to die from starvation or thirst, or for the want of ordinary care and attention in any respect which it

writing, testimony cannot be elicited from a shipper, on cross examination, as to the nature of his agreement.

10. The measure of damages, where mares shipped being with foal lose their foal on the way, is not the difference between their market value as they are and what it would have been had they arrived in good condition; but if the loss is total, it is the price, less freight charges, they would have brought if delivered in reasonable time having had due and necessary care while in the carrier's possession; and if the loss is partial, it is the difference between such price, less freight, and the actual value of the animals as delivered.

(November 27, 1888.)

**A** PPEAL by defendant, from a judgment of the District Court for Comal County, in favor of the plaintiffs in an action against a railroad company for damages for injuries to horses shipped for transportation. *Reversed.* (Commissioner's Decision.)

The questions presented, and the facts connected therewith, are stated in the opinion.

*Mr. J. D. Guinn* for appellant.

*Messrs. Cocke, Denman & Franklin* for appellees.

**Collard, J.**, delivered the following opinion:

This suit was brought by appellees, plaintiffs below, against appellant, defendant below, for injuries to and loss of two car loads of horses shipped by plaintiffs on defendant's railroad September 21, 1885, from San Antonio, Tex., to Memphis, Tenn. The cause was tried by the judge both on the law and the facts, and judgment rendered for plaintiffs for \$1,800. Defendant appealed.

The error assigned by appellant upon the ruling of the court in refusing defendant's application for a continuance need not be considered, as the case will be reversed on other grounds, and as there is no new feature of the law of continuances presented in the application.

required, he would be liable, unless he should be relieved from the duty by contract with his employer. South & N. Ala. R. Co. v. Henlein, 52 Ala. 606; Hutch. Carriers, 8 322. It is competent for the carrier to make terms for its transportation. Pardonington v. South Wales R. Co. 1 Hurl. & N. 336; McManus v. Lancashire & Y. R. Co. 4 Hurl. & N. 347; Carr v. Lancashire & Y. R. Co. 7 Exch. 711; Hutch. Carriers, 8 218-221. The carriers of live animals incur the responsibilities of common carriers as to such freight; but, at the same time, where an injury has happened to them it is competent for the carrier to show that it occurred through the "proper vice" of the animal, and not from any negligence on his part. Mich. South. etc. R. Co. v. McDonough, 21 Mich. 165. Railroads in Michigan seem from the above decision to be such private corporations as are described in the case of Leavenworth County v. Miller, 7 Kan. 524, 525.

Carriers as insurers are not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes. Rohl v. Parr, 1 Esp. 443; Hunter v. Potts, 4 Camp. 203; Boyd v. Dubois, 3 Camp. 133; Kendall v. London & S. W. R. Co. L. R. 7 Exch. 373. While common carriers are insurers of inanimate goods against all loss and damage except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance and care. Penn v. Buffalo & Erie R. Co. 49 N. Y. 204; Clarke v. Rochester & S. R. Co. 14 N. Y. 570; Mich.

The action of the court in overruling defendant's general demurrer to the petition is assigned as error. No error is pointed out in the assignment, and upon inspection of the petition we fail to discover any that would require a revision of the court's ruling. The court permitted Fagan to testify, over defendant's objections, that the conductor of the train on which the horses were shipped informed him at what time the train was due at Palestine from San Antonio. Defendant duly excepted, and assigned the ruling as error, because the statement of the conductor was not the best evidence. It is sufficient for us simply to say that there was no error in the ruling.

It is claimed by appellant that the court erred in permitting witness Fagan to state what the custom of the railroad was in delivering stock at their destination. It seems the object of the testimony was to show that Jones & Co. held the horses for the railroad company, and that plaintiff was thus relieved of the care of them while they were in Memphis. The testimony objected to was as follows: Fagan testified that "It was customary for railroad companies to turn over stock at shipping stations, and at destination of stock, just as his were turned over to J. C. Jones & Co., at Memphis." This evidence was introduced in connection with other statements of Fagan, while on the stand, that the horses were not turned over to him on arrival at Memphis; that Jones & Co. took possession of them, and put them in the stock yards; and that Jones told him he held them for the railroad for freight charges.

The question of fact was, Were the horses delivered to Fagan at Memphis? The custom of railroads was invoked to aid plaintiff's direct proof upon this subject. The question of custom does not seem to be of more than incidental importance in this case. The object of the evidence was not to establish any obligation on the part of the company by proof of a custom, or to show that it was a duty of the carrier, fixed by usage in the course of business, to hold the horses at the place of destination, upon which plaintiff seeks to recover in this

action; but the object was to show that because of such usage the stock was not in fact delivered. The fact of delivery or not was susceptible of positive proof, and there was positive proof upon the question. It seems hardly probable that the company would deliver the horses until the freight had been paid, and it is not claimed that it did. However, we may say that to warrant the introduction of usage or custom in the course of trade it is necessary to show that it is uniform, reasonable and notorious, and the custom must be established by a witness or witnesses who are experienced in such transactions, and who can testify to the facts constituting the custom. Opinions are not sufficient, nor are reports or reputation. 2 Greenl. & V. §§ 251, 252; 2 Redf. Railroads, § 184.

The evidence objected to does not come up to the required standard, so the assignment of error must be sustained.

Appellant says the court erred in "permitting Fagan to give his opinion as to what the stock would have been worth at Memphis if they had not been injured in transportation." Knowledge of the market value of an article is hardly an opinion. It is a fact known from information. If a witness is not fully qualified to state the fact, a cross examination will show it. Such matters go to the weight of the evidence and the credibility of the witnesses, and not to the competency of the testimony. The question here raised as to the correct measure of damages will be noticed hereafter.

The seventh and ninth assignments of error are to the same effect, and are based on the refusal of the court to allow defendant to prove by the witness Michelson that the universal custom of all railroads, and particularly that of defendant, had been at all times, and still was, not to ship live stock, or receive the same for shipment, of any kind whatever: (1) unless the owner or agent would accompany the stock on the same train, and at his, the shipper's, expense and risk, feed and water such stock at the points where it is unloaded for the purpose; (2) unless the shipper would hold the railway harmless against ordinary delays in taking up

South, etc. R. Co. v. McDonough, 21 Mich. 165; Bissell v. N. Y. Cent. R. Co. 25 N. Y. 442; Smith v. New Haven & N. R. Co. 12 Allen, 581. In the transportation of live stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur from or in consequence of the vitality of the freight. In all such cases, the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires. Cragin v. N. Y. Cent. R. Co. 51 N. Y. 61.

*Usage or custom cannot relieve carrier from responsibility.* Neither usage nor custom can be set up to absolve the carrier from his ordinary duties, which the public policy, his general undertaking or his special promise may have bound him to do. Pittsburgh etc. R. Co. v. Barrett, 36 Ohio St. 453. Custom cannot change a definite contract; and no custom is binding which is not certain, definite, uniform and notorious. Lamb v. Henderson (Mich.) 6 West. Rep. 106, citing Harvey v. Cady, 3 Mich. 431; Erwin v. Clark, 13 Mich. 10; Hutchings v. Ladd, 16 Mich. 493; Advertiser & T. Co. v. Detroit, 43 Mich. 118; Ledyard v. Hibbard, 48 Mich. 421; Greenstine v. Borchard, 50 Mich. 434. Evidence as to usage is inadmissible where its plain effect would be to vary or contradict the written contract. Barlow v. Lambert, 28 Ala. 704; Smith v. Mobile Nav. & Mut. Ins. Co. 53 Ala. 167; Cox v. Peterson, 30 Ala. 608; Powell v. Thompson, 80 Ala. 51. Evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading or to substi-

tute for its express terms an implied agreement or usage that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition. The Delaware, 81 U. S. 14 Wall. 606 (2) L. ed. 784; The Reeside, 2 Sumn. 567; Garrison v. Memphis Ins. Co. 60 U. S. 19 How. 316 (15 L. ed. 657). When the meaning of words is not ambiguous, proof of usage will not be received in the interpretation of contracts. Susquehanna Fertilizer Co. v. White, 6 Cent. Rep. 438, 65 Md. 444; Macomber v. Parker, 13 Pick. 178; The Reeside, 2 Sumn. 568; McArthur v. Sears, 21 Wend. 190; Gage v. Meyers, 50 Mich. 300. The liability of a common carrier cannot be limited by a custom not brought to the knowledge of the party dealing with it. Little v. Fargo, 43 Hun. 238; Noble v. Kennoway, 2 Doug. (Eng.) 513. Evidence of usages should be admitted with extreme caution, and not until the party offering it has distinctly stated what usage he intends to prove. Susquehanna Fertilizer Co. v. White, 6 Cent. Rep. 434, 65 Md. 444. In an action to recover damages for injury to cattle, caused by negligence in defendant railroad company, if its method of transportation was unsafe, the fact that it was usual with the defendant cannot exonerate it from its contract to safely transport. Its own usage would have no tendency to show that it had adopted a safe method. Leonard v. Fitchburg R. Co. 3 New Eng. Rep. 342, 143 Mass. 307. The existence or nonexistence of a custom is a question of fact for a jury. Its validity or invalidity is a question of law for a court. Sullivan v. Jernigan, 21 Fla. 264.

freight; (3) unless the shipper expressly agrees that, as a condition precedent to his right to any damage for any loss or injury to his stock during transportation, or previous to loading for shipment, such shipper will give notice, verified by affidavit, of his claim therefor to some general officer of the railroad company, or to the nearest station agent, before the stock is removed from the point of shipment or destination, and before the stock is mingled with other stock; (4) unless the shipper agrees that, in case of total loss of stock, not more than the actual cash value of the same at the place of shipment shall be the measure of damage; (5) without furnishing the shipper a free pass over the line of shipment, along with the same train, to the place of destination of the stock.

Defendant offered to show that such customs were general, and known to plaintiff, as well as to all shippers of live stock over railroads, and especially on defendant's railroad. The objection made to the evidence was that it would limit the liability of the carrier. It was not objected that these stipulations were set up in the answer as existing in contract between the parties, nor that the proof showed, as it did, that there was a contract containing all the agreements of the parties.

Usages of trade, Mr. Greenleaf says, should be sparingly adopted by the courts as rules of law. "Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts arising, not from express stipulation, but from mere implications and presumptions and acts of a doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful or various senses." 2 Greenl. Ev. § 251.

Usages of trade are admissible, however, to show the relative duties and rights of parties as incidents of contracts and transactions; but the usage sought to be invoked must have all the elements of a usage as to certainty, uniformity, notoriety and reasonableness, and it must not be contrary to law. A usage cannot be a good usage if it is contrary to law or public policy. In the case before us, for example, the defendant offered to show a custom of railroads not to receive for transportation any live stock unless under certain conditions, modifying their common-law liability. Such a custom would be bad, because railroads cannot legally refuse to ship live stock.

A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. If such a custom should be ever so common and uniform it could not be sustained because it, the custom, would be against law. Let us look at the particulars of the custom proposed in this case: It required the owner to go along on the same train with his stock, to feed and water them at his own risk and expense. The law imposes this duty on the carrier, and the carrier cannot transfer it to the shipper by custom. The shipper might agree to go with his stock, and to feed and water them at his own expense, but he could not be compelled to do so by custom, because the law requires this duty of the carrier.

This custom also required that the owner of the stock would hold the railroad harmless 2 L. R. A.

against ordinary delays in taking up freight. If the law held the railroad harmless for such delays, a custom would not be necessary. If the law held it liable, a custom could not repeal or suspend the law.

It was also required by the custom proposed that the shipper should expressly agree that, as a condition precedent to his right to any damages for any loss or injury to his stock during transportation, he should give notice of his claim therefor, verified by his affidavit, to some general officer of the railroad, or the nearest station agent, before the stock was removed from the point of shipment or destination. If the shipper should make a contract to give such notice, it might be binding, under our law, if it was shown that there was such officer or agent at the point of destination upon whom the notice could be conveniently served. The custom in this case did not propose to show that there was such officer or agent at the point of shipment or destination, without which it would be an unreasonable custom. It would be an unreasonable stipulation in a contract limiting the carrier's liability, and as an express contract for that reason it could not be enforced. *Mo. Pac. R. Co. v. Harris*, 67 Tex. 166.

But we will not be understood to hold that the custom, if it had been shown to be reasonable, could be sustained. A custom cannot require that a shipper shall expressly agree to a limitation of his right to damages. The law of the land regulates such matters, and fixes liability upon failure to perform duties and obligations of carriers; and when so fixed a custom cannot extinguish it, or require the injured party to limit it by agreement.

We may say the same of the stipulation in the proposed custom requiring the shipper to agree, as a condition to ship his stock on a railroad, that, in case of total loss of stock, the measure of damages should not be more than the cash value of the same at the place of shipment. Such a custom would be illegal, and the carrier could not require that the shipper should make such a special contract. See *Gulf, C. & S. F. R. Co. v. Travick*, 68 Tex. 814, in addition to other authorities cited.

Appellant claims that the court erred in sustaining plaintiff's objection to testimony of Fagan, sought to be elicited by defendant while he was being cross examined, that his agreement was to feed and water the stock and attend them at his own expense. It is sufficient to say, in answer to this assignment, that the evidence of Fagan showed that the contract of shipment was in writing. The objection to the evidence was that it was not the best evidence. The objection was well taken, and was properly sustained.

But one other assignment of error need be noticed, as it will dispose of the rest, which relate to the same subject more or less definitely. The court found as a conclusion of law that the measure of damages was the difference between the market value of the stock in the condition they arrived at destination, and their market value had they arrived in good order and condition. This rule for the measure of damages is assigned as error. We agree with the appellant upon this subject. The court found, and the evidence showed, that many of the mares shipped were with foal, and that they

lost their foal on the way, and when they arrived at Memphis they were practically worthless. The most of the cargo were mares. The railway company was bound to deliver them in a reasonable time, and it was bound to exercise reasonable care of the animals while in its possession and while in course of transportation.

The correct measure of damages for total loss, there being what is called an inherent defect in such freight, and especially so in mares with foal, would be the price, less the freight charges, they would have brought in the market at the place of destination in the condition they would have been in had the company exercised due and necessary care of the same while in its possession, and this price, less freight charges, at the time they should have arrived if shipped and delivered in a reasonable time. In case of partial loss the measure of damages would be the difference in such price,

less freight above stated, and the value of the animals at the same place at the time of arrival. *Mo. Pac. R. Co. v. Harris, supra.*

The company would not be liable for damages resulting from inherent vices and defects in animals. So if the defendant company performed all its obligations and duties as a public carrier in transporting the animals, and loss or depreciation of price resulted from natural defects, no damages could be had. The principle is the company would be liable for no injury arising from such defects, and the defects must be considered in estimating damages if any arise.

The judgment of the court below should be reversed, and remanded for a new trial.

#### Stayton, Ch. J.:

Report of the Commissioners of Appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

### MISSOURI SUPREME COURT.

W. F. DAVIS, *Appt.*,

v.

John KLINE *et al.*, *Repts.*

(....Mo....)

1. An attorney, who has prepared deeds of trust and been consulted as to the purposes for which they were made cannot afterwards, on purchasing the land included therein, on an execution sale, maintain a suit to set aside such deeds as fraudulent; and where another person simply loans to him the use of his name in purchasing the land and bringing the suit, the case will be treated as if the attorney were the actual party.

2. The evidence of a deceased witness,

given by him on a former trial, may be proved on a second trial by persons who heard his evidence; and where it is preserved in a bill of exceptions it can be read therefrom, upon proof that the report is correct in substance.

(November 26, 1888.)

**A**PPEAL by plaintiff, from a judgment of the Circuit Court for Pettis County (Strother, J.), in favor of the defendants in a suit to set aside a deed of trust. *Affirmed.*

The facts, and questions presented, are stated in the opinion.

*Jacobs. Samuel P. Sparks and Matt. A. Fyke* for appellant.

**NOTE.—Trial; testimony of witness at former trial, since deceased.** One exception to the rule rejecting hearsay evidence is the testimony of deceased witnesses, given in a former action, between the same parties. This testimony may have been given either orally, or in written depositions, taken out of court. Where it was given under oath, in a judicial proceeding, in which the adverse litigant was a party, and where he had the power to cross examine, and was legally called upon to do so, the testimony so given is admissible, after the decease of the witness, in any subsequent suit between the same parties. *Bull. N. P. 220, 242; Doncaster v. Day, 3 Taunt. 202; Glass v. Borch, 5 Vt. 172; Lightner v. Wike, 4 Serg. & R. 203; 1 Greenl. Ev. 217-223.* The admissibility of this evidence seems to turn rather on the right to cross examine than upon the precise nominal identity of all parties. *Wright v. Tatham, 1 Ad. & El. 8.* But see *Mathews v. Colburn, 1 Strob. L. 258.* What the deceased witness testified may be proved by any person who will swear from his own memory, or by notes taken by any person, who will swear to their accuracy. *Doncaster v. Day, 3 Taunt. 202; Chess v. Chies, 17 Serg. & R. 400.* But if he can state only what was said on that subject by the deceased, on his examination in chief, without also giving the substance of what he said upon it in his cross examination, it is inadmissible. *Wolf v. Wyeth, 11 Serg. & R. 149; Gildersleeve v. Curaway, 10 Ala. 200.* It seems to be generally considered sufficient, if the witness is able to state the substance of what was sworn on the former trial. See *Cornell v. Green, 10 Serg. & R. 14, 16*, where this point is briefly but powerfully discussed by *Mr. Justice Gilson.* See also *Miles v. O'Hara, 4 Blun. 108; Canton v. Lenoix, 5 Rand. 81, 86; Rex v. Rowley, 1 Mood. Cr. Cas. 111; Chess v. Chess, 17 Serg. & R. 400, 411, 412; Jackson v. Bailey, 2 Johns. 17; 2 Russ. Crimes. 3d Am. ed. 638 [488]; Sloan v.*

*Somers, 20 N. J. L. 68; Garrett v. Johnson, 11 Gill & J. 173; State v. Canney, 9 L. R. 408; State v. Hooker, 17 Vt. 688; Gildersleeve v. Curaway, 10 Ala. 200; Gould v. Crawford, 2 Pa. 80; Wagers v. Dickey, 17 Ohio, 481.*

The witness must be able to testify, from his recollection alone, that the deceased was sworn as a witness, the matter or thing which he was called to prove, and the substance of what he stated, after which his notes may be admitted. *Sloan v. Somers, 20 N. J. L. 68.* In New Jersey it has been held that if a witness testifies that he has a distinct recollection, independent of his notes, of the fact that the deceased was sworn as a witness to the former trial, of what he was produced to prove, and of the substance of what he then stated, he may rely on his notes for the language, if he believes them to be correct. *Sloan v. Somers, supra.* Although the two trials were not between the parties, yet if the second trial is between those who represent the parties to the first, by privy in blood, in law, or in estate, the evidence is admissible. *Ontram v. Morewood, 3 East, 346, 354, 355, per Lord Ellenborough; Peak, Ev. 3d ed. p. 87; Bull. N. P. 232; Doe v. Derby, 1 Ad. & El. 788, 791, note; Charges v. Sherwin, 12 Mod. 848; Shelton v. Barbour, 2 Wash. (Va.) 64; Rushworth v. Pembroke, Hardres, 472; Jackson v. Lawson, 15 Johns. 544; Jackson v. Bailey, 2 Johns. 17; Powell v. Waters, 17 Johns. 178. See also Ephraims v. Mordock, 7 Blackf. 10; Harper v. Burrow, 6 Ired. 1, 30.* Where the point in issue in both actions was not the same, the issue in the former action having been upon a common or free fishery, and in the latter, it being upon a several fishery, evidence of what a witness, since deceased, swore upon a former trial, was held inadmissible. *Melvin v. Whiting, 7 Pick. 79.* See also *Jackson v. Winchester, 4 U. S. 4 Dill. 206 (1 L. ed. 802); Ephraims v. Mordock, 7 Blackf. 10.*

2 L. R. A.

**Mr. John Montgomery, Jr.,** for respondents.

**Black, J.,** delivered the opinion of the court:

This is a suit in equity to set aside a deed of trust on 100 acres of land in Henry County. The court found the issues for defendants, and the plaintiff appealed.

John Kline, who resided in Warrensburg, Johnson County, owned two or three parcels of real estate at that place, which were incumbered by mortgages to the amount of about \$1,800. This property, and the 100 acres of land in Henry County, had an estimated value of about \$5,000. He owed other debts to various persons, amounting to \$3,000 or \$4,000. Civil suits and criminal prosecutions were pending against him. He was insolvent. On the 8th of June, 1875, and while his affairs were in this condition, he made a note for \$2,000 payable to Joseph Logsdan, who was his father-in-law, and secured the same by a deed of trust on the Henry County land. On the same day he made another note to Logsdan for \$3,000, and secured the same on all of the Warrensburg real estate. Logsdan says that these deeds of trust were made to save him harmless as the indorser for Kline, to protect him as security on certain appeal bonds, and to pay certain other debts owing by Kline. None of these agreements are set out in the deeds. Since the date of the deeds of trust, he has paid debts for Kline, including the mortgage debts, to the amount of \$3,500. Other evidence tends to show that the primary object of the deeds of trust was to place the property out of the reach of creditors of Kline, and to save some of it for his family.

W. P. Asbury prepared these deeds of trust as the employed attorney for Kline and Logsdan, was their adviser in the matter, and in this way became acquainted with Kline's affairs. He brought two suits against Kline, and recovered judgments in February, 1876—one in favor of Brockmire & Rankin for \$176, and the other in favor of Assig & Harig for \$206. Acting for these judgment creditors and as their attorney, he had the Henry County land sold on executions issued upon these judgments, and purchased the 100 acres at the price of \$10, and had the deed made to this plaintiff. That sale was made on April 21, 1876; and on the 16th of June, 1876, he caused the Warrensburg property to be sold under the same judgments; but Logsdan appeared, took up the bids, and paid Asbury the full amount of the judgments.

One of the defenses to this suit is that Asbury was the real purchaser of the 100 acres; that, having prepared the deeds of trust for Kline & Logsdan as their attorney, he cannot maintain this suit. Asbury is dead, but his evidence on a former trial is in the record. The plaintiff, Davis, though charged with fraud in the answer, did not appear at either trial, but his deposition was taken by defendant Logsdan. Their evidence shows that they were brothers-in-law; that Davis was not at the sale, and knew nothing about it. Asbury says he bought the land for Davis, and that the latter paid him the purchase price—\$10; but his account of the payment is confused and un-

reliable, and the plaintiff's account of this alleged payment is evasive. Davis, the plaintiff, says he gave Asbury general directions to buy for him land that sold cheap; and there is no claim that Asbury had any authority from Davis to purchase this particular land. The circumstances all go to show that Asbury was the real purchaser, and that Davis is simply loaning the use of his name; and such, we conclude, is the fact. The case must be treated the same as if Asbury had taken the sheriff's deed in his own name.

The relation of attorney and client is one of especial confidence. The employment to prepare these deeds of trust was of itself sufficient to create that relation. *Baker v. Humphrey*, 101 U. S. 494 [25 L. ed. 1065].

Weeks says counsel who has been consulted about a title to land will not be permitted to purchase an outstanding one, and set it up in opposition to his client. If he does, it inures to the benefit of the client. *Weeks, Atty. § 274.*

In *Smith v. Brotherline*, 63 Pa. 461, it is said: "A counsel or attorney, employed and consulted, as such, to draw a deed or an application for an original title for land, is in the line of his profession, and is precluded from buying in for his own use any outstanding title."

*Justice Swayne*, for the court, in *Baker v. Humphrey*, *supra*, says: "It may be laid down as a general rule that an attorney can in no case, without his client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates."

Asbury having purchased this land under the judgments, his clients, the judgment creditors, might have claimed the purchase. *Ward v. Brown*, 87 Mo. 468, 8 West. Rep. 919. But they make no such claim; so that the purchase of the 100 acres stands freed from any question that might have been made had they claimed the benefit of the purchase. Speaking of the time at which these deeds of trust were made, Asbury says: "Kline said he was greatly in debt, or largely in debt; and he wanted to put his property in Logsdan's hands, so that he would have something for his children." It thus appears that he not only prepared the deeds, but it is equally clear that he was consulted as to the purposes had in view by the execution of the deeds of trust.

The statute (Rev. Stat. § 4017) denies to an attorney the right to testify as to communications between himself and client, save by the consent of the client; yet the facts revealed to Asbury by reason of the confidence bestowed upon him are now brought forward and used against the client. If an attorney may not buy in and hold, as against his client, an outstanding title to property about which he gave advice, then he cannot, for his own benefit, be allowed to strike down the very transaction which he advised and put in writing for his clients. It matters not that he is attempting to show that the transaction was fraudulent in fact; nor does it matter that the facts are or can be proved by persons not disqualified to testify. The groundwork of the whole doctrine is that the attorney cannot take advantage of the trust reposed in him. The plaintiff,



who stands as a substitute for Asbury, can therefore take nothing by the sheriff's deed.

Asbury testified on the first trial of this cause, but died before the second trial. It was entirely competent to show on the second trial what his testimony was on the former one. This could be done by persons who heard his evidence. *Breeden v. Feurt*, 70 Mo. 624. As his testimony was preserved in a bill of exceptions, it could be read therefrom, upon proof that the report of it in the bill was correct in substance. *Jaccard v. Anderson*, 87 Mo. 91; *Scorille v. Hannibal & St. J. R. Co.* 18 West. Rep. 97, 84 Mo. 86.

It is true that the witness Gantt went further than was necessary to lay a foundation for

reading the evidence from the bill of exceptions, and gave some of the details of the testimony of the deceased witness; but we see no objection to this. A bill of exceptions, when filed, is not the only evidence of what the deceased witness said. What he testified to may be proved by any person who can swear to it from memory. 1 Greenl. Ev. § 166.

Even if incompetent evidence had been admitted, we would not reverse the decree for that reason only, but would dispose of the case on the competent proofs, the case being a suit in equity, and not an action at law.

*The judgment is affirmed.*

*Ray, J.*, absent; the other Judges concur.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Margaret P. GURLEY

v.

Edmund ARMSTEAD.

(.....Mass.....)

**A carrier is not guilty of conversion** where he in good faith takes goods from the possession of the owner, by direction of another having the apparent control of the goods, and the present capacity of investing himself with actual possession, and delivers them to such other person in another place.

(January 3, 1899.)

**ON** appeal by plaintiff. *Judgment for defendant.*

Tort for the conversion of personal property. Trial in the superior court on agreed statement of facts, when judgment was entered for the defendant and the plaintiff appealed.

The facts appear in the opinion.

*Messrs. J. P. & B. B. Jones*, for plaintiff:

The unauthorized taking of chattels from the owner's possession is in and of itself an act of conversion.

*Coughlin v. Ball*, 4 Allen, 834; *McPartland v. Read*, 11 Allen, 231; *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Hiort v. Bott*, L. R. 9 Exch. 86.

If the act of dominion is inconsistent with the owner's title it is a conversion, even though the wrong doer had no idea or intention of denying the owner's title or of setting up title in himself.

*Hall v. Corcoran*, 107 Mass. 251.

Where the act is inconsistent with the own-

er's title, the good faith or innocence of the wrong doer is no defense.

*Coles v. Clark*, 3 Cush. 899; *Stephens v. Ellwall*, 4 Maule & S. 259; *Garland v. Carlisle*, 4 Clark & F. 698; *Hollins v. Fowler*, L. R. 7 H. L. 766.

While it is true that one who receives goods from a person in actual wrongful possession and restores the goods to such person is not liable to the owner for conversion (*Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tidd*, 8 Met. 6; *National Mercantile Bank v. Rymell*, 44 L. T. N. S. 767; *Buratt v. Hunt*, 25 Maine, 419), even though the goods were received from and restored to the wrongful possession with notice of the claim of the true owner (*Loring v. Mulcahy*, 3 Allen, 575; *Metcalf v. McLaughlin*, 123 Mass. 84; *Nelson v. Iverson*, 17 Ala. 216), this case does not fall within that class, for this defendant took the goods from the owner's possession. It constitutes no defense that he acted under the direction of another person.

*McPartland v. Read*, 11 Allen, 231.

*Mr. William H. Moody*, for defendant:

It is excusable to deal with goods merely as the servant or agent of the apparent owner in actual possession, or under a contract with such owner, according to the apparent owner's direction where neither the act done, nor the contract (if any), purports to involve a transfer of the supposed property in the goods, and the ostensible owner's direction is one which he could lawfully give if he were really entitled to his apparent interest, and is obeyed in the honest belief that he is so entitled.

*Pollock, Torts*, pp. 293, 294.

**NOTE.—Conversion by carrier.** If a party be employed merely to keep or carry goods, and, having no beneficial interest in them, misuses the property thus intrusted to his care, he is liable in trover. *Ripley v. Dolbier*, 18 Maine, 382; *Lockwood v. Bull*, 1 Cow. 322; *Rice v. Clark*, 8 Vt. 109; *Swift v. Moseley*, 10 Vt. 208; *Norton v. Kidder*, 54 Maine, 189. Misdelivery, by a carrier, of goods which he took upon himself to carry, is a conversion. *Claffin v. Boston & L. R. Co.* 7 Allen, 241; *Hawkins v. Hoffman*, 6 Hill, 588; *Bowlin v. Nye*, 10 Cush. 417. If a carrier by mistake delivers goods to the wrong person, he is liable in trover (*Stephenson v. Hart*, 4 Bing. 476); so with a wharfinger. *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Price v. Oswego & S. R. Co.* 50 N. Y. 213; *Adams v. Blankenstein*, 2 Cal. 413; *Winslow v. Vt. & 3 L. R. A.*

*M. R. Co.* 43 Vt. 700. A bare nondelivery of chattels by a carrier is not a conversion, unless he refuses to deliver them after a demand on him. *Robinson v. Austin*, 2 Gray, 664; *Packard v. Getman*, 4 Wend. 613; *Lockwood v. Bull*, 1 Cow. 322. But if he has the goods in his possession, and refuses to deliver them on demand, then he is liable in trover. *Lockwood v. Bull*, 1 Cow. 322; *Packard v. Getman*, 4 Wend. 613. The false assertion of a carrier that he has delivered the goods is no conversion. *Attersol v. Briant*, 1 Campb. 409. If carriers improperly break open a box, they are liable in trover. *Tucker v. Housatonic R. Co. & Conn.* 47. Trover is sustainable against a carrier who draws out part of the contents of a barrel, and fills it with water. *Danah v. Walker*, 14 Mass. 500.

See also *Strickland v. Barrett*, 20 Pick. 415; *Metcalf v. McLaughlin*, 123 Mass. 84; *Parker v. Lombard*, 100 Mass. 405.

A mere dealing with goods, by direction or authority of a person having the apparent, though not the real, possession and control of them, unaccompanied by any assertion of title, is not a conversion.

*Nat. Mercantile Bank v. Symmell*, 44 L. T. N. S. 767; *Nelson v. Iverson*, 17 Ala. 216; *Burditt v. Hunt*, 25 Maine, 419.

There is no legal difference between a possession which is wrongful, and one which is lawful, provided they each present the appearance of apparent right to the person who is dealing with the goods, not for his own use or that of a third person, but by the direction of the person in the apparent possession.

See cases *supra*, and *Hollins v. Fowler*, L. R. 7 H. L. 766-768.

There are many cases where a mere unauthorized meddling with the plaintiff's possession is not a conversion, and to hold the plaintiff's claim (that the innocent removal of goods from the owner's possession is of itself a conversion) to be well founded would be to disregard the distinction between trespass and trover.

*Wilson v. McLaughlin*, 107 Mass. 587; *Farnsworth v. Lowery*, 184 Mass. 512; *Bushel v. Miller*, 1 Strange, 128; *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Heald v. Carey*, 11 O. B. 977.

**Devens, J.**, delivered the opinion of the court:

The defendant, who was a job teamster, removed the goods alleged to have been by him converted, from a room in Whittier's house to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not of storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith without any intention of depriving the rightful owner of her property and in ignorance of the fact that plaintiff was such owner, neither asserting title in himself, nor denying title to any other, nor exercising any act of ownership except by the removal above stated. The legal possession of the goods was under these circumstances undoubtedly in the plaintiff; and as they were in the room hired by her the actual possession was also hers. The apparent control of them was, however, in Whittier—as they were in his house and he had, further, the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and who restores the goods to such person, is not liable for a conversion by reason of having transported them (*Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tydd*, 3 Met. 6); and this would be so, apparently, even if the goods thus received were restored to the wrongful possessor after notice of the claim of the true owner. *Loring v. Mulcahy*, 8 Allen, 575; *Metcalf v. McLaughlin*, 123 Mass. 84.

2 L. R. A.

Upon the precise question raised, we have found no direct authority nor was any cited in the argument; but the principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner, but the party doing this honestly is protected because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession.

The defendant was a job teamster and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported with his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier he must exercise his calling upon proper request and under proper circumstances. *Buckland v. Adams Exp. Co.* 97 Mass. 124; *Judson v. Western R. Corp.* 6 Allen, 486.

His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. As, if Whittier had actually gone into the room, as he might readily have done, have taken physical possession of the goods, the defendant upon well established authority would have been justified in obeying the order and transporting the goods to Whittier at another place, he should not be the less justified where Whittier, in apparent control of the goods in his own house and capable of immediately taking them into his actual custody by entering the room in which they were, through the unlocked door, directs the removal.

If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion. Apparent control accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.

*Judgment for defendant.*

Leon RIDEOUT

v.

David KNOX *et al.*

(...Mass....)

1. Chapter 348 of the Acts of 1887, making a private nuisance of any fence unnecessarily exceeding six feet in height, maintained for the purpose of annoying owners of adjoining property, is within the limits of the police power and is constitutional in respect to fences erected either before or after its passage.
2. Malevolence must have been the mo-

tive for erecting a fence to a greater height than six feet, without which it would not have been erected or maintained, to render it a nuisance within the provisions of chapter 348 of the Acts of 1887. If such height is really necessary for any reason there is no liability; and if the owner thinks it necessary and acts on his opinion he is not liable because he also acts malevolently.

**2. Help given by one in lawfully building a fence** upon his wife's land to a greater height than six feet will not of itself render him liable to prosecution under chapter 348 of the Acts of 1887, for erecting or maintaining a nuisance, whatever his motive may be, nor will it tend to prove that he maintained the fence.

(January 4, 1889.)

**ON** defendants' exceptions. *Sustained.*

This was an action of tort under chapter 348 of the Acts of 1887, which is as follows:

"Sec. 1. Any fence or other structure in the nature of a fence unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance.

"Sec. 2. Any such owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damage sustained thereby; and the provisions of chapter 180 of the Public Statutes concerning actions for private nuisances shall be applicable thereto."

At the trial in the superior court before Lathrop, J., the defendants asked the court to rule (1) that the plaintiff had no action, as chapter 348 of the Acts of 1887 was unconstitutional; (2) that the structure must be erected for the sole purpose of annoyance. Even if a motive to annoy existed, it was inferior to a motive of use or adornment of the defendants' estate, and if there was a *bona fide* use of the structure beneficial to the defendants, the plaintiff cannot recover.

The court declined so to rule, but ruled that the statute was constitutional; and as to the second request, the court, after ruling that plaintiff must prove that the structure was maliciously maintained for the purpose of annoying the plaintiff, and that "annoying" meant "injuring" the plaintiff either in his comfort or the enjoyment of his estate, instructed the jury as follows: "The defendants say the structure was not put up for any such purpose; that it was put up for a perfectly legitimate purpose, namely: as a trellis on which to train vines. If you believe that that was the sole purpose for which the structure was put up, then the plaintiff has not made out his case. But if the defendants had in mind in maintaining the structure, or if it was their intention in maintaining it, not only to use it for the purpose of training vines, but also for the purpose of injuring the plaintiff, either in his comfort or in the enjoyment of his estate, then the plaintiff has made out that part of his case."

The jury found for the plaintiff, and defendants excepted.

*Mr. J. R. Baldwin* for defendants.

*Messrs. W. H. Niles and G. E. Carr* for plaintiff.

*Holmes, J.*, delivered the opinion of the court:

This is an action of tort under the Statutes

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of 1887, chap. 248. The plaintiff has had a verdict for nominal damages and the first question raised by the bill of exceptions is the constitutionality of the statute. Another question more or less connected with the former is whether the structure, in order to bring it within the Act, must be erected or maintained for the purpose of annoyance as the dominant motive, or whether it is enough if that purpose existed although subordinate to a *bona fide* use for legitimate purposes.

At common law a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbors' light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only. *Walker v. Cronin*, 107 Mass. 555, 564; *Chatfield v. Wilson*, 28 Vt. 40; *Phelps v. Nowlen*, 72 N. Y. 39; *Frazier v. Brown*, 12 Ohio St. 294; *Martin, R., in Rawstron v. Taylor*, 11 Exch. 869, 878, 884. See *Benjamin v. Wheeler*, 8 Gray, 409, 418.

But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends. It has been thought by respectable authorities that even at common law the extent of a man's rights in cases like the present might depend upon the motive with which he acted. *Greenleaf v. Francis*, 18 Pick. 117, 119, 122. See *Carson v. Western R. Co.* 8 Gray, 423, 424; *Roath v. Driscoll*, 20 Conn. 533, 544; *Wheatley v. Baugh*, 25 Pa. 523; *Swett v. Culls*, 50 N. H. 439, 447.

We do not so understand the common law; and we concede further that to a large extent the power to use one's property malevolently in any way which would be lawful for other ends is an incident of property which cannot be taken away even by legislation. It may be assumed that under our Constitution the Legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the Commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner.

But it does not follow that the rule is the same for a boundary fence unnecessarily built more than six feet high. It may be said that the difference is only one of degree. Most differences are when clearly analyzed. At any rate, difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain. *Sawyer v. Davis*, 136 Mass. 239, 248.

The statute is confined to fences and structures in the nature of fences, and to such fences only as unnecessarily exceed six feet in height. It is hard to imagine a more insignificant curtailment of the rights of property. Even the right to build a fence above six feet is not de-

nied when any convenience of the owner would be served by building higher.

It is at least doubtful whether the Act applies to fences not substantially adjoining the injured party's land. The fences must be "maliciously erected or maintained for the purpose of annoying" adjoining owners or occupiers. This language clearly expresses that there must be an actual malevolent motive, as distinguished from merely technical malice. The meaning is plainer than in the case of statutes concerning malicious mischief. *Com. v. Walden*, 8 Cush. 558; *Com. v. Goodwin*, 122 Mass. 19, 35.

Finally, we are of opinion that it is not enough to satisfy the words of the Act that malevolence was one of the motives, but that malevolence must be the dominant motive, a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor, merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons even if that pleasure should be denied him. If the height above six feet is really necessary for any reason there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary and acts on his opinion, he is not liable because he also acts malevolently.

We are of opinion that the statute thus construed is within the limits of the police power and is constitutional, so far as it regulates the subsequent erection of fences. To that extent it simply restrains a noxious use of the owner's premises; and although the use is not directly injurious to the public at large, there is a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go. See *Com. v. Alger*, 7 Cush. 53, 96, 96; *Watertown v. Mayo*, 109 Mass. 315; *Train v. Boston Disinfecting Co.* 4 New Eng. Rep. 437, 144 Mass. 523. See also *Talbot v. Hudson*, 16 Gray, 417, 423.

Whether the statute is constitutional with reference to fences already in existence when the Act was passed is a more difficult question. We are compelled to construe the Act as applying to all fences maintained after it goes into operation. If a fence which was built before the Act, and is simply allowed to stand, may be found to be a nuisance and abated at the expense of the owner, there is a taking of property without compensation, which is more marked and significant than in the case of a simple prohibition to build. *Com. v. Alger*, 7 Cush. 53, 103.

But the case is not so hard as it seems. If the owner of the fence gave leave to the party complaining to take it down, it would show conclusively that the fence was no longer maintained by him for malevolent motives, and therefore would defeat an action for subsequent annoyance.

On the whole, having regard to the smallness of the injury, the nature of the evil to be avoided, the quasi accidental character of the defendant's right to put up a fence for malevolent purposes, and also to the fact that police regulations may limit the use of property in ways which greatly diminish its value, we are  
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of opinion that the Act is constitutional to the full extent of its provisions. See *Mugler v. Kansas*, 123 U. S. 623 [31 L. ed. 205]; *Kidd v. Pearson*, 123 U. S. 1 [32 L. ed. 346].

We are of opinion, however, that the exceptions must be sustained, on the ground that the construction of the statute embraced in the second request for a ruling was substantially correct, as we have stated, whereas it appears that the request was refused and the jury were instructed otherwise.

This fence was built before the Act of 1887 was passed. The statute could not make the conduct of David Knox in 1886 unlawful retrospectively. Help given by him in lawfully building the fence on his wife's land did not of itself make him liable, whatever his motives, and did not tend to prove that he maintained the fence. There was no evidence that he did so, unless it is to be found in the ambiguous statement that he used it, which does not seem to have been the ground on which the case was allowed to go to the jury. The reply of Mrs. Knox in his absence was not evidence against him.

As the exceptions must be sustained upon another ground, it is unnecessary to say more on this branch of the case.

*Exceptions sustained.*

William C. DODGE

BOSTON & BANGOR STEAMSHIP CO.

(... Mass. ....)

1. A passenger is, whenever the performance of the contract of carriage in a usual and proper way necessarily involves leaving the vehicle and returning to it, entitled to protection as such as well while so leaving and returning as at any other time.

2. A passenger on a steamboat, who has purchased a ticket not entitling him to meals, can

**NOTE.**—Carrier, rights of passengers to protection on leaving vehicle and returning. A person may be entitled to be protected as a passenger without purchasing a ticket or entering a car. *Allender v. Chicago*, etc. R. Co. 37 Iowa, 264, 270; *Lake Shore & M. S. R. Co. v. Foster*, 2 West. Rep. 304, 104 Ind. 298. It is the duty of a railroad company to keep its premises in safe condition for the use of a friend of its passenger, aiding him to enter or leave its cars. *Hamilton v. Texas & P. R. Co.* 64 Tex. 251, and cases cited; *Texas & P. R. Co. v. Best*, 66 Tex. 118. In the absence of any rule of the road, or any stipulation on the ticket, he had a right to get off at an intermediate station. *Burnham v. Grand Trunk R. Co.* 63 Maine, 208; *Keeley v. Boston & M. R. Co.* 67 Maine, 163; *McKimble v. Boston & M. R. Co.* 2 New Eng. Rep. 43, 141 Mass. 463. A passenger is still a passenger, within the meaning of the word in the statute giving a right of action for his death, if, by reason of the company's neglect, he leaves the train on the wrong side and is thereby killed. *McKimble v. Boston & M. R. Co.* 139 Mass. 542. The carrier is also required, where the length of the journey makes it necessary, to allow the customary intervals, and at the usual places, for refreshment of his passengers; and such urges cannot be varied at his pleasure or caprice; for every passenger is understood to contract for the usual reasonable accommodations of this kind, and they may have been the reasons for preferring his conveyance to the less convenient arrangement of another carrier. *Story*, Bailm. § 507. And when the carrier has stopped his conveyance temporarily on the route for such purpose, or for any other, he cannot start again without giving due warning to the passengers who may have taken advantage of the delay to leave the

properly go on shore for a meal at an intermediate stopping place before reaching his destination, and has a passenger's right to protection during his egress, in the proper manner, from the steamer for that purpose.

3. A carrier of passengers is bound to exercise towards his passengers the utmost care and diligence in providing against those injuries which human care and foresight can guard against. This rule applies at all times when and in all places where the parties are in the relation of passenger and carrier, and includes attention to all matters which pertain to the business of carrying the passenger.

4. The words "utmost care and diligence," in the above rule, do not mean the utmost care and diligence which men are capable of exercising; but they mean the utmost care consistent with the carrier's undertaking and with a due regard for all the other matters which ought to be considered in conducting the business.

5. When a proper place of exit for passengers from a steamer is provided, a warning to a passenger not to leave at another part of the boat is a reasonable regulation which the passenger is bound to obey; and his disobedience thereof will, in the absence of a good reason for it, prevent his recovery from the carrier for an injury growing out of it.

(January 2, 1889.)

ON defendant's exceptions. *Sustained.*

This was an action of tort, to recover damages for personal injuries.

Plaintiff purchased a ticket for passage on one of defendant's steamers from Boston to Camden, the ticket not entitling him to meals. At Rockland, an intermediate point, plaintiff left the boat for the purpose of getting breakfast at a restaurant (not kept by the company) upon the wharf, and while going into the slip on the wharf, from a plank thrown from the steamer to the wharf, was injured by the falling upon him of a plank thrown from the deck of the steamer by a deck hand. The defendant did

not own the wharf but leased a portion of the same.

The jury found for the plaintiff for \$2,500 and the defendant excepted.

Other facts appear from the opinion.

Messrs. E. T. Burley and Edward V. Dodge for defendant.

Mr. William H. Moody for plaintiff.

Knowlton, J., delivered the opinion of the court:

This case presents an important question as to the rights and duties of passengers and common carriers, in reference to egress from and ingress to the vehicle of transportation at intermediate points upon a journey.

When one has made a contract for passage upon a vehicle of a common carrier, and has presented himself at the proper place to be transported, his right to care and protection begins, and ordinarily it continues until he has arrived at his destination, and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held to the highest degree of care for his safety. While he is upon the premises of the carrier before he has reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation.

It has sometimes been said that a passenger at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are other cases which indicate that the contract of carriage is performed when the passenger at the end of his journey has reached a safe and proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged; and that the degree of care to which he is then entitled is less than during the con-

veyance during its continuance. *State v. Grand Trunk R. Co.* 55 Maine, 176; *Mitchell v. Western & A. R. Co.* 80 Ga. 22. Where no means are provided to prevent passengers leaving the train at such point on the side where there is no platform, it is a question for the jury whether reasonable care was used by the company. *McKimbie v. Boston & M. R. Co.* 2 New Eng. Rep. 43, 141 Mass. 468.

*Passenger carriers bound to highest degree of care, skill and diligence.* Passenger carriers bind themselves to carry safely as far as human care can go; and are responsible for the slightest neglect. *Leslie v. Wabash etc. R. Co.* 3 West. Rep. 324, 55 Mo. 50. A carrier is bound to exercise the highest degree of care and skill to preserve the safety of passengers and prevent accidents; reasonable or ordinary diligence is not sufficient. *Moore v. Des Moines & Ft. D. R. Co.* 69 Iowa, 491. Where carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. *N. Y. Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 337 (21 L. ed. 327). Any negligence in such a case may well deserve the epithet of gross. *Phila. & R. Co. v. Derby*, 35 U. S. 14 How. 403 (14 L. ed. 502); *The New World v. King*, 37 U. S. 16 How. 469 (14 L. ed. 1019). The degree of precaution, care and skill required of a carrier of passengers by stage coaches, in detecting imperfections in the vehicles used by them, is no test of that which should be required of those engaged in transporting persons at a high rate of speed by the agency of steam power upon a railway. *Hogeman v. Western R. Corp.* 13 N. Y. 9; *Carroll v. Staten Island R. Co.* 58 N. Y. 123. As between a carrier and its passengers, it is not at liberty to run its trains at any rate of speed it may see fit, upon a down grade and around a curve. *Louisville* 2 L. R. A.

*eto. R. Co. v. Jones*, 7 West. Rep. 33, 108 Ind. 551. It has sometimes been concluded that the degree of care and circumspection required of them is the same as that required of private carriers of goods for hire, and no more. *Hutch. Car.* 401; *Boyce v. Anderson*, 27 U. S. 2 Pet. 150 (7 L. ed. 379); *Stokes v. Saltonstall*, 58 U. S. 13 Pet. 181 (10 L. ed. 116). Other cases, however, have stated the law upon the subject with more strictness as to the degree of caution to be required of the carrier. *Hutch. Car.* 401. The duty of the company is to employ the highest degree of practical care to guard against accidents; and where its agents or officers have knowledge that a great storm or a great flood has probably made its track or bridges unsafe, it must, where there is reasonable time and opportunity, take measures to protect its passengers from injury. *Whart. Neg.* 694; 2 Redf. Railroads, § 199; *Hardy v. N. C. Cent. R. Co.* 74 N. C. 784; *Great Western R. Co. v. Braid*, 1 Moore, P. C. N. S. 101; *International & G. N. R. Co. v. Mallory*, 55 Tex. 44, 37 Am. Rep. 744; *Louisville etc. R. Co. v. Thompson*, 5 West. Rep. 333, 107 Ind. 442. The agents of a carrier of passengers must observe the utmost care, proportionate to the age and condition of the passengers. *Baltimore & O. R. Co. v. Leapley*, 4 Cent. Rep. 233, 65 Md. 371. That the plaintiff when he entered the car was in a crippled condition makes it the duty of the driver to use a greater degree of care than in a common case of an apparently well and sound passenger. *Jacksonville St. R. Co. v. Chappell*, 21 Fla. 176.

*Distinction between carriers of freight and carriers of passengers.* "There is a wide distinction between contracts for the conveyance of passengers and those for the conveyance of goods. In the latter case, the parties are liable at all events, unless the goods are destroyed or damaged by the act of God

tinuance of his contract, as the liability of a carrier for goods is held less strictly after they have reached their destination and been put in a freight house than while they are in transit.

There is sometimes occasion to leave the boat, or car, or carriage, and return to it again before the contract is fully performed; and it is necessary to determine what are the rights and duties of the parties at such a time. Whenever performance of the contract in a usual and proper way necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time. And this has been held in cases where, in accordance with arrangements of the railroad companies, passengers by railway left their train to obtain refreshments. *Peniston v. Chicago eta. R. Co.* 84 La. Ann. 777; *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 563.

So where a railroad company undertakes to carry a passenger a long distance upon its line, and sells him a ticket upon which he may stop at intermediate stations, in getting on and off the train at any station where he chooses to stop he has the rights of a passenger. Of course, during the interval between his departure from the station and his return to it to resume his journey he is not a passenger.

To determine the rights of the parties in every case, the question to be answered is, What shall they be deemed to have contemplated by their contract? The passenger may do, without losing his rights while he is in those places to which the carrier's care should extend, whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of

a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey.

So of one who leaves a train to obtain refreshment where it is reasonable and proper for him so to do, and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route it may well be implied, in the absence of anything to the contrary, that he has permission to alight for his own convenience at any regular stopping place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties.

In the case of *Keokuk Packet Company v. True*, 88 Ill. 603, a plaintiff before reaching his destination was going ashore for his own convenience at a place where the boat stopped two hours, and was injured on the gangway plank. It was held that he was to be treated as a passenger, and that the defendant was bound to use the utmost care for his safety. See also *Cushman v. L. I. R. Co.* 9 Hun, 618, affirmed in 73 N. Y. 606; *Hrebrik v. Carr*, 29 Fed. Rep. 298; *Dice v. Willamette Transp. & L. Co.* 8 Oreg. 60.

In the first of these cases, the defendant was held liable for a defect in a platform of its station, to a passenger who had left a train to send a telegraphic message; but the court did not decide whether the plaintiff had the rights of a passenger at the time of his injury, or merely those of a person there by invitation. In the second, a passenger who had taken his place on board a steamship started to go on shore to buy some tobacco and fell from an unsafe plank and

or the King's enemies; whilst in the former case, they are only responsible to their passengers in cases of express negligence." *Crofts v. Waterhouse*, 11 Moore, 133. Carriers of passengers for hire are not responsible in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible, but are liable only for want of due care, diligence or skill. *Bennett v. Dutton*, 10 N. H. 481. While the carrier did not warrant the safety of the passenger, as the common carrier did that of the goods, he was, nevertheless, bound to provide for his safe conveyance "as far as human care and foresight will go." *Derwert v. Leumer*, 21 Conn. 245; *Hall v. Conn. River Steamboat Co.* 13 Conn. 319; *Laing v. Collier*, 5 Pa. 473; *Sullivan v. Phila. & R. R. Co.* 30 Pa. 234; *Caldwell v. Murphy*, 1 Duer, 233; *Brand v. Schenectady & T. R. Co.* 3 Barb. 363; *Ingalls v. Bills*, 9 Met. 1; *Hegema v. Western R. Corp.* 13 N. Y. 9; *Maverick v. Eighth Ave. R. Co.* 36 N. Y. 378; *Carroll v. Staten Island R. Co.* 53 N. Y. 123; *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 232; *McPadden v. N. Y. Cent. R. Co.* 44 N. Y. 478; *Sherlock v. Alling*, 44 Ind. 184; *Thayer v. St. Louis etc. R. Co.* 22 Ind. 26; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *The Oriflamme*, 3 Sawy. 37; *Dunn v. Grand Trunk R. Co.* 53 Maine, 187; *Tuller v. Talbot*, 23 Ill. 257; *Pittsburg etc. R. Co. v. Thompson*, 56 Ill. 133; *Stokes v. Saltounstall*, 38 U. S. 13 Pet. 181 (10 L. ed. 115); *Phila. & R. R. Co. v. Derby*, 55 U. S. 14 How. 468 (14 L. ed. 502); *The New World v. King*, 57 U. S. 16 How. 469 (14 L. ed. 1019); *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 231 (23 L. ed. 285); *Johnson v. Winona & St. P. R. Co.* 11 Minn. 236; *McKinney v. Neil*, 1 McLean, 540; *Mauzy v. Tilmadge*, 2 McLean, 157; *Stockton v. Frey*, 4 Gill, 408; 2 L. R. A.

*Farish v. Reigle*, 11 Gratt. 697; *Meier v. Pa. R. Co.* 64 Pa. 225; *Edwards v. Lord*, 49 Maine, 279; *New Jersey R. Co. v. Kennard*, 21 Pa. 236; *Paidleton v. Kinsley*, 3 Cliff. 416.

*Obligations imposed on carrier by contract.* The legitimate obligation imposed upon the company by its contract with a passenger or employee is, that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein which might have been discovered by the company or its agents, by the proper care and skill in the application of the ordinary and approved tests. *Nashville & D. R. Co. v. Jones*, 9 Heisk. 27. If any certain and satisfactory test of the machinery, used by a railway company in transportation, is known, which is within the reach of the company, it should be applied; and it is negligence to rely upon any test which is clearly insufficient. *Texas & P. R. Co. v. Hamilton*, 66 Tex. 122. Carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harnesses, horses and coachmen, in order to prevent those injuries which human care and foresight can guard against. *Ingalls v. Bills*, 9 Met. 1. The highest degree of practicable care, diligence and skill shall be adopted that is consistent with the mode of transportation used, and that will not render its use impracticable or insufficient for its intended purposes. *Tuller v. Talbot*, 23 Ill. 337; *Pittsburg etc. R. Co. v. Thompson*, 56 Ill. 133; *Dunn v. Grand Trunk R. Co.* 53 Maine, 187. And the measure of the carrier's liability therefore as thus defined is now almost universally adopted. *Frink v. Potter*, 17 Ill. 406; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Sawyer v. Hannibal & St. J. R. Co.* 37 Mo. 240; *Edwards v. Lord*, 49 Maine, 279; *Der-*

was drowned. He was held to have had the rights of a passenger, and his administrator was permitted to recover.

No decision has been cited that conflicts with our views.

In *State v. Grand Trunk Railroad Company*, 58 Maine, 176, the circumstances under which the passenger left the train and remained away from it were such that, applying the principles we have enunciated, he was not a passenger at the time he was killed. The court in that case was not called upon to consider at what point a passenger leaving a car under different circumstances would cease to be such and at what point he would resume his former relation.

Upon the undisputed facts of the case at bar we are of opinion that the plaintiff, as a passenger, could properly go on shore to get his breakfast at Rockland, and that he had a passenger's right to protection during his egress from the steamer. The first seven of the defendant's requests for instructions were rightly refused.

The defendant's tenth request was for an instruction that, if the plaintiff was justified in leaving the steamer as he did, the "defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer." This request referred to the degree of care which the law requires of carriers of passengers, as distinguished from the ordinary care required of men in their common relations to each other.

Because a passenger's life and safety are necessarily intrusted in a great degree to the care of the carrier who transports him, the law deems it reasonable that the carrier should be bound to exercise the utmost care and diligence in providing against those injuries which human care and foresight can guard against. This rule is held, not only in our own State and in England, but all over the United States.

*Wort v. Loomer*, 21 Conn. 245; *Hall v. Conn. River Steamboat Co.*, 13 Conn. 319; *McKinney v. Neil*, 1 McLean, 540; *Maury v. Talmadge*, 2 McLean, 187; *Peck v. Neil*, 3 McLean, 22; *Farish v. Belgie*, 11 Gratt. 697. *Sharp v. Grey*, 9 Bing. 457, settled the law in England in favor of the absolute liability of the passenger carrier for a defect in his vehicle, whether known or discoverable or not. *Alden v. N. Y. Cent. R. Co.*, 26 N. Y. 102. If an accident results from a defect in any apparatus, construction or service under the complete control of the carrier, a presumption of negligence on the part of the carrier arises. *Gleeson v. Va. Midland R. Co.* (1 D. C.) 5 Cent. Rep. 442; *Mackey*, 356. The breaking of a wheel of a stage coach is *prima facie* evidence that the wheel was defective. *Lawrence v. Green*, 70 Cal. 417. In an action for damages for an injury to a passenger, caused by a broken rail, defendant must show that the utmost practical care had been used to discover the defect. *Cleveland etc. R. Co. v. Newell*, 1 West. Rep. 583, 104 Ind. 284. Where injury resulted to the passenger, caused by the giving way of one of the wheels of the car in which he was being carried, if the defect in the wheel was one which could not be detected, either by the eye or the ear, there is no negligence on the part of the carrier; the plaintiff could not recover. *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

*Responsibility for defects attributable to the fault of the manufacturer.* A carrier is liable for the consequences of the failure, on the part of the manufacturer, to apply the test, which would have revealed the defect and led to its remedy; and by the omission of the manufacturer, the company became responsible, and plaintiff was entitled to recover. *Hegeman v. Western R. Corp.*, 13 N. Y. 9. This view of the carrier's liability for the careless-

It applies, not only to carriers who use steam railroads, but to those who use horse railroads, stage coaches, steamboats and sailing vessels. It applies at all times when and in all places where the parties are in the relation to each other of passenger and carrier; and it includes attention to all matters which pertain to the business of carrying the passenger.

In *Readhead v. Midland Railway Company*, L. R. 2 Q. B. 412, it is said that "A carrier of passengers is bound to use the utmost care, skill and diligence in everything that concerns the safety of passengers."

In *Pennsylvania Railroad Company v. Aspell*, 23 Pa. 147, carriers of passengers are said to be responsible for any species of negligence, however slight, of which they or their agents may be guilty.

In *Warren v. Fitchburg Railroad Company*, 8 Allen, 227, the principle was applied to providing for a passenger a safe and convenient way and manner of access to the train.

In *Simmons v. New Bedford Steamboat Company*, 97 Mass. 361, it was applied to the duty of a carrier to protect passengers from the misconduct or negligence of other passengers.

*Gaynor v. Old Colony Railroad Company*, 100 Mass. 208, was a case where it appeared that the defendant did not provide proper safeguards against injury for a passenger leaving the place where he alighted from the cars. *Mr. Justice Colt* said in the opinion: "The plaintiff was a passenger, and while that relation existed, the defendants were bound to exercise towards him the utmost care and diligence in providing against those injuries which can be avoided by human foresight. He was entitled to this protection so long as he conformed to the reasonable regulations of the company, not only while in the cars, but while upon the premises of the defendants; and this requires of the defendants due regard for the safety of passengers, as well in the location, construction

ness of the manufacturer is sustained by a number of cases, both English and American (*Caldwell v. N. J. Steamboat Co.*, 56 Barb. 425, 47 N. Y. 282; *Hegeman v. Western R. Corp.*, 13 N. Y. 9; *McPadden v. N. Y. Cent. R. Co.*, 44 N. Y. 473; *Bissell v. N. Y. Cent. R. Co.*, 25 N. Y. 442; *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534; *Carroll v. Staten Island R. Co.*, 58 N. Y. 129; *Grote v. Chester & H. R. Co.*, 2 Exch. 251; *Pym v. Great Northern R. Co.*, 2 Foster & F. 619; *Brazier v. Polytechnic Inst.*, 1 Foster & F. 507; *Pike v. Polytechnic Inst.*, 12 L. R. 4 Q. B. 379; *McGuire v. The Golden Gate*, 1 McAll. 104; *Gillenwater v. Madison & L. R. Co.*, 5 Ind. 340; *Meier v. Pa. R. Co.*, 64 Pa. 225; *Manser v. Eastern Counties R. Co.*, 3 L. T. N. S. 553; *Pittsburgh etc. R. Co. v. Nelson*, 31 Ind. 150; 111 Cent. R. Co. v. Phillips, 49 Ill. 234; *Pendleton v. Kinsley*, 3 Cliff. 416; and applied to carriers of passengers by all kinds of vessels and vehicles, whether propelled by steam power or not. In *Alden v. N. Y. Cent. R. Co.*, 26 N. Y. 102, it was, however, decided by the Court of Appeals of New York, that the carrier is bound, absolutely and irrespective of negligence, to provide roadworthy vehicles. For the injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no such remedy for damage arising from a mere breach of contract with the carrier. *Longmead v. Holliday*, 6 Exch. 761. This rule of responsibility on the part of the carrier for the unskillfulness or negligence of the manufacturer of the vehicles or machinery which he employs in the carriage of passengers, has been treated in subsequent cases as the established rule in that State. *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Carroll v. Staten Island R. Co.*, 58 N. Y. 129.



and arrangement of their station buildings, platforms and means of egress as in their previous transportation." See also language of Chief Justice Shaw in *McElroy v. Nashua & Lowell Railroad Corporation*, 4 Cush. 400.

Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions, "utmost care and diligence," "most exact care," and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this interpretation of the rule the application of it is easy. As applied to every detail the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular it is the highest which can be exercised in that particular with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars. *Warren v. Fitchburg R. Co. supra*; *Le Barron v. E. Boston Ferry Co.* 11 Allen, 815; *Taylor v. Grand Trunk R. Co.* 43 N. H. 304-316; *Tuller v. Talbot*, 23 Ill. 357.

It may be assumed that the plaintiff would have ceased for the time to be a passenger if he had left the steamer and gone away for his breakfast. But he was injured before he had completed his exit. Inasmuch as he had a passenger's right of egress this request for an instruction was rightly refused; for, while he was a passenger, the degree of care to be exercised towards him did not depend upon whether he was on the steamer, or on the plank, or the slip. It was the same in either place. But, in determining what is the utmost care and diligence within the meaning of this rule, it is always necessary to consider what is reasonable under the circumstances.

The decision in *Moreland v. Boston & Providence Railroad Corporation*, 141 Mass. 81, 1 New Eng. Rep. 909, was made to rest upon the inaccuracy of the instructions as to the degree of care required of passengers, and it is not an authority for the defendant in the present case.

In its eighth request the defendant asked for an instruction as to the rights of a passenger acting in disobedience of an order or regulation of a carrier. The evidence was undisputed that the defendant had provided a safe and convenient place for passengers to land from the saloon deck, and that the place where the plaintiff was injured was not intended for use by passengers. The judge said in his charge: "The plaintiff does not now claim that the defendant did not furnish proper means of egress from the saloon deck; nor do I understand that the plaintiff now claims that the defendant intended the gangway which was in fact used by the plaintiff for use of passengers leaving the boat." We must therefore assume that the court and the parties treated these matters as undisputed facts of the case, and upon these facts, a warning to the plaintiff not to leave the

steamer from the gangway by which he went was a reasonable order or regulation.

A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey. And the carrier owes him no duty to provide for his safety in acting in disobedience. His neglect of his duty in disobeying, in the absence of a good reason for it, will prevent his recovery for an injury growing out of it. This request, as applied to the admitted facts of the case, and to a fact which the jury might have found from the evidence, contained a correct statement of the law (*Ellis v. Narragansett Steamship Co.* 111 Mass. 146; *Pennsylvania R. Co. v. Zebe*, 88 Pa. 818; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124-142; *Gleason v. Goodrich Transp. Co.* 82 Wis. 85); and we are of opinion that the jury should have been instructed in accordance with it. It was not a request for an instruction merely as to the effect of a part of the evidence upon a particular subject. It was rather a request for a statement of the law applicable to one phase of the case which involved a consideration of all the evidence relative to that phase of it. And if, by the word *notified*, in the ninth request, was meant the giving of a notification intelligibly, so as to make it understood by the plaintiff, the same considerations apply also to that request. No instructions were given upon this subject, and because of this error the entry must be—

*Exceptions sustained.*

ATTORNEY-GENERAL, *ex rel.* Maria  
ADAMS *et al.*,

v.

Alphonso TARR *et al.*

(....Mass....)

# 1. A reservation in an ancient town grant, of land "for landing places for the pub-

**NOTE.—Grant of land; reservations and exceptions.** A reservation is a clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before; but an exception is always a part of the thing granted, or out of the general words and description in the grant. It is repugnant to the deed, and void, if the exception be as large as the grant itself. If the exception be valid, the thing excepted remains with the grantor, with the like force and effect as if no grant had been made. 4 Kent, Com. 468; *Moulton v. Trafton*, 64 Maine, 218; *Marshall v. Turnbull*, 28 Conn. 183; *Ashcroft v. Eastern R. Co.* 126 Mass. 196; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290; *Munn v. Worral*, 53 N.Y. 44; *Bridger v. Pierson*, 1 Lans. 481; *Petree v. Hawes*, 13 Pick. 323; *McDaniel v. Johns*, 45 Miss. 632; *Richardson v. Palmer*, 38 N. H. 212; *Rich v. Zelleldorf*, 22 Wis. 544; *Jackson v. McKenny*, 3 Wend. 233; *Klaar v. Ridgway*, 86 Pa. 522; *Wiley v. Sirdorus*, 41 Iowa, 224; *Sloan v. Lawrence Furnace Co.* 29 Ohio St. 668; *Lafayette & W. Gr. Road Co. v. Vanclain*, 92 Ind. 153. A reservation is to be construed most strongly against a grantor. *Klaar v. Ridgway*, 86 Pa. 522; *Wiley v. Sirdorus*, 41 Iowa, 224; *Jackson v. Hudson*, 3 Johns. 375, 3 Am. Dec. 500; *Jackson v. Gardner*, 8 Johns. 394. But reservations are to be construed as possessing the force which it is evident the deed meant that they should possess. *Hall v. Ionia*, 38 Mich. 493.

**Custom cannot deprive one of a legal right.** Where a party has a legal right he cannot be deprived of it by a custom; and whether a custom exists or not is a question of fact for a jury; but the validity or invalidity of a custom is a question of law for the court. *Sullivan v. Jernigan*, 21 Fla. 278; *Chicago Packing & Prov. Co. v. Tilton*, 87 Ill. 548.

House for the inhabitants of Gloucester forever," is to be construed as a reservation of a landing place for the public at large, and not merely for the inhabitants of the town; and a proceeding in equity to enjoin an intrusion thereon and to compel the removal of buildings erected thereon by private individuals may be maintained by the Attorney-General.

2. **No acceptance by the public, or by the inhabitants of the Town of Gloucester,** for whose benefit such reservation for landing places was principally designed, was necessary, other than that inferred from the reservation itself.
3. **The acceptance by the public or by the inhabitants of the town** is not to be held to have been limited to those parts of the lands so reserved which were in actual use as landing places, where it appeared that the parts thereof intruded upon by private individuals could have been fitted for and used as landings, and that they were used by fishermen for the drying of nets and by them and others for passage to actual landing places, and similar purposes connected with landings and not inconsistent therewith.
4. **An acceptance, by the public, of land for a public use** is to be construed in connection with the grant or dedication; where that clearly includes the premises, less evidence is required to show that any particular part had been accepted than where it is uncertain whether there has been more than a partial and limited dedication.
5. **A right by custom, to maintain a building or permanent structure upon the land of another,** cannot be acquired.
6. **Where the invasion of a right** (as, by the erection of a permanent structure on the land of another), if submitted to on the one hand and persisted in on the other a sufficient length of time, may result in the extinction of the right, a remedy may be sought before actual damage has occurred.
7. **No rights in favor of fishermen** now exist by virtue of the proviso in the Province Charter of Massachusetts Bay, that the rights of English subjects to fish, etc., and to erect wharves, etc., upon waste lands, not in the possession of particular proprietors, should not be abridged.

(January 2, 1889.)

**APPEAL** by defendants, from a decree in equity, directed by a single justice of this court (Morton, Ch. J.). *Affirmed.*

Information in equity by the Attorney-General, in behalf of the inhabitants of Gloucester, to restrain the respondents from completing a wall in process of construction, and to remove a building already constructed by them.

The case was referred to a master, who took the evidence and reported. The plaintiffs excepted to this report, and their exceptions were sustained and a decree entered in accordance with the prayer of the information. Thereupon the defendants took this appeal.

The questions presented, and the facts connected therewith, are set forth in the opinion.

**Mr. D. O. Allen** for defendants.

**Mr. W. Orison Underwood** for plaintiffs.

**Devens, J.**, delivered the opinion of the court:

This information, filed by the Attorney-General, prays relief against the defendants upon the ground that they have erected and are proceeding to erect certain structures upon a

common and public landing place in Gloucester which are a nuisance thereto at common law and within the meaning of Public Statutes, chap. 54, § 1.

The respondents do not seek to justify the continuance of these structures as having been maintained for forty years. They deny that the locus upon which the structures are now erected or being erected is a common landing place, or that they interfere with any rights of the public or the inhabitants of Gloucester therein. They assert also that they have a right to erect and maintain them under the Province Charter of 1691.

It will not be here important to determine the exact boundaries of the entire locus which the complainant claims as a landing place, and concerning which there was much evidence before the master, as the structures complained of are clearly within them—however those boundaries may be defined.

The early allotments of land were made at Cape Ann, now Gloucester, by committees appointed by the general court, it having been established in 1639 as a fishing plantation. 1 Mass. Col. Record, 156-339.

In the year 1642 it was recognized as a town by the name of Gloucester. 2 Mass. Col. Records. Its boundaries were settled, especially that between itself and Manchester. 1 Mass. Rec. 339; 2 Mass. Rec. 2-4; 4 Mass. Rec. pt. 2, pp. 504-520.

While no Act similar to our present Acts of incorporation was passed until after the expiration of the Colonial Government, as it was doubted whether that Government had authority to create municipal corporations, the towns and settlements which it organized can hardly be distinguished therefrom. They were subjected as such to taxes and assessments, to fines for failure to perform the duties imposed upon them, allowed to choose certain officers, and invested with many, perhaps all, of the most important municipal powers, until they thus grew to be in effect municipal corporations. *Porter v. Sullivan*, 7 Gray, 441.

The private property or ownership of land within the limits of the Colony of Massachusetts is derived from the Colonial Government. The lands were first granted by the Crown to the Governor and Company of Massachusetts Bay in New England, and by them were parceled out to individuals, to settlements or towns, and at a later period to distinct bodies of proprietors as tenants in common with a view to their subsequent incorporation as a town. *Com. v. Roxbury*, 9 Gray, 451.

Where there was no separate body of proprietors to whom the territory was granted the town, by its establishment, became as a general rule the owner of the land within its assigned limits. "Its functions were then of a twofold nature: to distribute the lands among the freemen for the purposes of settlement, reserving such parts as might be deemed requisite for various public uses; and to do its part as a constituent member of the new State, bearing its proportions of the public burdens, clothed with limited powers of self government in local matters, but amenable to the Commonwealth and subject to its control and direction." *West Roxbury v. Stoddard*, 7 Allen, 158.

It was never doubted but that their bounda-

ries might be changed, or that as the towns were organized for public purposes any land or territory granted to them (which had not been granted to private persons) they might be required to devote to such uses as the Legislature might thereafter by law designate. *West Roxbury v. Stoddard*, *supra*; *Boston v. Richardson*, 13 Allen, 146-150; Act March 8, 1685-86; 1 Mass. Col. Records, 172.

That the Town of Gloucester had authority to set apart and reserve for public use the *locus* as to which the dispute arises, and that it did so (without at this moment considering the language of the reservation), fully appeared by the report. There was no separate organization of the commoners of Gloucester. After it was recognized as a town, allotments appear to have been made by votes in town meeting. While a book, *Commoners' Records*, was produced at the trial, it was in the nature of a book of possessions—showing the action of the committees of the town under the authority of these votes, but containing no record of any vote or corporate action by the commoners as such.

A vote was passed at a town meeting in Gloucester June 16, 1707, by which a committee of nine were appointed to lay out to the inhabitants certain of the common and undivided lands as they might deem for the public or private good. A tract of land was laid out for John Stone by this committee, which is found in the so called *Commoners' Records* of the date of October 21, 1707. This laying out contains the reservation of the *locus* in question. After stating the boundaries of the land laid out to Stone it adds: "And all the common land on the western side of the above said line is left and reserved free for landing places for the public use for the inhabitants of Gloucester forever, by order of the committee."

As found in the *Commoners' Records*, this laying out is signed by only three of the committee, but it purports to be the act of the committee, and done by its order; and it may be that the three signatures are intended only as an authentication of the record, especially as it appears that many similar entries in the book are of this character. This is, however, of little importance, as the subsequent votes in town meeting show that the action taken was fully assented to and ratified as that of the committee. The reservation of these premises for landing places was therefore a public declaration of the town having authority to dispose of these lands, in the absence of any special grant or appropriation by the authorities of the Colony, or Province, that the premises were set apart "for the public use for the inhabitants of Gloucester" and reserved from being granted to any individual proprietor.

The language of this reservation is peculiar, and the suggestion is made that the words "for the public use" are qualified by those which follow; that all which it was intended to reserve was a landing place or landing places for the use of the inhabitants of Gloucester only; that therefore, assuming that the structures complained of are wrongfully maintained on the tract, no injury is done to the general public which can be remedied by any public proceeding at the suit of the Attorney-General, but a private injury only to be remedied by a proceeding commenced and conducted by the City of

Gloucester as a corporation, or the inhabitants thereof—both of whom are definite bodies amply competent to maintain their own rights.

It is true, as a general proposition, that it is only in case of a public wrong where each citizen of the State is interested, that it can be redressed by a public prosecution or proceeding. *Atty-Gen. v. Salem*, 103 Mass. 188.

We think it does not here apply. The statute has provided that where boundaries of tracts similar to that in question can be made certain "No length of time less than forty years shall justify the continuance of a fence or building on a town way, private way, highway, training field, burying place, landing place, or other land appropriated for the general use or convenience of the inhabitants of the Commonwealth or of a county, town or parish; but the same may, upon the presentment of a grand jury, be removed as a nuisance."

The Legislature has therefore treated an intrusion of this character upon a landing place when laid out for the general use and convenience of the inhabitants of a particular town as a public nuisance to be remedied by the presentment of the grand jury. Even if a way be but a private way, and such an one as a town may possess as incidental to the possession of its property, if it be appropriated to the general use and convenience of the inhabitants of a town, an intrusion upon it may be thus dealt with. *Deerfield v. Conn. River R. Co.* 4 New Eng. Rep. 189, 144 Mass. 325.

If a public prosecution of a criminal character may be adopted for the purpose of redressing such a grievance, there can be no reason why the Attorney-General (representing the public and acting at the instance of relators who are interested) may not initiate a civil proceeding, similar to that adopted in the case at bar, when such is for any reason found to be more convenient and appropriate.

We are not, however, disposed to adopt so narrow a construction as that which would hold that the reservation should be construed as one for the benefit of the inhabitants of Gloucester solely; nor is such the natural interpretation of its language. It has been often said that the language of the votes of a town is not to be too critically scanned, and that even if defectively expressed, where its meaning can be ascertained that will be followed. It was inconsistent to say that the landing place was for the public use if it was for the inhabitants of Gloucester only. When the word *and* is supplied between the two phrases its meaning is sure to be that the reservation was alike for the public and the inhabitants of Gloucester. Even if the last clause is in one aspect superfluous, as they are a portion of the general public, it indicates those for whose use it is primarily and principally intended. There is nothing inconsistent or unusual in thus specifying those for whose more immediate benefit such an appropriation is made while the public in general also acquires rights thereby.

Town ways are by the statute laid out by the town authorities "for the use of their respective towns." Without considering those cases where the county commissioners have jurisdiction in regard to them, such ways must be accepted by the respective towns, must be maintained by them, and may on proper proceed-

ings be discontinued by them. Gen. Stat. chap. 48, § 60; Pub. Stat. chap. 49, § 85 *et seq.*

While they exist, all persons, whether citizens of the town or not, have an equal right to use them and are injured if they are wrongfully obstructed or destroyed. *Craigis v. Mollen*, 6 Mass. 7; *Monterey v. Berkshire Co.* 7 Cush. 394; *Higginson v. Nahant*, 11 Allen, 530.

In the view we take of the statute, and of the form in which the land whereon respondents' structures now stand was "left and reserved free for public landing places," the Attorney-General may properly maintain this proceeding.

While the master properly held that by the action of the town the premises described in the bill were set apart to the public use and reserved from being granted to any individual proprietor, he also held that no sufficient use of that part of the *locus* which was set apart for landing places where the respondents' structures are situated was shown in order to constitute an acceptance thereof; and that the respondents have not therefore encroached upon the public use, unless it shall be held that the whole tract has been duly established as a landing place as it was reserved.

We are not prepared to hold that any acceptance was necessary on the part of the inhabitants of Gloucester for whose benefit the reservation for landing places was principally designed, other than that which is inferred from the reservation itself. The landing was certainly valuable and beneficial to the inhabitants; and the act by which it was appropriated to themselves and the public was done by themselves through the votes of the town, recorded in the book of possessions, kept by its authority for the purpose of showing the grants made by the town as the proprietary of the lands within its limits, and termed Commoners' Records. *Boston v. Richardson*, *supra*.

A town might accept a dedication made by others for the benefit of its inhabitants, as of a town way, previous to the Statute of 1846, chap. 203, by its acceptance or acquiescence, or that of its agents acting within the scope of their authority. *Hayden v. Stone*, 112 Mass. 360.

When the dedication is made by itself such acceptance is necessarily implied from the act of dedication.

But if any acceptance by the inhabitants or the public were necessary to be shown the case affords ample evidence of a sufficient user of the tract to show that the whole was accepted as a landing place, and that the structures of respondents are an intrusion thereon, even if they stand on a portion not in the most common and general use. This user is to be considered in connection with the acts of the town to which we have already adverted, with the fact that it has always been treated by the town as a landing place, so termed in its votes; and that the very location of a lot to John Stone when the reservation is found is bounded on it as a landing place. The tract as thus originally defined has been encroached on by the location of a wharf on the southerly end thereof on property now owned or possessed by a certain wharf association. A part of it was sold in 1823 to one Jonathan Knowlton, which part was rear land, the sale of which did not

diminish the shore frontage. The tract as described in the information excludes these encroachments or diminutions of the original locations. It extends from north to south from the Manchester boundary of the town along the shore. It is in part sandy beach which is at the northern extremity, this beach being partly within the limits of the Town of Manchester, the whole of which "has been continually and generally used from a time beyond the memory of living witnesses to within comparatively few years as a public landing place for all purposes." The remainder of the shore is rocky bank unfit for landing of boats in its natural condition. It has not been so generally used, with the exception of the portion at the southern extremity where the fishermen have prepared and constructed landing places known as "gutters" which have been used by them for landing in their boats in the prosecution of their business. From the time of the construction of the last gutter the use of the beach at the northerly end has diminished. While the intermediate space between the beach at the northerly end and the gutters has never been in general use as a landing place, individual instances of landing at different points along the intermediate space were proved. The character of the shore and the exposure to winds and waves renders it impossible to land with safety, unless under favorable conditions, except at the beach or the gutters; but it is practicable to clear out the rocks at or near the respondents' building and construct there a place for landing as well as at the gutters.

The distance from the southern boundary of the tract as it now exists to the north side of the north gutter is approximately twelve rods; from this to the southern limit of the sandy beach is twenty rods; and from that to the northerly end of the beach, which is beyond the town line of Manchester, about eighteen rods. The southerly end of the sandy beach is some fifteen to twenty feet north of the buildings of the respondents, and the wall as planned and partially constructed extends a short distance below the line of mean high water. In front of this there is a portion of smooth sandy bottom, but it would be unsafe for landing, except at particular times of the tide and in calm weather. Of late years parties going to the beach in Manchester, for bathing or recreation, have passed over the premises now occupied by the respondents; and within ten or twelve years some stone steps have been placed upon the bank by which many persons descend the bank to the path to the beach and the rocks. With this use of the steps and path the respondents' structures interfere.

Previous to the erection of defendants' buildings the land on which they stand had been unoccupied except from time to time by fishermen for drying fish on temporary fish flakes, and for spreading and drying nets. Landing had sometimes been made at or near it and goods brought in a dory carried up the bank near to, but whether actually over, the spot occupied by defendants' building did not appear. The whole intermediate space of upland between the sandy beach and gutters was occupied by fishermen at their pleasure "for their fish flakes, for depositing their fish and fishing

apparatus and for the several purposes of their fishing business" and also for their fish houses placed on this land and also on the land between the gutters. At some times visitors also came to a cottage kept as a house of entertainment near respondents' building, from the Manchester side of the cove, and landed in the vicinity of respondents' building.

Upon these facts it was erroneously held by the master that the acceptance by the inhabitants or the public was limited to those parts of the land reserved which were in actual use strictly as landing places. The whole of the tract apparently, certainly that where the respondents' structure was erected, could have been fitted for and used for the actual landing of boats. If the whole was not needed for this it might properly be devoted to those uses connected therewith, such as the drying of their nets and sails or of their fish by fishermen, so long as they did not thus interfere with such landing. The temporary and occasional landing at the intermediate space for pleasure or business showed also an acceptance of these as well as the other parts of the landing. The use of a portion of the land reserved to pass to the other or Manchester part of the beach or to descend the bank for pleasure or recreation was also an appropriate use of the landing place so long as it was consistent with the more immediate purpose for which it was designed. *Atty-Gen. v. Woods*, 108 Mass. 486; *Atty-Gen. v. Jamaica Pond Aqueduct Corp.* 183 Mass. 864.

The acceptance is to be construed in connection with the grant or dedication. Where that clearly includes the premises, less evidence must certainly be required to show that any particular part had been accepted than where it is uncertain whether there has been more than a partial and limited dedication. As to every portion of the tract described in the information there is some evidence at least of a public use; and when that which relates to the different parts is considered together and combined it establishes an acceptance if as heretofore suggested acceptance is necessary.

Nor does the fact that most of the evidence relates to acts done by the fishermen in their use of this landing place limit the acceptance to them as a class. They avail themselves more particularly of the benefits of this appropriation of landing places, but they do so as a portion of the public and their acceptance inures, not only to their own benefit, but also to that of any portion of the public having lawful occasion to use and enjoy them.

The respondents claimed a right to occupy the premises as they have done by custom; but it was correctly held by the master that a right by custom to maintain a building or permanent structure upon the land of another could not be acquired.

The master also finds that no presently proposed use of the premises by the public as a landing place is shown which requires the removal of the building and wall complained of; and that they are not upon the present state of facts encroachments upon the rights of the public. Some use appears to have been made by the public of the premises actually occupied by respondents, as by fishermen for drying their nets, and by the public in passing and re-

passing. Apart from this they are permanent structures, and if permitted to remain an absolute right to maintain them as against the public and thus to diminish the value of its easement may be acquired. Pub. Stat. chap. 51, § 1.

They cannot be claimed to be mere sheds or huts used for the immediate comfort of fishermen or the temporary protection of their fish, which may be removed at the end of a fishing season or which, if permitted to remain, will yet not lose their temporary character. As the invasion of a right if submitted to on the one hand and persisted in on the other a sufficient length of time may result in the extinction of the right, those whose right is thus threatened are not compelled to wait before seeking a remedy until actual damage has occurred. *Ware v. Allen*, 1 New Eng. Rep. 732, 140 Mass. 518.

It was further held by the master that if the whole of the premises had become established as a common landing place, the right to occupy the same for a fishing business used in the manner the respondents have done under the Province Charter, 8 Wm. & Mary, 1691, remained to the fishermen as to those portions of the landing place not in present use or at present called for to be used as landing places for the public, and therefore that the building and wall of respondents were not encroachments.

The Colony Charter (1638), after the granting part, contained a proviso that "These presents shall not in any manner inure or be taken to abridge, bar or hinder any of our loving subjects whatsoever to use and exercise the trade of fishing upon that coast of New England in America, mentioned in these presents to be granted." Fishermen were permitted to fish where they had been wont, and "to build and set up upon the lands by these presents granted such wharves, stages and workhouses as shall be necessary for the setting, drying, keeping and packing up of their fish to be taken or gotten upon that coast." It appears, then, to have been considered a common law right for fishermen to go upon adjoining lands to spread and dry their nets. Gould, Waters, § 100.

The object of this reservation in the Colony Charter was not to grant any new rights to fishermen, but to protect all English subjects against any hostile colonial legislation, and in the exercise of the same rights as those to which the inhabitants of New England were entitled. This is shown by the legislation of the Colony in answer to complaints of inhabitants of intrusions upon their lands by fishermen, by which such intrusion was forbidden upon lands granted to the towns or possessed by individual proprietors. 3 Mass. Col. Rec. 68; 4 Mass. Col. Rec. pt. 2, p. 868.

This construction was apparently accepted in the Province Charter, which confirms all grants theretofore made "by any general court formerly held" or "by any lawful right or title whatsoever," and by a proviso directs that the rights of English subjects to fish, etc., shall not be barred or abridged by the letters patent, nor their right "to build and set upon the lands within our said province or colony lying waste and not then possessed by particular proprietors such wharves, stages and ware-houses as shall be necessary for the salting,

drying, keeping and packing of their fish to be taken or gotten upon that coast, and to cut down and take such trees and other materials there growing or being upon any parts or places lying waste and not then in the possession of particular proprietors," etc.

Were the provisions of the Province Charter still to be treated as in full force and operation, there are several sufficient answers to the claim of the respondents. Apart from the fact that the grants made by the colony were confirmed and that those made to the towns were included within this provision, when subsequent to the Province Charter the town lawfully appropriated this tract to the purpose of a landing place, even if previous thereto it could have been deemed "lying waste" and "not possessed by any particular proprietor," it ceased to be such. It was then devoted to a definite and important public use; and the fact that a special part of it was not in immediate use or of immediate necessity to the landing place as then enjoyed did not render it waste land any more than a public park is to be so considered.

Again; even upon waste land no permanent structure could have been erected the possession and occupation of which continuously would have established a right of property as against the owner of the soil. The structures contemplated by the charter must have been temporary in their nature and intended for an immediate use, notwithstanding wharves are spoken of.

But we are of opinion that no rights now exist in favor of fishermen by virtue of the clause in the Province Charter which we are considering. A proviso in the charter which diminished the grant made by it and thus derogated from it in favor of all English subjects so far as it conferred any legal rights in the estates of others must have ceased to affect those who were no longer English subjects. If the proviso or reservation in the charter be treated as a grant, our own citizens cannot now have rights under it to be enforced upon the

property of others any more than those who are now English subjects can claim that they have still the right to build huts, etc., on this landing place.

The chapter, 6, art. 6, of Mass. Const. provides: "All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay and usually practiced on in the courts of law, shall still remain and be in full force until altered or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution."

No authority has been found that recognizes any such right as that claimed by the respondents, even if it be held that the laws referred to apply to rights of British subjects under the charter, nor can it be said that this reservation has been usually practised upon in courts of law as conferring the right now claimed. The fact that no such right so far as our knowledge extends has ever been asserted since the Revolution, is strong evidence that even if the grant gave the authority claimed for it the law conferring it was never adopted by the Commonwealth of Massachusetts. The existence of such right would be directly in conflict with our legislation for the protection of highways, commons and landing places the easement of the public in which is equally entitled to protection with the property itself.

It was claimed also, on behalf of the relators, that the structures of the respondents were encroachments upon a public highway, and in fact a highway was laid over a portion of the tract reserved for a landing place by the town in 1710. This highway does not appear to have ever been wrought, and in view of the fact that the master found it impossible upon the evidence to say whether the structures were within its limits, he correctly ruled that they could not be considered as encroachments upon it.

*Decree affirmed.*

## CALIFORNIA SUPREME COURT.

PEOPLE, *ex rel.* ATTORNEY-GENERAL,  
*Respts.,*

*v.*  
STANFORD *et al.*

(...Cal....)

1. A corporation cannot be sued as such and brought into court and the action maintained against it on the ground that it is not a corporation; and other defendants sued jointly with it cannot be charged in such an action with having jointly with such corporation usurped the rights of a corporation, etc.—because by suing the corporation as such its existence is admitted.

2. Where the existence of a corporation is expressly averred or admitted, it is not sufficient to allege that it has ceased to exist. The facts showing that its existence has terminated must be set forth.

3. An answer, to a complaint charging the defendants with usurping the rights of a corporation, which specifically denies that they, or any

of them, have unlawfully claimed or unlawfully exercised such franchise, etc., is sufficient, without affirmatively justifying their right to exercise such franchise, although they affirmatively allege the existence of a corporation—as the latter allegation may be properly treated as mere surplusage, and the answer still contains a complete defense.

4. The proper parties to be proceeded against—where it is claimed that certain persons are unlawfully claiming to be and are exercising the functions of a corporation which never had an existence—are such persons; and the corporation is not a proper party.

5. California Constitution, art. 4, § 31, providing that corporations shall not be created by special Act, does not prohibit the assignment of a franchise to a legally organized corporation by persons having the lawful right to transfer the same.

6. A count in a complaint, based on the sole ground of the nonexistence of a corporation, cannot sustain a judgment by which that question is

left wholly undetermined, but which decrees that plaintiffs recover certain franchises of the defendants, which the latter are thereby enjoined from exercising.

(November 21, 1888.)

**A**PPEAL by defendants, from a judgment of the Superior Court for the City and County of San Francisco (Finn, J.) in favor of the People in an action in the nature of *quo warranto*. *Reversed*.

On rehearing. The original opinion is reported 18 Pac. Rep. 85.

The questions passed upon in the present opinion are stated therein.

*Messrs. McAllister & Bergin* for appellants.

*Messrs. George A. Johnson, Atty-Gen., and J. P. Meux* for respondents.

**Works, J.**, delivered the opinion of the court:

This cause was decided in Department 1, and a rehearing granted. It was held by the department that the second count of the complaint was bad, and that it was error to overrule the demurrer thereto. We adhere to this conclusion, and to that extent the opinion of the department is adopted as the opinion of the court.

There was also a demurrer to the first count of the complaint, which was overruled by the court below. It is urged upon us that this count of the complaint is bad, for the reason that conclusions are pleaded, and not the facts. The pleading is an anomaly. It sues the Potrero & Bay View Railroad Company as one of the defendants, and at the same time alleges that it is not a corporation. It alleges that the private individuals named as defendants, and the Potrero & Bay View Railroad Company, are falsely claiming that there is such a corporation, and that they have unlawfully held and exercised, and still do exercise and claim and hold unlawfully, divers powers, etc.

It is well settled that a corporation cannot be sued as such, and brought into court, and the action maintained against it on the ground that it is not a corporation. If it is intended to draw in question the franchises of the corporation, the proceeding must be against the individuals who usurp the franchise. If it is claimed that the corporation is usurping privileges and powers not belonging to it, the corporation is the proper and only proper party. Ang. & A. Corp. § 756; Boone, Corp. §§ 162, 163; *State v. Cincinnati Gas Light & Coke Co.* 18 Ohio St. 269; *People v. Rensselaer & S. R. Co.* 215 Wend. 118; *Mud Creek Draining Co. v. State*, 43 Ind. 286. By making the corporation a party it is admitted that it once had an existence. Ang. & A. Corp. § 756.

In *Mud Creek Draining Co. v. State*, *supra*, the court says: "This first paragraph was clearly bad. It is not against certain persons claiming to be a corporation, but against the corporation by its corporate name. It is brought into court as a corporation, to answer an allegation that it is not and never was a corporation. When a corporation is brought into court by its

corporate name, its existence is thereby admitted."

In this case, the corporation being made a party, its existence is admitted. It must follow, therefore, that there is no cause of action stated as against it. But there are other defendants sued jointly with it, and charged with having, jointly with such corporation, usurped the rights of a corporation, etc. There is no question made in the record or in the briefs as to the misjoinder of these parties. But we are clear that the people cannot bring both a corporation and the individuals who compose it before the court by information in the nature of *quo warranto*, and claim the nonexistence of the corporation thus brought before the court, and that the other defendants, jointly with it, are claiming to be and exercise the rights and privileges of such corporation. To permit such a course would be subversive of all rules of pleading. If we are right in the position taken, that by suing the corporation as such its existence is admitted, this is an end of the matter, so far as this count of the complaint is concerned, for the reason that the whole force of its allegations, as against the individual defendants, rests upon the sole ground that no such corporation exists.

If the complaint can be defended on the ground that it admits that such a corporation once existed, but has ceased to exist, it is open to the objection made to it, that it does not state the facts showing how and by what means it has ceased to exist. We are of the opinion that it would be sufficient, in an action against individuals, charging that they are wrongfully claiming to act as a corporation, to allege, in general terms, that there never was such a corporation. In such case the allegation that there never was such a corporation covers the whole ground. Nothing can be added to this general statement, which is itself an allegation of a fact.

We are equally clear that where the existence of the corporation is expressly averred, or is admitted, it is not sufficient to allege that it has ceased to exist. The facts showing that its existence has terminated must be set forth; and if the claim is that the corporation is acting as such, but the proceedings under which it is acting are defective, the facts showing that it is so claiming to act, and the defects claimed to exist, should be set out specifically. Taking either view of the complaint, therefore, we must hold this count to be bad, and that the court below erred in overruling the demurrer to it.

There was an answer to the complaint, to which a demurrer was sustained. Notwithstanding what was said in the opinion in department, we are constrained to hold that this was error. The answer for each and all of the defendants jointly and severally and specifically denies that "The defendants, or any of them, claiming to be the said Potrero & Bay View Railroad Company, have for a long time, or do now, or at any time have, unlawfully claimed or unlawfully exercised the franchises, powers, or privileges in said city and county in this behalf in said complaint alleged, or any franchise, power, or privilege."

The other material allegations of the complaint are denied in like manner. It is urged that in an action of this kind it is not enough

\* See editorial note at beginning and digested citations at close of case, *Lawyers' edition*. [Rep.] 2 L. R. A.



for the defendants to deny the allegations of the complaint, for the reason that the writ requires them to show affirmatively by what right they are exercising the franchises, and so it is held in department. This is true where it is admitted, or not denied, that they are exercising the rights and privileges alleged, and attempt to establish their right to do so. High, Extr. Legal Rem. §§ 712, 716.

But the defendants, whether it is the corporation or individuals, who are alleged to be wrongfully claiming to be such, may, instead of justifying their claim, deny that they are making such claim and exercising the rights and privileges alleged. It is certainly not necessary to justify their right to lay down and operate a railroad when they deny specifically that they are doing any such thing. The authorities cited in the former opinion are to the effect that the people are not bound to prove anything where the defendants attempt to justify their right or disclaim. 2 Dillon, Mun. Corp. 3d ed. § 893; Ang. & A. Corp. § 756.

But these authorities are only applicable where it is admitted, or not denied, that the defendants are exercising the franchises, and the question is as to the right to exercise them. That is not the case here. The issue presented is not one of the right to exercise a franchise, but whether it is being exercised. The impropriety of attempting to join the corporation and the individuals alleged to be acting as such in the same action is thus made manifest. It is impossible that both could be doing the acts alleged.

That the individual defendants are in the wrong, as alleged, can only be established by showing that there is no such corporation, and, if the corporation does exist, and is itself exercising the franchises complained of, the individuals charged may truthfully, and with perfect propriety, deny that they are exercising such franchises; and such a denial, it seems to us, is a complete defense to the action as to them.

In this case they not only deny that they, as individuals, are doing the acts or exercising the privileges set forth in the complaint, but allege affirmatively that "The Potrero & Bay View Railroad Company was and is a corporation duly organized and acting under the laws of the State of California, and lawfully entitled to own, maintain, and operate its line of street railroad along and upon the several streets, highways, and roads in said complaint alleged, and in so doing to demand and receive fares and tolls in money from all persons and people who may pass over the same, over the cars of said Potrero & Bay View Railroad Company."

The answer goes further than is necessary to meet the first count of the complaint. The individual defendants are the only ones against whom it can be claimed any cause of action is stated. They meet the whole of this cause of action by denying that they are or have been doing the acts complained of. They go a step further, and allege that someone else, viz.: the Potrero & Bay View Railroad Company, is doing the acts set forth in the complaint, and that it has the right so to do. This latter allegation may properly be treated as mere surplusage, and the answer still contains a complete defense to the action. If we are right in

the conclusion reached, that a general averment that no such corporation exists is sufficient, it must follow necessarily that a denial in the same general form is likewise sufficient.

It is clear that in the opinion of the department the first count of the complaint was understood to be against the railroad company, as an existing corporation, on the ground that it was exercising the privileges set forth without right. It is said: "The first count of the complaint alleged that the Potrero & Bay View Railroad Company never had the right or franchise to build and maintain tracks and run cars upon streets within the City and County of San Francisco, and the answer fails to aver facts showing that the company had such rights or franchises."

We cannot so construe this count of the complaint. As we have said, it does not claim to recover on the ground that the corporation is usurping franchises or privileges not belonging to it, but, on the contrary, avers in direct terms that there is no such corporation, and that the individuals named are claiming to be such corporation. This being true, we are of the opinion that the cases cited by counsel for respondent to support their contention that a denial is not enough, but facts must be alleged showing a right to exercise the privileges claimed to be usurped, are not controlling.

The case of *People v. Pfister*, 57 Cal. 582, was one in which it was alleged that the corporation "never at any time legally existed as a corporation, and that, if it ever did so exist and was a corporation at any time, its full term of existence expired, and it ceased to be a subsisting corporation on the 11th day of November, 1877." The answer in the case was a "denial of all the material allegations of the complaint." No question seems to have been raised as to the form of either the complaint or answer. Certainly no such question is decided by the court.

In the case of *People v. Lowden*, 8 Pac. Rep. 66, the complaint alleged specifically the facts showing the illegality of the corporation. It was held that the facts stated must be specifically denied, and the denial of the legal conclusions drawn from the facts was insufficient.

*People v. Clayton* (Utah), 11 Pac. Rep. 206, was an information to contest the right of the defendant to hold a territorial office in Utah. It was held sufficient to allege generally in the complaint that the defendant "holds and exercises the functions of the office without authority of law therefor," and that such averment cast upon the defendant the burden of pleading and proving his title to the office.

We do not question the correctness of these cases, but do not regard them as in any way antagonistic to the views we have expressed.

In the case of *People v. Riverside*, 66 Cal. 288, it was alleged that the defendant was usurping the franchise to be a corporation. It was urged on the part of the defendant that the allegation that it was never incorporated was equivalent to an allegation that it never existed, and therefore no action could be maintained against it. The court says: "The argument is not devoid of logical force, and, unless the action given by the Code differs in this respect from that which existed at common law, the weight of authority is doubtless on that side; for it has been

held in England and in this country that an information for usurping the franchise to be a corporation should be against the particular person guilty of the usurpation (*Le Roy v. Ousacks*, 2 Rolle, 118; *People v. Richardson*, 4 Cow. 109); and it was held that *quo warranto* would not lie against one claiming office under a corporation which had no existence. But in New York and Minnesota, under statutes not materially different from our Code in this respect, it has been held that the statutory action would lie against one usurping a town or county office, although no such town or county as the one in which it was charged the office was usurped existed. *People v. Carpenter*, 24 N.Y. 86; *State v. Parker*, 25 Minn. 215.

An allegation that a person had usurped the office of supervisor of the County of A would be inconsistent with one that there was no county of A; and, since a city cannot exist in this State without incorporation, it is equally inconsistent to sue one as a corporation, and at the same time deny its existence as a corporation. But for this there is a precedent (*People v. Nevada*, 6 Cal. 143); and as no substantial right of anyone can be prejudiced by following it, we think no good would result from not doing so; particularly as the object of the Code would be effected, and justice promoted thereby."

The opinion shows great doubt in the mind of the court as to the correctness of the rule laid down. No reason is given for the statement that the Code changes the common law in respect to the proper mode of pleading, and we see none. That case differs from this, however. It was an action to determine the validity of certain proceedings to incorporate the City of Riverside, and the particulars in which those proceedings were invalid were specifically set forth. It would seem to be proper in such case that the defendant, claiming to be a city under such proceedings, and acting thereunder as such, should be made a party in an action to determine the validity thereof. *Boone, Corp.* § 162.

In such a proceeding the trustees of the city could not be sued, as there could be no trustees if there were no city, and no individuals could be made parties as claiming to be a corporation. In the case of a private corporation the rule must be entirely different. If no corporation exists, the parties who are claiming to be such can be proceeded against. That such is the only proper course where, as in this case, it is claimed that certain persons are unlawfully claiming to be, and are, exercising the functions of a private corporation which never had an existence, the authorities are, so far as we know, agreed; and such we believe to be the proper rule.

In *People v. Flint*, 64 Cal. 49, this court held that in a proceeding of this kind the corporation was the proper defendant. But there the facts were set forth, showing that the defendant was a *de facto* corporation, acting under articles of incorporation which were claimed and held by the court to be defective. The court, after holding that the corporation was a necessary

party, says: "It is well to say, to prevent any misconception, that if, on a new trial, after the alleged corporation had been made a party, it should be adjudged that it never had been legally a corporation, that in that case appropriate proceedings should be had by which the affairs of such *de facto* corporation should be wound up and settled by the trustees."

The Statute of Limitations is pleaded by way of answer, and a demurrer thereto was sustained by the court below. This it is claimed was error; but as the case must be reversed on other grounds, and the pleadings be amended, we express no opinion on the question.

As to the other questions arising upon the answer, they relate to the special answer to the second count of the complaint, which count of the complaint was held in the former opinion to be bad. We adhere to that opinion so far as it relates to these questions, except so far as it holds that a duly organized corporation cannot take an assignment, from its lawful owners, of a franchise to lay down and maintain a street railroad. This is based upon the constitutional provision that "Corporations may be formed under general laws, but shall not be created by special Act." Article 4, § 81.

This provision applies to the formation or creation of corporations, and to the powers directly conferred upon them by legislative enactment, and cannot, in our judgment, be construed as prohibiting the assignment of a franchise to a legally organized corporation, by persons having the lawful right to exercise and transfer the same.

If we look to the judgment rendered in this case it is apparent that it is founded upon the second count of the complaint, which was held by the department to be bad. It does not decree that there is or was no such corporation as the Potrero & Bay View Railroad Company, nor that the said corporation, or the other defendants, are usurping the right to be such corporation, but simply decrees that the plaintiff "recover of the defendants the said rights, powers, and franchises by them, the said defendants, exercised and claimed, viz.: of constructing, maintaining, and operating an iron railroad, commonly called and known as a 'street railroad,' along and upon certain of the streets, roads and highways, to wit:" describing the route; and the defendants are enjoined from exercising said franchises.

We are of the opinion that, upon the decision of the department that the second count of the complaint was bad, the judgment of the court below should have been reversed, for the reason that the judgment cannot be supported by the first count. The sole ground upon which the first count is based, viz.: the nonexistence of the corporation, is left wholly undetermined by the judgment.

*The judgment appealed from is reversed, and the cause remanded.*

We concur: *Searls, Ch. J.; Sharpstein, J.; McFarland, J.; Paterson, J.*

## GEORGIA SUPREME COURT.

ATLANTA NATIONAL BANK, *Plff.*  
*in Errr.,*v.  
Joseph F. BURKE, for Use of Mrs. Francis  
L. Cotting.

(....Ga....)

1. A bank depositor is not precluded from holding the bank liable for cashing his check on a forged indorsement, by the fact that a note and deed forged in the same manner had been palmed off on the depositor himself.
2. The genuineness of the last indorsement on a check does not relieve a bank from looking to the genuineness of preceding indorsements.
3. The liability of a bank to its depositor is not avoided by payment of money upon his check to a person who forges the name of the payee.
4. The entry in a depositor's bank book, which is returned to him, of the payment of a check to the payee named therein, puts the depositor under no obligation to look to see whether the check was paid upon a forged indorsement or not.
5. A depositor is not entitled to interest

**NOTE.—Banks and banking.** A bank must know the signature of its depositor, and if it pays out money on a forged check it cannot charge the depositor with the amount, but must bear the loss itself. *People's Sav. Bank v. Cuppa*, 91 Pa. 315; *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 398; *Hardy v. Chesapeake Bank*, 51 Md. 502; *Frank v. Chemical Nat. Bank*, 13 Jones & S. 42; *Morgan v. State Bank*, 11 N. Y. 404. Acceptor's banker should know his signature and cannot recover a payment made on a forged acceptance. *Smith v. Mercer*, 6 Taunt. 76; *Poolley v. Brown*, 11 C. B. N. S. 566. A bank must ascertain that the party presenting the check is the one entitled to receive payment, under penalty of refunding to the party entitled, or the drawer. *Thomson v. Bank of British N. A.*, 82 N. Y. 1; *Seventh Nat. Bank v. Cook*, 73 Pa. 489; *Millard v. Nat. Bank of the Republic*, 3 MacArth. 54. The giving of bank credit is a payment which cannot be recovered back on discovery of the forgery months afterward. *Levy v. Bank of U. S.*, 1 Binn. 27. Notwithstanding an agreement to credit checks in payment of clearing house balances, if the paper prove to be not genuine on inspection a bank may recover payment made on a forged certificate if guilty of no negligence. *Allen v. Fourth Nat. Bank*, 59 N. Y. 12.

**Payment of altered check; liability to loss.** The liability of the bank arises upon an altered check, even though detection was impossible. *Crawford v. West Side Bank*, 1 Cent. Rep. 253, 100 N. Y. 50. After payment a bank has authority to hold an altered check for its correct amount where it had a legal inception. *Crawford v. West Side Bank*, *supra*. But compare *White v. Continental Nat. Bank*, 94 N. Y. 316.

**Payment of raised check.** Where a bank pays a raised check it must stand the loss. *Hall v. Fuller*, 5 Barn. & C. 750. But where the check was drawn so carelessly as easily to admit of the insertion of words and figures, the drawer, and not the banker, should suffer the loss. *Young v. Grote*, 4 Bing. 253; *Swan v. North British A. Co.*, 7 Hurl. & N. 603; *Hallfax Union v. Wheelright*, L. R. 10 Exch. 183; *Morrison v. Buchanan*, 6 Car. & P. 18. If a bank certifies a check, and after it has been raised pays it to another bank, and charges it to the drawer, and the alteration is afterwards discovered by the drawer when his account is written up, the payment may be recovered by the bank, which is only bound to know the drawer's signature, and not the body of the instrument. *Nat. Bank of Commerce v. Nat. Mechanics Bkg. Assn.*, 55 N. Y. 211; *City Bank v. First Nat. Bank*, 45 Tex. 203; *Rand. Com. Paper*, § 1483; *White v. Continental Nat. Bank*, 64 N. Y. 316. Where money is paid on a raised check by mistake, neither

on money which he claims to recover against a bank that has paid it out on a forged indorsement of a check, where the bank held the money merely as a general deposit.

(October 8, 1883.)

**ERROR** to the Superior Court of Fulton County (Clarke, J.), to review a judgment in favor of the plaintiff in an action against a bank to recover the amount of a check drawn by the plaintiff and alleged to have been paid by the defendant on a forged indorsement. *Affirmed*.

On January 25, 1884, Mrs. Francis L. Cotting, through her agent, Joseph F. Burke, agreed with R. H. Knapp, as the agent of his wife, Euphemia Knapp, to lend Mrs. Knapp \$2,500 for one year at 8 per cent per annum interest, secured by deed of conveyance of certain real estate. All the negotiations were carried on and completed by and between Burke as agent for Mrs. Cotting, and Knapp as the agent of his wife. Knapp carried and delivered to Burke what purported to be a note of Mrs. Knapp for \$2,500, together with a deed of conveyance, which purported to be signed by Mrs. Knapp. These papers were accepted by Burke, who

party being in fault, it may be recovered back as paid without consideration; but if either party has been negligent, such party must bear the loss. *Espy v. First Nat. Bank*, 85 U. S. 18 Wall. 604 (21 L. ed. 947). When a bank collecting a raised check acts merely as an agent, it is not, after paying the money over to its principal, liable to the bank by which it was paid. *Nat. Park Bank v. Seaboard Bank*, 44 Hun, 49.

**Forged paper; party bound by his acknowledgment.** One who, knowing the signature of a note to be forged, acknowledges it as his own, intending to be bound thereby, is so bound. *Wellington v. Jackson*, 121 Mass. 157. So, where one accepts forged paper purporting to be his own and pays it to a holder for value, he cannot recall the payment. *Cooke v. U. S.*, 91 U. S. 389 (23 L. ed. 237). If an acceptor pays a forged bill of exchange he cannot recover payment except from the drawer, or from his surety. *Price v. Neale*, 3 Burr. 1354; 1 W. Bl. 390; *Byles, Bills*, 339; 2 Dan. Neg. Inst. 254; 2 Edw. B. & N. § 733; 3 Rand. Com. Paper, § 1487. An acceptor who pays a bill at maturity negotiated with payee's indorsement forged, and accepted after transfer, cannot recover from a bona fide holder. *Hortsmann v. Henshaw*, 52 U. S. 11 How. 177 (13 L. ed. 653).

**Payment of forged paper.** A drawee is liable for the genuineness of the drawer's signature, and cannot recover a payment made to a bona fide holder of a forged draft. *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77. And if he pays a bill with a forged bill of lading attached, in ignorance of the forgery, he cannot recover. *Hoffmann v. First Nat. Bank*, 79 U. S. 12 Wall. 181 (20 L. ed. 308). If a drawee pays a forged check to another bank in the same city, relying (according to bank custom) on the holder's diligence, without examining the check and returning it promptly on discovery of the forgery, the money was recovered from the bank which received the money and was guilty of negligence in purchasing the check. *Ellis v. Ohio I. Ins. & T. Co.*, 4 Ohio St. 623. If the drawee of a check pays it through the clearing house, he cannot recover on discovery of the forgery. *Commercial & F. Nat. Bank v. First Nat. Bank*, 20 Md. 11. If drawee's agent pays a bill, then in the notary's hands upon agreement of the notary's clerk to send it round the same day, and drawee next day on seeing the bill discovers the forgery and demands repayment, he may recover. *Goddard v. Merchants Bank*, 4 N. Y. 147. A drawee who pays a check which has been indorsed and deposited and presented through the clearing house may afterwards sue the indorser on his implied warranty upon discovering the forgery when the check was repudiated by the drawee. *Nat. Bank of N. A. v. Bangs*, 106 Mass. 441.

gave to Knapp a check on the Atlanta National Bank payable to the order of Mrs. Knapp, to cover the note, Burke having funds in the bank which he held for Mrs. Cotting, but deposited to his own credit.

The bank paid this check to R. H. Knapp on what it supposed was the genuine indorsement of Mrs. Knapp followed by the genuine indorsement of R. H. Knapp. It charged the same to Burke and returned it, among other vouchers, with his pass book to Burke some two months after its payment. Burke never questioned the correctness of that payment until about the time this litigation began—more than three years afterwards.

The original note, falling due twelve months after date, was renewed by taking another note purporting to be signed by Mrs. Knapp for the same amount. The interest on the first note was paid and the payment indorsed on the back thereof. Who paid the interest does not appear, but it was contended that Mrs. Knapp paid it and presumptively it was paid by Knapp. Knapp carried said renewal and delivered it to Burke who kept it, together with the original, indorsing on the latter, "Another note is given for this note, January 25, 1885."

In 1887 it was ascertained that R. H. Knapp had been guilty of irregularities in business and had fled the country. This put Burke upon inquiry, and he ascertained, as he claimed, for the first time, that the notes (both original and renewal), as well as said deed, were forgeries, and that the indorsement of Euphemia Knapp on the back of the check was also a forgery. The forged indorsement was in the same handwriting as the signatures to the note and deed. Thereupon Burke notified the bank that it would be held as for a wrongful payment of said check. Demand was made upon the bank for payment and the same was refused, and this action was brought to recover the amount.

It was admitted, on the trial in the court below, that the bank paid the check without any knowledge of the forgery of Euphemia Knapp's name, or of any irregularity about it. The jury found for the plaintiff below the full amount sued for, and defendant moved for a new trial, and, the same being denied, accepted and brings the case here for review.

The plaintiff filed a cross bill of exceptions, questioning the correctness of a ruling of the trial court requiring him to write of the interest claimed by him, on the amount paid out by the defendant bank.

**Messrs. Abbott & Smith**, for plaintiff in error:

The rule which requires that banks shall know the signature of their customers is not so stringent with regard to the handwriting of an indorser—of one who is not the customer of the bank.

See Story, Bills, §§ 263, 412, 451; 2 Daniel, Negotiable Instruments, § 1663; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Price v. Neale*, 3 Burr. 1854; *Bank of U. S. v. Bank of Ga.* 23 U. S. 10 Wheat. 333-356 (6 L. ed. 334-340); *Bank of St. Albans v. Farmers & M. Bank*, 10 Vt. 141.

We contend that when the drawer of a check paid on a forged indorsement has so acted as to mislead or deceive the drawee bank, or to

throw it off its guard, or to prevent its inquiries as to the validity of the instrument before payment; or when by acquiescence the drawer adopts the forgery, or by his laches and negligence fails to discover it within a reasonable time after such wrongful payment, thereby depriving the bank of its remedies against the forger and the genuine indorsers on the check so wrongfully paid—the liability of the bank is avoided.

The relation between the bank and the depositor is that of debtor and creditor. There is no question of trust, therefore, between the parties; their relation is purely a legal one.

See *Lynch v. First Nat. Bank*, 9 Cent. Rep. 564, 107 N. Y. 179; *Morse, Banks & Banking*, pp. 28, 29; *Taylor, Private Corporations*, § 872; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Phoenix Bank v. Risley*, 111 U. S. 125 (28 L. ed. 874); *Chapman v. White*, 6 N. Y. 412.

Both parties are bound to exercise the best of good faith in their transactions with each other, and are chargeable with the same degree of diligence in the transaction of their own affairs as though no such relation existed. Hence, if the bank is induced or entrapped into making a payment on account of its indebtedness to its depositor by the deception, negligence, bad faith or other misconduct on the part of such depositor, he cannot repudiate such payment when the same is charged up to him in his account with the bank.

See *Young v. Grote*, 4 Bing. 258; *DeFeret v. Bank of America*, 23 La. Ann. 810; *Smith v. Mechanics & T. Bank*, 6 La. Ann. 610; *Levy v. Bank of America*, 24 La. Ann. 220, 13 Am. Rep. 124; *Hardy v. Chesapeake Bank*, *supra*; *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 623, 667; *Gloucester Bank v. Salem Bank*, 17 Mass. 33, 42; *Cooke v. U. S.* 91 U. S. 397 (23 L. ed. 242); *First Nat. Bank v. Tappan*, 6 Kan. 456, 7 Am. Rep. 568; *McKleroy v. Southern Bank*, 14 La. Ann. 462; *National Bank of N. A. v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Byles, Bills*, 337, 338; 39 Am. Dec. 520, general note.

See Story, Partn. § 108, and *DeFeret v. Bank of America*, 23 La. Ann. 810, to the general proposition that where one of two innocent parties must suffer from the act of a third person, he should bear the loss who placed it in the power of such third person to commit the wrongful act.

More caution is required in case of a discounter than a payer.

See *Snow v. Peacock*, 12 Eng. C. L. 95; *Egan v. Threlfall*, 16 Eng. C. L. 237; *Gill v. Oubitt*, 3 Barn. & C. 466.

The rendering up of the account and return of the vouchers of the depositor by the bank operates as an account rendered, and the depositor "is bound personally or by an authorized agent, and with due diligence, to examine the pass book and vouchers, and to report to the bank, without unreasonable delay, any errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown by the pass book."

*Leather Mfrs. Bank v. Morgan*, 117 U. S. 96-122 (29 L. ed. 811-821).

Plaintiff is chargeable with knowledge of the genuine signature of the payee, because, in

the exercise of due care and diligence in his attempted transaction with her he could and ought to have known it, and his negligent failure to know it and report the forgery to the bank for more than three years, to the injury of the bank, is such negligence as ought to defeat his recovery.

See Morse, Banks & Banking, p. 324; *Bank of St. Albans v. Farmers & M. Bank*, 10 Vt. 141, 83 Am. Dec. 188; *Wiggins v. Burkhams*, 77 U. S. 10 Wall. 129 (19 L. ed. 884); *Rand. Com. Paper*, § 1782; 2 Herm. Estoppel, pp. 1202-1214, 1222, and notes.

Plaintiff's negligence in failing to examine the authority of the agent with whom he dealt, and such negligence being the direct cause of his loss, bars his recovery.

*City Bank of Macon v. Kent*, 57 Ga. 283. See also *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; 53 Ga. 618; 54 Ga. 52.

*Messrs. Hillyer & Bro.*, for defendant in error:

The title to a bill of exchange remains in the person who sends it, until received by the person to whom sent.

*Graves v. American Exch. Bank*, 17 N. Y. 207; *Talbot v. Bank of Rochester*, 1 Hill, 295.

There was no privity between the bank and Mrs. Knapp until the check was accepted; and the right of action is in the owner of the deposit.

A bank can pay a check only on genuine indorsement of payee.

Bolles, Banks & Banking, § 206.

If a check has never passed into the hands of payee, and the bank makes wrongful payment to a stranger on a forged indorsement, its liability is to the drawer.

Bolles, §§ 48, subsec. (a), 206, 339; *Morgan v. State Bank*, 11 N. Y. 404; *Graves v. American Exch. Bank*, 17 N. Y. 208; *Talbot v. Bank of Rochester*, 1 Hill, 295; *Canal Bank v. Bank of Albany*, Id. 287; *Welsh v. German Am. Bank*, 78 N. Y. 424; *Coggill v. American Exch. Bank*, 1 N. Y. 118; *Daniel, Negotiable Instruments*, §§ 1869, 1618, and note 5, § 1663, foot; *Rand. Com. Paper*, §§ 1468, note 9, 1469; *Roberts v. Tucker*, 16 Q. B. 560; *First Nat. Bank v. Whitman*, 94 U. S. 846 (24 L. ed. 231); *Mrs. Nat. Bank v. Barnes*, 65 Ill. 69, *First Nat. Bank v. Tappan*, 6 Kan. 456, 467; *State Bank v. Fearing*, 16 Pick. 534, and cases cited; 2 Pars. N. & B. pp. 594, 595, 569 (r).

A depositor is under no special duty to examine or detect forgeries in vouchers returned to him by the bank; certainly not as to matters occurring beyond his knowledge or observation.

2 Daniel, Negotiable Instruments, § 1870 and notes.

A depositor has a right to assume that before paying his checks the bank will ascertain the genuineness of the indorsement.

*Welsh v. German Am. Bank*, 78 N. Y. 424.

There was no custom proven, such as claimed by plaintiff in error; but even if otherwise, such custom would not excuse the bank.

Bolles, 89; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209.

Lapse of time will not bar remedy of party injured by the wrongful payment (Bolles, § 208, subsec. (c), especially where notice is given as soon as the forgery is discovered.

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Bolles, p. 210; *Rand. Com. Paper*, § 1469, pp. 545, 546; *Weisser v. Denison*, 10 N. Y. 83.

Where forgery was not discovered for six years, the party injured was allowed to recover.

*Rand. Com. Paper*, § 1468, note 9; *Bank of British N. A. v. Merchants Nat. Bank*, 91 N. Y. 106. See also Bolles, § 215; *Carpenter v. Northborough Nat. Bank*, 123 Mass. 66, 69.

On transfer by mere delivery of bills or checks, the person uttering them warrants genuineness and validity of the instrument in its then condition.

*Daniel, Negotiable Instruments*, §§ 1354, 1856, 1662; *Herrick v. Whitney*, 15 Johns. 240 and notes; Code, 2778 and cases cited; *Merriam v. Wolcott*, 3 Allen, 260; *Cabot Bank v. Morton*, 4 Gray, 156; *Loddell v. Baker*, 1 Met. 193.

The cases cited for plaintiff in error show that the bank has been protected from a recovery only in cases where the depositor had misled the bank, or where the error lay at the door of the depositor; but there is no case in which the bank was relieved when the error lay at the door of the bank itself, and there was nothing to put the depositor on notice, or to excite inquiry by him.

*Blandford, J.*, delivered the opinion of the court:

1. It is contended by counsel for the bank that, inasmuch as Knapp had palmed off on Burke a forged note and forged deed purporting to be signed by his wife, Mrs. Euphemia Knapp, Burke is precluded from complaining of the payment by the bank of the check drawn by Burke in favor of Mrs. Knapp, upon the forged indorsement of her name by Knapp; and it is further contended that, inasmuch as Knapp's indorsement was genuine, and he was the last indorser, the bank was not bound to look to the genuineness of any preceding indorsement.

The cases of *Smith v. Mechanics & T. Bank*, 6 La. Ann. 610, and *Lery v. Bank of America*, 24 La. Ann. 220, are cited by counsel for the bank. As to the first of these (*Smith v. Bank*), it appears to us that the case was not well decided by the majority of the court, and the dissenting opinion of Slidell, J., appears to us to embody the correct law of the case. Yet that case has some features in it different from the case at Bar, and may be distinguished from the latter.

In the other case cited the proposition is announced that where the last indorsement is genuine, the bank is not bound to look to any prior indorsement. This proposition we cannot concur in. We do not think it is sustained by the decision of any other court in this country. No other case has been shown us in support of it; and yet that case is distinguishable from the present case in this: in that case the check was made payable to a fictitious person, by the depositor, and the person to whom the check was delivered was supposed by the drawer of the check to be the payee, and he obtained the money on the check at the bank; whereas, in the present case, the check was made payable to Mrs. Knapp, and Knapp forged her name as indorser, making the check payable to himself, and afterwards adding his own indorsement.



There is nothing in the present case to take it out of the ordinary rule. Where one deposits money in a bank on general deposit, the bank immediately becomes the debtor of the depositor for the money deposited, and undertakes, impliedly, to pay that money either to the depositor or to some person to whom he directs it paid; and, in order to discharge itself from this liability to the depositor, the bank must pay the money to the depositor, or as directed by him. The liability cannot be discharged in any other way. In the present case Burke, the depositor, drew a check in favor of Mrs. Knapp for a certain amount of money; and the bank did not pay the money to her or to her order, but paid the money to Knapp, upon a forged indorsement. How does the bank discharge its indebtedness to Burke? It has not paid the money to Burke, or to the person to whom he directed it to be paid, or to her order; and it is only in these ways that the bank can be discharged of its liability.

2. Again; it is insisted on the part of the bank that, inasmuch as the bank had made up the account of Burke with the bank, and returned to him the book containing that account, showing the payment of this amount of money to Knapp, which book was retained by Burke for three years before any complaint was made by him, the bank was not put upon due notice of any forged indorsement, and that this was such laches on the part of Burke as relieved the bank of liability to him.

We think, however, that the fact that the bank reported to Burke in this account that the check was paid to Mrs. Knapp, the payee, relieved Burke from any diligence whatever. He was then under no obligation to look to see whether the check was paid upon a forged indorsement or not. He had a right to accept this statement of the bank as true, and to rest upon it. The bank in its statement deceived him, and there was nothing in the account to put him on notice that there was a forged indorsement.

On this point the counsel for the bank cites the case of *Leather Manufacturers Bank v. Morgan*, 117 U. S. 96 [29 L. ed. 811]. That, however, is a different case from this. In that case the check drawn by the depositor had been raised in amount, the check as originally drawn had been changed by forgery; hence, when the check was returned to the drawer, it was in his power to ascertain, by looking at the check, that it was a forgery. It was not the case of a forged indorsement, where he had a right to rely upon the statement of the bank that the money was paid as he had directed it paid. In the case cited, the depositor might have discovered the forgery upon looking at the check, and he ought to have looked into it within a reasonable time, and, if it was a forgery, ought to have notified the bank, so that the bank could have taken steps to protect itself; hence, the refusal of the court below to give the instructions prayed for by the bank on this subject was not error. There were other points made in the case which, in the view we take of it, it is unnecessary to consider here.

3. We affirm the judgment of the court below in requiring the plaintiff to write off the interest. The bank was entitled to hold the money without interest; it was a general de-

posit; and the bank not having paid out the money, according to the theory upon which this case is decided, the money is supposed to have still remained in the vaults of the bank, and there is no reason why the depositor should have interest on it. Indeed, I have some doubt whether in this case any exception could be taken at all to the writing off of the interest, as the plaintiff wrote it off. He was not bound to write it off, but, having written it off, it is right that it should so remain.

*We affirm the judgment of the Court below, both upon the original bill of exceptions and the cross bill.*

Clarence F. BIRDSEYE, Intervener, *Piff. in*

*Err.*,

v.

BAKER *et al.*

(.....Ga.....)

1. **An assignment made in the State of New York**, which is legal there, will not be held void in Georgia for failure to attach such a schedule and inventory as the law of that State requires in cases of assignment, under the provision of Georgia Code, § 8, that a writing intended to have effect in that State must be in conformity to the laws of that State—where there is nothing to show that it was intended to have effect in Georgia merely because debts were due by citizens of that State to the assignors, and were assigned in the instrument.

2. **The situs of a debt** follows the creditor, and where the debtor and creditor reside in different States the law of the domicile of the creditor prevails.

3. **The rule that contracts made out of the State**, which contravene the policy of the State, will be held void, does not make void an assignment for creditors merely because it does not have annexed to it the schedule required in such cases by the laws of that State, as such schedules are not parts of the contract.

(November 5, 1898.)

**ERROR** to the Superior Court of Fulton County (Clarke, J.), to review a judgment in favor of the plaintiffs below in an action by attachment and garnishment. *Reversed.*

The original action was brought by Stephen Underhill against the firm of Baker & Clark, and certain debts due the defendants were garnisheed. Thereupon Clarence F. Birdseye, assignee of Baker & Clark under an assignment for the benefit of creditors, intervened and claimed the garnisheed fund. The trial court rendered judgment in favor of the plaintiff, Underhill, and the intervener brought error—

**NOTE.—Foreign assignments.** See *Sheldon v. Blauvelt*, 1 L. R. A. 885.

**Foreign bankrupt proceedings.** Title acquired under foreign bankrupt or insolvent proceedings will not prevail against the rights of attaching creditors where the property is situated. *Harrison v. Sterry*, 9 U. S. 5 Cranch, 289 (3 L. ed. 104); *Orden v. Saunders*, 26 U. S. 12 Wheat, 213 (6 L. ed. 68); *Plestor v. Abraham*, 1 Paige, 236; *Holmes v. Remsen*, 20 Johns, 228; *Hoyt v. Thompson*, 5 N. Y. 320; *Hoyt v. Thompson*, 19 N. Y. 207; *Crapo v. Kelly*, 83 U. S. 16 Wall, 610 (21 L. ed. 480); *Osborn v. Adams*, 18 Pick, 245; *Felch v. Bugbee*, 48 Maine, 9; 2 Kent, Com. 405; *Story*, Conf. L. § 410; *Bliss*, Insolv. 261. See note to *Cramton v. Valido Marble Co.* 1 L. R. A. 130.

the defendants in error being Baker & Clark, defendants in attachment, and Stephen Underhill, plaintiff in attachment.

The questions presented, and the facts connected therewith, are stated in the opinion.

*Messrs. Hoke & Burton Smith*, for plaintiff in error:

1. Section 8 of the Code of Georgia is the codification of the common law, and is therefore subject to the interpretation of the common law.

See *Potter's Dwarrris*, Statutes, 185.

2. The choses in action, being due to non-residents of this State, have no location in Georgia.

*Princeton Mfg. Co. v. White*, 68 Ga. 96; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 129, note, and cases cited, 183; *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Savage v. Corn Exchange Ins. Co.* 36 N. Y. 657; *People v. Tax Commrs.* 23 N. Y. 224; *Burrill*, Assignments, p. 436; *Story Conf. Laws*, §§ 396, 398-400, 404, 400 (a).

3. The general rule is that an assignment valid where made is valid everywhere.

See cases above stated.

There is an exception to this rule where a foreign assignment attempts to convey property located in a State whose public policy it contravenes; but our courts will not do away with a foreign assignment because it seeks the same end as our law by different means. And especially is this true in this case because the means of the New York Law seem better adapted to the desired result than do our own. And, furthermore, this exception is not universal, but exists only in favor of domestic creditors.

See *Princeton Mfg. Co. v. White*, 68 Ga. 96; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 133; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 139 (19 L. ed. 109); *Hervey v. R. I. Locomotive Works*, 93 U. S. 664 (23 L. ed. 1003); *Varnum v. Camp*, 13 N. J. L. 326; *Moore v. Bonnell*, 81 N. J. L. 90-94; *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Bryan v. Brislin*, 26 Mo. 423; *Philson v. Barnes*, 50 Pa. 230; *Guillander v. Howell*, 85 N. Y. 657; *Mumford v. Canty*, 50 Ill. 370; *Zipey v. Thompson*, 1 Gray, 243; *Boyd v. Rockport Mills*, 7 Gray, 406; *Stricker v. Tinkham*, 35 Ga. 177; *U. S. v. U. S. Bank*, 8 Rob. (La.) 262; *Southern Bank v. Wood*, 14 La. Ann. 561; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 812; *Rice v. Courts*, 32 Vt. 460; *Pierce v. O'Brien*, 129 Mass. 814, 37 Am. Rep. 360; *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450; *Edgerly v. Bush*, 81 N. Y. 199-206; *Burlock v. Taylor*, 16 Pick. 335.

*Messrs. Calhoun, King & Spaulding*, for Underhill, defendant in error:

The fact that the attaching creditor is not a citizen of Georgia, in no wise affects his rights.

*Stricker v. Tinkham*, 85 Ga. 176; *Mason v. Stricker*, 87 Ga. 262; *Orton v. Madden*, 75 Ga. 88-88; U. S. Const. art. 4, section 2, §1 (Code 5295); article on Foreign Assignments, 26 Cent. L. J. No. 19, p. 463; *Ward v. Md.* 79 U. S. 12 Wall. 430 (20 L. ed. 452); *Davis v. Pierce*, 7 Minn. 13.

And if he lived in the same State with the debtors and the assignee, or either of them, which does not appear, it would make no difference.

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*Stricker v. Tinkham*, *supra*; *Wharton*, Conf. Laws, §§ 371, 353; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 150 (19 L. ed. 113); *Kidder v. Tufts*, 48 N. H. 125, 126; *Morgan v. Neville*, 74 Pa. 52; *Rhawn v. Pearce*, 110 Ill. 358, 359.

The assignment in question is contrary to the policy of the Laws of Georgia.

Acts 1884-85, p. 100; Code 1953 (d), (e); *Tur-nipseed v. Schaeffer*, 76 Ga. 109-130, 133, 134; *Shelton v. Ellis*, 70 Ga. 296; *Coggins v. Stephens*, 73 Ga. 414-417; *Crittenden v. Coleman*, 74 Ga. 381.

An assignment, although good in a foreign State where made, will not be enforced in Georgia, if contrary to the policy of our law.

Code, §§ 8, 9; *Herchfeld v. Dezel*, 12 Ga. 582; *Stricker v. Tinkham*, 85 Ga. 177; *Mason v. Stricker*, 87 Ga. 262; *Miller v. Kernaghan*, 56 Ga. 155; *Princeton Mfg. Co. v. White*, and *Green v. Van Buskirk*, *supra*; *Reynolds v. Geary*, 26 Conn. 183; *Wharton*, Conf. Laws, § 365; 26 Cent. L. J. No. 19, p. 463.

The fact that the property seized in this State is a chose in action which was attempted to be assigned by such a foreign assignment, does not defeat the creditor who attaches here.

*Herchfeld v. Dezel*, 12 Ga. 582; *Miller v. Kernaghan*, 56 Ga. 157; *Princeton Mfg. Co. v. White*, 68 Ga. 96; Code, § 8302; *Dearing v. Bank of Charleston*, 5 Ga. 513; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 150 (19 L. ed. 113); *Martin v. Potter*, 34 Vt. 87; *Ingraham v. Geyer*, 13 Mass. 146, 147; *Blanchard v. Russell*, 13 Mass. 6; *Zipey v. Thompson*, 1 Gray, 243.

The Code of Georgia gives a chose in action a *situs* as property in this State, so as to acquire jurisdiction for her courts, by the levy of an attachment thereon.

Code, § 8302.

*Simmons, J.*, delivered the opinion of the court:

It appears from the record in this case that Baker & Clark, merchants doing business in the State of New York, on the 24th of November, 1886, made an assignment to C. F. Birdseye of "all and singular their copartnership and individual estate and property, real and personal, of every kind whatsoever, and wherever situated, held by and in the name of said parties . . . except such property as is exempt by law from levy and sale." In this deed of assignment preferences were made of certain creditors.

On the 7th of November, 1886, Stephen Underhill, a nonresident of Georgia, instituted his action in this State, against said nonresident assignors, by attachment and garnishment; and summons of garnishment was served upon several of their debtors residing in this State. The garnishees answered, admitting their indebtedness. Birdseye, the assignee, appeared in court, and claimed the assets as belonging to him as assignee.

The case was submitted to the trial judge without the intervention of a jury, upon the following agreed statement of facts: "(1) This paper shall be construed as a properly made claim by C. F. Birdseye, assignee, for all assets garnished. (2) The debts of plaintiffs are due and correct. (3) Plaintiff [Underhill] resides outside of the State of Georgia. (4) The firm of Baker & Clark, both of whom reside out of



Georgia, executed an assignment to C. F. Birdseye, on November 24, 1886, a copy of which is hereto attached. The assignment was a general assignment executed in New York, and was a legal assignment under the Laws of New York. There was no schedule of assets attached to the assignment, as provided for in section 1953 (d), (e), Code, nor of creditors, as provided for in Acts 1884-85. The assignment covered, among other property elsewhere, choses in action in Georgia; and this claim of Birdseye, assignee, only applies to choses in action in Georgia, the attachment not having been levied upon anything else. (5) There is no agreement as to whether notice of the assignment was served on the garnishee before the garnishments were served, and each side reserves the right to suspend the case at any time, and have evidence taken on this point."

On this statement of facts the trial judge decided that Birdseye, the assignee, was not entitled to the fund in court, and rendered a judgment in favor of Underhill against Baker & Clark, for the amount they were indebted to Underhill, and a judgment against Birdseye, the assignee, for the costs. To this ruling the assignee excepted, and brought the case here for review.

1. The main question before us in this case was whether this assignment, made in the State of New York, was void under the Laws of Georgia. It was insisted by counsel for the defendant in error that it was void under our law, because the assignors did not attach thereto a properly sworn to, "full, and complete inventory and schedule of all the assets of every kind, held, claimed or owned by said firm at the time of the execution of the assignment;" and also a "full and complete inventory and schedule of all indebtedness of every kind of said firm at the time of the execution of the assignment, and the names of, the amounts due to, and the residence of, each creditor of said assignors," properly sworn to, as required by the Acts of 1881 and 1885. It was insisted that for this reason the assignment was void, being in violation of the policy of our law. It was admitted that under the Laws of New York it was a legal assignment.

Section 8 of our Code declares that "The validity, form and effect of all writings or contracts are determined by the laws of the places where executed. When such writing or contract is intended to have effect in this State, it must be executed in conformity to the laws of this State, excepting wills of personality of persons domiciled in another State or country." Here, then, is an assignment or contract which it is agreed was a valid and legal contract under the Laws of the State of New York; and under this section of the Code its validity, form and effect are to be determined by the laws of that State. It is claimed that this assignment or contract was intended to have effect in this State, because it was introduced in the court below as evidence, and under it this fund was claimed; and that, therefore, it must have been executed in accordance with the laws of this State, which require a schedule of assets and of indebtedness to be attached to the assignment as part of the execution thereof.

We can see nothing in this assignment that 2 L. R. A.

shows that it was intended to have effect in this State. It appears from the face of it that it was an assignment in the State of New York; and not intended to have effect in this State alone, but to have effect generally, wherever the assignors had property. We do not think that the latter part of section 8, *supra*, applies to contracts of this sort. We think that that part of the section means that, if this contract had been made in New York, to be performed in this State, then it must be executed in accordance with the laws of this State. But, as we have seen, the contract was intended only to have effect in the State of New York.

It may be said, however, that Baker & Clark, the assignors, had debts due them by citizens of this State, and those debts were assigned in this instrument, and to that extent it was intended to have effect in this State. We do not think that this is a sound proposition. The debt owed them by the garnishees in this State had no *situs* in this State. The rule is that the *situs* of a debt follows the creditor, and, where the debtor and creditor reside in different States, the law of the domicile of the creditor prevails. A debt is not a *corpus* capable of local position, but purely a *jus incorporale*. Story, Conf. Laws, 8th ed. 559.

"A chose in action cannot surely be said to have any actual *situs* in the place where the debtor resides. As a general principle, it is payable at the residence of the creditor if not expressed otherwise; and a tender, to be good, must be made to the creditor." Burrill, Assignments, 471.

The *situs* of the debt being at the domicile of the creditor, the creditor had a right to transfer it to his assignee for the benefit of his creditors. Story, Conf. Laws, 558, says: "The reasoning of Lord Kenyon, in a celebrated case (*Hunter v. Potts*, 4 T. R. 182, 192), would certainly lead to the conclusion that an assignment of personal property, whether it were of goods or debts, according to the law of the owner's domicile, would pass the title in whatever country it might be, unless there were some prohibitory law in that country."

2. But it is said that the assignment, not having attached thereto the schedules of assets and of indebtedness as required by our law, contravenes the policy of our law, and is therefore void. That is true if these schedules are a part of the contract. Our law is that, whenever the contract itself violates the policy of our law, it is void, and cannot be enforced in the courts of this State. We are referred to the following cases to show that this assignment is void: *Herschfeld v. Dazel*, 12 Ga. 582; *Stricker v. Tinkham*, 35 Ga. 176; *Mason v. Stricker*, 37 Ga. 262; *Miller v. Kernaghan*, 58 Ga. 155; *Prieston Mfg. Co. v. White*, 68 Ga. 96.

We have carefully read the cases referred to, and such of them as are in point establish the principle we have just laid down; that is, that, if the contract itself contravenes the policy of our law, it will be void in this State. In the cases in 12 Georgia, 35 Georgia, and 37 Georgia, *supra*, the assignments gave a preference to one creditor over another, which at that time made them void, under our law; and the property, in each of these cases, was situated in this State.

We do not think that the Acts of the Legisla-

ture requiring schedules to be annexed to the deed of assignment made these schedules a part of the contract, nor do we think that these Acts apply to contracts or assignments made out of this State. An inspection of the Acts relied on will show that it was not the intention of the Legislature that they should affect contracts or assignments other than those made in this State. While it is in the power of the Legislature to enact laws declaring that all assignments made out of this State, and not executed in conformity with our law, shall be void as to property found here, we do not think it has done so.

We think these requirements concerning schedules were made for the protection of the creditors of the assignors, and were intended to prevent fraud on the part of the assignors, by throwing greater restrictions around assignments, and compelling the assignors to give a correct statement under oath to their creditors of all their assets, and of all their indebtedness, and of the persons to whom they are indebted, and where those persons reside. We therefore do not think that the schedules are parts of the contract; and, as we have seen, it is only when the contract element violates the policy of our law that the assignment is void.

We are strengthened in this view by the following decisions made in other States upon questions somewhat similar to the one now under discussion:

In the case of *Sanderson v. Bradford*, 10 N. H. 260, it was ruled that although the oath of the assignor, made in Massachusetts, and sufficient in that State, would have been insufficient in New Hampshire, and would have rendered the assignment void if made in New Hampshire, yet, the assignment being valid in Massachusetts would be held to be valid in New Hampshire.

In Vermont the statute required an inventory of all the property assigned to be attached to the assignment; an assignment was made in New York without this inventory; and it was held that a New York assignment without this inventory would be valid, and that the Statute of Vermont requiring the inventory to be attached to the assignment did not apply to assignments made out of that State. *Hanford v. Paine*, 32 Vt. 448. See the able and learned opinion of Chief Justice Redfield in that case. See also *Atwood v. Protection Ins. Co.* 14 Conn. 555.

In *Ockerman v. Cross*, 54 N. Y. 29, the court held that the statute law of New York regulating assignments for the benefit of creditors did not apply to foreign assignments; and that such assignments, if valid by the law of the place where made, although not in conformity to the Law of New York, would protect the property assigned from attachment. The same principle was held in the case of *Bentley v. Whittemore*, 19 N. J. Eq. 462; also in the case of *Chafee v. Fourth Nat. Bank*, 71 Maine, 514.

In *Re Paige & S. Lumber Company*, 81 Minn. 136, it was held that "The statute which declares void assignments not made to residents of this State, and such as are not filed as prescribed, was intended to apply only to assignments made within this State. It does not change the unwritten law relative to the validity of foreign assignments."

2 L. R. A.

In the case of *Weiden v. Maddox*, 66 Tex. 372, it was held that if a voluntary assignment covering property in more than one State is deemed valid, it would be sufficient under the law of the domicile of the assignor, and under the law of the State where the property is situated, to pass title, notwithstanding local laws regulating the administration of the trust property be not complied with.

It therefore appearing that this was a legal and valid assignment in the State of New York, where it was made, and that it was not intended to take effect in this State, that no part of the contract of assignment contravenes the policy of our law, and that the assignor had no property in this State; and the requirement of our statute as to schedules being no part of the contract, it follows that *the judgment of the Trial Judge was erroneous, and must be reversed.*

WESTERN & ATLANTIC R. CO., *Pfg.*  
in *Err.*,

EXPOSITION COTTON MILLS.

(....Ga....)

1. **Liability as the last of several connecting roads**, under Georgia Code, § 2084, cannot be avoided by the last road named on the through bill of lading of a shipment from Boston to Atlanta and which runs into Atlanta, by the simple fact that it pushed the cars to the track of another railroad in Atlanta, and procured that road to haul them with its engine two and a

NOTE.—*Carriers, of freight; rights, duties and obligations.* There is no difference between carriers by land and carriers by water in respect to their rights, duties and obligations; each incurs the same liabilities, and is subject to the same duties and is governed by the same rules of law. *King v. Shepherd*, 3 Story, 349; *Elliott v. Rosell*, 10 Johns. 1; *Baxter v. Leland*, Abb. Adm. 350; *Maury v. Talmadge*, 2 McLean, 157; *N. J. Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 423 (12 L. ed. 465); *Dale v. Hall*, 1 Wils. 281. The duty of the carrier extends to all that relates to loading, safe keeping and transportation, and right delivery; and for all these he is liable. *Clark v. Barnwell*, 53 U. S. 12 How. 272 (13 L. ed. 945); *The Lady Pike*, 38 U. S. 21 Wall. 15 (22 L. ed. 508); *The Niagara v. Cordes*, 62 U. S. 21 How. 27 (16 L. ed. 47); *Laveroni v. Drury*, 8 Exch. 166; *The Commander in Chief*, 68 U. S. 1 Wall. 51 (17 L. ed. 611); *Richardson v. Winsor*, 3 Cliff. 402. He is chargeable with damages occasioned by the delay in delivering the goods; and diminution in value is properly chargeable as an item. *Wilson v. Lancashire & Y. R. Co.* 9 C. B. N. S. 632; *Kent v. Hudson River R. Co.* 22 Barb. 278; *The City of Dublin*, 1 Ben. 58. But consult *Jones v. New York & E. R. Co.* 29 Barb. 633. An exemption in a bill of lading, not accountable for rust, does not exempt from responsibility for damage caused by improper storage. *Dedekam v. Voss*, 3 Blatchf. 44; *The Invincible*, 3 Sawy. 176. The common-law obligations of a railroad company to a connecting line are the same as to reception, transportation and delivery of freight as those existing between a railroad company and the individual shipper. *Shelbyville R. Co. v. Louisville C. & L. R. Co.* 32 Ky. 541. Where a common carrier receives goods to carry, marked to a particular place beyond his line, he is bound under an implied agreement, from the marks and directions, to carry to and deliver at that place, although it be a place beyond his own line of carriage. 111. Cent. R. Co. v. Copeland, 24 Ill. 332; 111. Cent. R. Co. v. Johnson, 84 Ill. 389; 111. Cent. R. Co. v. Frankenberg, 54 Ill. 88; *Chicago & N. W. R. Co. v. Montfort*, 60 Ill. 175; *Erie R. Co. v. Wilcox*, 84 Ill. 239; *Wabash St. L. & P. R. Co. v. Jageman*, 2 West. Rep. 364, 115 Ill. 407.

quarter miles and deliver them to the mills to which the goods were shipped.

2. **A declaration** alleging that defendant was only one of connecting railroads of a continuous line, and received from another railroad named certain machinery easily injured by exposure, which it negligently transported in open cars, states a common-law action, and is not sufficient to raise the question of defendant's liability under Georgia Code, §2064, making the last of several railroads which receive goods in good order responsible for any damage, open or concealed, to the goods. A plaintiff relying on the provisions of this statute for recovery should put defendant on notice of his intention thereof by proper allegations in his declarations, as the proof and the liability thereunder are entirely different from that of a common-law action.
3. **A contract in a bill of lading** for a shipment from Boston to Atlanta, although it would not have been a good contract if made in Georgia, can be enforced in that State if it is a good contract in Massachusetts and was not intended to take effect wholly in Georgia, but was to be partly performed in several different States, including Massachusetts.
4. **The carrier may be liable** for damage caused by the weather or rust, if occasioned by its negligence, or by unreasonable delay upon the road—although the goods were shipped at the owner's risk.
5. **If a shipper of machinery agrees** that it may be transported upon open cars, the carrier may still be liable for damage by rust or by the weather during a detention on the road, if ordinary diligence required the carrier to cover the cars during such detention and it fails to do so.

(November 5, 1883.)

**ERROR** from the City Court of Atlanta, to review a judgment in favor of the plaintiff below in an action for damages for injury to certain machinery in the course of transportation. *Reversed.*

The facts, and questions presented, are stated in the opinion.

*Mr. Julius L. Brown* for plaintiff in error.

*Mr. B. F. Abbott* for defendant in error.

*Simmons, J.*, delivered the opinion of the court:

The Exposition Cotton Mills, of Atlanta, Ga., sued the Western & Atlantic Railroad Company for damages, upon the following state of facts:

The plaintiff purchased from Riley & Co. certain cotton mill machinery, and made a contract with the Virginia, Tennessee & Georgia Air-Line to ship the machinery from Boston and other places in the East to Atlanta, at a reduced rate of freight, and at the "owner's risk." The different roads over which it was to be shipped were mentioned in the bill of lading, commencing with the New York & New England Railroad Company, and ending with the Western & Atlantic Railroad Company; the latter having its terminus in the City of Atlanta. A portion of this machinery was shipped from Boston some time in September, and arrived in Atlanta some time in October—being over thirty days on the route. When this portion of the machinery arrived in Atlanta, and was delivered to the Exposition Cotton Mills, it was found to be badly damaged by rust.

2 L. R. A.

The delivery at the mills was made by the Georgia Pacific Railroad Company, to which the Western & Atlantic Railroad Company had delivered the cars containing the machinery, at its depot in Atlanta, on the morning of the 20th of October, 1882, and it carried the cars thence to the mills, two and a quarter miles from the depot. The bill of freight for the machinery was made out against the Exposition Cotton Mills by the Western & Atlantic Railroad Company, and the freight charges paid to it by the Exposition Cotton Mills.

The evidence further shows that, when this particular lot of machinery was about to be shipped, application was made to the railroad company by Leigh & Co., shipping agents of Riley & Co., for cars in which to transport it; and Leigh & Co. were informed by the agent of the railroad company that he could only furnish flat cars. These flat cars were accepted by the shippers, and the machinery was loaded thereon, and started south towards Atlanta. In one of the contracts for the shipment of the machinery, it was stipulated that the machinery, after it was first loaded, should not be changed to other cars, but should go through on the same cars to its destination.

It was stipulated in the bill of lading that the railroad company should not be held liable for "any loss or damage arising from the following causes, viz.: fire from any cause, on land or water . . . freshets, floods, weather . . . explosions, accidents to boilers and machinery . . . insufficiency of package in strength or otherwise, rust, dampness," etc.

On the trial of the case, the jury returned a verdict for the plaintiff. The defendant made a motion for a new trial, which was overruled by the court, and it excepted.

The view we take of this case renders it unnecessary for us to discuss all of the forty-seven grounds of this motion. There are certain legal principles which control the case, and when they are discussed and decided they will sufficiently determine the liability of the railroad company under this form of action:

1. It was contended by counsel for the plaintiff in error that the Western & Atlantic Railroad Company was not the last road receiving the machinery, and therefore was not liable, because it delivered the cars containing the machinery to the Georgia Pacific Railroad Company. The court below, however, instructed the jury that, under the contracts of shipment, the Western & Atlantic Railroad Company was the last road. We do not see any error in this charge. This was a through bill of lading from Boston to Atlanta, and, according to one of the stipulations therein, the machinery was to be delivered to the Exposition Cotton Mills in Atlanta by it and its agents, the railroads mentioned therein. The Western & Atlantic Railroad Company was one of the roads mentioned, and made out its freight bill against the Exposition Cotton Mills, and the freight charges were paid to it by the Exposition Cotton Mills. The simple fact that the Western & Atlantic Railroad Company pushed these cars from its track to the track of the Georgia Pacific Railroad in Atlanta, and the latter carrying the cars two and a quarter miles to the mills, could not make the latter, under this contract, the last road receiving the

machinery, under a proper construction of the contract.

The bill of lading upon which this machinery was shipped, stipulated that the roads therein mentioned would deliver the machinery to the Exposition Cotton Mills in Atlanta. It does not seem to us to make any difference whether the Western & Atlantic Railroad Company delivered the machinery to the Exposition Cotton Mills in drays, wagons, or by getting the Georgia Pacific Railroad Company to haul the cars on its road with an engine, and deliver them at the mills, two miles and a quarter from the depot in Atlanta. The Western & Atlantic Railroad Company claimed protection under this bill of lading; but if it is entitled to protection thereunder, as we will show in the progress of this opinion, we think it is bound by the other terms of the contract, which put upon it the duty to deliver this freight to the Exposition Cotton Mills. Besides, it appears that the Georgia Pacific Railroad Company received nothing for carrying these cars from the depot to the mills, but that the Western & Atlantic Railroad Company received the whole freight charges.

2. We now come to the main and important point in the case. It seems to us that, under the pleadings, the case was tried in the court below upon a wrong theory. The declaration alleges that in September, 1882, the defendant was one of the connecting railroads of a continuous line from Boston, Mass., to Atlanta, Ga.; that on the 20th of October, 1882, it received from the East Tennessee, Virginia & Georgia Railroad Company, at Dalton, Ga., the following cotton mill machinery (describing it); that the machinery was of a delicate nature, and easily injured by exposure to rain or moisture; that it was negligently transported by the defendant in open cars, so that it was exposed to rain, and was rained on for five days, and greatly injured and damaged. The case was tried in the court below on the idea that it was an action brought under section 2084 of our Code. . All the rulings and charges of the trial judge were predicated upon that idea. It will be observed that no allegation is made in the declaration that the goods were received by the Western & Atlantic Railroad Company as in "good order," but the allegation is simply that they were received by it from the East Tennessee, Virginia & Georgia Railroad Company. From the evidence offered and the points made on the trial by the defendant's counsel in the court below, it would seem that his idea was that this was a common-law action, and not founded on the rule of liability laid down in the Code. We are inclined to think that counsel for the defendant was right, and the trial judge wrong. The liability of the railroad company in the two actions is entirely different.

The Code, § 2084, declares that "Where there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus, and until delivery to the connecting road. The last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods; and

such companies shall settle among themselves the question of ultimate liability."

Our Code declares that the plaintiff "shall plainly, fully and distinctly set forth his cause of action." We think that when a plaintiff sues a railroad company for loss or damage to goods *in transitu*, and relies upon the provisions of this statute for recovery, he should put the defendant upon notice thereof by proper allegations in his declaration.

As we have said before, the proof to be made in the case, and the liability of the company, are entirely different in the two actions. Under this section of the Code, when the last road receives freight as in good order, it is estopped by this statute from setting up any defense as to the loss or injury of the goods, except, perhaps, that they were injured or damaged before shipment. It cannot relieve itself of liability by showing that the goods were damaged on other railroads. It is bound to pay all damage occurring to the goods on its connecting lines, and trust to a settlement with its connecting lines, or with the road which actually did the injury. While, on the other hand, if sued on its common-law liability, the railroad company can relieve itself of liability by showing that the goods were damaged on a connecting line before it received them.

Although the presumption of law would be that the last road received the freight in good order, it could rebut that presumption by proof. Under this form of action, the last road is also entitled to all the benefits and exceptions reserved in the contract made between the shipper and the first carrier who received the goods, where it is a through contract. In this case the defendant offered proof to show that the machinery was damaged before the defendant received it, and the court refused to allow the proof to be made. It also tried to avail itself of the benefits and exceptions of the contract made with the first carrier, and this was also disallowed by the court. We think that, under this declaration, the defendant was entitled to relieve itself of liability by making this proof.

3. This contract in the bill of lading, limiting the liability of the carrier, would not have been a good contract in Georgia, but it seems that under the laws of Massachusetts it is a good contract in that State. It not being intended by the parties to take effect wholly in Georgia, but to be partly performed in several different States, including Massachusetts, it can be enforced here. It would be unjust to hold, under this declaration, that the defendant company could not avail itself of the benefit of this contract, and that it must pay the damages here, and settle with its connecting lines, when those connecting lines, under the laws of their States, could rely upon the contract and defeat a recovery when sued by the Georgia company.

Of course, none of the carriers could exempt themselves from liability arising from their own negligence. Although the goods were shipped at the owner's risk, and the carriers were not to be liable for damage caused by the weather or rust, still, if the damage was caused by the weather or rust occasioned by the negligence of the carrier, or by unreasonable delay upon the road, the carrier guilty of the negli-

gence would be liable. The owner could well say: "While I agreed to take the risk, I did not agree to take the risk of your negligence. I agreed to take the risk of the weather in open cars, if delivered within a reasonable time; but I did not agree to take the risk of the weather for over thirty days when you should have delivered in ten."

We also think that, if the shipper of this machinery agreed that it might be loaded and transferred upon open cars, the railroads should not be held liable for any damage caused by its being so loaded, or any damage which occurred during its transportation by reason of its being

in open cars. The carrier should be held liable only for his own negligence, or for the damage caused by its unreasonable detention on the road. If ordinary diligence required the carrier to cover these cars during a detention on the road, and it failed to do so, it would be liable for any damage occurring while thus detained, if the damage arose from the want of such covering.

These being the rules of law controlling this case, under the pleadings, and the trial Judge having failed to apply them, it follows that his judgment must be reversed.

## SOUTH CAROLINA SUPREME COURT.

E. STERNBERGER, *Appt.*,

CAPE FEAR & YADKIN VALLEY R.  
CO., *Respnt.*

(....S. C....)

**The South Carolina Railroad Commission** has no jurisdiction of a complaint against a railroad partly in another State, for charges for transportation partly in such other State—such transportation being interstate commerce although part of a transportation, by connecting lines, between points both in South Carolina.\*

(October 30, 1888.)

**A** PPEAL by plaintiff, from a judgment of the Common Pleas Circuit Court of Marlborough County (Hudson, J.), dismissing, on appeal from the State Railroad Commission, a complaint to the Commission which had been sustained by it. *Affirmed.*

The facts are stated in the opinion.

**Mr. Jos. H. Earle, Atty-Gen.**, for appellant.

**Mr. Knox Livingston** for respondent.

**Simpson, Ch. J.**, delivered the opinion of the court:

The plaintiff (appellant), who lives at Tatum, Marlboro County, had consigned to him from Charleston, S. C., a ton of commercial fertilizers. The railroad route from Charleston to Tatum, over which the fertilizer was transported, was first over the Northeastern Railroad and the Cheraw & Darlington Railroad to Cheraw, both roads being entirely in South Carolina; thence from Cheraw over the Cheraw & Salisbury Railroad to Wadesboro, in North Carolina, this road being partly in this State and terminating in North Carolina, at Wadesboro; thence over the Carolina Central Railroad, being entirely in North Carolina, to Shoe Heel, in North Carolina; thence, over the Cape Fear & Yadkin Valley Railroad, principally in North Carolina, to Tatum, in South Carolina, which point is about six miles from Bennettsville, S. C., where the railroad terminates.

The freight charged to plaintiff on his ton of fertilizer to Tatum was \$4.40, while the freight to Bennettsville, six miles further, on the same article, was only \$4. Under these circum-

stances, the plaintiff complained to the railroad commission that the defendant was violating section 1443, General Statutes, which forbids common carriers to charge more freight on the same goods for transporting the same a shorter than a longer distance in one continuous carriage.

This complaint was investigated by the railroad commission, the defendant resisting the complaint upon the grounds: (1) that Bennettsville was a competitive terminal point, and therefore exempt from the provisions of section 1443, General Statutes, by the terms of the proviso to said section; and (2) that the railroad state commission had no jurisdiction of the matter, inasmuch as it involved interstate commerce. These defenses were overruled by the railroad commission, and the defendant was required to correct its rates, and to refund the excessive charges. From this judgment the defendant appealed to the Circuit Judge of the Fourth Circuit, who, after full testimony upon the question whether Bennettsville was a competitive terminal point, sustained defendant's appeal upon both the grounds taken; holding that Bennettsville, being a competitive terminal point, was exempt from the operation of section 1443, General Statutes, and also that the matter involved was interstate commerce, and therefore beyond the jurisdiction of the state railroad commission. He consequently decreed and adjudged that the judgment of the commission be reversed.

From this decree and judgment the plaintiff has appealed to this court, assigning error to the Circuit Judge in overruling the two grounds upon which the judgment of the commission was based.

We will take up these grounds in the inverse order in which they were discussed by the Circuit Judge. And, first, did the railroad commission have jurisdiction?—or did the matter involve and belong to interstate commerce, and thereby deprive the state commission of jurisdiction?

The word *commerce* is a term of broad signification. It embraces considerably more than the mere bargain and sale of goods and merchandise and other property between individuals. Yes, it includes all the instruments by which it may be conducted. It embraces transportation by railroads, steamboats, ferries, etc., and all common carriers. It may be

\*See *Lehigh Valley R. Co. v. Commonwealth of Pa.*, appended to report of *Delaware & Hudson Canal Co. v. Commonwealth of Pa.* 1 L. R. A. 232.  
2 L. R. A.

carried on between individuals in the same State, or over railroads lying in the same State. It is then internal commerce, and is under the control of state legislation. Or it may be conducted and engaged in between individuals living in different States, or transported over railroads lying in and running through different States. It is then interstate commerce, and its regulation belongs to Congress.

Now, here was a purchase by the plaintiff, a citizen of South Carolina, of a ton of commercial fertilizer, from a citizen in Charleston, both of the same State. Thus far, this transaction belonged to internal or domestic commerce, and would be subject to state control, if any. But the plaintiff lived at Tatum, in Marlboro County, some distance from Charleston, and to reach him his fertilizer had to be transported by railroads to him; and, as it turns out, by railroads, some entirely in South Carolina, some in North Carolina, and others partly in both.

Now, while it is admitted that our state railroad commission has jurisdiction over all railroads commencing and terminating in the State, and over all transportation between points within the State, yet it is equally true that it has no jurisdiction over transportation running from the State into another State, or from another State into this State, or running entirely in another State. Transportation like that suggested in the two first classes mentioned would be interstate commerce, while that in the last class would be the domestic commerce of the State in which it might be conducted.

Applying these principles to the case in hand, it seems that only two of the railroads over which this ton of fertilizer was transported commence and terminate within the limits of the State—the Northeastern and the Cheraw & Darlington; and if the question here had originated out of the freights of these two roads only, one or both, then there could have been no doubt as to the jurisdiction of the commission. But the Cheraw & Salsbury road is partly in this State and partly in North Carolina, and the Carolina Central road, from Wadesboro to Shoe Heel, is entirely in North Carolina, and then the Cape Fear & Yadkin Valley is partly in the two States. Our commission has no right to adjudicate questions of freight on roads like these last three, for the simple reason that they are not South Carolina roads.

Suppose that the plaintiff had purchased this ton of fertilizer at Cheraw, and had then consigned it to himself at Wadesboro, in North Carolina, could our railroad commission have

regulated the freight on that transportation? We think not. Or suppose he had purchased at Wadesboro, and shipped to Shoe Heel, certainly upon that transportation our commission could have taken no jurisdiction, let the freight have been as exorbitant as possible. Neither would shipping from Shoe Heel to Tatum, the road running from North Carolina into our State, have given the commission jurisdiction. See our own case of *Railroad Commissioners v. Charlotte Railroad Company*, 22 S. C. 220, where this court said:

"Any regulation of freights for the transportation from Columbia, in this State, to points in the State of North Carolina, by the statutes of this State is beyond the power of the State, because of its being an invasion of the power exclusively vested in Congress by the Constitution of the United States." See also decision of *Mr. Justice Field* in the case of *Pacific Coast Steam-Ship Co. v. California R. R. Comrs.* 18 Fed. Rep. 10 (decided September 17, 1888, Dist. Ct. Cal); *Lord v. Goodall N. & P. Steam-Ship Co.* 102 U. S. 541 [26 L. ed. 224].

We think this ton of fertilizer, in its transportation from Charleston to Tatum, has practically taken the course indicated. First it reached Cheraw on South Carolina roads; then it was substantially shipped anew into North Carolina, halting at Wadesboro, to be reshipped to Shoe Heel; and thence back into South Carolina to Tatum; the route being partly on roads over which the freight thereon would be subject to the supervision of the commission if the charges complained of had been made there, and partly on roads over which the commission had no jurisdiction. The charges complained of arising on settlement with one of these last roads, the judgment of the Circuit Judge is sustained, upon the ground that the railroad commission was without jurisdiction.

Having reached the conclusion above, it is needless to discuss or adjudicate the other question as to whether Bennettsville is a competitive terminal point in the sense of the proviso to section 1448, and therefore exempt from said section. In fact, if the commission had no jurisdiction, the case was not properly before that commission, and the question suggested could neither have arisen before it, nor have been legally considered by it. We do not regard said question as before us. We therefore pronounce no judgment thereon.

*It is the judgment of this Court that the judgment of the Circuit Judge be affirmed, upon the ground hereinabove given.*

**McIver and McGowan, JJ., concur.**

## NORTH CAROLINA SUPREME COURT.

LEE

v.

MOSELEY, *Appt.*

(.....N. C.....)

**1. Under N. C. Const. art. 10, § 2, giving a homestead right in real estate not exceeding**

**NOTE.—Homestead; right, how secured.** The very idea of homestead implies occupancy of some sort, permanent or temporary, actual or constructive; 2 L. R. A.

\$1,000 in value "owned and occupied by any resident of this State," a person who moved with his family out of the State for the purpose of cultivating his wife's land there, and to make it his home until he got the property there in order, which he thought would take about two years, and then returning, is not, while so living out of the State, although returning two or three times a year for the purpose of purchasing supplies

and this, it is presumed, all statutes of homestead require. *Thomp. Homest. & Ex. § 9b.* So long as the parties actually reside in the State, and use the

and looking after property left there, a resident entitled to a homestead in North Carolina.

2. A change of residence, clearly manifested as matter of law by acts, cannot be defeated by a subsequent declaration of the person that he did not intend his acts to have that effect. (*Merrimon, J., dissents.*)

(November 19, 1888.)

**A**PPEAL by defendant from a judgment of the Superior Court for Sampson County (Shepherd, J.), upon issues found by a jury in favor of the plaintiff, upon the petition of the defendant for an order setting aside a sheriff's sale of land, and for the appointment of commissioners to assign defendant a homestead. *Affirmed.*

The facts, and questions presented, are stated in the opinion.

**Mr. B. R. Moore** for appellant.

**Messrs. W. R. Allen and J. L. Stewart** for appellee.

**Smith, Ch. J.**, delivered the opinion of the court:

The plaintiff, having recovered judgment against the defendant in the court of a justice of the peace in the County of Sampson, and caused it to be docketed in the superior court, sued out execution thereon, under which the tract or lot of the defendant was in July, 1887, sold and conveyed to the plaintiff, without assigning him a homestead. At the time of sale no claim was made thereto, but the defendant, according to the sheriff's return, then residing at Little River, in South Carolina, was notified by mail of the sale.

In February, 1888, the defendant applied by petition to the superior court, upon the allegations of fact therein contained, for an order setting aside the sale, and vacating the deed of the sheriff, and for the appointment of commissioners to lay off and assign him a homestead in the lot. Accompanying the petition is his affidavit, in which he says that he is a citizen and resident of this State, and that his removal to South Carolina was for a definite period of time, with no intent to make that his permanent home, but to return; and that such is his present purpose, after a short sojourn.

property as a home, they cannot be denied the benefits secured by the law. *Dawley v. Ayers*, 23 Cal. 108. Where a husband sold the family homestead, the wife not joining in the deed, and afterwards with his family removed from the State, and died in another State, the wife could not, after his death, return to Texas and assert her right of homestead. Her removal from the State is inconsistent with any right remaining to her former homestead, and effectually precludes her from afterwards asserting such right. *Jordan v. Godman*, 19 Tex. 275. Under a statute extending the homestead exemption to "every free white citizen of this State, male or female, being a householder or head of a family," the word "citizen" as here used, was held to be the equivalent of the word "resident," or "inhabitant." *McKenzie v. Murphy*, 24 Ark. 158. So, under a Statute of Texas reserving from execution certain chattels to every citizen or head of a family in this republic, it has been held that proof of citizenship is not necessary to entitle the debtor to the exemption; "for, although the statute uses the phrase 'every citizen,' yet this is not to be taken in a restricted sense, as designating only the native born or naturalized citizen, but in its general acceptation and meaning—as descriptive of the inhabitants of the country." *Cobb v. Coleman*, 14 Tex. 564. There is nothing in the Statute of Michigan which

Notice was given to the plaintiff of an intended motion to this effect, to be made before the judge on March 2, 1888. At April Term, 1888, the application was heard, and a single issue submitted to the jury, to wit: Was the petitioner, A. A. Moseley, a resident of the State of North Carolina on July 4, 1887?

The testimony of the defendant was offered in support of an affirmative finding, and was to this effect:

"I was born and raised in Sampson County. Resided in New Hanover on July 4, 1887, and reside there now. I owned no real estate except this described in the petition. I owned this in July, 1887."

Upon cross examination he testified as follows: "I am fifty-three years old. Have a wife and one child. Left them in Horry County, S. C., last Sunday. She went there on the 17th of February, 1887. My child is seventeen years old. My wife has two other children who are of age. One of them is in New Berne, and the other is with her. She owns about 8,000 acres of land in South Carolina, and is living on other land in which she has an interest. I am farming on the 8,000 acres. I made a general crop on the same last year, and superintended its cultivation. I am cultivating also the land on which she lives. I went over to South Carolina when she did, and carried horses, mules, furniture, and farming implements. I left some of the furniture in New Hanover, but no beds. I left one half dozen stool chairs and some other things, inconvenient for me to carry, some carts, and a few hogs. I came back to Wilmington, N. C., two or three times, and got some supplies for my farms in South Carolina. I did my trading in Wilmington, N. C., and went down to see the party I left on the New Hanover place. There was a division of the land in South Carolina three years ago, and my wife's share was 8,000 acres or more. There is a part still undivided, in which my wife has an interest, and on this we live. These farms were rented, and were going down when the division was made. There was only a small house on my wife's draw. I couldn't find anyone to take it in charge as it was. It was idle the year 1886. I told my wife there was only one way to do with

contemplates that a wife who has never lived on the premises, or claimed to live there, may, after her husband's death, claim such an interest, by relation, as will avoid his dealings with property which he never meant should be the home of the absentee. The statute of that State which, after a husband's death, secures rights to his widow, is confined expressly to resident widows. *Stanton v. Hitchcock* (Mich.), 7 West. Rep. 618.

**Removal from the State.** Where a husband and wife had a right of homestead in certain land in Texas, and the wife removed to Georgia with her children and remained permanently there, and the husband went to Mexico with the army and died there, so that the widow had become in fact a citizen of Georgia, it was held that she could not assert a right of homestead in the land as against a person claiming under a deed from the husband. *Trawick v. Harris*, 8 Tex. 812. In Indiana a person who has had an exemption of personalty set off to him loses his right to retain it by removing from the State; since he ceases to be a "resident householder." 2 *Gavin & Ford*, Ind. Stat. 368, § 1; *Finley v. Sly*, 44 Ind. 269. So, in Indiana, a debtor who has had a chattel exemption laid off to him loses it by removing from the State, so that he cannot claim it if a second execution is issued on the same judgment. *Finley v. Sly*, 44 Ind. 269.



the property, and that is to go and move to South Carolina; that I could fix the place in two years so as to get rent. I told numerous parties before I left that I was going to move to South Carolina. I left South Carolina last Sunday to come here to this court. I have crops on both places in South Carolina for the present year. I was confident I could fix the place in about two years. I expected to return in the winter of 1888, and I still expect to return and make my residence in North Carolina. I have never intended to change my residence. I was a justice of the peace in New Hanover July 4, 1887. I haven't tried a case since I left for South Carolina, and have not transacted any business as a justice of the peace."

The counsel for petitioner asked the court to instruct the jury as follows: "That if the defendant left New Hanover County to go to South Carolina for the purpose of remaining there for a definite period, to wit: for the period of two years; and at the time of such removal he intended to return at the expiration of such period; and that he did not at any time intend to change his residence except for the foregoing purpose—then the defendant was an actual resident of New Hanover."

The court declined to give this instruction, but gave the following: "If in February, 1887, the petitioner, Moseley, moved with his family to South Carolina, for the purpose of cultivating his wife's land there, and to make it his home until he got the property there in order, which he thought would take about two years, and then return to North Carolina, and he has so lived in South Carolina ever since, and is now living there, making that his actual home, returning to Wilmington only two or three times a year to purchase supplies for his operations in South Carolina, and looking after some property he had left in New Hanover County, then you'll find that he was not a resident within the meaning of this issue." The jury answered the issue, "No."

The petitioner moved for a new trial. Motion overruled. Judgment. Appeal prayed. Notice of appeal waived. Appeal granted, and bond fixed at \$25. The foregoing case agreed by counsel.

The Constitution of the State confers a right of homestead in land which shall be for a limited time exempt from execution or other final process obtained on any debt, with the dwelling and buildings used thereon, "owned and occupied by any resident of this State," not exceeding \$1,000 in value (Const. art. 10, § 2); and the only inquiry the appeal requires us to make is as to the correctness of the construction put upon the words, "a resident of this State," by the judge in his charge to the jury.

We think it clear that the Constitution does not contemplate a double or divided residence in different States, so that, if a similar exemption is provided in each, a party can have his exemption allotted to him in both. The preceding qualifying words limiting the claim to a lot "occupied" as well as "owned" by a resident, forbids its assertion in a case like the present, where all the facts, outside of the defendant's declared intent, point to an absolute and permanent removal.

Can there be any doubt that a person removing, under like circumstances, from South

Carolina into this State, with his family and domestic implements and furniture, into a dwelling on land of his wife which he cultivates for two successive years, would thereby become a resident, entitled to all the rights incident thereto; or, if the removal was to other land of his own, such occupation would not secure to him a homestead therein of which a creditor could not deprive him? If he would thus acquire a right to an exemption in the State to which he goes, of necessity he loses it in the State from which he removes; for, under similar laws, he would not have it in both.

So, when all the acts of the debtor show an actual removal, as they do in this case, an effort to secure a constitutional exemption could not be thwarted by proof of declarations of an intent inconsistent with those acts in which it is expressed. In like manner a secret or avowed intent to return to a forsaken home, when one has been acquired in another State, cannot preserve a privilege accorded to one who has a present and existing residence, and only so long as that residence lasts.

Very little aid can be derived from the law of domicile, and little more from the adjudications in other States, where the homestead is deemed a home, protected from the creditor only when occupied as such, and ceasing when the place is no longer the debtor's home.

"When a resident removes from the State and becomes a resident elsewhere," remarks Merrimon, J., in *Baker v. Legget*, 98 N. C. 304, "he thereby abandons, relinquishes, his right of homestead. As to him it becomes suspended. He ceases to be within the terms, the purpose, or spirit of the constitutional provision; and all the property, both real and personal, that he may leave behind, becomes at once subject to the satisfaction of his debts."

The same proposition is enunciated by the court in *Munda v. Cassidy*, 98 N. C. 565, where the party had been absent seven or eight years employed on board a steamboat in Florida, yet intended to return in the future to his former home in Wilmington. In reference to this point the court says: "Our Constitution and statute do not extend to such a case. The person must be a resident, actual and not constructive, to be entitled to the exemption. This is made clear by the section securing the homestead to insolvent debtors, when 'owned and occupied by any resident of this State.' The benevolent provision is for our own citizens—those who have a residence among us—and must be construed as not embracing cases of mere domicile, when the rights incident to domicile may be retained until a domicile is obtained elsewhere."

It suggested itself during the argument that perhaps the question of intent should have been left to the jury in determining whether the first residence is retained, so as to secure the home of the debtor for his occupation when he should return. But upon further consideration we approve of the form of the charge, because all the facts forming the hypothesis upon which the instruction is predicated, develop an intent to change, as in fact the debtor does change, his residence; and the effect of his acts cannot be defeated by his declaration that he did not so intend.

It is important that legal rights should rest

upon facts proved, with their attending consequences, and not upon an undisclosed purpose at variance with them. So we are of opinion that the enumerated facts do in law, if so found by the jury, constitute a change of residence under this clause of the Constitution.

*There is no error, and the judgment is affirmed.*

**Merrimon, J.**, dissenting:

Without scrutinizing the instruction which the court gave the jury, I am of opinion that it should also have given that, or the substance of it, which the plaintiff requested it to give, because there were two distinct views of the evidence that might reasonably have been considered—one, that given, favorable to the defendant; the other, as certainly favorable to the plaintiff. When this is so, common justice requires that the court shall submit both views, with proper instructions as to each; especially when the complaining party requests the court to give that favorable to him. In such a case it is error not to do so. To submit one view, and not the other, will generally mislead the jury more or less.

It is not questioned, it seems, that under the Constitution and statutes applicable, the plaintiff was entitled to homestead, as claimed by him, if he had not abandoned it by removing from this State. Parts of the evidence produced on the trial tended to prove that he did not leave it with the view and purpose to abandon his residence in this State. On the contrary, he testified in his own behalf, expressly, that he did not intend by going to the State of South Carolina to change his residence; that he went there for a special temporary purpose, mentioned and explained, to be absent two crop years, and to return in the winter of 1888; that he still expected to return; that he left some of his personal property in this State, and also certain real property—that in which he claims homestead—and to some extent he kept up his business relations in it. The purpose for which he went was not of itself such as necessarily implied permanent residence in South Carolina at a place not distant from his place of residence in this State. In view of such evidence, it seems to me that the court should have told the jury that if it satisfied them that the plaintiff did not intend to abandon his residence in this State, then they should respond to the issue submitted to them in the negative. I do not question that if a resident of this State entitled to a homestead therein removes from it with a view to change his residence, and does so, he thereby abandons his homestead and his right to have it, and leaves the real property in which it was or might have been allotted to him exposed to the rights of his creditors to subject the same to the discharge of their debts due from him. This is certainly true. *Baker v. Legget*, 98 N. C. 804.

But here the pertinent questions arise, Who is such a resident; and when does he cease to be such? I will endeavor to answer them briefly:

The Constitution (art. 10, § 2) secures to any resident of this State "the right of homestead." Who is such a resident, in the sense of this provision? The plain purpose of it is to secure to such residents, as such, a home—a homestead—

the same to "be exempt from sale under execution or other final process obtained on any debt;" and the interpretation of the word "resident" must be such as effectuates this purpose. A resident, then, in such sense, is a person who has his home—not his temporary home, not his home for a temporary purpose, but his permanent home—that which is established—in this State, and he has no present purpose to abandon it temporarily or permanently, while at such home or abroad, and, when he leaves it for any purpose, he has *animus revertendi*. It is not essential to such a home, nor does it in effect imply, that the owner thereof—the resident therein—shall be constantly personally present at it. He may be temporarily absent from it—from the State in which it is situated—for purposes of business or pleasure. His family may be with him, or absent elsewhere; and nevertheless, his home—his residence—in a legal sense, is in this State. He continues to be a resident of it, and he and his family may return at their will and pleasure to their home.

A resident of this State means one who has his permanent home in it, whether he be at home or not, if he has *animus revertendi*; hence, if a resident of the State goes out of it to remain absent, say for years, in the execution of the duties of a public office, he does not by such absence lose his residence in it, or the advantages arising from it. And so, also, if a mechanic goes out of the State to build a house or mill, and return; or a builder of railroads goes out of it, to be gone two or three or more years, to construct such a road—he does not lose his residence, or the benefits arising from it; nor any more will a farmer lose his residence, or the advantages arising from it, who goes beyond the State temporarily for a year or two or three, to repair and put his farm there, or that of his wife, or that of another person, in condition to be useful and profitable, and fit to be let. Mere absence from the State, in such and like cases, does not work a loss of residence or of its benefits; nor does it necessarily imply abandonment of residence, and therefore an abandonment of the right of homestead. Such going from the State, such absence from it, is not an abandonment of residence. It may be evidence of it, more or less strong, accordingly as the attendant facts and circumstances tend more or less strongly to show a purpose to abandon it; and, ordinarily, whether there has been such abandonment of residence or not is a question of fact to be determined by the jury under proper instructions from the court.

It is also very largely a question of intent, and whatever evidence tends to show this intent is competent. The claimant himself may testify as to his intent, and his testimony will have more or less weight accordingly as he is more or less worthy of credit, and as it may be strengthened or impaired by other evidence. What he says and does in this State, and in the State or other country to which he goes, may be competent evidence for or against him. If he claims permanent residence, by words or acts, in the State to which he goes; if he claims and exercises the right of citizenship thereof; if he votes there, and does the like acts—such facts would be strong evidence against his right; but if his conduct showed a purpose to return to this State, and that he had not

abandoned his residence here, the facts would be evidence for him. While the laws of the State to which he goes may extend to him advantages as a temporary resident there, this would not be conclusive against his right of residence here. The residence here depends upon whether he does or does not abandon it. If he does not, he is entitled to the benefits extended to residents of this State by its Constitution and laws, although temporarily absent. *Thomp. Homest. & Ex. § 268 et seq.*

What I have said is not in any degree in conflict with what is decided in *Munds v. Cassidy*, 98 N. C. 558. There, clearly, the appellant had

abandoned the State. He was a sort of wanderer, without any fixed purpose to return to it. Had been absent seven or eight years; had a vague purpose to return to it. If it had appeared that he went abroad on a vessel making a voyage to Liverpool, or around the world, or to the Arctic seas, to be absent a year, or two or three years, but with a fixed, settled purpose to return to his home here, in this State, and not to abandon it, the case would have been very different. Mere removal from the State, no doubt, generally raises a presumption of abandonment, but this presumption may be rebutted by sufficient evidence.

## KANSAS SUPREME COURT.

ANDERSON, *Plff. in Err.*,  
v.  
CITY OF WELLINGTON.

(....Kan.....)

\*An ordinance of a city of the second class that declares it unlawful for any persons, society, association, or organization, under whatsoever name, to parade any public street, avenue or alley of the city, shouting, singing or beating drums or tambourines, or playing upon any other musical instruments, or doing any other act designed, intended or calculated to attract or call together an unusual crowd or congregation of people upon any of said public streets, avenues or alleys, without first having obtained in writing the consent of the mayor, or, in his absence, the president of the city council, city clerk or city marshal, in the order named, authorizing such parade, is of doubtful delegated power, is unreasonable, does not fix the conditions uniformly and impartially, contravenes common right, and is illegal and void.

(November 10, 1888.)

**E**RROR to the District Court of Sumner County (Herrick, J.), to review a conviction

\*Head note by SIMPSON, C.

**NOTE.**—*Limit of police power over religious organizations.* The provisions of the State Constitution not only prohibit all church establishments, but also guarantee to each individual the right to worship in his own way, and to give free expression of his religious views; so, a law is unconstitutional which gives to one religious sect a privilege not enjoyed equally by all. *Shreveport v. Levy*, 26 La. Ann. 671. Whatever establishes a distinction between classes or sects is to the extent of that distinction a persecution. The extent of the discrimination is not material; it is enough that it creates an inequality of right or privilege. *Cooley, Const. Lim. 490.* Under a charter which confers upon the common council power to make ordinances, among other purposes, "to prevent vice and immorality, to preserve public peace and good order, to prevent and quell riots, disturbances and disorderly assemblages," and to prevent disturbing noises in the streets, and to abate nuisances of every kind—it was held that the provisions of an ordinance that no person should make any noise in the public streets are not to be construed literally; nor are they intended to interfere with individual liberty of action in any respect, except so far as is necessary to preserve the public peace and order, and prevent public annoyance or disturbance; that a procession in the public streets is not necessarily a nuisance, and the fact that the occurrence was on Sunday does not affect the question;

2 L. R. A.

under a city ordinance. *Reversed.* (Commissioners' decision.)

The case is stated in the opinion.

*Messrs. Halsell & Ray, Ready & Ready* and *J. H. Murray* for plaintiff in error.

*Messrs. W. A. McDonald and Isaac G. Reed* for defendant in error.

*Simpson, C.*, delivered the following opinion:

On the 15th day of August, 1887, the following ordinance was duly passed and approved by the Mayor and Council of the City of Wellington, then and now a city of the second class, to wit:

"Ordinance No. 422. An ordinance for the regulation of street parades, and the prevention of public disturbances and breaches of the peace. *Be it ordained*, by the Mayor and Councilmen of the City of Wellington, Kansas: 1. It shall be unlawful for any person or persons, society, association or organization, under whatsoever name, to parade any public street, avenue or alley of the City of Wellington, Kansas, shouting, singing or beating drums or tambourines, or playing upon any other musical instrument or instruments, or doing any other act or acts designed, intended

and that it is not pertinent to inquire into the sentiments or purposes of the organization, or the expediency or propriety of their practices in a moral or religious point of view. *People v. Rochester*, 44 Hun. 106.

It is only when political, religious, social or other demonstrations create public disturbances or operate as nuisances that the law interferes, and not because of the sentiments or purposes of the movement, if not otherwise unlawful. *Re Frazee (Mich.)* 8 West. Rep. 140. A statute prohibiting the beating of a drum in the compact part of the town does not infringe the right of religious worship, secured by the Bill of Rights. *State v. White (N. H.)* 2 New Eng. Rep. 867. It seems, however, that where the beating of a drum within the compact part of the town is forbidden by the General Laws of the State, on a complaint for violation of the statute, it is no defense to show that the act was done in the performance of religious worship, in accordance with a sense of religious duty, and that no actual disturbance of the public peace, or the religious worship of others, resulted from it. See *State v. White (N. H.)* 2 New Eng. Rep. 867. The State has authority to make regulations, as to the time, mode and circumstances, under which parties shall assert, enjoy or exercise their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights and private property. *Cooley, Const. Lim. 556; Com. v. Davis*, 140 Mass. 485, 1 New Eng. Rep. 380; *State v. Freeman*, 38 N. H. 426.

or calculated to attract or call together an unusual crowd or congregation of people upon any of said public streets, avenues or alleys, without having first obtained in writing the consent of the mayor of said city, authorizing such parade. In case of the absence of the mayor from the city, such consent may be granted by the president of the council, city clerk or city marshal, in the order named; *Provided*, That the provisions of this section shall not apply to funerals, fire companies, regularly organized companies of the state militia, or United States troops. 2. Any person or persons violating any of the provisions of section 1 of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction in the Police Court of the City of Wellington, shall be fined in any sum not less than \$5 nor more than \$100, or imprisonment for a period not exceeding ninety days, or both such fine and imprisonment, in the discretion of the court. 3. This ordinance shall take effect and be in full force from and after its publication once in the official newspaper of the City of Wellington, Kansas."

The ordinance, duly signed and attested, was on the 17th day of August, 1887, published in the Wellington Morning Quind-Nunc, a paper printed and published in said city; and known and recognized as the "official newspaper" thereof, and the issue of said newspaper which contained said publication was printed, delivered, and distributed throughout the city before and by the hour of 7 o'clock A. M. of said day. At about 8 o'clock in the evening of the same day, the appellant and others, calling themselves the "Salvation Army," assembled at their hall or "barracks" in the city, and under the command of their female "captain" (Shiltz), who had seen and read the published ordinance in the morning, proceeded to parade Washington Avenue and other public streets of the city, singing, shouting and playing tambourines, etc., to attract an unusual crowd thereon, and expecting to be arrested therefor. And thereupon the arrest of the appellant, and a number of his male and female associates, was made; and appellant and two other males (the females, in consideration of their sex, having been released from arrest) were tried and convicted in the police court, from which appeals were taken to the district court, where convictions were again had; and appellant brings his case here.

He attacks the validity of the ordinance, and claims that it is void because: (1) it is not within the power of the city council to enact such an ordinance; (2) the ordinance undertakes to make that criminal which in its nature is not criminal; (3) because it gives to the officers named, not the right to regulate, but to prohibit, street parades; (4) because it is unreasonable and oppressive, and does not act upon all classes alike, and is not fair, general and impartial. It is also objected to because it had not been legally published; and because it contains more than one subject; and because it attempts to revise and amend another ordinance without referring to the same, and repealing it, in violation of sections 746, Compiled Laws 1881, p. 165.

As to the power of the council to pass such an ordinance, our attention has been called to 2 L. R. A.

sections 31, 50, 67, chap. 19, Compiled Laws 1885. These, in general terms, authorize the council to enact such ordinances as are not repugnant to the Constitution and Laws of the State, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order; may restrain and prohibit noises, disturbances and disorderly assemblies in any street, house or place in the city. This is about the extent of the legislative grant of authority.

The ordinance in question makes it unlawful for any persons, society, association or organization to parade any public street, avenue or alley of the City of Wellington, shouting, singing or beating drums or tambourines, or playing upon any musical instrument designed, intended or calculated to attract or call together an unusual crowd of people upon such street, avenue or alley, without having first obtained in writing the consent of the mayor of said city, authorizing such parades. Funerals, fire companies, regularly organized companies of state militia, and United States troops are excepted from the operation of the ordinance. Persons convicted of the violation of the ordinance may be fined in any sum not less than \$5 nor more than \$100, or by imprisonment not exceeding ninety days, or by both fine and imprisonment.

The power to pass a city ordinance must be vested in the governing body of the city by the Legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation; not simply convenient, but indispensable. 1 Dillon, Mun. Corp. 3d ed. 115, and authorities cited.

Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporations, and the power is denied. Powers encroaching upon the rights of the public or of individuals must be plainly and literally conferred by the charter. *Breninger v. Belvidere*, 44 N. J. L. 250; *Horr & B. Mun. Ord. 18*.

In addition to this, the ordinance must be reasonable, not inconsistent with the laws of the State, not repugnant to the fundamental rights, must not be oppressive, must not be partial or unfair, must not make special or unwarranted discriminations, and must not contravene common right. These restrictions upon the power of the common councils of cities in this country have been frequently imposed, and almost universally recognized in all the courts of last resort that have expressed opinions upon the subject.

The object of this ordinance, and the danger apprehended and to be avoided by its enactment and enforcement, as expressed by its terms, is to prevent calling together of a large or unusual crowd of people on any of the streets, avenues or alleys of the City of Wellington. Then the question is this: Is a street parade, with music or singing, legally objectionable in itself, or does it threaten the public peace or the good order of the community? There are other questions made in the briefs of counsel for the appellant, but we shall consider only the general legal characteristics of the ordinance; for, if it is not legal, the other questions go with it, and, if it is, they are probably not

important enough to justify reversal in this particular case.

This ordinance prevents any number of the people of the State attached to one of the several political parties from marching, together with their party banners and inspiring music, up and down the principal streets, without the written consent of some municipal officer. The Masonic and Odd Fellows' organizations must first obtain consent before their charitable steps desecrate the sacred streets. Even the Sunday School children cannot assemble at some central point in the city, and keep step to the music of the band as they march to the grove, without permission first had and obtained. The Grand Army of the Republic must be preceded in their march by the written consent of His Honor, the Mayor, or march without drums or fife, shouts or songs. It prevents a public address upon any subject being made on the streets. It prevents an unusual congregation of people on the streets, under any circumstances, without permission.

The ordinance is framed on the theory that an unusual crowd or congregation of people upon one of the public streets of a city is either of itself a disturbance of the public peace, or that it threatens the good order of the community. A crowd of people is one of the most ordinary incidents of every day life in any city of considerable size in this country. A fire, a runaway, an unusual sight, collects a crowd as if by magic; and it is not a fair estimate of the character and habits of the American people to assume that the public peace is threatened when numbers of them congregate.

We do not believe that the legislative grant of power to the city council, as enumerated in the sections above cited, can be so construed as to authorize the city council to take from the people of a city and the surrounding country a privilege exercised by them in every locality throughout the land—to form their processions and parade the streets with banners, music, songs and shouts. It is an abridgment of the rights of the people. It represses associated effort and action. It discourages united effort to attract public attention and challenge public examination and criticism of the associated purposes. It discourages unity of feeling and expression on great public questions, economic, religious and political. It practically destroys these great public demonstrations that are the most natural product of common aims and kindred purposes.

The power to pass such an ordinance should be clear and controlling before it can be upheld, and take away from the people the privilege they have exercised ever since the organization of the government.

Public parades of this character are not unlawful in their intent, purpose and result. They are not *mala in se*. If they are to be *mala prohibita*, it ought to be by some general law, and not by local regulation. "All charters and laws and ordinances must be capable of construction, and must be construed in accordance with constitutional principles, and in harmony with the general laws of the land; and any ordinance that violates any of the recognized rights and privileges, or the principles of legal and equitable rights, is necessarily void so far as it does, and void entirely if it cannot be ap-

plied according to its terms." *Fraser's Case* (Mich.), 6 West. Rep. 140.

We conclude that the city charter only grants such power to the Common Council of the City of Wellington as will enable the city to preserve the public peace, and maintain good order, subject to the limitations and conditions required by the rights of the people themselves, as secured by the general principles of the law, as exemplified by their universal action since the organization of the government, and the common occurrences in every city in the Union on every public or festive occasion. The right of the people in this State, by organization, to co-operate in a common effort, and by a public demonstration or parade to influence public opinion, and impress their strength upon the public mind, and to march upon the public streets of the cities of the States with the usual accompaniments of bands, banners, transparencies, glee clubs and all the accessories of public meetings, is too firmly established, and has been too often exercised, to be now questioned, or to be made the basis of an ordinance forbidding the same, predicated on the false assumption that they are dangerous to the peace of the public, or inimical to the good order of the city.

Of course, such parades are subject to the operation of the laws upon the subject of riots, mobs, unlawful assemblies and nuisances, whenever they become so; and city ordinances and statutes of the State already afford ample protection to the public, and ready processes to prohibit, repress and arrest offenders, whenever the original purposes of such parades are perverted, and they become criminal in character and action. "It is quite possible that some things have a greater tendency to produce danger and disorder in the cities than in smaller towns or rural places. This may justify reasonable precautionary measures, but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. That which is an actual nuisance can be suppressed just so far as it is noxious; and its noxious character is the test of its wrongfulness. There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions; but most dangerous things are not so different in cities as to require more than increased or qualified safeguards; and to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them, is not a process tolerated under free institutions. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power." *Fraser's Case, supra*.

The title to the ordinance seems to indicate that the object in view was the regulation of street parades, and regulation means to control, to govern, to subject to certain restrictions or restraints growing out of a condition of affairs, a state of public opinion, some threatened invasion of public or private rights, or some unusual commotion. The word employed necessarily implies that street parades are lawful, but that certain restrictions may be necessary to preserve the public from harm. It might be

proper, on account of the peculiar conditions of affairs in a city, that street parades should be confined to certain streets, or should be conducted within certain hours of the day, or should be forbidden in the night time, or that the police department should have some previous notice, or that there should be other reasonable regulations respecting them, justified by such a condition that it would be apparent that regulation, and not prohibition, was the object of the ordinance; because the power cannot be extended to prohibition, for the very essence of regulation is the existence of something to be regulated. *Sweet v. Wabash*, 41 Ind. 7; *McConoill v. Jersey City*, 39 N. J. L. 88; *Bronson v. Oberlin*, 41 Ohio St. 476; *Austin v. Murray*, 16 Pick. 121; *Duckwall v. New Albany*, 25 Ind. 288; *Shallcross v. Jeffersonville*, 26 Ind. 193.

It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons, combined for legal and meritorious purposes, to parade the streets with music. The use of musical instruments on such occasions is not specially objectionable. Songs and shouts, cheers and the waving of banners, have always been considered as demonstrations of approval, and not as tending to create disturbances, or provoke breaches of the peace. All these are the usual accompaniments of public demonstrations in every civilized country; and there is nothing in their use, on all ordinary occasions of this character, to justify absolute prohibi-

tion. It is not justified by common experience, and our attention has not been called to any local disturbance that would seem to create a necessity for such an unusual attempt at regulation.

All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the public streets, expressly and intelligently—such conditions operating on all of the same class alike, and being reasonable in their requirements, and not oppressive in their operation; and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he did not agree on controverted questions from calling public attention to the principles of their party, or the objects of their organization, in one of the most effectual methods known to associated effort.

For all these reasons, and because of all these results and consequences, we doubt the power of the City Council of Wellington to pass the ordinance in question, and, because it is not free from fair and reasonable doubt, resolve the question against the city, and pronounce the ordinance illegal and void.

*It is recommended that the judgment of the Court below be reversed, and the case remanded for further proceedings in accordance with this opinion.*

**By the Court:**

It is so ordered, all the Justices concurring.

## MISSOURI SUPREME COURT.

Jacob LAMPERT, *Resp't.*,

v.

F. L. HAYDEL, *Appt.*,

(....Mo.....)

**1. A restraint upon alienation of an equitable life estate may be imposed by the settlor of the estate and will be enforced in equity.**

**2. The limitation of the power of a cestui que trust to dispose of his interest in the income of property devised in trust for the use of testator's sons to enjoy the rents, issues and profits thereof during their natural lives, is valid, and an assignment by one son of his interest in such rents and profits is not valid either as to the rents already accrued or thereafter to accrue.**

(November 26, 1888.)

**NOTE.—Creation of life estate.** Generally if property is given to a man for his life, the donor cannot take away the incidents to a life estate. If a condition is so expressed as to amount to a limitation, neither the man nor his assignees can have it beyond the period limited. *Bramhall v. Ferris*, 14 N. Y. 51; *Hallett v. Thompson*, 5 Paige, 583.

**Use or income, when commences.** Where the will fixes no time for the commencement of the use of a life legacy of the residuary estate, the legatee is entitled to the use or income of the bequest as finally ascertained, to be computed from the death of the testator. *Lawrence v. Security Co. (Conn.)* 1 L. R. A. 342; *L'Jarm. Wills*, 4th Am. ed. 547; *Williamson v. Williamson*, 6 Paige, 298; *Loving v. Minot*, 9 Cush. 151; *Cooke v. Meeker*, 36 N. Y. 15; *Bartlett v. Slater*, 53 Conn. 106; *Pollock v. Learned*, 102 Mass. 34; *Angerstein v. Martin*, *Turn. & R.* 234.

**Provision against alienation.** The founder of a trust may secure the enjoyment of it to other persons, the object of his bounty, by providing that it shall not be alienable by them or be subject to be taken by their creditors; and his intention in this regard, when clearly expressed, must be carried out by the court. *Hallett v. Thompson*, 5 Paige, 583; *Sparhawk v. Cloon*, 125 Mass. 206. See *Brannan v. Stiles*, 2 Pick. 460, 464; *White v. White*, 30 Vt. 333, 344; *Armistead v. Carroll*, 8 N. J. Eq. 620, 625; *Brown v. Williamson*, 36 Pa. 338; *Rife v. Geyer*, 69 Pa. 353; *Nichols v. Eaton*, 91 U. S. 718, 727, 729 (25 L. ed. 254, 257, 258); *Hyde v. Woods*, 94 U. S. 529, 536 (24 L. ed.

264, 265). Although the will directs the whole estate to be converted into personality the interest of the *cestui que trust* is inalienable. He takes no interest in the principal fund except the right to compel the execution of the trust and the application of the income to his use. There is therefore nothing that can pass to a receiver or which can be sold by him so long as there is no income in the hands of the executor unappropriated. *Scott v. Nevins*, 6 Duer, 676; *Kane v. Gott*, 24 Wend. 641; *Clute v. Bool*, 8 Paige, 83; *De Graw v. Clason*, 11 Paige, 136; *Rider v. Mason*, 4 Sandf. Ch. 352. The inalienability of the beneficial interest of the judgment debtor in a trust of personal estate created by the will of his father was the same as if the trust was of real estate. *Campbell v. Foster*, 85 N. Y. 371. The trust may be so limited that it shall not take effect unless the beneficiary is free from debt, or that his estate shall cease upon his becoming insolvent or upon judgment being recovered against him, and shall thereupon vest in another person; but the *cestui que trust* cannot hold and enjoy his interest entirely free from the claims of creditors. 2 Pom. Eq. Jur. 536; *King v. Donnelly*, 5 Paige, 46.

**Interest of cestui que trust inalienable.** Although the will directs the whole estate to be converted into personality the interest of the *cestui que trust* is inalienable. He takes no interest except the right to compel the execution of the trust and an application of the income to his use. *De Graw v. Clason*, 11 Paige, 136; *Scott v. Nevins*, 6 Duer, 676; *Campbell*

**A**PPEAL by defendant, to the St. Louis Court of Appeals, from a judgment of the St. Louis Circuit Court (Lubke, J.), in favor of the plaintiff in an action to compel a testamentary trustee to account for the rents and profits of certain real estate. The Court of Appeals reversed the judgment and the case was thereupon transferred to the Supreme Court. *Reversal affirmed.*

The facts and question presented, are stated in the opinion.

**Messrs. J. K. Hansbrough and E. B. Adams, with Messrs. Hitchcock, Madill & Finkelburg, for appellant:**

Under the will, Junius Jacobs could not dispose of his interest in the rents and profits, in advance of their being paid over to him by the trustee; and his assignment of the same is void.

*Dougal v. Fryer*, 3 Mo. 40; *Olamorgan v. Lane*, 9 Mo. 447; *Langdon v. Ingram*, 28 Ind. 380; *Stewart v. Brady*, 3 Bush, 623; *Stewart v. Barrow*, 7 Bush, 368; 1 Washb. Real Prop. 4th ed. \*54, top p. 80, § 45 et seq.; 2 Minor, Inst. 252; *Laval v. Staffel*, 64 Tex. 370; *Blackstone Bank v. Davis*, 21 Pick. 42; *Montague v. Orane*, 12 Mo. App. 582; *Nichols v. Eaton*, 91 U. S. 716 (23 L. ed. 254); *Hyde v. Woods*, 94 U. S. 523 (24 L. ed. 264); *Spindle v. Shreve*, 9 Biss. 199; *Broadway Nat. Bank v. Adams*, 133 Mass. 170; *Pacific Nat. Bank v. Windram*, 133 Mass. 175; *Thackara v. Mintzer*, 100 Pa. 151; *Steib v. Whitehead*, 111 Ill. 247; *Pope v. Elliott*, 8 B. Mon. 56; *Camp v. Cleary*, 76 Va. 140; *Siemens v. Kleeburg*, 56 Mo. 198.

If the clause in the will restraining the aliening of the rents and profits is void, then the entire trust is void; the creation of the trust and restraining the alienation are an entirety, and utterly incapable of separation without doing violence to, and wholly ignoring, the testator's scheme and manifest intent.

*Root v. Stuyvesant*, 18 Wend. 257.

**Messrs. C. P. & J. D. Johnson, Albert Winstein, H. S. D'Arcy, and Cunningham & Eliot for respondent.**

**Sherwood, J.**, delivered the opinion of the court:

The clause of the will of George R. Jacobs, deceased, brought in question by this litigation, is as follows:

v. Foster, 35 N. Y. 571. Where the beneficial interest is in the fund itself, and the only limitation upon the right of the cestui que trust is the discretion of the trustee as to the amount to be paid from time to time, and the manner of expending the fund for the benefit of such beneficiary, such an interest is assignable by the cestui que trust, and passes to assignees under bankrupt and insolvent Acts, and is liable to be reached by a creditors' bill. *Havens v. Healy*, 15 Barb. 301; *Bryan v. Knickerbacker*, 1 Barb. Ch. 408. A power of appointment by will, conferred on a life tenant, does not empower him to devise the land charged with the payment of his own debts. *Balls v. Dampman* (Md.) 1 L. R. A. 545. In the execution of a power to appoint, the words in the will declaring that testator's debts are to be paid, must be regarded as immaterial and inoperative. *Id.*; *White v. Kaufman*, 4 Cent. Rep. 161, 68 Md. 92.

**Rule in Indiana.** Where a life estate is created in a devise named, and the same will devise the remainder to devisees also named and their lawful heirs, the devisees take an estate in fee. *Hockstedler v. Hockstedler*, 7 West. Rep. 77, 108 Ind. 503, citing *Shimer v. Mann*, 90 Ind. 122; *Biggs v. McCarty*, 58 Ind. 363; *Gonzales v. Barton*, 45 Ind. 298; *McCray v. Lipp*, 35 Ind. 118; *Andrews v. Spurlin*, 35 Ind. 262; *Doe v. Jackman*, 5 Ind. 235; *Washb. Real Prop.* 596; 2 L. R. A.

"I give and devise the next or middle lot, and the storehouse thereon . . . to the said John Byrne, Jr., and F. L. Haydel, of St. Louis County, in trust, and for no other purpose, for the use and benefit of my three sons, Wm. H., Charles A., and Junius, in equal shares, as long as they all may live, with power in my three sons to use and enjoy equally the rents, issues and profits thereof during their natural lives. When all three of my said sons have died, it shall be the duty of said trustees, or their successors in office, to convey this lot and the storehouse thereon, in fee simple, to the descendants or heirs at law of William H., Charles A., and Junius, in equal proportions, *per stirpes*. As long as any of my three sons, just named, survive, the said trustees shall hold said property in trust for the use and benefit of the survivor or survivors, and the descendants or heirs at law of the deceased . . . My object in making the foregoing disposition of my St. Louis property, and in attaching the limitations aforesaid, is to secure to my children a certain annual income beyond the accident of fortune and bad management on their part, and, with this end in view, to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their debts."

John Byrne, Jr., one of the trustees named in the will, declining to act, the defendant, Haydel, is the only acting trustee. He took charge of the property in 1878, collected the rents, etc.

In April, 1885, Junius Jacobs executed and delivered to plaintiff a deed of assignment, purporting to convey to him all the interest in the rents and profits of the property accrued, and thereafter to accrue. The defendant, having been notified of the assignment, refused to recognize it as valid. The plaintiff thereupon instituted this proceeding against him to compel an accounting, for judgment for the amount found to be due upon such accounting, and for other and further relief.

The answer of the defendant denied that the plaintiff acquired any interest in the rents and profits by reason of the assignment, and alleged that said assignment, under the terms of the will, was void. He further alleged that neither at the date of the assignment to plaintiff, nor

*Prest. Est.* 271. In Indiana, the rule in *Shelley's Case* is the firmly established law; and unless it can be affirmed that the clause respecting the power of alienation is as clear and decisive as that which created the estate, the estate cannot be cut down. *Allen v. Craft*, 7 West. Rep. 513, 109 Ind. 476; *Fountain County Coal & Min. Co. v. Beckelheimer*, 102 Ind. 76; *Ridgeway v. Lanphear*, 90 Ind. 251; *Doe v. Jackman*, 5 Ind. 235. Under the rule in *Shelley's Case* the fee passes in opposition to the apparent intent of the testator. *McCray v. Lipp*, 35 Ind. 118. Where there is a remainder limited to children or grandchildren the implication is that the first taker is invested with nothing more than a life interest in the property. *Goudie v. Johnston*, 7 West. Rep. 589, 109 Ind. 427; *Hawk. Wills*, 2d ed. 173. Upon principle, an estate created by clear words cannot be enlarged by words less clear and decisive. *Allen v. Craft*, 7 West. Rep. 513, 109 Ind. 476; *Bailey v. Sanger*, 6 West. Rep. 553, 108 Ind. 384. Hence a bequest of property to a wife "for her use during her natural lifetime" is a clear restriction not only to her life, but to her use. *Goudie v. Johnston*, 7 West. Rep. 589, 109 Ind. 427. Realty cannot be subjected to debts of life tenant. See *Balls v. Dampman*, 1 L. R. A. 545. For power of appointment by life tenant, see *Id.* For devise to wife during widowhood, see *Myers v. Adler*, 1 L. R. A. 432.



since that date, did he have any money in his hands, arising from said rents and profits, due said Junius Jacobs, or the plaintiff. His answer concludes with a prayer that the court would construe the aforesaid clause of the will, and enter a decree for the guidance and protection of him in his capacity as trustee.

The circuit court held the clause in the will restraining the alienation of the rents and profits void, the assignment valid; and, as the testimony showed that the defendant had in his hands \$168.96 at the hearing of the cause a decree was entered allowing the trustee \$30 for answering, and gave judgment against him for the residue and costs. He thereupon appealed to the St. Louis Court of Appeals, where the judgment of the lower court was reversed; but inasmuch as Lewis, *P. J.*, dissented, basing his conclusion on the ground that the majority opinion was contrary to two decisions of this court (*McDowell v. Brown*, 21 Mo. 57, and *McLaine v. Smith*, 42 Mo. 45), the cause was transferred to this court, under the provisions of section 6 of the Constitutional Amendment concerning the judicial department.

The prominent point in this cause—one which overshadows all the rest—is, Were the limitations in this will void, as being in restraint of alienation? If this question be answered in the negative, it will be needless to inquire as to the correctness of the ruling in regard to stating the account between the plaintiff and the defendant, or as to the amount due the former—since the defendant has not refused to come to an accounting with his *cestui que trust*, nor shown any unwillingness to respond to his obligation towards him; so that a negative answer, as aforesaid, disposes of the whole case, so far as concerns the plaintiff; and this is all that is necessary to do. In order, then, to determine what answer shall be returned to the question propounded, it becomes necessary to examine the clause of the will upon which both the plaintiff and the defendant rely to support their respective contentions.

An examination of that clause, in connection with the authorities, leaves no room to doubt that, taken as a whole, it lacks nothing, either of form or substance, to make the intent of the testator effective, provided that intent is such a one as a court of chancery can sanction, protect and effectuate. That the testator intended to give his sons but a limited control over the rents, issues and profits of the realty devised to the trustees—a control beginning only upon payment to them of such rents, etc.; that he intended those rents should be inalienable; that they should not be anticipated; that they should be unsubject to any debts or liens created by the beneficiaries—is quite too plain for argument; and this is especially true when the duty of the courts is considered—a duty emphasized by statute—to make the intent of a testator the pole star of construction. Rev. Stat. § 4008, *Hall v. Stephens*, 65 Mo. 670.

The validity of the devise, therefore, as against creditors and assignees, is the only question at present at issue.

It will be proper to ascertain, before proceeding further, whether the cases already cited from our own reports have any material bearing on the point under discussion. That of *McLaine v. Smith*, 42 Mo. 45, was a case

where a man attempted to place property, its rents and profits, in the hands of a trustee, so that neither could be reached by his creditors—a case where the “beneficiary himself was the donor;” and it was held that this could not be done. This was the point in judgment, and any remarks of a broader scope must be classed as *dicta*.

The case of *McDowell v. Brown*, 21 Mo. 57, was one which involved the construction of a deed, not a will. The granting clause was to the grantee, “and her heirs from henceforth and forever.” Subsequent to this granting clause were words indicating a desire on the part of the grantor that the grantee, his daughter, should not alienate the estate, but that upon her death the property should “revert to the children of my said daughter, as well living as to be born.” And on these words it was claimed that the daughter only took a life estate, with remainder to the children. But it was ruled that, the fee having passed by the granting clause, any subsequent restriction upon alienation, being repugnant to the fee granted, was void, and this was the only point in judgment. Anything else said in the case was said *arguendo*, and does not carry with it the force of an adjudication; nor does the language used, even in argument, at all bear upon the point whether there could be, as to a life estate, a restriction upon alienation.

In quite a recent case in this court, where a deed came under consideration—an instrument which contained apt and sufficient words to confer a fee upon the first taker, but failed to expressly convey a life estate to her—and the rule was invoked that the remainder over was void, we refused to apply the rule; notwithstanding there was a decided repugnancy between the legal significance of the two clauses in controversy; and we examined “the face of the entire deed in question,” and from that examination we deduced the conclusion that as the object was to give a life estate to the daughter, with remainder over to the husband, we ought to “make the intention of the parties effectual,” and so it was ruled. *Bean v. Kenmuir*, 2 West. Rep. 128, 86 Mo. 666.

That case strongly exemplifies the growing tendency in modern adjudication to give as much consideration to the claims of obvious justice as to the demands of an arbitrary and technical construction. There is nothing, therefore, in the two cases heretofore mentioned, and which occasioned the transfer of this cause to prevent the consideration of the case at bar upon correct principles, and as a case of first impression in this court.

Those affirming the validity of the clause of the will, as against the claims of creditors or assignees, have cited authorities showing that the doctrine of restraint upon alienation does not apply even to a legal life estate, but only to estates in fee; and authorities have been cited of a contrary effect. The weight of authority would seem to favor the conclusion that such restraints are not invalid, except when annexed to a legal title in fee; and there is certainly great force in the position that if a legal estate for life can be fettered by a restraint upon alienation, a more rigid rule should not prevail in regard to equitable life estates.

But it may be conceded that restraints upon

the alienation of legal life estates are invalid at law, and still it does not follow that such restraints are invalid in respect to estates in equity of a similar duration. The reasons for this view of the matter will now be presented, and they will be confined to the question here at issue, *i. e.*, whether a restraint may be imposed upon the alienation of an equitable life estate, such as was created in the assignor in the present instance.

Trusts of this character are the "creatures of equity." They had their origin in courts of chancery, and are alone cognizable in such courts. The growth of the system of jurisprudence pertaining to them has been slow and gradual in its development, and the methods and the nature of the relief given in respect of them consist in the new application of old principles to new cases as they arise according to their exigency. 1 Perry, Trusts, §§ 7, 8, 17; 1 Story, Eq. Jur. 18th ed. § 49.

Being the creatures of equity, they must be and are administered and enforced in accordance with the inherent and peculiar rules which pertain to that system of jurisprudence. Sometimes those rules accord with and are in conformity to the rules of law; sometimes they vary from them partially or totally.

It has been urged that the restraint upon alienation which is allowed in trusts for the separate use of married women is an exception which proves the rule that such restraints are not to be allowed in other cases. But it must be remembered that this exception, as well as the doctrine upon which it is grafted, are both of comparatively modern growth. The doctrine that a married woman could have a separate estate—an estate free from the control of her husband—only dates back to the first quarter of the last century.

In *Hulme v. Tenant*, 1 Brown, Ch. 16, decided in 1778, it was ruled that a limitation to the separate use did not prevent the *feme* from alienating. But it was found that this doctrine gave very insufficient protection to married women, as they were still in danger of parting with their property under the influence or coercion of their husbands. Subsequently *Lord Thurlow*, happening to be nominated as trustee of Miss Watson's settlement, directed the insertion of the words, "and not by anticipation." But even such words are not necessary if an intention to restrain anticipation can be gathered from the whole instrument. *Re Ross' Trust*, 1 Sim. N. S. 196; *Bengough v. Edridge*, 1 Sim. 199; *Doolan v. Blake*, 8 Ir. Eq. 849.

Then the question arose, when the settlement was made on a *feme sole*, whether a clause restraining alienation would apply as to a future and unknown husband. At first it was ruled that it would not. *Massey v. Parker*, 2 Mylne & K. 174. But *Lord Cottenham*, who had decided the case just cited, overruled it in *Tullett v. Armstrong*, 4 Mylne & C. 877, decided in 1840, wherein he ruled that, when property was given for the separate use of a woman, it would shift with her condition, be at her disposal when single or discover, and come anew into operation and vigor when marital relations were entered into.

It is observable of that case that it overrules the principles announced in *Newton v. Reid*, 4 Sim. 141 (decided in 1880), and *Malcolm v. O'Callaghan*, 5 L. J. Ch. N. S. 187 (decided in 1836), and other cases; that notwithstanding a restriction against alienation, yet such restriction was void unless there was a gift over in that event—the very same doctrine as that asserted in 1811 in *Brandon v. Robinson*, 18 Ves. Jr. 429, and upon which the plaintiff relies for success in the present instance.

*Lord Cottenham* was in much doubt as to the ground upon which to base his decision in *Tullett's Case*, *supra*; but finally, after much consideration, he placed it upon the broad ground that a court of chancery had an inherent power to modify estates of its own creation, and, in virtue of that jurisdiction, to establish the validity of the separate use to the fullest extent, in order to effectuate the intention of the donor, which might be defeated but for such interposition. He said: "When once it was established that the separate estate of a married woman was to be so far enjoyed by her, as a *feme sole*, as to bring with it all the incidents of property, and that she might therefore dispose of it as a *feme sole* might do, it was found that to secure to her the desired protection against the marital rights it was necessary to qualify and fetter the gift of the separate estate by prohibiting anticipation. The power to do this was established by authority not now to be questioned, but which could only have been founded upon the power of this court to model and qualify an interest in property which it had itself created, without regard to those rules which the law has established for regulating the enjoyment of property in other cases. If any rule, therefore, were now to be adopted by which the separate estate should, in any case, be divested of the protection of the clause against anticipation, it would in such cases defeat the object of the power so assumed. A *feme covert*, with a separate estate not protected by a clause against anticipation, is, in most cases, in a less secure situation than if the property had been held for her simply upon trust. In the latter case this court, with the assistance of her trustees, can effectually protect her; in the other, her sole dependence must be upon her husband not exercising that influence or control which, if exercised, would, in all probability, procure the destruction of her separate estate. In the case of a gift of separate estate, with a clause against anticipation, the author of the gift supposes that he has effectually protected the wife against such influence or control. Upon what principle can it be that this court should subject her to it, and by so doing defeat his purpose, and completely alter the character and security of his gift? The separate estate, and the prohibition of anticipation, are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together."

That case affords a striking illustration of what Judge Story so eloquently observes: "The beautiful character, pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case, in all its complex habitudes." 1 Story, Eq. Jur. § 489.

And *Lord Cottenham* frequently laid down

the rule that it was the duty of a court of equity to "adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy." *Taylor v. Salmon*, 4 Mylne & C. 141; *Mare v. Malachy*, 1 Mylne & C. 559; *Wallworth v. Holt*, 4 Mylne & C. 619.

Now, if a court of equity, in order to protect one class of trusts, creatures of its own creation, and by so doing to effectuate the intention of the author of the gift, exercises its own inherent power to model and qualify an interest in equitable property without regard to the rules which the law has established for regulating the enjoyment of property in other cases, it is difficult to see why, with a like object in view, *i.e.*, the effectuation of the gift just as its author intended it to be effectuated, such court may not lay down and declare a rule, in such a case as this, which shall be equally effectual in preventing the intention of the donor from being thwarted—a rule which injures or defrauds no one, which violates no rule of public policy, and which gives stability and protection to a provision which, originating in the warmest ties of affection, seeks to afford to the beneficiary a sure and unfailing refuge against the vicissitudes of fortune.

If a court of equity, as already seen, will guard such a trust in one case with jealous solicitude, why should it fail to do so in another, in circumstances equally meritorious? No sound reason can be urged to support a negative answer to this question, unless that be deemed a good reason which is based upon some isolated technicality. But, as a general rule, a court of equity, in administering its peculiar jurisprudence, regards substance, not form, and refuses to be hampered by the narrow confines of technical formulas. Instances almost too numerous for computation are to be found in the books where instruments void and valueless at law are held valid and enforced in equity.

Under the operation of the rule announced in *Brandon v. Robinson*, 18 Ves. Jr. 429, *supra*, while a clause against alienation is held invalid, on the ground that a donor creating a life estate could not attach to his gift conditions forbidding its alienation, yet, even by that rule, an equitable estate for life may be given, with a limitation over to a third person, should the life tenant attempt to alien it or become bankrupt; or a donor can place his bounty beyond the reach of creditors, by making it optional with the trustee whether he will pay the income to the beneficiary. In all these instances, there is more or less restraint upon the right of alienation. The only effect of the English rule where the instrument is drawn in accordance with it, and the

terms of the instrument are not complied with, is that the interest becomes forfeit, and so the creditors get nothing; and they get nothing also where there is a discretion as to payment lodged with the trustee. If this be so, it seems difficult to see why the founder of the trust may not do by a direct restraint upon alienation what he may indirectly do by another method. Sound reason would seem to maintain that such a distinction is too shadowy for a court of equity to follow; especially so, as by a direct restraint upon alienation the intention of the donor is effectuated, and by the indirect method his intention is frustrated and overthrown.

But, whatever may be the view taken by the English Courts on this question, some courts of the highest authority in this country maintain the opposite view, holding that those considerations which apply to legal estates have no application where property is transferred in trust, as in such instances the trustee takes the whole property, with the usual incidents of alienation, and in like manner the beneficiary takes the legal title to the income when it is paid over to him, and therefore the point about restraints upon alienation has no foundation either in law or in fact. This is the position taken by the Supreme Court of Massachusetts, in a cause which was twice argued (*Broadway Nat. Bank v. Adams*, 133 Mass. 170), and the trust in that case, substantially identical with that one before us, held valid.

Similar adjudications have been made in Pennsylvania from an early period in its judicial history (*Thackara v. Mintzer*, 100 Pa. 151, and cases cited); and in other States (Vermont, *Barnes v. Dow*, 4 New Eng. Rep. 717, 59 Vt. 530, and cases cited; Maryland, *Smith v. Towers*, 12 Cent. Rep. 872). The two cases just cited are quite recent, the former having been decided in 1887, and the latter in June of the present year.

The Supreme Court of the United States in *Nichols v. Eaton*, 91 U. S. 716 [23 L. ed. 254], has affirmed the validity of such trusts, and also in a subsequent case—*Hyde v. Woods*, 94 U. S. 523 [24 L. ed. 264].

The opposite view is taken in several States, and the authority in support of that view will be found in the briefs of counsel. In some States the validity of such trusts, where the fund proceeds from the bounty of another, is sanctioned by express statutes. This is true of New York, New Jersey, Illinois and Tennessee. Decisions in those States, therefore, are of no value in the discussion of the question where such statutory provisions are not involved.

*The judgment of the St. Louis Court of Appeals will be affirmed, and the cause remanded to that Court, with directions to order the Circuit Court to dismiss the plaintiff's petition.*

With the exception of *Ray, J.*, absent, all concur.

## LOUISIANA SUPREME COURT.

Fannie GUNTHER *et al.*

v.

NEW ORLEANS COTTON EXCHANGE  
MUTUAL AID ASSOCIATION, *App't.*

(....La. Ann....)

1. The fact that by the charter of a mutual benefit association a particular method of notice of assessments falling due is declared to be sufficient and binding on all members does not exempt the corporation from the operation of the principles of equitable estoppel which apply to all other persons, natural or juridical.
2. In matters affecting the execution of contracts, the doctrine of estoppel has no use or significance when the contract has been complied with. It is only in cases of noncompliance that the question arises whether the other party has, by misrepresentations or course of conduct, estopped himself from setting up such noncompliance as a ground of forfeiture.
3. Forfeitures are not favored by the law; and in cases of insurance, where the company has pursued a course of conduct which leads the insured honestly to believe that by conforming thereto his rights will be protected, the company will be estopped from claiming a forfeiture, although incurred under the letter of the contract.
4. Hence though the charter provides only for notice by posting, yet, if the company adopts the practice of always sending written notice by mail, to a particular class of members, of assessments due, and if on a particular occasion it failed to send such notice, and if the failure to pay was solely due to the want of notice, and if, as soon as informed, payment was tendered, the company is estopped from claiming the forfeiture.
5. Upon a review of the evidence, the facts of the uniform custom to send notice, and of the

failure to send it in the particular case in which the default occurred, that this was the sole cause of nonpayment, and that payment was offered as soon as knowledge was obtained, are found established, and therefore the judgment is affirmed.

(November 12, 1888.)

**A** PPEAL by defendant, from a judgment of the Civil District Court for the Parish of Orleans (Houston, J.), in favor of the plaintiffs in an action on a contract of life insurance.

*Affirmed.*

The facts are stated in the opinion.

*Messrs. Bayne, Denegre & Bayne* for appellant.*Messrs. W. F. & D. C. Mellen* for appellees.

**Fenner, J.**, delivered the opinion of the court:

The defendant is a corporation, organized as a mutual benefit association, the members of which, or their designated beneficiaries, are entitled at death to receive an amount equivalent to the sum of certain assessments which are levied upon and payable by the surviving members. Plaintiffs exhibit a certificate of the association, reciting the membership of Julius Aroni, and that, in consideration of \$20 by him paid as such, said Aroni has secured to his children (the plaintiffs), in the nature of insurance upon his life, all the benefits of said association, subject at the same time to the conditions, limitations and penalties imposed by the charter of the association.

Defendant admits the original membership of Aroni, and the right of plaintiffs to claim whatever is due in the certificate, but avers that, in accordance with the provisions of the charter, he had, prior to his death, been duly

## \*Head notes by the COURT.

**NOTE.—Life insurance; forfeiture not favored in law.** Forfeitures are odious and will only be enforced where there is the clearest evidence that that was the intention of the parties. *Bacon, Benefit Assn. & Ins. § 862.* "In transactions of this nature," it is easy to mislead by a pretense of liberality; and if the party has been misled, it is a fraud upon his rights. *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107; *Buckbee v. U. S. Ins. A. & T. Co.* 18 Barb. 541; *Ruse v. Mutual Ben. L. Ins. Co.* 20 Barb. 556; *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459; *Howell v. Knickerbocker L. Ins. Co.* 44 N. Y. 276; *Whitehead v. New York L. Ins. Co.* 3 Cent. Rep. 34, 102 N. Y. 143; *Bergmann v. St. Louis L. Ins. Co.* 2 Mo. App. 262; *O'Reilly v. Guardian Mut. L. Ins. Co.* 1 Hun, 400; *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538; *McCorkle v. Texas Ben. Assn. (Tex.)* 8 S. W. Rep. 516. The company cannot set up a default as a forfeiture if it was caused by the fraud of its agent intrusted with general authority or authority to collect. *McLean v. Piedmont & A. L. Ins. Co.* 29 Gratt. 361; *Hopkins v. Hawkeye Ins. Co.* 57 Iowa, 203. In such cases, where the conduct of the company has been misleading, the ordinary principles of estoppel apply and preclude the company from setting up the forfeiture. *Appleton v. Phoenix Mut. L. Ins. Co.* 59 N. H. 541, 47 Am. Rep. 220; *Meyer v. Knickerbocker L. Ins. Co.* 73 N. Y. 516; *Horn v. Cole*, 51 N. H. 287; *Globe Mut. L. Ins. Co. v. Wolf*, 95 U. S. 326 (24 L. ed. 337). Where the secretary of a mutual company retained the money sent in payment of overdue assessments and dues, without notifying the insured whether the amount of the remittance was satisfactory or not, such action is a waiver of the default. *Georgia Masonic Mut. L. Ins. Co. v. Gibson*, 52 Ga. 640.

2 L. R. A.

**Notification of premium due.** If it was the general practice of the company to notify the assured of the amount of the premium and the share of the profits which he, as a member of the mutual company, was entitled to receive, and the company had knowledge of the residence of the assured and failed to notify the assured, and by reason thereof a premium is not paid when due, the company cannot set up such failure to pay as a defense to the policy. *Meyer v. Knickerbocker L. Ins. Co.* 73 N. Y. 516; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572 (24 L. ed. 841); *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459; *Mayer v. Mutual L. Ins. Co.* 38 Iowa, 304. It is competent for the parties to modify the contract in regard to the payment of premiums or notice, and the terms of such modification must be complied with by the insurer. *Phoenix Mut. L. Ins. Co. v. Hinesley*, 75 Ind. 1; *Dilleber v. Knickerbocker L. Ins. Co.* 76 N. Y. 567. Yet where the company was in the habit of receiving overdue premiums and sent out letters with the words, "Every policy is non-forfeiting," printed prominently thereon, it was held that these facts were sufficient to prevent the company from insisting upon forfeiture for nonpayment of premium. *Home L. Ins. Co. v. Pierce*, 75 Ill. 423. And so where the insured was misled by a duly authorized agent of the company as to the day of payment, the nonpayment of the premium in consequence of such information cannot be set up to avoid the policy. *Selva v. John Hancock Mut. L. Ins. Co.* 12 Fed. Rep. 603. The insured may rely upon the agreement of the clerk, employed in the office of the general agent of the company, and clothed with the insignia of agency, that personal demand should be made for future payments. *Mayer v. Mut. L. Ins. Co.* 38 Iowa, 304; *Leslie v. Knickerbocker L. Ins. Co.* 63 N. Y. 37.

suspended for nonpayment of assessments, and entirely forfeited his membership, and all claims against the association.

The charter contains the following provisions:

"Upon proof of the death of a member, each surviving member shall, within ten days, pay to the secretary the sum of \$10. A notice posted in the rooms of the Cotton Exchange shall be deemed a proper notification to all members. Any member not having paid within ten days shall be suspended, and shall be treated as not being on the rolls of membership; and, in case of his death during the period of such suspension, he shall forfeit all claim upon the association; provided, however, that within thirty days from the date of such notice, upon payment of past dues, and any that would have accumulated had he remained a member of this association, his suspension shall cease. Should any member remain in default after the said term of thirty days, he can only be reinstated by a vote of the board of directors, and upon payment of all arrears."

To become a member it was essential that the applicant should be either a member of the Cotton Exchange, or holder of a power of attorney of a member or a visiting member, or an employé of said exchange; but the charter provided that "Any member may withdraw from the Cotton Exchange without severing his connection with this association."

The rule with regard to notice was evidently adopted with reference to the original conditions of membership, under which every member having access to the floor of the Cotton Exchange would have the opportunity to observe the posted notices. But, as time went on, under the operation of the provision last quoted, there arose a class of members of the association who had ceased to be members of the exchange, and had lost the privilege of access to its rooms. As to them the posting of notices in a room which they were forbidden to enter became obviously unavailing.

We do not say that this change of condition operated the creation of any new right, or imposed any duty, upon the association, to give a different notice from that required by the charter. It might have stood upon its rights, and have held the excluded members to the hard lines of their contract. But it did not choose to do so. On the contrary, it adopted the just and reasonable custom of sending by mail written notices of all assessments due, to all such members, and even to others who requested it. It is true that the president says that he told such members as spoke to him on the subject that this was a matter of courtesy, and not of right; but he does not pretend that he made such a statement to Aroni.

Aroni had ceased to be a member of the Cotton Exchange. Under the custom above indicated, notices were always mailed to his address when assessments became due, and he always paid. The custom was to send notices, as soon as an assessment was posted, to all members who, like Mr. Aroni, were not admitted to the Exchange.

In November, 1886, Mr. Aroni was stricken with cerebral apoplexy and softening of the brain, from which date until his death, in the

latter part of 1886, he remained in a state of mental incompetency.

Mr. Aroni had an office on Carondelet Street, and resided in rooms on Canal Street, both of which were known to the officers of the association charged with giving notices. In February, 1886, two deaths occurred, of which notices were received at his office, and his son, Mr. Ernest Aroni, promptly paid the assessments. On March 27, 1886, another member, Mr. Friedlander, died. No notice was ever received of this death, either at the office or residence of Mr. Aroni. Mr. Mellen, his friend and associate in much legal business, testifies that he regularly examined his mail, and that no such notice came. If it had, he would have attended to it. Mr. Ernest Aroni states he was with his father day and night at his residence, and that no such notice came there. The officers of the association testify that notices were sent out as usual, and that they presume one was sent to Mr. Aroni; but they do not profess to remember it as a fact, or to have any record of any kind to confirm their impression based simply on their ordinary course of proceeding. The liability to accidental omission in sending a large list of notices is too great to justify us in giving to this testimony sufficient weight to overthrow the presumption resulting from the fact that all other notices sent reached their destination, and that this one certainly did not.

Another fact still more strongly weighs against the defendant. On the 31st of March, 1886, Mr. R. N. Lewis, another member, died. This was several days before the expiration of ten days from the death of Friedlander, at a time when Mr. Aroni was in no manner in default, when the custom clearly entitled him to immediate notice of the assessment, and when there was no excuse for not sending it. If the former notice had simply miscarried in the mail, it is not likely that a similar accident would have happened a second time. If the latter had been received, all the consequences of the former accident would have been averted; yet it is admitted that in the second case no notice was sent. The admitted failure to give notice in this case, being without excuse, supports the probability of failure in the former, and places the association in fault. There is not the slightest ground for attributing the failure to pay these assessments to any other cause than want of notice. As soon as the default came to the knowledge of the beneficiaries, and long before the death of Mr. Aroni, the parties immediately tendered payment of all assessments due, and demanded the reinstatement of Mr. Aroni, which was refused. We, therefore, accept and treat it as a fact in the case that Mr. Aroni was not notified of any assessment which he failed to pay, unless the simple posting in the exchange operated as a sufficient notice.

The learned counsel for defendant vigorously maintain that Mr. Aroni was entitled to no other notice than the posting; that the charter is a contract to which he was a party, and by the terms of which he is bound; and that he had not, and no action of the officers of the company could confer on him, a right to any other notice than that which the charter declared should be sufficient.

We can discover no possible reason why the defendant should be exempt from the application of the principles of equitable estoppel which operate upon all other persons, natural and juridical, nor why the mere fact that there was a contract should bar their application. In matters affecting the execution of contracts, there would never be any occasion for invoking the doctrine of estoppel if the party had complied with the terms of his contract, because such compliance would be of itself a sufficient basis for his legal right. It is only when the terms have admittedly not been complied with that the question arises whether the other party has, by his representations or conduct, estopped himself from setting up such noncompliance as a ground of forfeiture. Says Mr. Bigelow: "Where a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things." Bigelow, *Estop.* Introduction, p. 64.

There can be no doubt that the long continued practice of the defendant company to send to Mr. Aroni prompt notice of every assessment as soon as made, justified him in believing that he would receive such notices, and in acting on the belief that, by paying when so notified, his rights would be protected. The case is very much stronger than that of ordinary insurance, where a fixed premium is due at a date certain, and where the insured, independently of any notice, is fully advised of his duty in the premises. Here notice of some kind was absolutely essential in order to inform the insured that anything was due. But, even in the former class of cases, it has been universally held that, however positive the terms of the contract in requiring payment, unconditionally, of the premiums when due, yet, if the company pursues the practice of notifying its policy holder before the maturity of his premiums, the latter would have the right to expect and to rely on receiving such notices; and that if the company failed to send it in a particular case, it would be estopped from claiming a forfeiture for nonpayment at the exact time. This has been held by the United States Supreme Court, using the following language:

"Forfeitures are not favored in the law, and courts are always prompt to seize hold of any circumstances that indicate an election to waive

a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting on the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the contract. In the present case it appeared that the company had discontinued its agency at the place of residence of the insured soon after the policy was issued, and had given him notice by mail, from time to time, where and to whom to pay the premium. Such notice, it would seem, had never been omitted prior to the maturity of the last installment. The effect of the judge's charge was that if this was the fact, and if no notice had been given on that occasion, and the failure to pay the premium was solely due to the want of such notice, it being ready and being tendered as soon as notice was given, no forfeiture was incurred. We think the charge was correct, under the circumstances of this case. The insured had good reason to expect and to rely on receiving notice to whom and where he should pay that installment. It had always been given before," etc. *N. Y. L. Ins. Co. v. Eggleston*, 96 U. S. 572 [24 L. ed. 841].

The same doctrine was reiterated in a later case, and was extended to a case where the insurance company was in the habit of receiving the premium, though tendered a few days after maturity, and was thereby held to be estopped from claiming a forfeiture when the premium was tendered within a reasonable time of the maturity. *Phœnix Ins. Co. v. Doster*, 106 U. S. 30 [27 L. ed. 65]. See also *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Atty. Gen. v. Continental L. Ins. Co.* 83 Hun, 138; *Thompson v. St. Louis Mut. L. Ins. Co.* 52 Mo. 469; *Flitpatrick v. Mutual & Benev. L. Ins. Assn.* 25 La. Ann. 444. The last case quoted fully recognizes the authority of a mutual benefit association, like the defendant, to change the method of notice provided in the charter, and held the company estopped from setting up a forfeiture under the charter notice, where the new notice adopted had not been given. We consider the present case as fully covered by the principle above set forth.

*Judgment affirmed.*

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

Richard LANGDON *et al.*

v.

CENTRAL R. R. & BANKING CO. OF  
GEORGIA, T. P. Branch, *et al.*

(....Fed. Rep.....)

\*1. Where A, B and C, citizens and residents of Pennsylvania, brought their

\*Head notes by SPEER, J.

NOTE.—Contract tending to create a monopoly is void. See *Gulf, C. & S. F. R. Co. v. Texas*, 1 L. R. A. 849.

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bill in the Southern District of Georgia, against D and E, citizens of Georgia, and F, a citizen of New Jersey, and G, a citizen of New York, and claimed therein an equitable lien upon or trust in the assets of F, which were entirely within the limits of Georgia and the jurisdiction of the circuit court, and in which assets the several complainants and defendants were all in a more or less degree interested,—held, that in such case the jurisdiction of the circuit court depends upon the fact that the property against which the lien or trust is asserted is within its jurisdiction rather than upon the residence of the several defendants.

1. Where a citizen or citizens of one State sue in equity citizens of other States, in the district where the property in controversy is situated, and of which one or more of the defendants is or are inhabitants,—*held*, that in such case the suit does not abate by reason of the non-residency of some of the defendants; but that the nonresident defendants who have been properly served by publication or otherwise, and who shall fail to appear, are nevertheless bound.

2. Where A contracts with B to construct a railway, for the payment of which work certain securities of the railway are pledged, and subsequently, with the approbation of B, transfers the contract and securities to C for the same object, who, in order to pay the purchase money, borrows from D and pledges him as consideration thereof part of the profits to arise under the contract,—*held*, that D becomes entitled to an equitable lien upon the contract and securities pledged to secure payment, and that B, subsequently purchasing said contract and securities, takes them subject to such lien, and the moneys and assets arising under the transfer constitute a trust as to D, enforceable in a court of equity. Especially is this so where the allegations of the bill present a strong case of fraud.

3. Under a provision of the Constitution of the State of Georgia, reciting that "The General Assembly of this State shall have no power to authorize any corporation to buy shares or stock in any other corporation in this State or elsewhere, or to make any contract or agreement whatever with any such corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly, and all such agreements and contracts shall be illegal and void,"—*held*, that a purchase by a railway company in Georgia of the contract to construct the line of a competitive company, and of the securities of such competitive company, with a view to prevent the construction of such competing line, is illegal and void, although accomplished indirectly, and constitutes all concerned in such illegal transaction trustees as to assets resulting therefrom for the benefit of persons whose rights have been invaded.

4. A bill is not multifarious although the claims of the several complainants arose under different contracts, if they are pursuing upon the same grounds and for the same reasons a common trust fund in which they are jointly interested.

(November 20, 1888.)

**MOTION** for an injunction and receiver.  
*Granted.*

Statement by **Speer, J.:**

The following is a statement of the issues involved in the cause on trial:

The complainants, Richard Langdon, J. C. McNorton and L. A. Conwell, citizens of the State of Pennsylvania, bring their bill against the Savannah, Dublin & Western Short Line Railway, a corporation of this district, the United States Construction & Improvement Company of New Jersey, doing business in the City of Savannah, James A. Simmons, of the State of New York, Thos. P. Branch, a citizen of this district, and the Central Railroad & Banking Company of Georgia, and allege—

That the Savannah, Dublin & Western Short Line Railway Company is incorporated to build and operate a railway from Savannah to Dub-

lin and Americus. That the Macon & Dublin Railway Company is incorporated to build a railroad from Macon to Dublin. That the former bought all the charter rights and franchises of the latter, and in that manner became authorized to build and equip a railroad from Savannah to Macon.

That on the 18th of March, 1887, the Savannah, Dublin & Western Short Line Railway Company (which for conciseness we will term the Short Line Company) and John McKechney, made a contract by which the company deposited with McKechney all its capital stock except \$60,000, its mortgage bonds to the amount of \$3,000,000, with its local aid and all the bonds to be issued on that part of the road between Dublin and Macon, the entire property to be delivered to be held by McKechney as security for all of his outlay on the road, with full power to him to sell or pledge the same to secure funds for its construction. McKechney, in consideration of this agreement, obliged himself to build, construct and equip the road from and to the terminal points above mentioned, subject to any changes that might be agreed on by the parties.

On the 19th of March, 1887, McKechney assigned, by written instrument, his rights under this contract to the United States Construction & Improvement Company, chartered in New Jersey to construct, build, lease or purchase railroads. This was done with the assent of the Short Line Company, and the bill alleges with distinctness that this created a trust in the Construction Company to build the road from Savannah to Macon.

On the 19th of March, 1887, the Construction Company and the Short Line Company made a supplemental contract whereby the former undertook to pay certain existing liabilities of the latter in the amount of \$19,228.92 for the pay of civil engineers' work, services and material, as indicated in a schedule attached to such contract, the payment to be deemed a part of the cost of construction. The Construction Company agreed further to pay to the Short Line Company \$28,940.95 for the charter and franchises of the Macon & Dublin Company, to enable the Short Line Company to perfect its title to the Macon & Dublin Company. Copies of the several agreements before referred to are attached as exhibits to the bill, and are not questioned.

On the 22d of March, 1887, an agreement was entered into between Thomas P. Branch, of Augusta, and James A. Simmons, of New York, reciting the facts that they had obtained the organization of the Construction Company in New Jersey, with a capital stock of 1,000 shares of the par value of \$100 each, and that 946 shares had been issued as "full paid" stock to John McKechney, and, together with \$2,700, delivered to him as the consideration for the assignment to the Construction Company of the contract of March 18, 1887, between the Short Line Company and McKechney; and that the Construction Company had undertaken to pay certain debts of the Short Line Company, amounting to about \$19,228.92, which John McKechney had not assumed; and that by "assignment and transfer duly made," the 946 shares of Construction Company stock owned by McKechney was now the property



of Branch and Simmons, share and share alike, Branch and Simmons undertaking to advance an equal portion, as necessary to pay the claims before mentioned against the Short Line Company. They agreed further to hold for three years from March 23, 1887, 510 of the 946 shares of Construction Company stock, unless otherwise mutually agreed, and that one certificate for the 510 shares should be issued to James A. Simmons and Thomas P. Branch jointly; that it could be transferred by consent of both; that its valid power should be exercised jointly.

It was agreed that the remaining 436 shares should be issued in like manner to Thomas P. Branch and Cornelius V. Sidell jointly, with like provision as to transfer. This agreement was made binding on their legal representatives and assignees. The parties were to be entitled to an interest in the said shares proportionate to the amount each paid only to the sum necessary to pay the debt of the Short Line Company.

Sidell and Branch received the 436 shares on March 23, 1887, and agreed to hold them upon the terms agreed to by Simmons and Branch, in an agreement hereafter set forth. Simmons thereafter obtained Branch's and Sidell's interest in the entire matter. He became in this manner fully possessed of the assets of the Short Line Company and the trusts of the Construction Company.

On the 20th of April, 1887, Simmons agreed with Richard Langdon, one of the plaintiffs, that if he, Langdon, would discount Simmons' promissory note for \$5,000, payable four months after, for the purpose of raising the sum which Simmons had undertaken to pay by his contract with Branch, he, Simmons, would pay to Langdon one fourth of all the gains, profits and emoluments which should accrue to Simmons by virtue of the contract before described. In case it became necessary to pay the note, Langdon and Simmons each agreed to pay an equal proportion. Langdon avers that he performed his part of the agreement, but that Simmons failed to perform his. The bill further alleges that on the 21st day of April an agreement was made by Simmons and J. C. McNorton, which was to the same effect as that made with Langdon, and McNorton, one of the complainants, gave his note the 21st day of April, 1887, to the said James A. Simmons, payable four months after date, for the sum of \$5,000. Subsequently, in lieu of this note, he gave Simmons his check for \$3,000 and a new note for \$3,000. McNorton did all he had promised, but Simmons wholly failed to keep his covenant.

On the 27th of December, 1887, the defendant Simmons, and the plaintiff L. A. Conwell, agreed that in consideration of the payment to Simmons by Conwell of \$2,300, Simmons, his heirs, assignees, etc., agreed to pay Conwell one sixth of the profits and emoluments of the contracts before described. In case the advances were repaid by the Construction Company, Simmons agreed to pay Conwell \$791.66. Conwell paid the \$2,300. In this manner the required sum was raised. Copies of all the contracts referred to are annexed and made exhibits to the bill. The complainants aver that under these several agreements they became

equitably interested in all of the contracts for the construction, building and equipment of the railway, and, further, that they become equitably entitled, to the extent of their interest, to the security of the stocks, bonds and other assets of the Short Line Road which had been originally transferred to McKechney for the purposes of the trust created in him, viz.: to build the Short Line Road, and subsequently vested in James A. Simmons for the United States Construction & Improvement Company.

They charge that they nor either of them have received any part of the net gains, profits or emoluments. Thomas P. Branch, they state, is a director in the Construction Company, a director also in the Short Line Company, and Simmons is the president of the Construction Company.

The complainants charge that Branch and Simmons, who themselves, without consulting the stockholders or other officers, managed the affairs of the Construction Company, have unlawfully, secretly and privily conspired and confederated with unknown parties to cheat and defraud the complainants; and, without the knowledge or authority of plaintiffs or the directors and stockholders in the Construction Company, they have sold to Thomas P. Branch for a nominal consideration all of their interests in the stock of the Construction Company, and that Branch and Simmons have entered into an agreement to sell and deliver the entire control of the Construction Company, with all the securities, stock and bonds, of the Short Line Company delivered to them to build, construct and equip the road to the Central Railroad & Banking Company of Georgia for the purpose of defeating the construction of the road, and to render it impossible for the Construction Company to do so, and thus to cheat and defraud plaintiffs of all returns to which they were legally entitled to their contracts. The plaintiffs charge upon information and belief that Simmons and Branch have made a large profit for themselves out of the transaction, and that their action was void and in excess of their power; that Branch and Simmons have not disclosed their designs, but have lulled plaintiffs into a false sense of security; that they will now be totally defeated of their rights and interests, which are of great value. Complainants distinctly charge that the attempted purchase by the Central Railroad & Banking Company of the control of the stocks, assets and properties of the United States Construction Company is a contract or agreement which has the effect, or was intended to have the effect, to defeat or lessen competition in their respective businesses, and to encourage a monopoly, contrary to the express provision of paragraph 4 of section 2 of the Constitution of Georgia, and that the same is therefore illegal and void and should be so decreed by the court. They allege that the amount or value in dispute exceeds the sum of \$2,000, and that all the assets and property to which they have an equitable lien are in the district and in the jurisdiction of the court.

An amendment to the bill makes a party E. P. Alexander, a citizen of Georgia residing in this district, and within the jurisdiction of the court, and the Savannah & Fort Valley Rail-

way Company, a corporation also within the jurisdiction.

The amendment further charges that the whole scheme of Branch and Simmons was a fraudulent speculation, that they had no intention to comply with the contract of the Construction Company to build and equip the Short Line Road; that the Construction Company was in truth nothing but a fiction and was used to protect Branch and Simmons from any individual liability; that they had absolute control of the Construction Company and that its capital stock was never actually paid in by them, but that Branch and Simmons adopted the favorite plan and device of corporate manipulators to realize large gains and accumulate fortune at the expense of the public, and used that as stock which was a mere fiction.

They charge, further, that the United States Construction Company is insolvent and had admitted the rights of complainants; this was made evident by placing the plaintiff Langdon on the board of directors of that company; and Branch also admitted the rights of the complainants as they are set out in the bill.

That the Savannah, Dublin & Western Railway Company also had knowledge of complainants' advancements to its construction fund and resulting rights, and placed Langdon on the board of directors of that company also, in order that he might protect the rights of himself and his associates. That E. P. Alexander, made party by the amendment, is the president of the Central Railroad & Banking Company, and contracting for the purchase and transfer of the stock of the Construction Company acted in the interest of the Central Railroad & Banking Company.

That the Savannah & Fort Valley Railway Company is a corporation recently formed of the friends of the Central Railroad & Banking Company; that E. P. Alexander is likewise its president; that it is a creature of that company; that the purchase of the stock of the stockholders of the Short Line Company was made by H. C. Cunningham and A. R. Lawton, Jr., of the firm of Lawton & Cunningham, the general counsel of the Central Railroad & Banking Company, and *ex officio*, of the Savannah & Fort Valley Railroad and the Short Line Company, and the United States Construction & Improvement Company; and that the money paid was the money of the Central Railroad & Banking Company.

The bill further charges that the Fort Valley Company and the parties in whose name the stocks purchased as aforesaid stand are not holders for value, but in truth hold them for the Central Railroad & Banking Company of Georgia; and that the assumption by the Savannah & Fort Valley Railroad Company of the Construction Company stock bought by E. P. Alexander is itself a contract or agreement which has the effect to defeat or lessen competition and to encourage a monopoly, contrary to the express provision of paragraph 4, section 2, of the Constitution of Georgia, and should be so decreed by the court. There is a general prayer for discovery, and many interrogatories addressed to E. P. Alexander and the Savannah & Fort Valley Railroad Company by which they seek disclosure of the transaction hereinbefore described, and the present relations of

the parties and their purposes and dispositions with reference to the complainants' alleged interest, and the stock and assets generally of the Short Line Company, upon which complainants seek to assert and enforce an equitable lien.

The prayers of the original bill are (1) that the attempted purchase of the contracts, stock, securities, assets and other properties of the United States Construction & Improvement Company be declared void and of no effect, and that the Central Railroad & Banking Company of Georgia be declared a trustee, for the benefit of complainants, of all the stocks, contracts, assets and other properties belonging to the Construction Company in its possession or under its control, to the extent of plaintiffs' interest; (2) that Simmons and Branch may be compelled to account generally for all money or properties received by them from the Central Railroad & Banking Company or its representatives or other parties, and that an account may be taken immediately, and that they may be declared trustees for the benefit of plaintiffs; (3) a general and special prayer for discovery, with many interrogatories to Branch and to Simmons, and others to the Central Railroad & Banking Company.

They pray for a temporary injunction until the hearing to restrain Branch and Simmons, the Construction Company, the Short Line Company and the Central and other parties defendant from consummating or carrying into effect any contract, engagement or agreement by which complainants may be defrauded of their rights, and for general relief, subpoena, etc.

In the amended bill the plaintiffs pray that E. P. Alexander, the Fort Valley Railway, the Construction Company, may be compelled to make full and complete discovery under oath of all contracts, dealings between themselves and Branch, Simmons, the Construction Company, the Short Line Company, in relation to the transfer of all the stocks, bonds, assets and other properties of the Short Line Railway Company, which were pledged with the Construction Company as security for their contract to build the road from Savannah to Macon, which may be in the possession and under the control of either of the defendants, and all copies of the correspondence, and that they attach to their answers true and correct copies of all agreements, etc.

They pray also that all of the defendants may be enjoined from removing out of the jurisdiction of this court any of the contracts, stocks, bonds, securities or other property in which the complainants are alleged to be interested; and further that the United States Construction & Improvement Company be enjoined from transferring to anyone the stock, contracts, etc., received by it from the Short Line Railway Company under the contract described; and for general relief.

There is a prayer for subpoena against E. P. Alexander and against the Savannah & Fort Valley Railway Company in the usual form.

The bill and the amendments are properly verified.

E. P. Alexander, the Central Railroad & Banking Company of Georgia, the United States Construction & Improvement Company, the Savannah, Dublin & Western Short Line

Railway Company, and the Savannah & Fort Valley Railroad Company all demur to the bill, generally, upon the ground that there is no equity in the bill; that the bill is multifarious both as to the subject matter and to the parties; that the complainants have no title such as would justify their prayers for discovery. The demurrers were overruled.

Thomas P. Branch has filed a formal answer denying that legal service has been effected upon him. The other defendants have also answered. E. P. Alexander, and the Central Railroad & Banking Company of Georgia, somewhat in detail; and the Short Line Railway Company, the Construction Company, and the Savannah & Fort Valley Railway Company adopt the answers of E. P. Alexander and the Central Railroad & Banking Company for the purpose of this motion. The answers may therefore be treated as identical. They cannot be held sufficiently responsive as answers upon the final hearing, and are apparently intended to be used simply in reply to the rule and show cause, and are so indorsed.

E. P. Alexander, in his answer, admits that he purchased from Thomas P. Branch all of the stock of the United States Construction Company, in good faith, and paid Branch the sum of \$100,000 therefor; that by the purchase he became entitled to all the stock, and the same was by his direction transferred and put in the names of the parties now holding the same; that he was not aware of the rights of the plaintiffs as evidenced by their contracts appended to the bill; that Branch exhibited to him two certificates of stock in the Construction Company, one for 510 shares, and one for 436 shares. That both of said certificates were signed by Douglas Green, President, and M. J. Verdery, Treasurer, who are known to him as the president and treasurer of the Construction Company (a copy of the certificate is incorporated in the answer); that in addition to these 946 shares he bought the stock of the following parties: M. J. Verdery, twenty shares; Thomas P. Branch, fifteen shares; A. F. McLeish of New York City, fifteen shares; Thomas A. Simmons, two shares; Edward W. Scott of New York City, one share; Douglas Green of New York City, one share.

He answers that he does not believe that the United States Construction & Improvement Company was organized for fraudulent speculation, and if it was he does not know it; that it is not more insolvent now than it was at the time the plaintiffs made their contracts with it; and that it has the same assets now that it had at the time of the sale to him, except 1,500 shares of the capital stock of the Savannah, Dublin & Western Short Line Railway Company, which have since been transferred by the Construction Company for a valuable consideration. As complainants are only interested in the profits that might accrue to Simmons under the contracts of the Construction Company and the Short Line Railway Company, if the Construction Company is insolvent there could be no profit accruing out of the contracts, and the company will not be bound to respond to the plaintiffs in any amount. He denies that the Construction Company ever admitted the rights of plaintiffs, and insists that if the plaintiffs have lost, it is from their own  
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laches. He denies that Richard Langdon was ever a director in the Construction Company, and gives as a reason that Langdon never owned any stock in said company. He denies that the Savannah, Dublin & Western Short Line Railway Company since the assignment of McKechney, could admit the existence of a lien against the Construction Company, or could bind them or any other person. He answers, further, that in acting in the purchase of the stock of the Construction Company he did not act for the Central Railroad & Banking Company, but acted in behalf of and for the interests of the Savannah & Fort Valley Railway Company, which company was duly chartered to build and operate a railway from Savannah to Fort Valley; and the stock of the Savannah, Dublin & Western Short Line Railway Company was not purchased for the Central Railroad & Banking Company, but was purchased *bona fide* for the Fort Valley & Savannah Railway Company, which company was chartered to build a road from Savannah to Fort Valley, which was the general direction in which the Savannah, Dublin & Western Short Line Railway was projected. That the stock so purchased by the Fort Valley & Savannah Railway Company was that in which the Construction Company had no interest, and was that portion of the stock of the Short Line Company which was in the names of its original projectors, and which had never been transferred or assigned to the Construction Company or to anyone else. That plaintiffs never had any interest, equitable or legal, or any lien, on said stock. This answer is verified by the oath of E. P. Alexander.

The answer of the Central Railroad & Banking Company of Georgia is verified by E. P. Alexander, also, as the president of that company. This answer denies that the Short Line Railway Company purchased from the Macon & Dublin Company its franchises or any part of them, and that the Short Line Company has no authority under its original charter or under any purchases to build a railroad from Savannah to Macon; that the contract referred to and set out in the resolution of the Macon & Dublin Railroad Company was never carried out, and it could not now be carried out, however desirable such contract might be. It admits that the contract in "Exhibit A" to the bill was entered into between John McKechney and the Short Line Railway Company; that said contract was assigned to the Construction Company under the terms set forth in "Exhibit B" to the bill; that the contract set out in "Exhibit C" was also made. As to the contract set out in "Exhibit D" as made between Thomas P. Branch and James A. Simmons, it denies any knowledge save that derived from the plaintiffs' bill.

The answer admits that it was aware that 946 shares of the stock of the Construction Company had been issued in two certificates, one for 510 shares in the name of James A. Simmons and Thomas P. Branch jointly, and the other 436 shares in the names of Thomas P. Branch and Cornelius P. Sidell of Georgia; but these certificates are now in the hands of the Construction Company, and the assignment on the back of the two certificates is signed by the parties in whose names they were issued; and

they have been delivered to the company for cancellation and the issue of new scrip therefor in names of other parties; and this has been done by the Construction Company.

It denies any knowledge of the contract between Simmons and Langdon and Simmons and McNorton and Simmons and Conwell; and it denies that either of the plaintiffs under the three agreements E, F, G, annexed to the bill, are equitably interested in any of the contracts for the construction, building and equipment of the Short Line Railway; and it denies that the plaintiffs have any interest, legal or equitable, in the stocks, bonds or other securities which were turned over to John McKechney under the first contract set out in Exhibit A. Thomas P. Branch is neither a director in the Construction Company nor in the Short Line Company. James A. Simmons is the nominal president of the Construction Company; but before the filing of the bill of complainants he had sold his interest therein, and his place in the board of directors would have been filled at the next meeting of the board. It is unaware of any conspiracy between Branch and Simmons to defraud Langdon, McNorton and Conwell or either of them; and it further says that no part or portion of the stock, bonds and other securities of the Short Line Railway was ever deposited with anyone for a security of the contracts referred to by complainants in their bill. This is stated on the knowledge, information or belief of the defendant.

The answer states further that defendant is not advised what consideration Thomas P. Branch paid for the stock of the Construction Company, but denies that Branch ever purchased an interest in the contracts to build the Savannah, Dublin & Western Short Line Railway; that all the interest in these contracts was vested in the Construction Company under the assignment made by John McKechney, and the said contracts have remained in the possession of the Construction Company ever since that assignment, and are now in its possession and owned exclusively by it.

It denies that Branch and Simmons or either of them has entered into any agreement to sell and deliver the control of the Construction Company or any of its contracts to the Central Railroad & Banking Company, and it alleges that all the stock of the Construction Company has already been sold and transferred to and is now held by the stockholders in said company, and that said Branch has no interest whatever in said company, nor said Simmons any other interest than that heretofore set out.

The defendant admits, however, that while the stock of the Construction Company is not held by the defendant it is held by persons who are interested in defendant. Defendant does not know of any purpose or intent on the part of any person to cheat or defraud either of the complainants; and if such fraud was accomplished, and if the stock of the Construction Company was intended to be held for the security of the plaintiffs for their advancements to Simmons, the laches of the plaintiffs made it possible for Branch and Simmons to dispose of said stock.

The answer denies further that the contracts, securities, stocks and bonds of the Short Line Company have been sold or transferred to this  
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defendant, the Central Railroad & Banking Company, and insists that all said contracts and securities are now held by the Construction Company, as they were at the time of the sale by Branch and Simmons, with the exception of 1,500 shares of the capital stock of the Short Line Railway Company, which have been transferred to sundry parties for money advanced to said Construction Company to carry out the purposes of its organization. It does not know what profits Branch and Simmons made. It was not advised of any limitation on the power of Branch and Simmons to transfer and assign their interest in the Construction Company. If such limitation existed and was known to the plaintiffs, they are in laches which render it possible for Branch and Simmons to transfer and sell out their interest, and plaintiffs are not, therefore, entitled to any relief as prayed for in the bill.

The answer denies that the plaintiffs have any title or interest which will justify their prayer for relief, and it denies that it has made any attempt to purchase the control of the contracts, assets and property of the United States Construction & Improvement Company.

It denies that it has the control of the Savannah, Dublin & Western Short Line Railway Company, and avers that it is under the control of its own board of directors, duly elected at its last annual meeting, which board is engaged in discharging its duties devolving on them as such directors and is endeavoring to bring order out of chaos, that has developed in the management of said company.

The answers to the interrogatories are substantially the same as the denials in the bill. The gist of the answers is as follows: That it is not true that Simmons and Branch have transferred to the Central Railroad & Banking Company of Georgia, or to persons suggested by it, the interests of the Construction Company in the Short Line Company. The Central Railroad & Banking Company has not bought, paid or promised to pay to Branch and Simmons or to anybody for such interest, but the contract was entered into by E. P. Alexander individually on the one part and Thomas P. Branch on the other part, whereby the said Alexander covenanted and agreed to pay to the said T. P. Branch \$100,000 on delivery to him of all the capital stock of the United States Construction & Improvement Company, which was duly carried out by the said T. P. Branch and the said sum of \$100,000, was duly paid by the Savannah & Fort Valley Railway Company, of which the said E. P. Alexander was and is a director, said company having assumed the said contract.

It is not true that the Central Railroad & Banking Company of Georgia has bought out the interest of the stockholders and incorporators of the Savannah, Dublin & Western Railway Company residing in Georgia.

In the answer to the fifth interrogatory the defendant said the stockholders of the United States Construction & Improvement Company are as follows:

T. G. Hillborn .....	946 shares.
E. P. Allen .....	47 shares.
C. R. Woods .....	2 shares.
H. B. Hollis .....	2 shares.
H. C. Cunningham .....	1 share.

And two shares standing in the name of James A. Simmons, which have been assigned by Simmons.

The stock book of the Savannah, Dublin & Western Railway Company shows that there are now standing 29,775 shares in the names of the following parties:

U. S. Construction & Improvement Co.	27,900
H. Blun	115
C. R. Woods	185
S. A. Woods	50
H. C. Cunningham	150
A. R. Lawton, Jr.	149
J. K. Garnett	50
A. Vettesburg	50
E. P. Alexander	49
D. M. Hughes	1
J. L. Warren	1
Douglas Green	25
J. J. Wilder	98
E. M. Green	102
F. G. DuBignon	201
W. W. Frazer	197
Wallace Cummings	204
Charles H. Dorsett	100
George J. Baldwin	175

The answer closes with a general denial of the plaintiffs' complaint and prays that the defendant be discharged, with its reasonable costs.

**Messrs. Charlton & Mackall** for plaintiffs.

**Messrs. Lawton & Cunningham** and **George A. Mercer** for defendants.

**Speer, J.**, delivered the following opinion:

The foregoing is a statement of the issues involved in the motion under consideration. Upon the hearing first had a temporary injunction was granted, as prayed for in the bill, until more complete argument could be made.

After the argument had concluded, the papers were taken *sub judice*, and the decision has just been reached.

Stripped of the amplification and verbiage of the bill, answers and affidavits, the facts may be condensed as follows:

The Savannah, Dublin & Western Short Line Railway Company, which, for convenience, will be termed the Short Line, was chartered to construct a railway from the City of Savannah to Dublin; and for the purpose of extending the road to Macon, that company secured, or attempted to secure, the franchises of the Macon & Dublin Railroad Company, which would enable it to complete the line.

It is unnecessary for the purposes of this motion to consider whether or not the Short Line actually secured the rights of the Macon & Dublin Company. It is undeniable and admitted that the Short Line made a valid contract with John McKechney to build, equip and construct its road as far as its charter rights and purchase rights permitted. The language of this contract is highly essential to the comprehension of the trust which the plaintiffs insist has been betrayed to their injury and in violation of the organic law of the State, and is as follows:

#### EXHIBIT A.

This agreement, made and entered into this 9 L. R. A.

18th day of March, A. D., 1887, by and between the Savannah, Dublin & Western Short Line Railway Company, party of the first part, and John McKechney, party of the second part, witnesseseth:

Whereas, the said party of the first part is duly incorporated under the laws of the State of Georgia, to build, construct, equip and operate a railway from Savannah, Georgia, to Dublin and Americus in the same State; and—

Whereas, the Macon & Dublin Railroad Company, a corporation also incorporated under the Laws of the State of Georgia, to build, construct, equip and operate a railroad from Macon to Dublin, in the State of Georgia; and—

Whereas, the first named company have purchased from the Macon & Dublin Railroad Company all of their rights, franchises and privileges, together with all the work done and materials furnished on said railway, as by reference to a resolution of the board of directors of the Macon & Dublin Railroad Company, hereto attached will more fully appear; and—

Whereas, the said party of the first part is now desirous of building and completing the said railway from the City of Savannah to Macon by way of Dublin, and from Dublin to Americus; and—

Whereas, the said party of the first part has already executed a mortgage on its said road, and has issued its mortgage bonds to the amount of three millions (3,000,000) of dollars, and has issued its capital stock to the amount of three millions (3,000,000) of dollars, and has secured local aid along the line of the said roads by subscription to the capital stock, at par, to the amount of about two hundred and seventy-eight thousand (278,000) dollars, and does agree that so soon as it shall be legal to do so it will properly execute and record a mortgage on that portion of its line between Dublin and Macon, and will simultaneously issue its mortgage bonds and capital stock on the same, at the rate of fifteen thousand (15,000) dollars per mile, respectively—

Now, therefore, for and in consideration of the sum of one dollar, each to the other in hand paid, the receipt whereof is hereby acknowledged, and other good and valuable considerations, it is agreed and understood as follows:

First. The party of the first part shall forthwith deposit with the party of the second part all of the before mentioned capital stock (except sixty thousand (60,000) dollars taken by the corporators), mortgage bonds and local aid which have already been issued and secured, and will further deposit with the party of the second part immediately on the issuing of the same, all of the before mentioned stock and bonds applicable to that portion of the road between Dublin and Macon. Also any and all local aid it may hereafter secure. All of which said stock, bonds and local aid shall be held by the party of the second part as security for any and all advances made, expenses incurred, moneys invested, work done, and materials furnished on said road, with full power to the party of the second part to use by sale or otherwise the said stock, bonds and local aid, for the purpose of securing the funds to carry on the

construction of said road, substantially as hereinafter set forth.

Second. In consideration of the before mentioned covenants and agreements to be kept and performed by the party of the first part, and the before mentioned stock, bonds and local aid, to the extent of three millions, seven hundred thousand (\$7,000,000) dollars of said bonds, and three millions, nine hundred and forty thousand (\$3,940,000) dollars of said stock and all local aid procured, or hereafter to be procured, by said company, the said party of the second part agree to build, construct and equip the said railroad, from and to the terminal points above mentioned, subject to any changes that may hereafter be agreed upon by the parties hereto, such road to be of single track, standard gauge, with steel rails of fifty-six pounds to the yard, to be well laid with the usual ballast in that locality, to have the necessary sidings, turn-outs, depots, water tanks, and turn tables, with 2,640 ties to the mile, which shall be of good, sound yellow pine, of not less than eight inch face, six inches thick, and eight and one half feet long.

The roadbed on embankments shall be fourteen feet wide on the top with slopes of one and one half feet horizontal to one foot perpendicular, with cuts eighteen feet wide on bottom, with one foot horizontal to one foot perpendicular, except when in rock, when it shall be one quarter foot horizontal to one foot perpendicular.

The cuts shall be properly drained with ditches three feet wide on either side, leaving a twelve foot roadbed at sub grade.

The bridges shall be what are known as the Howe Truss or Combination. The trestles and waterways shall be ample and constructed of first class material. The grades shall not exceed seventy-five feet to the mile, and the curves shall not exceed six degrees. The work on the entire line shall be done in a first class workmanlike manner, and when complete shall compare favorably with new roads of a like character that are now being constructed in the State of Georgia. The terminal and depot facilities shall be ample for the requirements of said road. The rolling stock shall be first class and of sufficient quantity to fully meet the requirements of the operation of the said road, the details of same to be hereafter agreed upon.

The said road shall be completed from Savannah to Macon in twelve months from date, and from Dublin to Americus within six months from the time of the completion from Savannah to Macon.

The said party of the first part may appoint a consulting engineer who shall at all times be ready to confer with the chief engineer of the said party of the second part, as to alignments, grades, curvatures and general character of work to be done.

The said party of the first part, through its president, A. B. Linderman, shall at all times be at the service of the said party of the second part for the purposes of securing local aids, and the necessary rights of way and terminal facilities required.

It is understood and agreed that all the covenants herein contained shall be binding on their

heirs, executors, administrators and assigns of the respective parties hereto.

In testimony whereof, the said parties hereto have set their hands and seals the day and year first above written.

Thus, to enable McKechney to raise the necessary funds to construct the road, it transferred its entire assets to him. McKechney undertook the contract, but subsequently, with the assent of the Short Line, transferred his contract to the United States Construction & Improvement Company, a corporation chartered under the Laws of New Jersey. Whatever McKechney was bound to do, the Construction Company was bound to do also, and undoubtedly, therefore, the Construction Company was bound to build, construct and equip the road of the Short Line Company as marked out in the contract. After long and patient consideration, the court has not been enabled to discover any power in the assignees of this contract to change the nature or purpose of their undertaking. The original power and vitality of the trust sprang from the Act of the General Assembly of Georgia. This created a legal entity for one purpose only, and that to build, construct and equip the railway. The contract with McKechney simply transferred the duty to execute this power to him. His conveyance to the Construction Company, of which Branch and Simmons obtained control, did not and could not alter the legal duty, its nature, extent, scope or method of performance.

In creating a charter to build the railway, the Legislature, *ex vi termini*, excludes the power in any person or corporation to suppress or defeat its construction. This is equally true of the contracts in evidence.

Of course this result can be accomplished by the nonaction of the holders of stock, lawfully issued and lawfully obtained, and we will presently reach that feature of the rights in issue.

James A. Simmons, the President of the Construction Company, which had now assumed, by the transfer, the duties devolving, under the law, upon the Short Line Company, assuming for the present that his purposes were honest and in good faith, found it necessary before he could obtain control of the contracts which were vested in McKechney, to raise \$19,228.92 to pay off immediate demands against the road. To do this he applied to the plaintiffs, Langdon, McNorton and Conwell. These parties, in consideration of the promises on his part for the Construction Company to pay to them a proportion of the profits of the building and equipment contracts which had been made with the Short Line and now to be performed by him, advanced the money in different amounts, and under the terms as set out in the contracts annexed to the bill.

It cannot be doubted that the Construction Company had the right to borrow this money, necessarily to be used in its undertaking; and it does not seem capable of fair doubt that the Construction Company would have the same right to pledge to its creditors a share of its profits as consideration and security for the loan. It was stipulated that it should be held and deemed a part of the construction fund. The plaintiffs then have a distinct equitable

interest in the work which the Construction Company has undertaken. They look to its performance for their compensation, and they do so with clear equitable right. It has undertaken by transfer the trust which John McKechney assumed from the Short Line, namely: to construct and equip its road. It has assumed, in consideration of the advances made to enable it to carry out that trust, to pay a share of its profits to those who made the advancements.

In the presence of such a trust, of such faithless trustees, and such fraud as is alleged and scarcely disputed, it would be in the domain of an ancient clearly defined province of equity jurisdiction that the relief of the plaintiffs could be found; and this is the more clear when the trustee, the Construction Company, is insolvent.

This being true, how does the case present itself to the chancellor? That the Construction Company had assets of the Short Line Company for a valuable amount—how much it does not yet plainly appear, but certainly worth, if we may judge from the price that was paid for them, \$100,000—is most apparent, and to these assets the equitable lien of the creditors will attach, if they are in the hands of the Construction Company or elsewhere within the reach of the court. Where are they? According to the theory of the answers of General Alexander and the Central Railroad & Banking Company, they now belong to new stockholders of the same company. These stockholders are admitted to be the friends of the Central Railroad & Banking Company; they are, in fact, its president and several of its directors. It is not denied that the transfer of the assets was obtained by money which was the money of the Central Railroad & Banking Company. It is true that General Alexander states in his answer that it was an individual transaction; but it is specifically charged in the bill—and specific interrogatories are put to him which would enable him to deny it if not true—that the money which bought the assets of the Construction Company was the money of the Central Railroad & Banking Company. This indeed was admitted in argument.

Another step in the argument: It is charged in the bill, and not denied in the answers, and besides it is perfectly evident to every intelligent mind, that the Short Line Railway Company, running parallel, in large measure, with the line of the Central Railroad & Banking Company, extending from Savannah toward Macon, which are important business and terminal points, and that the Short Line, if completed, would be a dangerously competitive railway; and there can be no doubt, whatever may be the forms and ceremonies of the purchase from the Construction Company of the control of the Short Line, that it was either to defeat its completion, or when completed to prevent, by harmonious control, its effective competition with the Central Railroad & Banking Company of Georgia, of which the present stockholders of the Construction Company are the president and many of the directors.

The fundamental law of Georgia upon this subject is plain and emphatic and was intended to defeat the precise transaction which, by the averments of the bill, the indisputable facts,

and the admissions of the defendants is so clearly made to appear to the court.

Paragraph 4, section 2, of the Constitution of Georgia is as follows:

"The General Assembly of this State shall have no power to authorize any corporation to buy shares or stock in any other corporation in this State, or elsewhere, or to make any contract or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts or agreements shall be illegal and void." Code, § 5097.

This is the action of the sovereign people of Georgia. They chartered the Central Railroad & Banking Company. They chartered the Savannah, Dublin & Western Short Line Railway Company. They granted to these railways vast, valuable and perpetual franchises. With these rights thus granted no power can interfere. They are perpetual; they are indefeasible; but with these rights are carried all the deterring and prohibitory effects of the constitutional inhibition, just quoted, by which the people seek to defeat the aggregation of monopolies and prevent the corporations which they permit to exist, from aggrandizement of power, to the injury or destruction of public and private rights. The court has no official concern in the policy of this law. It is too plain and significant for intelligent controversy. Whatever may be the rules upon similar topics prescribed in other States, the people of Georgia, with full power to act—with undeniable jurisdiction over the important parties here—have embodied in their fundamental law this comprehensive and vital clause, clearly intended to accomplish what they deemed the salutary and healthful result of competition in railway transportation.

Contracts in violation of this clause are not permitted. When attempted they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so.

Now, what cannot be done directly may not be done by indirection. The Central Railroad & Banking Company could not purchase the control of a railroad running parallel with its line from the same terminal points. Such a contract would be absolutely void, and being void, and an absolute nullity, no title would pass under it.

This being true, General Alexander and those who acted with him for the Central Railroad & Banking Company, cannot accomplish the same result in any other manner whatever. They cannot make the purchase to defeat the Short Line or to control it.

It is scarcely just to the intelligence of a court of equity to expect it to fail to perceive the real facts and the true purposes of the contracting parties in the transfer from T. P. Branch to E. P. Alexander, and the subsequent transfer from E. P. Alexander to other persons, themselves directors of the Central Railroad & Banking Company, and the Fort Valley & Savannah Company, which is its creature, controlled by its board of directors and under the same president.

The sworn averments of the bill and the an-



swers, and failures to answer by the defendants, under the equity rules, sufficiently show to the court what is perfectly evident, that this whole transaction was for the interest of the Central Railroad & Banking Company of Georgia. That the practical and operative franchises of the Savannah, Dublin & Western Short Line Railway Company, and the shares of stock of the Construction Company, while nominally owned by individuals, and by another corporation, are really under the control of the president and board of directors of the Central Railroad & Banking Company of Georgia, is clear, and this control is as complete and absolute and effective as any power it may exercise.

The technical defenses urged for the defendants are not considered meritorious.

The answers are altogether too evasive and partial to have any effect toward disproving the material averments of the bill. There is no attempt to dispute any of the main facts alleged in the bill; and such a reply as that in the answer of General Alexander, and of the Central Railroad & Banking Company, that if the plaintiffs have been wronged, it is by their own laches, does not commend itself to the court. The same reply might be urged to the complaint of anyone who had become the victim of misplaced confidence. As to the want of notice of plaintiffs' claims, this defense is no reply to supplement a void contract, and the substantial merit of these claims is proved by the undisputed affidavits of the plaintiffs, which were submitted to the court.

The contracts by which these unlawful results were attained are null and void; and since the Central Railroad & Banking Company, and the Fort Valley & Savannah Company, which are practically one and the same corporation, have control of the assets upon which the plaintiffs have had an equitable lien for their advancements made toward the performance of their trust originally assumed by John McKechney and the Construction Company, the plaintiffs are entitled to an accounting against the defendants, to ascertain and subject any values which are in their possession and which may be applied to the discharge of the complainants' demands.

It must be understood that the great underlying trust in this whole transaction was to build,

construct and equip the Savannah, Dublin & Western Short Line Railway. It was for this that the State granted the charter. It was for this that McKechney was empowered and given, not the title, but control, of the stock and securities of the Short Line Railway Company. It was for this that the Construction Company undertook the trust. And this trust is not to be defeated by the wrongs of individuals, or the illegal contracts of corporations; and since for its performance the plaintiffs have, in good faith, paid their money, they are entitled to recover from the trustees, who refused to act, what would be their lawful compensation if the trustees had acted.

As to T. P. Branch, who, with James A. Simmons, most wrongfully and outrageously, if the allegations of the bill are true, sold out and betrayed the rights of which they came into control, he holds \$100,000 in his own proper person to which he has no title whatever; and while the Central Railroad & Banking Company, and the parties who acted for it, may not be able to recover what they have wrongfully paid to him, he holds the sum he received as a trustee for the plaintiffs and other persons in interest. It represents in part at least the franchises and property of the Short Line Company; and as the case now appears he should be compelled to make restitution of the sum which he had received for the benefit of the trust which he attempted to defeat, and for the legal beneficiaries of that trust. It would seem that the court has ample power to compel this.

*The decision of the court* is that the injunction prayed for against all the parties against whom it is prayed shall be granted, and that a receiver be appointed to take charge of the assets of the Savannah, Dublin & Western Short Line Railway Company, and of the United States Construction & Improvement Company, so far as they are within the control of either of the defendants or otherwise in the jurisdiction of the court, and to recover in such manner as may be deemed most effective from T. P. Branch and the persons acting with him the sum unlawfully paid to him by E. P. Alexander for the franchises, stocks, shares and other property of the Savannah, Dublin & Western Railway Company, and that the case proceed regularly as is usual in equity.

## NEW YORK COURT OF APPEALS.

William J. BYAM, *Appl.*,

*v.*

Jennie E. COLLINS and Alfred H. Collins,  
her Husband, *Respts.*

(....N. Y....)

1. A communication based upon mere rumors and hearsay, although believed to be true by the person making it, is not rendered priv-

ileged by a request by a young woman for information as to any rumors about the young men of the neighborhood.

2. A letter by a mere volunteer containing defamatory statements as to a man's character, not known to be true, written for the purpose of breaking off relations which may lead to his marriage with a friend, but not a near relative, of the writer, is not privileged.

3. Defamatory words do not become privileged

*NOTE.—Libel; malice as an element.* Malice is a necessary ingredient of the offenses of libel and slander. *Com. v. Snelling*, 15 Pick. 337; *Com. v. Bonner*, 9 Met. 410; *Com. v. Blanding*, 3 Pick. 304. See 2 Whart. Cr. L. 8th ed. § 1648. Malice, so far as the law requires it to sustain the action, is implied from the publication of that which is untrue—the law presuming it to exist in such a case. Therefore,

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express malice is not required to sustain the action. *Littlejohn v. Greeley*, 13 Abb. Pr. 55; 3 Greenl. Ev. § 410, 421, 518; *Hargrave v. Le Breton*, 4 Burr. 2425; *Bromage v. Prosser*, 4 Barn. & C. 247, 6 Dowl. & R. 298; *Wilson v. Stevenson*, 2 Price, 232. It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill will, or that he pursue or entertain any general bad pur-

merely because uttered in the strictest confidence by one friend to another, nor because uttered on the most urgent solicitation, where the person uttering them is under no duty to do so, and has no interest to subserve by uttering them, and the person to whom they are addressed has no interest or duty to, and no right to demand that he may, hear them.

4. In the case of oral defamation, as in the case of written, if the words uttered are not privileged the law implies malice.

(*Danforth, J., dissents.*)

(November 27, 1888.)

**A**PPEAL by plaintiff, from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment entered on a verdict for defendants at the Livingston Circuit, in an action for libel and slander. *Reversed.*

Reported below, 89 Hun, 204.

The facts are sufficiently stated in the opinions.

Mr. A. J. Abbott for appellant.

Mr. James Wood for respondents.

**Earl, J.**, delivered the opinion of the court:

The general rule is that in the case of a libelous publication the law implies malice, and infers some damage. What are called "privileged communications" are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus:

"A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus

stated in *Harrison v. Bush*, 5 El. & Bl. 844, and has been generally approved by judges and text writers since.

In *Toogood v. Spyring*, 1 Crompt. M. & R. 181, an earlier case, it was said that the law considers a libelous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned;" and that statement of the rule was approved by Folger, J., in *Klinck v. Colby*, 46 N. Y. 427, and in *Hamilton v. Eno*, 81 N. Y. 116.

In *White v. Nicholls*, 44 U. S. 3 How. 266, 291 [11 L. ed. 591], it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general law is deduced."

Whether within the rule as defined in these cases a libelous communication is privileged, is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury. It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties—the one making and the one receiving the communication—are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty and difficulty

pose or design. *Com. v. Snelling*, 15 Pick. 337; *Com. v. Bonner*, 9 Met. 410. The mere fact of publication shows malice. *Com. v. Snelling*, 15 Pick. 337; *Com. v. Bonner*, 9 Met. 410. Express malice may be shown by other libels not materially different. *Com. v. Harman*, 2 Gray, 230. Untruthfulness and other circumstances raise an inference of express malice. *McCullough v. McIntee*, 13 Up. Can. C. P. 441. See *Com. v. Blanding*, 3 Pick. 304. It means in its legal sense exactly what it means in its popular sense, namely: a mischievous design or intent to do an injury to an individual or to the public. *Viale v. Gray*, 10 Abb. Fr. 5, 18 How. Pr. 550. Malice is always presumed where one person deliberately injures another. It is the opposite of an act performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose. *Spies v. People (The Anarchists' Case)*, 10 West. Rep. 701, 122 Ill. 1. It is true that injuries to the feelings and to one's social standing are not susceptible of precise adjustment, but such injuries are recognized as a legitimate ground of action for reasonable indemnity. *Williams v. McManus*, 38 La. Ann. 184. When the intent is to injure, it is a bad intent, and bad intent is malice. *Stephens, Cr. L. 81*; *Townshend, Lib. & Sland. § 84*.

**Legal malice defined.** Malice in the legal sense denotes a wrongful act done intentionally without just cause or excuse; and the intention is an inference of law resulting from the doing of the act, except where the circumstances rebut the presumption of its existence. *Maynard v. Firemen's Fund Ins. Co.*, 84 Cal. 48; *People v. Taylor*, 36 Cal. 255; *Hayes v. State*, 58 Ga. 35; *Beauchamp v. State*, 6 Blackf. 290; *Loosen v. State*, 62 Ind. 437; *Com. v. Snelling*, 15 Pick. 337; *State v. Hays*, 23 Mo. 237; *Com. v. Goodwin*, 122 2 L. R. A.

*Mass. 19*; *State v. Town, Wright (Ohio)*, 75; *Com. v. Green*, 1 Ashm. (Pa.) 230; *Lander v. State*, 15 Tex. 402; *McCoy v. State*, 25 Tex. 33; *Plasters v. State*, 1 Tex. App. 673; *Farrer v. State*, 42 Tex. 255; *Williams v. State*, 3 Tex. App. 316; *Worley v. State*, 11 Humph. 172; *Wiggin v. Coffin*, 3 Story, 7; *U. S. v. Coffin*, 1 Sumn. 304; *U. S. v. Taylor*, 2 Sumn. 598; *Blunt v. Little*, 3 Mason, 102; *Dexter v. Spear*, 4 Mason, 115; *U. S. v. Outerbridge*, 5 Sawy. 620; *Gathercole's Case*, 2 Lewin, Cr. Cas. 237; *Desty, Cr. L. § 140 b*. The law presumes from the act an intent to bring about its consequences. To denominate this intent malice or malice in law, when it may have arisen from a good motive, the defendant believing what he alleges to be true, is to employ the word *malice* in a sense justified neither by its etymology, its ordinary meaning, nor its previous legal signification. *Townshend, Lib. & Sland. § 84*. Malice has sometimes been divided into legal malice or malice in law, and actual malice or malice in fact. The true distinction, however, is not in the malice itself, but simply in the evidence by which it is established. In all ordinary cases, if the charge complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. *Lewis v. Chapman*, 16 N. Y. 372.

**Inference and presumption from evil intent.** An evil intent is a conclusive inference and presumption of law from the publication of the libelous matter without excuse. 2 Bish. Cr. L. § 922, 923; *Com. v. Snelling*, 15 Pick. 337; *Gathercole's Case*, 2 Lewin, Cr. Cas. 237; *Negley v. Farrow*, 60 Md. 158; *Richardson v. State*, 5 Cent. Rep. 797, 66 Md. 205. The malicious intent of the publication is not a question of fact, but a conclusion of law. It is the intent which

in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty.

In *Whiteley v. Adams*, 15 C. B. N. S. 393, Erie, C. J., said: "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification;" and in the same case Byles, J., said the application of the rule "to particular cases has always been attended with the greatest difficulty; the combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood gates of injurious gossip and defamation, by which private character may be overwhelmed, and irreparable mischief done; and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Everyone owes a moral duty not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency.

In *Coxhead v. Richards*, 2 Man. G. & S. 569, 602, Coltman, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty ought not to be sanctioned in the case of voluntary communications, except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted honestly, and when nothing more can be imputed to him than an error in judgment. It may be hard; but it is very hard, on the other hand, to be falsely accused. It is to be borne in mind that people are but too apt rashly to

think ill of others. The propensity to tale bearing and slander is so strong among mankind, and when suspicions are inferred men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected."

And in the same case Cresswell, J., said: "If the property of the ship owner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not know to be true was quite as strong as the duty to communicate to the ship owner that which he believed to be true."

One may not go about in the community and acting upon mere rumors proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owed a social duty to give them currency, that the victim of them may be avoided; and ordinarily one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration:

In *Godson v. Home*, 1 Brod. & B. 7, one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah to deprecate his so employing the plaintiff, and this was held to be clearly not a confidential or privileged communication.

In *Storey v. Chaulands*, 8 Car. & P. 234, one Hersford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything to do with Storey you will live to repent it. He is a most unprincipled man," etc.; and Lord Denman directed a verdict for the plaintiff, because the defendant began by

the law implies, and which the plaintiff is therefore not required to prove, nor the defendant permitted to deny. *Fry v. Bennett*, 1 Code Rep. N. S. 243, 5 Sandf. 54. It is for the court to determine whether the subject matter to which the alleged libel relates, the interest of the author of it, or his relations to it, are such as to furnish an excuse; but the question of good faith, or belief in the truth of the statement and the existence of actual malice remains for the jury. *Klinck v. Colby*, 46 N. Y. 427; *Hamilton v. Eno*, 81 N. Y. 116; *Hinman v. Hare*, 6 Cent. Rep. 51, 104 N. Y. 841. It is a question of fact to be submitted to the jury. *White v. Nicholls*, 44 U. S. 3 How. 255 (11 L. ed. 591); *Wheeler v. Nesbitt*, 65 U. S. 24 How. 544 (16 L. ed. 785); *Bromage v. Prosser*, 4 Barn. & C. 247; *Fairman v. Ives*, 1 Dowl. & R. 251; *Thompson v. Shackell*, Moody & M. 187. If malice is deduced from want of probable cause, it is as much malice in fact, within the meaning of the law, although shown or deduced from any other fact or facts. *Smith v. Howard*, 23 Iowa, 51; *Darry v. People*, 10 N. Y. 123.

*Slander. Tendency to injure, sufficient.* When slander has been published the proper question for the jury is not whether the intention of the publication was to injure the plaintiff, but whether the tendency of the matter published was so injurious. *Fisher v. Clement*, 10 Barn. & C. 472, 21 Eng. C. L. 117; and see *Duncan v. Thwaites*, 3 Barn. & C. 54, 10 Eng. C. L. 179; *Pennington v. Meeks*, 46 Mo. 217; *People v. Taylor*, 30 Cal. 256; *Reg. v. Wallace*, 3 Ir. C. L. R. N. S. 38; *Bouvier*, L. Dict. *Malice*; *Townshend*, Lib. & Sland. § 87.

*Privileged publications.* A letter written merely confidentially is not thereby privileged. *Brooks v. Blanchard*, 1 Cramp. & M. 779, 3 Tyrw. 844; *Andrews v. Wilson*, 3 Kerr (N. B.), 86. The publication, in a 2 L. R. A.

newspaper, of rumors is not justified, but may be mitigated by the fact that such rumors existed. *Skinner v. Powers*, 1 Weid. 451. A communication is privileged when made in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper, that he should give the information. *Sunderlin v. Bradstreet*, 46 N. Y. 191; *Harrison v. Bush*, 5 El. & Bl. 344. Where it appears that a defendant, authorized by his relation to the party addressed to make a "privileged communication," is professing to do so makes a false charge, the inference of malice is against him, and the burden is put on him to show that he acted *bona fide*. *Wakefield v. Smithwick*, 4 Jones, L. 827; *Harwood v. Keech*, 6 Thomp. & C. 635, 4 Hun. 389; *Hartwool v. Vesey*, 3 L. T. N. S. 275; *Cole v. Wilson*, 18 B. Mon. 212. When language is actionable, and it does not appear that it is privileged, it is presumed to be both false and malicious, and no other evidence of falsehood or malice is necessary than the publication itself. *Townshend*, Lib. & Sland. 388; *Dixon v. Allen*, 60 Cal. 529. But so far as the communication was privileged, the law ceases to infer malice from the mere falsity of the charge, and other proof of its existence is required; for, as is held in *Lewis v. Chapman*, 16 N. Y. 330; and *Hinman v. Hare*, 6 Cent. Rep. 51, 104 N. Y. 841—if the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice. *Hamilton v. Eno*, 81 N. Y. 116. Whether a communication be privileged or not is a question for the court, not for the jury. *Briggs v. Garrett*, 2 Cent. Rep. 364, 111 Pa. 404.

making the statement without waiting to be asked.

In *York v. Johnson*, 116 Mass. 482, the defendant, a member of a church, was appointed, with the plaintiff and other members of the church, on a committee to prepare a Christmas festival for the Sunday School. He declined to serve, and being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease; and being asked where he got it said he did not know, but that "he had been with the plaintiff," who was a woman; and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet Devens, J., in the opinion said:

"The ruling requested by the defendant, that the communication made by him to Mrs. Newton was a privileged one, and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York, but he was under no obligation to give any reason therefor, however persistently called upon to do so; and, even if Mrs. Newton had an interest in knowing the character of Mrs. York as a member of the same church, it was an interest of the same description which every member of the community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer, and had been engaged in the practice of his profession at Caledonia for several months, and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora, and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora, and they had been very intimate friends. Dora had a father, and no brother, and Mrs. Collins had a brother.

During the time of this intimacy, and at some time before the marriage of Mrs. Collins, Dora repeatedly requested of her that if she "knew anything about any young man she went with, or in fact any young man in the place, to tell her, because her father did not go out a great deal, and had no means of knowing, and people would not be apt to tell him;" that she, Mrs. Collins, had a brother and would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before 2 L. R. A.

the letter was written, when a coldness sprang up between them. They became somewhat estranged, and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors, and believed them, and therefore did not wish her to marry the plaintiff.

It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man, or about any young man in whom she had any interest, but it was for information about the young men generally with whom she associated; nor, literally construing the language, did Dora wish for information as to the gossip and rumors afloat as to young men. What she asked for was such facts as Mrs. Collins knew, and not for her opinion about young men, or her estimation of them.

But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony; it was for information about all the young men in her circle. Mrs. Collins was not related to her, and was under no duty to give the information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them (even upon request) by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information did not make the defamatory communication privileged. *York v. Johnson, supra*.

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so if they did so find. On the contrary, it is clear that Dora would not at the time have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins' letter was prompted by her friendship for Dora, and by the solicitations of "mutual friends to interfere in the matter and break off the relations which seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself, as well as the evidence of Mrs. Collins, shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the

action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in warning the former "against a person whom she had reason to believe was not a fit person; and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her" upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins, in writing that letter, act fairly, act judiciously, not in the matter of good taste, but did she with the facts which had been brought to her mind act in a conscientious and proper manner? If she did—if she acted as an ordinarily prudent person would act under the same circumstances, if she had probable ground for her belief—she was justified in writing the letter."

Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith and without malice. But a mere volunteer, having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation, but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text books and judicial opinions supporting the contention of the defendant that this letter was in some sense a privileged communication. But after a very careful research I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than any other, is that of *Todd v. Hawkins*, 8 Car. & P. 88.

In that case a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character; and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury were satisfied that in writing it he acted *bona fide*, although the imputations contained in the letter were false, or based upon the most erroneous information; and if he used expressions however harsh, hasty, or untrue, yet *bona fide*, and believing them to be true, he was justified in so doing. The letter was held privileged, solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and the defendant had been strangers to each other there would have been a mere question of damage.

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A case nearer in point is that of *Joannes v. Bennett*, 5 Allen, 169. There it was held that a letter to a woman containing libelous matter concerning her suitor cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that in writing the letter the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not in any way interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected to him by the ties of consanguinity or kindred, and that he had no peculiar interest in her.

Some years before the same learned court decided the case of *Krebs v. Oliver*, 12 Gray, 289, wherein it was held that statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to inquiry, are not privileged communications. In the opinion it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words without knowing or ascertaining their truth far outweighs any mere claim of friendship."

I am therefore of opinion that the letter was in no sense, upon the facts as they appear in the record, a privileged communication.

There was also error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies in part to these verbal slanders. There was no substantial denial of these slanders in the answer, and there was no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that "There is not that presumption of malice in the case of oral slanders that there is in the case of a deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous.

In the case of oral defamation, as in the case of written, if the words uttered were not privileged the law implies malice.

The judge further charged the jury in substance that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and

under such circumstances there is no authority holding that any privilege attaches to such communications.

There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins as an emissary from or agent of the plaintiff, or that at the plaintiff's solicitation or instigation he obtained the slanderous communications from her; and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties and seems to have sought the interview with her either to gratify his curiosity, or to prevent the impending litigation between the parties. But, even if he obtained the interview with her at the solicitation of the plaintiff, and as his friend, she could not claim that her slanderous words uttered at such interview were privileged. The trial judge therefore erred in refusing to charge the jury that there was no question for them as to the second cause of action, but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out, *the judgment should be reversed, and a new trial granted.*

All concur except **Danforth, J.**, who reads for affirmance.

**Danforth, J.**, dissenting:

The plaintiff united in his complaint two causes of action for slander with two causes of action for libel, and a fifth cause of action reiterating by general reference the allegations of the preceding ones, and charging the report and publishing thereof "to divers other persons." No attention seems to have been given to this cause of action at any time during the trial; and before the plaintiff rested his counsel stated that there was a failure of proof as to the third cause of action, and it was abandoned. Nor upon this appeal is any point made by the learned counsel for the appellant as to the first count, and our attention is directed by him only to the disposition made by the trial judge of the questions arising on the second and fourth causes of action.

The defendant Mrs. Collins testifies that Dora told her "repeatedly that if I knew anything about any young man she went with, or in fact any young man in the place, to tell her, because her father didn't go out a great deal, and had no means of knowing, and people wouldn't be apt to tell him; that I had a brother, and I would be more apt to hear it, and she wished me to tell her what I knew." She heard Byam talk about a great deal, but no one spoke well of him, and she did not wish him to marry Dora; so she wrote the letter, sealed it, stamped it, took it to the office, and mailed it.

It seems Dora was then absent, but returned in a few days, and the letter was given to her in the presence of the plaintiff. She read the letter, then gave it to him. He read it and took it immediately to Dora's father, who either read it or heard it read. The plaintiff then took it to his office, sent for his friends and confidants, among others, Walker and Cameron. He read the letter to Walker and Cameron. On the same day Cameron procured the attendance of Mrs. Collins at his store, where he spoke to her about the letter, and, as she testifies, said: "Byam is going to sue you for it,"

and he wished to know what she "knew about Byam."

In answer, as she testifies, "I told him I didn't wish to tell him. He said he wanted me to tell him just as if he was my lawyer. He said, 'I am your friend, and I want you to have perfect confidence in me'; and he said, 'You know, if a person employs a lawyer they tell him everything'; and I said I didn't wish to tell him. I said, 'You have heard these things yourself.' He said he didn't know, he would rather I would tell, and he could tell better." She avoided and resisted his inquiries, and endeavored to leave, but he persisted, and "held on to the door latch," so she could not go out. And the disclosures of that interview now form the subject of complaint as set out in the second cause of action.

The fourth count is founded upon the letter and publication already referred to. At the close of the evidence the plaintiff's counsel asked the trial court to "hold as matter of law and charge the jury that the cause of action set out in the fourth count of the complaint was libelous, and the communication not privileged; that the cause of action has been established, and the only question for the jury is the question of damages." The court declined, but after reading the letter to the jury, and declaring it to be libelous, charged that liability for writing and publishing it might be avoided by showing that what was written was a privileged communication, and called upon them to determine whether it was of that character. The plaintiff's counsel excepted to the refusal to charge as requested, and also to the submission of the question to the jury.

The whole charge must be taken together, and, so taken, it is apparent that the trial judge violated no rule of law in respect to this matter. He called the attention of the jury to the evidence as to the relations between the parties, and the request by Miss McNaughton for information, and also to the statements in relation to the plaintiff, which had come to the ears of the defendant, and then said: "If the relation of these persons was of such an intimate character as to warrant Mrs. Collins in warning Miss McNaughton against a person whom she had reason to believe was not a fit person; and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her upon that cause of action."

And again: "I say to you, therefore, that if Mrs. Collins had heard these things and the others to which she has testified, and believed them to be true, and had reason to believe them to be true, and if she acted honestly and conscientiously in writing that letter, it is a privileged communication, and there can be no recovery against her for that count."

And finally: "If you find the lady was justified in those things, or she acted conscientiously and intelligently, as a reasonably prudent person would have acted in similar affairs, on account of her relationship with this lady, your verdict will be generally for the defendant."

"If certain facts exist," the Judge, in substance, says, "the letter is privileged." Whether those facts did exist, he properly left for the jury to determine. *Stace v. Griffith*, L. R. 2 P. C. 420.

There was therefore no error in making this disposition of the question. *Klinck v. Colby*, 46 N. Y. 427; *Hamilton v. Eno*, 81 N. Y. 117.

He held the letter upon its face to be libelous; but as liability for even a libelous publication may be defeated by the occasion or circumstances under which it was made, he left those matters to be inquired of by the jury. We have them established by the verdict, and, assuming their existence, the important inquiry now is, whether the trial judge was right in holding the letter privileged.

The parties directly concerned in this question resided in the same town. The defendant Mrs. Collins and Dora McNaughton (now Mrs. Byam) were from childhood neighbors and intimate friends, and at the time made material by this inquiry were unmarried. The latter seems to have supposed that the former had better opportunities than herself to learn the character of the young men of that town, and requested that she would communicate to her anything she might know concerning, among others, those "who went with her," obviously indicating persons whose attentions were of the nature of addresses and given in view of matrimony. In response to this request, as the evidence tends to show, and as the jury have found, the defendant wrote the letter complained of. Previous thereto she had uttered no word of disparagement or reproach concerning the plaintiff, and the letter itself was sealed and directed to Miss McNaughton, and in that condition delivered to her. There was no other publication by the writer, or with her assent.

Was the communication privileged? If so, in the absence of malice, there was a perfect defense to the action, so far as the fourth count is concerned. This qualification requires no discussion, because, at the request of the learned counsel for the plaintiff, the trial judge charged the jury that "when one stands in a privileged relation, but makes a false charge, the proof is on her to disprove malice, and show that she acted in good faith," thus improperly shifting the burden from the plaintiff, upon whom in the supposed case it properly lay, to the defendant, to whom it did not belong. *Gassett v. Gilbert*, 6 Gray, 94; *Somerville v. Hawkins*, 10 C. B. 583; *Hastings v. Lusk*, 22 Wend. 414.

The error was against the defendant, but that is of no importance, since the jury by their verdict found that there was no malice, and that the defendant acted in good faith. It is well settled that without malice, either express or implied, an action for defamation by words spoken or written cannot be supported. In ordinary cases malice is implied from the slander; but there may be a justification from the occasion, and when this appears an exception to the general rule is created, and the words must be proven to be malicious as well as false. In that aspect of the case, as already stated, the plaintiff failed. The question as to privilege is, however, yet to be considered.

The letter is one of warning or entreaty. It names no one as its subject, but it was conceded that the person referred to was the plaintiff, and he is held up, in numerous phrases conveying divers degrees of disparagement and imputation, to reproach, and as a person to be

feared and avoided. *Craft v. Boile*, 1 Saund. 248, and note.

The trial judge therefore ruled that it was libelous, and the appellant is entitled to have that ruling stand as the law of the case. The publication was admitted. From these circumstances the law supplied the rest, and the burden of justification or excuse was cast upon the defendant. *Lewis v. Few*, 5 Johns. 85.

The question, therefore, is whether the occasion of the publication, or the circumstances prompting it, furnish a legal excuse for that act, and so repel the inference of malice arising from the matter of it, as to bring it within the exception to which I have referred. If it does, then in legal contemplation the communication is privileged. Of such communications there are two classes; in one the privilege is absolute and a shield against any action for defamation, as where the charge, even if false and malicious, is made in the course of official duty or under certain other circumstances not embracing those before us; in the other class the privilege is qualified and may be overcome by proof of malice. This class includes cases where the interest and welfare of society and common convenience require that the defendant should be permitted to speak freely in the relation in which he is placed, provided he confines himself within the bounds of what he believes to be the truth. *Hastings v. Lusk*, 22 Wend. 410.

The law frequently referred to upon this subject is to be found in *Toogood v. Spyring*, 1 Crompt. M. & R. 181-192, and requires that the communication, to be privileged, should be fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, where his interest is concerned.

In *Harrison v. Bush*, 32 Eng. L. & Eq. 173, substantially the same rule is restated, but it is added "That duty cannot be confined to legal duties which may be enforced by indictment, action or mandamus, but must include moral and social duties of imperfect obligation," and as thus amplified the rule is adopted in this court, and may be considered as well settled. *Ormsby v. Douglass*, 37 N. Y. 477; *Hamilton v. Eno*, 81 N. Y. 116.

A common application of the rule is to words spoken by a former master in giving a character of a servant (*Weatherston v. Hawkins*, 1 T. R. 110), or in answering an inquiry concerning the solvency of a tradesman or banker, or between persons having a common interest in the subject to which they relate. It applies, however, to other cases of the same nature, and is meant to protect the communications of business, and the necessary confidence of man in man; as where one employed by a sheriff to ascertain and inform him of the facts relating to an interference with a levy upon certain cattle, wrote a letter charging the plaintiff with feloniously taking them (*Washburn v. Cooke*, 3 Denio, 110); or where, at the request of the father, a person made inquiry as to the character of his daughter's husband. *Atwell v. Mackintosh*, 120 Mass. 177.

In each instance the report, if made in good faith, and reasonably believed true, was held to be privileged. *Atwell v. Mackintosh*, *supra*.

So it is said to extend to the confidential



communications of friendship (Holt, Libel, 235), and will undoubtedly include every case where, in the discharge of any legal, natural or social obligation, the defendant states what he honestly believes the plaintiff's character to be, whatever the charges may be which he thus imputes to him.

Thus, in *McDougall v. Claridge*, 1 Camp. 267, it was held that a letter written confidentially concerning a solicitor, and under an impression that its statements were well founded, could not be the subject of an action; and in *Herver v. Dousson*, mentioned in Bull. N. P. 8, where the defendant said, "in confidence and friendship, by way of warning," to one about dealing with the plaintiff, words affecting his credit, no action would lie, because the manner of speaking repelled the idea of malice.

In *White v. Nicholls*, 44 U. S. 8 How. 286 [11 L. ed. 591], Justice Daniel enumerates among such communications, "words spoken in confidence and friendship as a caution;" and applying the same principle to specific cases, it is laid down in a recent work on this subject (Odger, Sland. & Lib. 210), that a father, guardian or intimate friend may warn a young man against associating with a particular individual, or may warn a lady not to marry a particular suitor, though under the same circumstances a stranger could not do so without incurring liability. Among other instances of privilege, and of the same nature, is any communication required by the interest of the person to whom it is made, and reasonably called for or warranted by the relation in which the person making it stands to him, as a letter written in good faith by a person to his mother-in-law, warning her of the bad character of the man she was about to marry. *Todd v. Hawkins*, 8 Car. & P. 88-91.

The same principle was applied in *Adcock v. Marsh*, 8 Ired. L. 861. It there appeared that Anderson Adcock was twice married. His first wife died, leaving a daughter Sally, and one other. Upon his second marriage the defendant, Mrs. Marsh, advised the daughters of the first Mrs. Adcock that they ought not to live at their father's, giving reasons in words relating to the plaintiff, his then wife, which were in themselves *prima facie* actionable. In excuse it was shown that the first Mrs. Adcock "had requested the defendant Marsh, with whom she was very intimate, to give 'advice' to her daughters;" but the trial judge ruled that this was insufficient in any view to rebut the implication of malice; and after verdict for the plaintiff a new trial was granted, the court of review holding that the communication was privileged if made by the defendant in good faith, and as to that the jury were the proper judges. The learned Judge, speaking for the court, and referring to the ruling of the trial Judge said:

"The idea seems to have been that the communication was not a privileged one, because the defendant had no interest in the matter, and stood in no relationship to the witness" (the person advised by defendant), "but was in every respect a volunteer;" and, after citing and commenting on various cases, says, in substance, that, whether there was just cause for the opinion expressed by Mrs. Marsh or not, she was justified in making it known to the

daughter, if she honestly held that opinion, "and that her communication so made was a privileged one." "And we further hold," he says, "that without any request from the mother she would, under the other circumstances, have been justified."

To the same effect are the cases in our own court. In *Lewis v. Chapman*, 16 N. Y. 369, Selden, J., enunciates the rule as embracing both alternatives, and says: "There is no doubt that when the communication is made *bona fide*, in answer to inquiries from one having an interest in the information sought, or when the relation between the parties by whom and to whom the communication is made is such as to render it reasonable and proper that the information should be given, it will be regarded as privileged;" and referring to the authorities, says: These cases show that all that is necessary to entitle such communications to be so regarded is "that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others;" and although the information given in that case was volunteered, and not in answer to any inquiry, the judges all agreed that the relations existing between the person addressed and the defendant, rendered the communication privileged.

In the later case of *Sunderlin v. Bradstreet*, 46 N. Y. 188, it appeared that the defendants, of their own volition, and for their own profit, collected information concerning the condition of traders, and this they communicated to subscribers not interested in the matter; and the court, reiterating the rule laid down in *Lewis v. Chapman*, *supra*, held that, owing to that want of interest in the person addressed, the communication was not privileged. Protection would seem to be due, therefore, to communications between persons having relationship, whether by blood or marriage, or as principal and agent, attorney and client, or as intimate friends, or as the result of any trust or confidence, provided such communications are fairly warranted by a reasonable occasion, and honestly made.

It follows that the term *malice*, in a legal sense, has no application where there is a just cause or occasion for speaking the words complained of, although, under other circumstances, they would constitute a slanderous charge. *Jones v. Givin*, Gilb. Cas. 185; *Washburn v. Cooke*, and other cases, *supra*. In discussing this question, the learned Judge already quoted says: "When the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence." *Lewis v. Chapman*, *supra*.

The facts found by the jury, and already adverted to, bring the case at bar within the principle and the rule stated in the case above cited, as decided by this court. The occasion was the courtship of the plaintiff, and the object of the letter was to give information of his character. It was written in confidence and in friendship to one sought by him in marriage and thus having a vital interest in the subject,

and written also in response to her request. These conditions seem to answer the first branch of the proposition laid down by Judge Selden in the *Chapman Case*, *supra*, and by Judge Allen in the *Sunderlin Case*, *supra*, and also bring the communication directly within the other branch of the rule. If we regard the communication as volunteered, it still remains that Dora, the party to whom the communication was made, had an interest in it, and the writer stood, by reason of her intimate friendship and the request, in such relation to her as to make it at least proper that the defendant should warn and put her on further inquiry. I think the communication was privileged by the occasion and by the position of the writer, and the court committed no error in refusing to charge otherwise. Whether the letter was in excess of the privilege so conferred I need not inquire, for such question was for the jury, and it was not raised at the trial.

As to the second cause of action the counsel for the appellant asked the court to charge "that the charges set out in the second count of the complaint have been substantially proved, and stand uncontradicted, and the plaintiff is entitled to recover, and the only question for the jury is one of damages." The court declined so to hold and charge, and plaintiff's counsel duly excepted. In this there was no error.

1. The allegations of the complaint are not admitted by the answer, but denied, and the plaintiff went into evidence to sustain the issue.

2. Between the plaintiff's witnesses and the evidence of the defendant there was a conflict.

3. The communication to Cameron was given in confidence, at his request, and under circumstances which might very well lead to the conclusion that Cameron as the friend, or even agent, of the plaintiff was by him put upon an inquiry, suggested by the letter just before read to him by the plaintiff. *Weatherston v. Hawkins*, *supra*; *King v. Waring*, 5 Esp. 18.

The statement was not voluntary, and the occasion of speaking, as well as the words spoken, were to be considered. The submission of it to the jury was proper (2 Greenl.

Ev. § 421), and the language of the judge, as applied to it, was not inappropriate. *Weatherston v. Hawkins*, *supra*.

4. Nor was it necessary to plead specially that the communication to Cameron was privileged. The defendant's answer alleged that the communication, such as it was, to Cameron, was drawn out by him, "was a confidential communication, and was made without malice, and without any intent to injure the plaintiff," and in the belief of its truth, and denied, among other things, the allegation of malice contained in the complaint. This goes to the very root of the action. If true, it shows there was no malice; and as formerly the defense of privilege was open under the general issue (*Hastings v. Lusk*, *supra*; *Howard v. Thompson*, 21 Wend. 824), so it is now under the denial.

The learned counsel for the appellant argues that the plea of justification, set up as a separate defense, was insufficient, because, he says, the matters alleged are stated to have been known at the commencement of the action, and not at the time of uttering or writing the words attributed to the defendant. No objection was made to evidence on that account, and the question was only presented to the trial judge as he was about to give the case to the jury, and then in these words: "That the court should hold as a matter of law that there is no sufficient plea of justification set up in the defendant's answer, and the proofs have not sufficient force to sustain a justification."

The proof shows that the defendant had heard the matters referred to when she wrote the letter, and no objection was made that the evidence was not competent under the answer. But the request, when made, was double, and required the court to pass upon the sufficiency of the evidence to sustain the justification, as well as its final presentation upon the pleadings. One branch was for the jury, and upon both grounds the refusal of the court may stand. The other questions presented by the appellant were properly disposed of by the general term.

The judgment appealed from should, I think, be affirmed.

## INDIANA SUPREME COURT.

Jane SKINNER, *Appt.*,  
v.

HARRISON TOWNSHIP, Cass County.

(.... Ind. ....)

1. The courts will take judicial notice that funds raised for or appropriated to the support of common schools in Indiana pertain to the school corporation of a township, and can only be administered by the township trustee in that behalf.

2. A bequest or devise to a township in Indiana, although primarily to the civil township, will be held to be for the school township when the intention appears to create a fund for the support of common schools.

3. Evidence is admissible to prove which township was intended in a devise to a township, where

2 L. R. A.

there are more than one of the same name in the State.

4. A school township in Indiana is capable of taking a devise in trust for the support of common schools therein.

5. A bequest to a school township in support of common schools is a public and charitable use.

6. The trust does not fail if a corporation to which property is devised in trust for the support of common schools is incapable of acting as a trustee, but the proper court may appoint a new trustee.

(November 14, 1888.)

APPEAL by plaintiff, from a judgment of the Circuit Court of Cass County (Winfield, J.), in favor of the defendant in a suit to quiet title. *Affirmed*.

The question presented, and the facts connected therewith, are stated in the opinion.

*Messrs. Nelson & Myers* for appellant.  
*Messrs. Daniels & Jenkins* for appellee.

**Mitchell, J.**, delivered the opinion of the court:

On August 17, 1866, Abraham D. Skinner, a resident of Harrison Township, in Cass County, died testate, leaving no child or other heir at law, except his widow, Jane Skinner, to whom he devised and bequeathed eighty acres of land, together with his personal property, subject to the payment of his debts. Another eighty acres of land of which he was the owner was disposed of as follows: "My land lying in section twenty-six (26) in the same town and range as above mentioned, on the west side of the La Porte road, my wife to have the use of it during her natural life, and at her decease to fall to Harrison Township; said land to be sold by the authority of the township, and the money to be put at interest, and the interest to be used for the support of common schools in said township annually, each district to draw an equal share."

The controversy is between Jane Skinner, the widow, and Harrison Township, in Cass County; and the only question involved relates to the validity of the clause of the will above set out, and whether or not it is capable of being carried into effect.

The doctrine is, of course, familiar that in the construction of a will the primary object is to discover and give effect to the intention of the testator, as it appears upon and is gathered from the words found in the instrument; and, although the testator's purpose may have been expressed in a manner conformable to the rules by which rights of property are secured and established, the law will not suffer his intention to be defeated merely because it may not have been declared with completeness or with technical accuracy. *Van Gorder v. Smith*, 99 Ind. 404; *Bell County v. Alexander*, 22 Tex. 350.

One of the grounds of objection made to the will is that the devisee or trustee is not described or identified with sufficient certainty. The contention is that without extrinsic evidence it is impossible to determine whether the civil or school township is meant; and it is urged, moreover, that there was evidence from which it appears that there are twenty-two townships in the State of Indiana known by the corporate name of "Harrison Township," and that hence the devise was void for uncertainty.

It is plain enough that the purpose of the testator was to provide a fund, the interest of which should be devoted to the support of the public schools of Harrison Township after the death of his wife. While, according to our system, there are two corporations nominally within the same territory—one the civil township, the other the school township, both are nevertheless under the control of the same officer. The township trustee is, by virtue of his office, the trustee both of the civil and the school township. Courts, therefore, take notice, as do others concerned, that funds raised for or appropriated to the support of the common schools pertain to the school corporation, and can only be administered by the trustee in that behalf. *Middleton v. Greeson*, 3 West. Rep. 2 L. R. A.

905, 106 Ind. 18; *Inglis v. State*, 61 Ind. 212.

While, therefore, a devise or bequest to Harrison Township is, *prima facie*, a devise or bequest to the civil township, yet, when it appears that the intention of the testator was to create a fund to be administered for the support of the common schools, it is then rendered certain that the school township was meant. *Sheffield School Trp. v. Andress*, 56 Ind. 157.

In respect to the point that there are numerous townships answering the description of that named in the will, the rule applicable in such cases justifies the statement that, where the object of the testator's bounty or the subject of disposition is described in terms which are applicable indifferently to more than one person or thing, extrinsic evidence is admissible in certain special cases to prove which of the persons or things, so described by the testator, was intended. *Wigram, Wills*, 188.

Thus in *Reynolds v. Whelan*, 16 L. J. Ch. 434, a testator, who was a farmer, by his will gave a legacy in these terms: "To William Reynolds, one of my farming men, if in my employ at the time of my decease, a sum of 100l." At the date of the testator's will, and at the time of his death, he had two persons in his service named William Reynolds. One of them was a farming man, and the other, who could turn his hand to anything, was employed both in the house and on the farm. Held, upon evidence showing the special relation and character of the service of the latter as compared with the former, that he was the person intended, and therefore entitled to the legacy.

The devise to Harrison Township was neither ambiguous nor obscure until circumstances are shown which make it appear that there are other townships of the same name. This, then, is clearly a case of latent ambiguity; and it was therefore competent to show, by extrinsic evidence, that the testator resided in Harrison Township, in Cass County, and that he sustained a peculiar relation to that township different from all others of like name, so as to remove the obscurity occasioned by the extraneous circumstances. *Hiscocks v. Hiscocks*, 5 Mees. & W. 362; *Smith v. First Presbyterian Church*, 26 N. J. Eq. 182; *Taylor v. Tolen*, 38 N. J. Eq. 91; 1 Redf. Wills, 618.

It is contended, next, that neither the civil nor school township is capable in law of taking under the will. This position is not tenable. The effect of the will is to make the school corporation a trustee, in perpetual succession, to take a certain fund, into which, upon the principles of equitable conversion, the land mentioned is transformed in trust for the benefit of the common schools of the township. *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489.

This constitutes a bequest to a public and charitable use, and one towards which the courts extend a liberal construction in order to carry into effect the intention of the testator. *Clement v. Hyde*, 50 Vt. 716; *Hamden v. Rice*, 24 Conn. 850.

A municipal corporation may be a trustee under the will of an individual when the trust created is germane to the purposes for which the corporation was called into being; and when the administration of the trust, and the

liabilities it imposes, are not foreign to the object for which the corporation was instituted: *Craig v. Seerist*, 54 Ind. 419; *Lagrange Co. v. Rogers*, 55 Ind. 297; *Phila. v. Fox*, 64 Pa. 169; *Chambers v. St. Louis*, 39 Mo. 548; *Girard v. Phila.* 74 U. S. 7 Wall. 1 [19 L. ed. 58]; *Bell County v. Alexander*, 23 Tex. 850; *Carder v. Fayette Co.* 16 Ohio St. 353; *First Congregational Society v. Atwater*, 23 Conn. 34; 1 Perry, Trusts, §§ 42, 43; 2 Dillon, Mun. Corp. § 567.

Even if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, this would furnish no ground upon which to declare an otherwise unexceptionable trust void. The corporation could not be compelled to execute it, and the intervention of the proper court might be required to appoint a new trustee in order to enforce and perfect the trust; but a court of equity would enforce it, nevertheless. *Vidal v. Girard*, 43 U. S. 2 How. 127-187 [11 L. ed. 205]; *McDonogh v. Murdoch*, 56 U. S. 15 How. 367 [14 L. ed. 732].

Each civil township and each incorporated town or city in this State is, by the statute, declared a distinct municipal corporation for school purposes, and is authorized to contract and be contracted with, to sue and be sued; and the primary purpose of the corporation is to receive and expend, in the support of our common schools, such funds as may lawfully come into its possession devoted to that purpose. It is therefore clearly consistent with the purposes for which the school corporation was instituted that it should become a trustee to receive funds bequeathed to it for the use of the public schools. *Dascomb v. Marston* (Maine) 6 New Eng. Rep. 423.

The argument of counsel directed to the proposition that devises and bequests for charitable uses, where no trustee intervenes, and no estate is vested in the supposed beneficiaries, or where the objects of the testator's bounty are indefinite and uncertain, are not enforceable, is, in our view of the case, aside from the real question involved.

The present is not such a case. There would be no propriety, therefore, in entering upon an examination of the subject of charitable trusts, in cases where no trustee capable of taking was provided for, and where the beneficiaries of the charity were not described with certainty; leaving them to be ascertained by those who might be charged with the management of the trust. We have here, as we have seen, a trustee capable of taking and holding the trust estate or fund, while the objects of the testator's bounty, the common schools of the township, are definite and certain. The devise relates to matters which will promote the welfare of the schools of the township, and the duty of preserving the trust fund is germane to the purposes for which the corporation was created.

Whether or not the trustee of the township will be compelled or permitted to administer the trust, or whether, if he does administer it, he shall do so in his official capacity as township trustee, or under the jurisdiction or supervision of the proper court, are questions which do not affect the validity of the bequest. The testator having made a bequest to a trustee, capable of taking and holding the property in trust for a well defined object, which is recog-

nized as a public charity, we cannot doubt that, at the proper time, the court having jurisdiction of such matters will take all needful steps to secure the preservation and administration of the fund.

This disposes of the questions discussed; and results in an affirmation of the judgment of the court below.

*Judgment affirmed, with costs.*

William R. CRAWFORD and Emma P. Crawford, his Wife, *Appts.*,

v.

Charles HAZELRIGG

(.....Ind.....)

1. **The inchoate interest of a married woman** in real estate of her husband is discharged from a mortgage in which she joined with him to secure a note given by her husband and others, when, with the mortgagee's consent and without her knowledge or consent, one of the makers of the note has been released or discharged by renewal or otherwise from liability for the note and debt secured; and she may set up such defense to protect such inchoate right from sale on the foreclosure of the mortgage.
2. **Extension of time of payment of a note** to which a married woman is not a party does not of itself discharge her inchoate right in her husband's property from a mortgage thereon in which she has joined to secure such note.
3. **A mortgage** which contains a covenant to pay the sum thereby secured is not barred in six years, although a mortgage of indemnity merely is barred in six years, under the Indiana Statute of Limitations.

(November 23, 1888.)

**A**PPPEAL by defendants from a judgment of the Circuit Court for Decatur County, (Bonner, J.), in an action to foreclose a mortgage. *Reversed.*

The case is stated in the opinion.

*Messrs. Miller & Gavin* for appellants.

*Messrs. Ewing & Ewing* for appellee.

**Howk, Ch. J.**, delivered the opinion of the court:

This was a suit by appellee, Hazelrigg, as plaintiff, to foreclose a certain indemnifying mortgage alleged to have been executed to him by the appellants, William R. and Emma P. Crawford, on certain parcels of real estate in Decatur County, Ind.

The mortgage sued on was dated and acknowledged on the 23d day of October, 1877, and was recorded in the proper recorder's office on the 31st day of August, 1878. It was stipulated in such mortgage that it was given "to secure and hold the said Hazelrigg harmless from all liability as indorser on a certain promissory note for the sum of \$2,800, dated October 1, 1877, due in four months after date, payable to the Citizens' National Bank of Greensburgh, Ind., with 10 per cent interest from maturity, and providing for 5 per cent attorney's fees, signed by said Will R. Crawford, 'Hazelrigg Carriage Company,' 'Hazelrigg Carriage Works,' Newton Hazelrigg, and J. F. Hazelrigg, and indorsed by said mort-

gage; and the mortgagors expressly agree to pay the sum of money above secured, and hold the said mortgagee harmless therefrom, without relief from valuation or appraisal laws."

In his complaint plaintiff alleged, among other things, that at the date of said note and mortgage he was, and at all times since had been, solvent and able to pay said debt, and that the other parties to said note had wholly failed to pay the same, or any part thereof, although it had become due in four months after its date; that at the commencement of this suit all the parties to said note were insolvent, except the plaintiff and defendant William R. Crawford; that said Crawford had left the State of Indiana, and was then a resident of the State of Ohio, and had no property within this State subject to execution, except the last two parcels of real estate described in said mortgage; and that the parcel of real estate first described in said mortgage was incumbered by and had been sold to satisfy a mortgage prior to the mortgage sued on herein; wherefore, etc.

The case was put at issue and submitted to the court for final hearing, and at defendants' request the court made a special finding of facts herein, and thereon stated its conclusion of law in favor of the plaintiff. Over defendants' exceptions to its conclusion of law the court rendered its final judgment for plaintiff, and decreed the foreclosure of the mortgage in suit, etc.

In this court, defendant Emma P. Crawford has separately assigned errors, which call in question the rulings of the trial court in sustaining plaintiff's demurrers to each of the first and second paragraphs of her separate answer. In their brief of this cause defendants' learned counsel have discussed together the questions presented here by these alleged errors, and we will consider and decide such questions in the same manner.

In the first paragraph of her separate answer, defendant Emma P. Crawford alleged that she then was, as she was at and prior to the execution of the mortgage sued on, a married woman, being the wife of her codefendant, William R. Crawford; that no part of the indebtedness said mortgage was given to secure was her individual debt or the individual debt of her said husband, but was the debt of a firm of which he was a member; that after the execution of said mortgage, to wit: on the—day of—, 187—, the note described in said mortgage was renewed by the several makers thereof, except John F. Hazelrigg, who, by and with the plaintiff's consent, and without the knowledge and consent of said defendant, failed to sign said note as a maker—wherefore she said that, the debt having been altered and changed without her consent, she was released; and she asked that the title to her interest in said real estate might be quieted. In the second paragraph of her separate answer said defendant alleged substantially the same facts as in the first paragraph, except that she averred in such second paragraph that after the execution of the mortgage sued on the payment of the note intended to be secured thereby was, for a valuable consideration, and without her knowledge and consent, by the plaintiff and her codefendant, and the other members of the firms of the "Hazelrigg Carriage Company" and the

"Hazelrigg Carriage Works," extended for the period of ninety days.

The fundamental question presented for our decision by the alleged errors of the court below in sustaining plaintiff's demurrers to the first and second paragraphs of Emma P. Crawford's separate answer herein may be thus stated: Where a married woman has joined her husband in the execution of a mortgage on his real estate, to indemnify and save harmless an indorser or surety upon the note or debt of her husband, or of him and others, in the event of a suit to foreclose such mortgage, may she avail herself of a valid legal or equitable defense to protect or prevent the sale of her inchoate interest in such real estate, should she survive her husband, or should his title to the real estate become absolute and vested in the purchaser at a judicial sale thereof under the mortgage? We are of opinion that this question must be answered in the affirmative.

It is true, as we have often decided, that where a wife joins with her husband in the execution of a mortgage on his real estate, such mortgage, as to the wife, is not a "contract of suretyship," within the prohibition of section 5119, Revised Statutes 1881, and is not void as to her for that reason. *Leary v. Shaffer*, 79 Ind. 567; *Dodge v. Kinzy*, 101 Ind. 102; *Cupp v. Campbell*, 1 West. Rep. 255, 103 Ind. 218; *Tennison v. Tennison*, 14 West. Rep. 320, 114 Ind. 424. But in such case we have also held—and correctly so, we think—that the wife occupies as to her inchoate interest in the mortgaged real estate of her husband a relation so far analogous to that of a surety as that she was entitled in equity to an order directing that the two thirds of the mortgaged real estate should be first sold to satisfy the debt secured by the mortgage. *Leary v. Shaffer*, *supra*.

In the case last cited it was held that the inchoate interest of the wife in the lands of her husband was "a substantive right, carrying with it some equities," and that the equities were "of strength sufficient to entitle her to have an order incorporated in the decree directing an offer to be first made of the husband's interest in the land.

It has always been held by this court that the provisions of our statutes for the wife in the lands of her husband were a substitute for dower under the common law, and dower was defined to be "a legal, an equitable and a moral right." *Noel v. Ewing*, 9 Ind. 37; *McCord v. Wright*, 97 Ind. 34.

It must be that the wife is entitled to invoke the aid of a court of equity in the defense of any suit the object of which is to subject to sale her inchoate interest in the lands of her husband for the payment of his debt.

In the case in hand, if the facts stated in the first paragraph of Emma P. Crawford's separate answer are true—and, as they are well pleaded, their truth is admitted by plaintiff's demurrer—one of the makers of the note described in the mortgage sued on, by and with the plaintiff's consent, and without the knowledge and consent of said Emma P. Crawford, was released and discharged from liability for the note and debt secured by such mortgage. The note described was the principal thing, of which the mortgage sued on was merely an

incident. To secure the payment of that note and of the debt evidenced by that note, and to indemnify and save harmless the plaintiff as indorser of that note, Emma P. Crawford, the wife, joined with her husband in the execution of the mortgage in suit upon his real estate. In legal effect, she thereby contracted and agreed with the plaintiff that, if that note were not paid by any of the makers thereof, her inchoate interest—her legal, equitable and moral right—in and to the mortgaged lands might be sold and forever barred for the indemnity of the plaintiff, under the decree of a competent court foreclosing such mortgage. She had the right to insist upon a strict construction of her contract and agreement to and with the plaintiff. If it be true, as alleged, that, after the execution of the mortgage sued on, the note therein described, with the consent of the mortgagee, the plaintiff herein, and without the knowledge and consent of defendant Emma P. Crawford, was so changed and altered, by the renewal thereof or otherwise, as that one of the makers of such note, John F. Hazelrigg, was released from liability thereon or for the debt evidenced thereby, then it must be held, we think, that the inchoate interest of said Emma P. Crawford—her "substantive right"—in the mortgaged real estate was thereby discharged and released from the lien of such mortgage as fully and effectually as though she had never joined her husband in the execution thereof.

Under the law of this State, as it existed at the time of the execution of the mortgage sued on, on the 23d day of October, 1877, a married woman was protected by the disabilities imposed on her by the common law, and was incapable of binding herself by an executory contract. *Thomas v. Passage*, 54 Ind. 106; *American Ins. Co. v. Avery*, 60 Ind. 566; *Liberty Twp. Draining Assn. v. Watkins*, 73 Ind. 459; *Haas v. Shaw*, 91 Ind. 884, 887; *Frazer v. Clifford*, 94 Ind. 482. We need not argue, therefore, for the purpose of showing that said Emma P. Crawford was in no manner bound by the contract contained in the mortgage sued on, whereby "the mortgagors expressly agreed to pay the sum of money above secured and hold the said mortgagee harmless therefrom," etc. She was incapable of binding herself by such contract at the time of its execution.

For the reasons given we are of opinion that the facts stated by said Emma P. Crawford in the first paragraph of her separate answer herein were sufficient to constitute a perfect and complete defense to plaintiff's action to foreclose the mortgage sued on, as against her, and that the demurrer to that paragraph ought to have been overruled.

The alleged error predicated upon the ruling of the court below in sustaining plaintiff's demurrer to the second paragraph of said Emma P. Crawford's separate answer herein, presents a very different question. That paragraph of the answer proceeds upon the theory that the extension of the time of payment of a promissory note for a definite period of time, upon an agreement between the maker and holder for a valuable consideration, will release an indorser or surety who does not consent to such extension from all liability on the note. That theory

is right, and accords with the law of this State. *Praher v. Young*, 67 Ind. 480, and cases cited. It was not averred in the second paragraph of answer, as in the first paragraph, that there had been a change in the makers of the note described in the mortgage sued on, or that one of such makers, with plaintiff's consent, but without knowledge or consent of said Emma P. Crawford, had been discharged and released from the debt evidenced by such note by the taking of a new note in renewal thereof, to which new note such maker was not a party. The note described in the mortgage sued on was apparently the joint and several note of all the makers thereof, and plaintiff was the only indorser or surety thereon. Under the averments of the second paragraph of said Emma P. Crawford's answer, it is certain that plaintiff was not released from liability as an indorser of the note by the extension of the time of its payment, for it was alleged that plaintiff was a party to such extension. Defendant Emma P. Crawford was not a party to such note in any capacity; and the mere extension of the time of its payment, as alleged, did not affect her, or her inchoate rights in the mortgaged property, in any manner or to any extent. The demurrer to the second paragraph of her separate answer was correctly sustained.

Defendant William R. Crawford has separately assigned here as error the ruling of the court below in sustaining plaintiff's demurrer to the second paragraph of his separate answer herein. In that paragraph of his answer said defendant alleged that the cause of action mentioned in the complaint herein did not accrue within six years before the commencement of this suit. We are of opinion that the court did not err in sustaining plaintiff's demurrer to this paragraph of answer. Plaintiff's action is founded on the mortgage described in his complaint herein. If that mortgage had been one of indemnity merely—if it had not contained a covenant or express agreement by the mortgagor William R. Crawford "to pay the sum of money" secured thereby—then the facts stated in the second paragraph of his answer would have been sufficient to withstand the demurrer thereto, and, if sustained by the evidence, to have constituted a complete and absolute bar to plaintiff's action. *Lilly v. Dunn*, 96 Ind. 220, and cases there cited; *Nichol v. Henry*, 98 Ind. 84; *Post v. Looney*, 9 West. Rep. 616, 111 Ind. 74.

Where, however, as in the case under consideration, the mortgage sued on contains a covenant or express agreement by the mortgagor to pay the sum of money secured thereby, it is settled by our decisions that an answer setting up the six years' clause of our Statute of Limitations as a defense in bar of the action is clearly bad on demurrer thereto for the want of sufficient facts. *Etina L. Ins. Co. v. Finch*, 84 Ind. 801; *Lilly v. Dunn*, *supra*; *Nichol v. Henry*, *supra*; *Catterlin v. Armstrong*, 79 Ind. 514; *Bridges v. Blake*, 4 West. Rep. 486, 106 Ind. 382. The demurrer to the second paragraph of William R. Crawford's answer, therefore, was correctly sustained.

Each of the defendants has assigned error upon the court's conclusion of law on its special finding of facts; but, as the judgment must

be reversed for the error already pointed out, we need not and do not consider the other errors of which defendants complain.

*The judgment is reversed, with costs, and the*

*cause is remanded, with instructions to overrule the demurrer to the first paragraph of Emma P. Crawford's separate answer, and for further proceedings not inconsistent with this opinion.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

### COMMONWEALTH OF MASSACHUSETTS

George PLAISTED.

(.....Mass.....)

1. **A rule of the Boston board of police**, that "No person shall sing, or play, or perform on any musical instrument in the streets or public places of the City of Boston, except in connection with a funeral, a military parade, or a procession of a political, civic or charitable organization for which a police escort is provided, unless licensed thereto by the Board of Police for the City of Boston, or as hereinafter set forth,"—is within the authority conferred upon that board to regulate "itinerant musicians," and is reasonable and valid.
2. **A member of the Salvation Army**, playing on a musical instrument in a parade of that organization in the streets, comes within the general phrase "itinerant musician."
3. **That an act was done as a matter of religious worship only** will not protect one from the consequences of an act which is made subject to a penalty under the law.
4. **The constitutional provisions securing freedom of worship** were not designed to prevent the adoption of reasonable rules for the use of streets; and a religious body cannot avail itself of these provisions as an authority to take possession of a city street, in violation of such rules, for the purpose of public worship therein.
5. **It is not an unconstitutional delegation of power** for the Legislature to authorize a city council to empower the city board of police to make rules and regulations in reference to itinerant musicians.
6. **An Act of the Legislature** will not be declared invalid by the courts because it abridges the exercise of the privilege of local self government in a particular in regard to which such privilege is not guaranteed by the Constitution.
7. **The Legislature** has the right to provide (as

by Statute 1885, chap. 823, placing the police of Boston under the control of a board of police appointed by the Governor) that powers previously vested in cities or towns but not by force of any constitutional provision, shall be vested in officers appointed by the Governor, and may fix the qualifications of such officers and provide that they be appointed from two principal political bodies.

(January 4, 1889.)

### ON report. Judgment on verdict.

This is a complaint, dated October 6, 1887, brought against the defendant in the Municipal Court of the City of Boston, and to the superior court on appeal, in which it is recited that, "On the 5th day of October, A. D. 1887, the said George Plaisted, of Boston, at Boston, in a public street of said city within said district called Washington Street, did then and there perform on a certain musical instrument, to wit: a cornet, he, the said Plaisted, not being licensed by the board of police for said city so then and there to do, against the peace of said Commonwealth, and the form of the Statutes of said Commonwealth, and the rules and regulations of the board of police for said city, in such cases made and provided."

The rule of the board of police which the defendant was charged with having violated was one "for the government of itinerant musicians," which provides that "No person shall sing or play or perform on any musical instrument in the streets or public places of the City of Boston, except in connection with a funeral, a military parade, or a procession of a political, civic or charitable organization for which a police escort is provided, unless licensed thereto by the board of police for the City of Boston, or as hereinafter set forth."

It appeared at the trial in the Superior Court, before Hammond, J., and a jury, that the defendant, on the day alleged, at about half past

NOTE.—Municipal corporations as agencies of government. Municipal corporations are bodies politic and corporate, established by law to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated. 1 Dillon, Mun. Corp. § 9 b. Wetherell v. Devine, 8 West. Rep. 521, 116 Ill. 631. They are quasi corporations—mere governing agencies charged with certain objects of necessary local administration (Hamlin v. Meadville, 8 Nob. 227); and it is only in reference to their delegated powers that they will be regarded as governments. Touchard v. Touchard, 5 Cal. 308; Desty, Tax. 473. They are created by the Legislature, and they derive all their power from the source of their creation. Rogers v. Burlington, 70 U. S. 8 Wall. 654 (18 L. ed. 79). They are institutions designed for local government of towns and cities, with their inhabitants; are mere artificial beings, invisible, intangible and existing only in contemplation of law; and possess only those properties which the characters of their creation confer upon them, either expressly or as incidental to their very existence. Mather v. Ottawa, 2 West. Rep. 46, 114 Ill. 669; Meriwether v. Garrett, 102 U. S. 511 (23 L. ed. 304); U. S. v. Baltimore & O. 3 L. R. A.]

R. Co. 84 U. S. 17 Wall. 322 (21 L. ed. 597); Tippecanoe County v. Lucas, 83 U. S. 108 (23 L. ed. 822); People v. Morris, 13 Wend. 325; Phila. v. Fox, 64 Pa. 169; Montpelier v. E. Montpelier, 20 Vt. 12. A municipal corporation is but the creature of the Legislature, and derives its power, rights and franchises from legislative enactment or from statutory implication. State v. Swift, 11 Nev. 123. The Legislature of the State represents the public at large, and has full and paramount authority over all public ways and public places. And streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals or public roads, laid out by the authority of the quarter sessions. O'Connor v. Pittsburgh, 18 Pa. 137; Phila. & T. R. Co's Case, 6 Whart. 25; Northern Liberties v. Northern Liberties Gas Co. 12 Pa. 318; Stuber's Road, 23 Pa. 199; Stormfeltz v. Manor Turnpike Co. 18 Pa. 555; Baird v. Rice, 63 Pa. 498; Gray v. Iowa Land Co. 26 Iowa, 387; Warren v. Lyons City, 22 Iowa, 361; Albany Northern R. Co. Brownell, 24 N. Y. 345; Reading v. Com. 11 Pa. 196; Woodruff v. Neall, 23 Conn. 168; James River & K. Co. v. Anderson, 12 Leigh (Va.) 278; 2 Dillon, Mun. Corp. § 518. See Anderson v. City of Wellington, ante, 110.



7 o'clock in the evening, was on said Washington Street, a public street of said City of Boston, between Warrenton and Common Streets, and was a part of a procession or parade of the Salvation Army, so called; and was engaged in playing upon a cornet. This procession was without police escort. There was no disturbance or breach of the peace, and the persons viewing the procession were such as ordinarily gather on the sidewalk when a street procession is going through the streets.

By requests to rule, the defendant presented the various questions which are set forth in the opinion. Exceptions were taken by him to refusals to rule as requested; and the jury having returned a verdict of guilty, the case was reported to this court.

**Mr. G. A. A. Pevey**, for defendant:

If the power to make orders and rules as these in question is in the mayor and aldermen and common council, then they could not delegate this power to the board of police.

*Day v. Green*, 4 Cush. 433; *Lowell v. Simpson*, 10 Allen, 89; *Dillon*, Mun. Corp. § 60.

These rules are invalid as they are inconsistent with law.

This court has held ordinances valid forbidding persons driving faster than a specific rate (*Com. v. Worcester*, 3 Pick. 462); declaring what persons shall remove offal from streets (*Vandine's Case*, 6 Pick. 187); forbidding one occupying a stand in the street for sale of wares not his own produce (*Nightingale's Case*, 11 Pick. 168); forbidding dogs going at large without muzzles (*Com. v. Chase*, 6 Cush. 248); forbidding erection of awnings without permit (*Padrick v. Bailey*, 12 Gray, 161); restricting the use of Faneuil Hall Market without permit of clerk (*Com. v. Brooks*, 109 Mass. 358); against a hackman, accepting more than regulated fare (*Com. v. Gage*, 114 Mass. 828); preventing drivers of coaches from soliciting passengers apart from their stands (*Com. v. Matthews*, 122 Mass. 60); as to kind of dwellings to be erected within a certain district (*Salem v. Maynes*, 123 Mass. 372); preventing persons from entering sewer without a permit (*Ranlett v. Lowell*, 126 Mass. 431); restraining vehicles from stopping in street more than twenty minutes at a time (*Com. v. Fenton*, 139 Mass. 195); preaching on Boston Common without permit. *Com. v. Davis*, 1 New Eng. Rep. 380, 140 Mass. 485.

But in all these cases the court limited the power to make regulations which refer to the time, mode and circumstances, under which parties shall assert, enjoy or exercise their rights.

*Com. v. Stodder*, 2 Cush. 571; *State v. White* (N. H.) 2 New Eng. Rep. 867.

They were held to come under the provisions of the statutes as to making "such necessary orders and by-laws not repugnant to the laws of the State, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereon."

Stat. 1785, chap. 75, § 7; Gen. Stat. 18, § 11; 19, § 2; Pub. Stat. 27, § 15; 28, § 2.

The ordinances in the cases just cited were held valid, either because they were authorized by some express provision of the charter of the city, or derived as an incidental power resulting from its incorporation as a city, or found in some general or special statute.

See *Com. v. Stodder*, 2 Cush. 569; *State v. Freeman*, 88 N. H. 426.

The power to license cannot be inferred from the power to regulate and control.

See *Com. v. Stodder*, *supra*.

The rules in question are inconsistent with law as they give the board of police power by refusing a license or a police escort to prevent any and every person from using the streets in the manner specified in the rules. They prohibit unless a license or police escort is obtained, which amounts to an absolute prohibition.

*Newton v. Belger*, 8 New Eng. Rep. 722, 143 Mass. 598; *Re Frazee* (Mich.) 6 West. Rep. 140.

They are more in the nature of a general law, and hence invalid.

*Com. v. Roy*, 1 New Eng. Rep. 524, 140 Mass. 432.

They impose unauthorized restrictions on the rights of the citizen *i. e.*, a tax. This cannot be done without an Act of the Legislature.

Mass. Const. pt. 2, chap. 1, art. 4; Declaration of Rights, art. 23.

Here to obtain a license, money in every case must be paid. But no such authority for an imposition of a tax is given under the power to "regulate and control."

*Com. v. Stodder*, 2 Cush. 578.

These rules interfere with religious rights of citizens, and that of the defendant. Questions of religious belief and worship should be left to the individual man and his Maker; of these questions human tribunals are not to take cognizance so long as the public order is not disturbed.

Cooley, Const. Lim. § 467; Mass. Const. art. 2, Amend. art. 11, Bill of Rights; *Reynolds v. U. S.* 98 U. S. 163 (25 L. ed. 249).

A form of worship proper to one community or sect may not so appear to a different community or sect. But in this Commonwealth which gives to every subject the right "to worship God in the manner and season most agreeable to the dictates of his own conscience," it is not for the law to say how one shall conduct himself in religious worship or practices, unless he interferes with public order, or the fixed, known and well recognized social and moral laws.

Cooley, Const. Lim. § 467; Potter's Dwarries, Stat. & Const. L. § 563; Mass. Const. last cited.

This act not being forbidden by statute, an actual disturbance of the peace is necessary to complete the offense.

*State v. Cate*, 58 N. H. 240; *Reynolds v. U. S.* 98 U. S. 163 (25 L. ed. 249); *Gilbert v. Showerman*, 23 Mich. 448.

Only as far as religious worship involves the commission of a crime or constitutes a civil trespass against the rights of others, can it be prohibited.

Tiedeman, Lim. of Police Powers, § 74.

**Mr. Andrew J. Waterman**, Atty-Gen., for the Commonwealth:

The offense was in being an "itinerant musician" without a license; and the fact that the defendant was a religious itinerant musician, or one of many religious itinerants, could not in the least affect his amenability to the law

*Com. v. Worcester*, 3 Pick. 478. And see *Com. v. Davis*, 1 New Eng. Rep. 380, 140 Mass. 485; *Com. v. Fenton*, 139 Mass. 195.

So long as no tax is imposed in order to obtain a license, and the small fee of fifty cents only required as a mere provision for paying the expenses incident to giving a license, it is within the power authorizing a regulation and control.

*Com. v. Stodder*, 12 Cush. 572; Gen. Stat. chap. 19, § 14; *Com. v. Gage*, 114 Mass. 328-330; *Pedrick v. Bailey*, 12 Gray, 162.

It can make no difference that the defendant in this case was a parader in the Salvation Army, playing his cornet as a matter of religious worship. To do this upon the streets of Boston he must have a permit or license. He is not hurt, molested or restrained in his person, liberty or estate from reasonably worshipping God in the manner most agreeable to the dictates of his own conscience; but he is required to do so in a manner and at a time that may not disturb the public peace or obstruct others in this religious worship, as is provided by the Declaration of Rights of the Commonwealth.

*Com. v. Davis*, 1 New Eng. Rep. 380, 140 Mass. 485; *Com. v. Stodder*, 12 Cush. 562-570; *Goddard's Case*, 16 Pick. 509; *Nightingale's Case*, 11 Pick. 168; *Com. v. Gage*, 114 Mass. 330; *Com. v. Goodnow*, 117 Mass. 116; *Com. v. Has*, 122 Mass. 42; *Com. v. Matthews*, 122 Mass. 60; *Com. v. Worcester*, 3 Pick. 462; *Com. v. Robertson*, 5 Cush. 438; *Vandine's Case*, 6 Pick. 187-190; *Com. v. Rice*, 9 Met. 253; *Pedrick v. Bailey*, 12 Gray, 161; *Com. v. Lagorio*, 2 New Eng. Rep. 97, 141 Mass. 81.

It was not necessary that a breach of the peace should have taken place before a violation of the order, rule or ordinance could occur.

*Com. v. Worcester*, 3 Pick. 462, 464-474.

The case does not come within the decisions which deny the right of the legislative branch of the government to delegate its legislative powers to a board or commission. The power to make rules and exercise a discretion in this board is analogous to the powers recognized by this court as existing in other bodies, *e. g.*:

Water commissioners:

*Parker v. Boston*, 1 Allen, 361; *Young v. Boston*, 104 Mass. 95.

Fire engineers:

Pub. Stat. chap. 35, § 35; *Perry v. Stowe*, 111 Mass. 60; *Long v. Sargent*, 101 Mass. 117; *Fisher v. Boston*, 104 Mass. 87.

School committee:

*Roberts v. Boston*, 5 Cush. 198.

Board of health:

*Tuunton v. Taylor*, 116 Mass. 260.

Bank commissioners:

*Com. v. Farmers & M. Bank*, 21 Pick. 542.

County commissioners:

*Breuer v. Boston, C. & F. R. Co.* 113 Mass. 56; *Agawam v. Hampden County*, 180 Mass. 528. See also *Harrison v. Holland*, 3 Gratt. 247; *Bull v. Read*, 13 Gratt. 98; *Bank of Mich. v. Williams*, 5 Wend. 478; *Williams v. Bank of Mich.* 7 Wend. 589; *Coe v. Schultz*, 47 Barb. 64.

**Morton, Ch. J.**, delivered the opinion of the court:

The defendant contends that the rules of the 2 L. R. A.

board of police, which he is charged with having violated, are not within the terms of the authority conferred upon that board. But we think this ground of objection cannot be maintained.

The Statute of 1885, chap. 828, § 2, conferred upon and vested in the board of police all the power theretofore vested in the board of police commissioners, except as otherwise therein provided.

The Statute of 1878, chap. 244, established the board of police commissioners, and in section 2, after mentioning other powers, proceeded to enact that "Said board may also be empowered by the city council to exercise all or any of the powers conferred by the Statutes of the Commonwealth upon the board of aldermen, the city council, or the City of Boston, in relation to licensing, regulating or restraining theatrical exhibitions . . . itinerant musicians," etc.

By Public Statutes, chap. 53, § 16, "The mayor and aldermen of a city may adopt rules and orders, not inconsistent with law, for the regulation and control of persons who frequent the streets and public places therein, playing on hand organs, and other musical instruments, beating drums, blowing trumpets . . . with penalties for the violation thereof, not exceeding \$20 for each offense."

This enactment was derived from Statutes 1875, chap. 186, § 2, which in its turn was founded on Statutes 1869, chap. 301, § 2. The words "mayor and aldermen," in the statute above quoted, when applied to Boston, mean "board of aldermen." Gen. Stat. chap. 19, § 17.

It has been suggested that the Public Statutes, chap. 53, § 16, were not designed to be applicable to the City of Boston; but we see no reason for excluding Boston from this salutary provision, and we have no doubt that under the various statutes cited the board of police may be empowered to regulate and restrain itinerant musicians to the same extent that the board of police commissioners might have been. By the Revised Ordinances of 1885, of the City of Boston, chap. 26, § 1, it was provided that "The board of police shall have and exercise all the powers conferred by the Statutes of the Commonwealth and the ordinances of the city upon the board of aldermen or upon the mayor and aldermen, in relation to licensing, regulating and restraining . . . itinerant musicians."

It thus appears that the board of police, according to the terms of the statutes and ordinances, have the authority to adopt rules for regulating and restraining itinerant musicians in the streets and public places of Boston.

It is objected that the defendant was not an itinerant musician, within the meaning of the rule of the board of police. But the general phrase "itinerant musician" includes the defendant; and the exceptions contained in the rule are sufficient to show that no other exception can fairly be implied, which would take him out of its operation.

It is also objected that the defendant's act of playing the cornet in the parade in the street was done as a matter of religious worship only. But this defense cannot avail to protect him from the consequences of an act which is made

subject to a penalty under the law. *Reynolds v. U. S.* 98 U. S. 145, 161 [25 L. ed. 244, 248]; *State v. White*, 64 N. H. 48, 2 New Eng. Rep. 867.

The provisions of the Constitution, which are relied on, securing freedom of religious worship, were not designed to prevent the adoption of reasonable rules and regulations for the use of streets and public places; and a religious body, however earnest and sincere, cannot avail itself of these provisions, as an authority to take possession of a street in a city, in violation of such rules, for the purpose of public worship therein. The fact that there is no actual disturbance or breach of the peace, on the particular occasion, is immaterial. *State v. White*, *supra*.

It is further urged by the defendant that the rules are unreasonable and invalid; that under the guise of regulating, they virtually prohibit; and that the power of requiring the taking out of a license and paying a license fee is not included in the power of regulation. It is, however, to be borne in mind that these rules do not restrict anyone in the ordinary use of his own property, but merely affect the use which may be made of the streets and public places of the city. Nor is the reasonableness of the rules to be tested by their possible application to extreme cases, as, for instance, singing or playing (in a low tone, not intended to be heard by others) for a short time in a street or place not occupied with dwellings. No police rules or regulations are to be tested in this manner; and if such a case were to present itself, perhaps the rule might by construction not be deemed to include it. However that may be, we are to look at the rule more generally. The validity of rules and regulations quite as broad and sweeping as this, in reference to the use of streets in cities, has often been upheld. *Com. v. Worcester*, 3 Pick. 462; *Vandine's Case*, 6 Pick. 187; *Pedrick v. Bailey*, 13 Gray, 161; *Com. v. Bean*, 14 Gray, 52; *Com. v. Curtis*, 9 Allen, 266; *Com. v. McCafferty*, 145 Mass. 884, 6 New Eng. Rep. 886.

Under a power to regulate, the requirement to take out a license is free from legal objection. *Com. v. Stodder*, 2 Cush. 562, 578; *Pedrick v. Bailey*, 12 Gray, 161; *Vandine's Case*, 6 Pick. 187; *Nightingale's Case*, 11 Pick. 168; *Com. v. Brooks*, 109 Mass. 855.

And where a license is lawfully required, a small fee may be imposed, not designed for revenue, but to cover reasonable expenses incident to the enforcement of the rules. *Com. v. Stodder*, 2 Cush. 562; *Weich v. Hotchkiss*, 39 Conn. 140; *Cooley*, Const. Lim. 201, note; *Dillon*, Mun. Corp. 8d ed. § 857.

The rules are binding upon all persons without notice. *Heland v. Lowell*, 3 Allen, 407; *Vandine's Case*, 6 Pick. 189; *Dillon*, Mun. Corp. 8d ed. §§ 855, 856.

The defendant contends that the power to make the rules in question could not be delegated to the board of police. The decisions cited in support of the argument (*Day v. Green*, 4 Cush. 438; *Lowell v. Simpson*, 10 Allen, 89), are merely to the effect that, where a city ordinance gives power to the mayor and aldermen to grant a license to move a building through the streets, the aldermen cannot delegate this power to the mayor alone. No authority has been cited, and after some examination

we have found none, which holds that the Legislature cannot authorize a particular board of officers who have charge of the whole or a portion of the affairs of a city, to make reasonable police rules and regulations which shall be binding upon the people, and with penalties imposed for a violation of them.

It could not at this day be contended that such power cannot be intrusted by the Legislature to cities and towns, or to the mayor and aldermen of a city and the selectmen of a town, as representing the municipality. *Heland v. Lowell*, 3 Allen, 407; *Dillon*, Mun. Corp. 8d ed. § 808.

And in this Commonwealth it has long been the custom to vest similar powers in boards of health of cities and towns, and such delegation of authority has always been recognized as valid. Stat. 1866, chap. 44, § 8; Rev. Stat. chap. 21, §§ 1, 5, 6; Gen. Stat. chap. 26, §§ 1, 5; Pub. Stat. chap. 80, §§ 1, 4, 8, 18; *Com. v. Young*, 185 Mass. 526; *Sawyer v. State Board of Health*, 125 Mass. 182, 196; *Taunton v. Taylor*, 116 Mass. 254, 260.

Similar power was also in 1860 given to the cattle commissioners. Stat. 1860, chap. 221, §§ 2, 6, 10; Pub. Stat. chap. 90, §§ 18, 16, 19.

In the present case, as has already been seen, the Legislature authorizes the city council to empower the board of police to make rules and regulations; and we see no constitutional objection to this delegation of authority. *Cooley*, Const. Lim. 118, 204; *Brooklyn v. Breslin*, 57 N. Y. 591; *Birdsell v. Clark*, 73 N. Y. 78; *State v. Paterson*, 84 N. J. L. 163.

The case *Re Frazer* (Mich.) 6 West. Rep. 140, is no authority against this view. In that case the city council, without having any legislative authority, assumed to pass a by-law prohibiting, under a severe penalty, acts similar to those done by the defendant, and the court held it to be beyond the power of the city council to do so.

It is also suggested, though not much insisted on, that the Statute of 1885 is unconstitutional, because it takes from the city the power of self government in matters of internal police. We find no provision of the Constitution with which it conflicts; and we cannot declare an Act of the Legislature invalid because it abridges the exercise of the privilege of local self government in a particular in regard to which such privilege is not guaranteed by any provision of the Constitution.

While the Constitution recognizes our system of town governments as an inherent part of our general system of government, so that the Legislature could not abolish the town system without coming in conflict with some parts of its provisions, yet in most respects it leaves the power and duty of providing laws for the government of the towns and cities in the discretion of the Legislature. It gives to the general court the very broad and sweeping powers to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth and for the government and ordering thereof, and of the subjects of the same, and for the necessary sup-

port and defense of the government thereof; and to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said Commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers and limits of the several civil and military officers of this Commonwealth." Const. chap. 1, art. 4.

The second article of amendment provides "That the general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this Commonwealth, and to grant to the inhabitants thereof such powers, privileges and immunities, not repugnant to the Constitution, as the general court shall deem necessary for the regulation and government thereof." Articles of Amendment, art. 2.

Under these provisions, as is said by *Chief Justice* Chapman, "There can be no doubt that the power to create, change and destroy municipal corporations is in the Legislature. This power has been so long and so frequently exercised upon counties, towns and school districts, in dividing them, altering their boundary lines, increasing and diminishing their powers and in abolishing some of them, that no authorities need be cited on this point. The Constitution does not establish these corporations, but vests in the Legislature a general jurisdiction over the subject by its grant of power to make wholesome laws as it shall judge to be for the general good and welfare of the Commonwealth." It "may amend their charters, enlarge or diminish their powers, extend or limit

their boundaries, consolidate two or more into one and abolish them altogether, in its discretion." *Weymouth & B. Fire District v. Norfolk Co.* 108 Mass. 142.

The several towns and cities are agencies of government largely under the control of the Legislature. The powers and duties of all the towns and cities, except so far as they are specifically provided for in the Constitution, are created and defined by the Legislature; and we have no doubt that it has the right in its discretion to change the powers and duties created by itself, and to vest such powers and duties in officers appointed by the Governor, if in its judgment the public good requires this, instead of leaving such officers to be elected by the people or appointed by the municipal authorities. We are therefore of opinion that the Legislature has the right to provide that the police of Boston shall be put under the control and management of a board of police appointed by the Governor; and we see nothing in the details of the Statute of 1885 which is open to any constitutional objection.

The Legislature has the right to fix the qualifications of the members of the board, and we see no objection to the provision that they shall be appointed from two principal political parties. It is designed to secure, in the action of the board, impartiality and freedom from political bias. It can probably be regarded only as directory to the Governor, and not as an element in the tenure of the office; in either view it violates no provision of the Constitution, and it is for the Legislature to determine whether such a qualification is wise.

*Judgment on the verdict.*

## KANSAS SUPREME COURT.

Louis M. FINK *et al.*, *Plffs. in Err.*,

v.

Constantine UMSCHIED *et al.*

(.....Kan.....)

- \*1. Where property is claimed by a church organization not incorporated, and the property is in dispute, any number of the members of such association or congregation may maintain an action for the benefit of the church, under Compiled Laws 1885, § 35.
- \*2. Where a church organization not incorporated purchases real estate for the benefit of such congregation, and the purchase price is paid, the property improved, and possession retained by such congregation, and the property

is conveyed to some person in trust for such church and congregation, a trust is thereby created that may be enforced, although not in writing; and it can make no difference that the person to whom the land is conveyed is the bishop of the denomination of which said church is a part.

(November 10, 1885.)

**E**RROR to the District Court for Pottawatomie County (Spillman, J.), brought by the defendants below to review a judgment in favor of the plaintiffs below in an action to set aside a deed, etc. *Affirmed.* (Commissioners' decision.)

Statement by Clogston, C.:

This was an action brought in the District

\*Head notes by CLOGSTON, C.

**NOTE.—Resulting trust.** Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds. *Perry, Trusts*, § 122; *Jackson v. Matsdorf*, 11 Johns. 61; *Botsford v. Burr*, 2 Johns. Ch. 405; *White v. Carpenter*, 2 Paige, 218; *Kellogg v. Wood*, 4 Paige, 579; *Foot v. Colvin*, 3 Johns. 218; *Forsyth v. Clark*, 3 Wend. 638; *Brown v. Cherry*, 59 Barb. 628. A resulting trust is a mere creature of equity, founded upon presumptive intention and designed to carry that intention into effect, not to defeat it. *White v. Carpenter*, 2 Paige, 217. It will not attach in the per-

\* L. R. A.

son paying the purchase money, if it was not the intention of either party that the estate should vest in him. *Byers v. Danley*, 27 Ark. 30; *Botsford v. Burr*, 2 Johns. Ch. 405; *Steere v. Steere*, 5 Johns. Ch. 18; *Squire v. Harder*, 1 Paige, 494; *Phillips v. Crammond*, 2 Wash. C. Ct. 441; *McGuire v. McGowen*, 4 Deaus. Eq. 487; *Page v. Page*, 8 N. H. 187; *Elliott v. Armstrong*, 2 Blackf. 199; *Seeley v. Morse*, 16 Johns. 199. If A purchases land with B's money and takes the deed to himself with the knowledge of the owner of the money, it will not raise a resulting trust in his favor. *Norton v. Stone*, 8 Paige, 222; *Byers v. Danley*, 27 Ark. 37; *Pierce v. Pierce*, 25 Barb. 250.

**How created.** To make out a resulting trust, the money must be paid at or before the execution of the conveyance, and not after. *Russell v. Allen*, 10 Paige, 249; *Niver v. Crane*, 98 N. Y. 47; *Botsford v. Burr*, 2 Johns. Ch. 405; *Rogers v. Murray*, 8 Paige,

Court of Pottawatomie County to cancel and set aside a certain deed executed by Louis M. Fink to Frank Winter, and to declare the land to be held by said Fink in trust for the use and benefit of the Catholic Church of Rock Creek, in said county. Trial by the court, and judgment for the plaintiffs below. The defendants now bring the case here for review.

The evidence shows that some time in 1868 the plaintiffs, with other persons, composing the Catholic Church and congregation at Rock Creek, in Pottawatomie County, purchased, through the priest then in charge of the congregation, eighty acres of land. The land was bought for a church farm, to be used and cultivated for that particular congregation and Catholic Church. The land was fenced and put in cultivation by the congregation, and was cultivated and farmed and rented by them. The land was paid for largely out of the proceeds of its rental. The improvements placed upon the land were made by the congregation, and were of about the same value as the land, and this congregation held the continued and uninterrupted possession up to the time of the sale in 1885.

In 1882 a part of the land was sold by the bishop, plaintiff in error, and afterwards it was repurchased by the congregation, and reconveyed to him, so as to preserve the tract intact for the church. This sale, in 1882, was without the consent and against the wishes of the congregation. In 1885 the bishop sold and conveyed the entire tract, less a small portion occupied by the church building, to Frank Winter, for the sum of \$1,600. Frank Winter at the time of purchase had knowledge that the church claimed the property as the individual property of that congregation, and that they also claimed that the bishop held the property in trust for them; and with this knowledge he purchased the land.

**Messrs. Lucien Baker and Thos. P. Fenlon** for plaintiffs in error.

**Messrs. Green & Hessin** for defendants in error.

**Clogston, C.**, delivered the following opinion:

Plaintiffs in error now insist that there was error in the proceedings below: (1) in that the plaintiffs had no right to bring this action; (2) that this property was held by the plaintiff in error, the Bishop of the Diocese of Leavenworth, and that under the rules and regulations of the Catholic Church all property is held by the bishop for the benefit of the Catholic Church at large, and that he had the right to

sell and control the same at his pleasure, and that, having disposed of the property as he saw fit, the plaintiffs had no right to complain of his action in this sale; and (3) that the evidence failed to show that the defendant took the title to the land as a trust for the Rock Creek congregation, and that no trust can be created as claimed, unless some contract creating the same be in writing.

Section 38 of the Code of Civil Procedure provides that "When the question is one of common or general interest to many persons, or when the parties are numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

It is true that the congregation at Rock Creek was not incorporated, and could not hold title to lands, but they might purchase as an association, and have the property conveyed to some person in trust for them; and where, as in this case, it is claimed the land is purchased by a congregation of individuals, the purchase price paid by them, the property improved and the possession retained by them, and, by an arrangement with the purchaser, the land is conveyed to some person for and in trust for them, a trust is created that may be enforced although not in writing. See *Franklin v. Colley*, 10 Kan. 261.

The question whether or not this land was conveyed with the express understanding that it was to be held in trust for the Rock Creek congregation was a question of fact, which was submitted to the court, and upon that issue testimony was given to the court by the parties who conveyed the land in the first instance to the bishop; the testimony of the bishop as to his information about the same; and the testimony of a number of the congregation in respect to what purposes the land was intended to be used for; and upon these questions of fact the court found in favor of the plaintiffs, and against the defendants. This finding is conclusive.

The evidence clearly shows that at the time this land was purchased the priest in charge visited a great number of his parishioners, and conversed with them in relation to buying the property. He held out the inducement to them that it would enable them to maintain a church and a priest, and aid them in school purposes, and by this farm thus acquired they would be better able to maintain their church; and with this understanding the property was bought. It was conveyed to the bishop, as all property owned by a congregation not incorporated is, in accordance with the usage of the Catholic Church. The evidence was clear that this was

309, 391. To constitute a resulting trust, the consideration money for the purchase should belong to the *cestui que trust*, or should be advanced by some other person as a loan or gift to him. *Mason v. Libbey*, 19 Hun, 123, 64 How. Pr. 112; *Steele v. Steele*, 5 Johns. Ch. 1. *White v. Carpenter*, 2 Paige, 217. The test fact as to a resulting trust is this: if the purchaser used his own money and credit, there is nothing to raise a resulting trust. *Tufts v. Tufts*, 3 Woodb. & M. 483. When an agent exceeds his authority, purchase will be held to be for the benefit of the principal at the election of the latter, even though the agent takes the title in his own name. *Norton v. Stone*, 8 Paige, 222; *Safford v. Hynds*, 30 Barb. 623. See *Hosford v. Merwin*, 5 Barb. 51.

What sufficient to constitute. It is sufficient to constitute a resulting trust, if the consideration money upon the purchase was advanced by some other person as a loan to the *cestui que trust*, or as a gift

to him, or for his benefit. *Russell v. Allen*, 10 Paige, 249; *Voorhees v. Amsterdam Presby. Church*, 5 How. Pr. 63, 8 Barb. 145—a case where associates purchased the new church lot for their own individual benefit, and took the deed in their own names with intent to defraud the corporation, or the corporators. In those cases in which an incorporated religious society can take and hold real estate, a trust cannot arise, be created or declared, in favor of such corporation, by parol, except where it could arise, be created or declared in favor of a private person. *Norton v. Stone*, 8 Paige, 222; *Voorhees v. Amsterdam Presby. Church*, 17 Barb. 108. There may be a question whether, if the proof of the verbal contract be excluded, there is any evidence to show any interest, or upon which claimant can be regarded as a purchaser, so as to raise a trust. *White v. Carpenter*, 2 Paige, 217; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 378.

the understanding of the people who contributed to its purchase, and to its improvement; and the claim that it was conveyed to the bishop to do with and dispose of as he saw fit was an afterthought, and not a part of the original agreement.

Plaintiffs in error still insist that, under the usages and customs of the Catholic Church, all property is conveyed to the bishop as the absolute property of the Catholic Church. However this may be, the evidence in this case does not disclose that fact. The bishop testified as to the general usage of the church, and the custom of bishops to hold all the property of the church, save and except where some church organization is incorporated; but he also said that he held this property by reason of the original understanding that it was conveyed to him to do with as he pleased, or to aid in the education of destitute young persons who were unable to procure an education, and that he had no power or right to convey it for any other purpose; that he respected the trust imposed in him, and to carry it out he sold the property. He recognized that he held the land as a trustee for a particular purpose—that created, as he claimed, by reason of the understanding or agreement at the time the land was conveyed; and as the court has held against him on this theory, and as we think the evidence clearly supports the finding of the court, this claim is not tenable.

From the testimony of the priest himself, and his conversation with the committee who

went to him to secure the repurchase of the ten acres of land sold in 1882, all goes to show that this land was to be held in trust by the bishop for this particular congregation of Rock Creek. This being so, the action of the bishop in selling and conveying the land was in violation of that trust; and, it appearing that the purchaser had full knowledge of the claim and the rights of this congregation to the property, and the bishop's trust therein, and the court having found in favor of the plaintiffs upon the evidence, and the evidence all tending to support the judgment, the judgment must be affirmed.

*It is recommended that the judgment of the Court below be affirmed.*

**Per Curiam:**  
*It is so ordered.*

**Valentine and Johnston, JJ., concur.**

**Horton, Ch. J., concurring:**

Upon the view that the land in question was conveyed with the express understanding it was to be held in trust for the Rock Creek congregation, I concur, with some doubt, in the judgment ordered. If, however, it had been established upon the trial that the title to the property was conveyed with the understanding between the parties that, by the usages and customs of the Catholic Church, it was vested in the bishop in trust, to be used for church purposes generally, as his own judgment might determine, the judgment of the trial court could not be sustained.

## NEW YORK COURT OF APPEALS.

**PEOPLE, *ex rel.* MAYOR, Aldermen & Commonalty of the City OF NEW YORK,**  
*Respts.,*

*v.*  
**ASSESSORS of the City OF BROOKLYN**  
*et al., Appts.*

1. **Property of a municipality** acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject, within the purview of the tax laws, unless specially included.
2. **It seems that the principle that municipal property devoted to public uses is not taxable**, unless expressly made so by statute, does not depend upon the origin of the title, whether acquired by purchase or voluntary grant, or as the product of taxation, nor upon the locality of the property, whether situate

within or without the territorial limits of the municipality.

3. **The landing place of Fulton Ferry, in the City of Brooklyn**, which has been occupied and used as an incident to the ferry franchise for two hundred and fifty years by the City of New York and its agents or lessees, being held and used for public purposes, is not taxable in Brooklyn, unless special authority to tax it is given by the Legislature.
4. **That the City of New York operates the ferry through lessees**, and derives its revenues from the rental, and not from the operation of the ferry by its immediate agents and servants, does not make the franchise or the landing taxable.

(December 4, 1888.)

**A**PPPEAL by defendants, from an order of the General Term of the Supreme Court,

**NOTE.**—*Public property exempted from taxation.* Most public property is exempt from taxation on general principles. *West Hartford v. Hartford Water Comrs.*, 44 Conn. 380. And no exemption law is needed for public property held as such. *Schuylkill Co. Directors of Poor v. N. Manheim Twp. School Directors*, 42 Pa. 25. Independently of any constitutional or statutory provision statutes imposing taxes do not extend to or include public property. *People v. Doe*, 36 Cal. 220; *Ryan v. Gallatin Co.*, 14 Ill. 78; *Augusta v. Dunbar*, 50 Ga. 387; *People v. Salomon*, 51 Ill. 37; *Buckley v. Osburn*, 9 Ohio, 180; *Nashville v. Bank of Tennessee*, 1 Swan, 269. The term in the Constitution "all property in the State" intends all private property, and does not include public property (*People v. McCreery*, 34 Cal. 432); whether used as a means or instrumentality of the government or not. *People v. U. S.*, 93 Ill. 38; *McGoon v. Scales*, 76 U. S. 9 Wall. 23 (19 L. 2 L. R. A.

ed. 545); *Kan. Pac. R. v. Prescott*, 88 U. S. 16 Wall. 603 (21 L. ed. 378). See *Desty*, Taxn. 34.

However general may be the enumeration of property for taxation, the property held by the State and by all its municipalities, for governmental purposes, was intended to be excluded; and the law will be administered as excluding it in fact. *Louisville v. Com.*, 1 Duvall, 236; *People v. Salomon*, 51 Ill. 37; *People v. Doe*, 36 Cal. 220; *People v. Austin*, 47 Cal. 35; *Worcester Co. v. Worcester*, 116 Mass. 193; *Wayland v. Middlesex Co.*, 4 Gray, 500; *Gibson v. Howe*, 37 Iowa, 163; *Moore v. Morledge*, 42 Iowa, 26; *State v. Gaffney*, 34 N. J. L. 133; *Schuylkill Co. Directors of Poor v. North Manheim Twp. School Directors*, 42 Pa. 21; *Cooley*, Taxn. 172. A State may tax its own municipal organizations, or their corporate property; but the intention to do so must clearly appear; it will not be presumed. *Stein v. Mobile*, 24 Ala. 591; *Wayland v.*

Second Department, affirming an order of the Kings Special Term, vacating an assessment. *Affirmed.*

Reported below, 47 Hun, 883.

The proceeding was by certiorari to review the determination of the Board of Assessors of Brooklyn, in assessing certain land in Brooklyn belonging to the City of New York. The land in question is the landing place of the Fulton Ferry, and is leased to and occupied by the Union Ferry Company of Brooklyn. Under the terms of the lease to that company, it pays an annual rental to the City of New York, and conducts a ferry plying between the two cities.

Other facts are stated in the opinion.

*Mr. Almet F. Jenks* for appellants.

*Mr. Frederic A. Ward* for respondents.

**Andrews, J.**, delivered the opinion of the court:

We deem it unnecessary to examine at length the questions presented by this record, in view of the elaborate and satisfactory opinions pronounced at the Special and General Terms, and shall content ourselves with a brief statement of what seem to us controlling considerations, which justify and require an affirmance of the orders below.

It is to be taken as a conceded fact that the title to the landing place at the foot of Fulton Street, Brooklyn, which is the subject of the assessment, is vested in the mayor, aldermen, and commonalty of the City of New York. The tax proceedings are based on this assumption. In what manner or at what precise time the City of New York acquired title does not appear. The ferry (now known as Fulton Ferry) running from this landing place to the City of New York is recognized in the Dongan charter as in existence when that charter was granted. In the protest of the mayor, aldermen and commonalty of the City of New York, presented to Lord Cornbury in 1707, against granting the petition of one Seberingh for a ferry franchise between Nassau Island and the city, it is alleged that the City of New York had possessed and enjoyed the franchise of operating a ferry between Nassau Island and the City of New York for seventy years prior to that time; and the protest refers to the landing place on Nassau Island used in connection therewith, locating it at the point where the landing which is the subject of the tax in question now is. The commencement of this period of seventy years antedates the Dongan charter nearly fifty years.

The words of grant of the ferry privilege to the City of New York in the Dongan Charter of

1686, and in the Cornbury Charter of 1706, and also in the Montgomerie Charter of 1780, operated by way of confirmation of existing rights, and were not the foundation of the city's title to the franchise or the landing place. The City of New York, therefore, under an admitted title, the origin of which is not disclosed, has for a period of two hundred and fifty years occupied by itself, its agents or lessees, the present landing place in Brooklyn, and used it for the convenience of the public, and as an incident to the ferry franchise.

We think the landing place was not taxable, upon the principle that property of a municipality acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject, within the purview of tax laws, unless specially included. It would probably be competent for the Legislature to make the landing place taxable in Brooklyn; but not having done so in terms or by necessary implication, the power to tax the landing cannot be spelled out from general words subjecting to taxation all real and personal property within the State. This principle of construction is well settled. It proceeds upon obvious public considerations. There would be manifest incongruity in subjecting to taxation for public purposes property dedicated to, or acquired under, legislative authority for public and governmental use.

We do not think the principle that municipal property devoted to public uses is not taxable, unless expressly made so by statute, depends upon the origin of the title, whether acquired by purchase or voluntary grant, or as the product of taxation, nor upon its locality, whether situate within or without the territorial limits of the municipality. These considerations may be important in some cases. We prefer, however, to express no opinion on the question whether there is in principle a distinction between taxation of the property of a municipality strictly devoted to public uses, and property which it owns, though not acquired for a public use, although it may be held on the general trust applicable to all property of a corporation, but the acquisition or holding of which has no essential connection with the public functions of the municipality.

It is conceivable, we suppose, that the City of New York might, in satisfaction of a debt, or upon some other consideration, acquire a building lot in Brooklyn, which was not and could not be specifically devoted to any public use of the City of New York. The question which would be presented in such a case is quite foreign to the present one. The ferry franchise

Middlesex County, 4 Gray, 500; Louisville v. Com. 1 Duval, 235; State v. Gaffney, 34 N. J. L. 183. See Desty, Taxn. 49.

*Property held for general use is not taxable.* Property held for public use, although operated by a private company, is not taxable; so it has been held that the bridge across the Mississippi at Davenport and owned exclusively by the government, although half its expense was paid for by the railroad company, and secured to its use, is not taxable wholly or in part to the company. Chicago etc. R. Co. v. Davenport, 61 Iowa, 451. See Ill. C. R. Co. v. Decatur, 1 L. R. A. 613. The property of municipalities is not taxable, and by clear implication is excluded from taxation (People v. Doe, 98 Cal. 220; People v. Austin, 47 Cal. 333; Gibson v. Howe, 37 Iowa, 168; State v. Gaffney, 34 N. J. L. 183); as a city cemetery (Baltimore v. Green Mount Cemetery, 7 Md. 517; Louisville v. Nevin, 10 Bush, 549; 2 L. R. A.

Woodlawn Cemetery v. Everett, 118 Mass. 854); or a city hall (Louisville v. Com. 1 Duval, 235); or a court house and jail (Worcester Co. v. Worcester, 116 Mass. 193; Piper v. Singer, 4 Serg. & R. 854); or a city wharf (Low v. Lewis, 46 Cal. 549); or a reservoir (State v. Gaffney, 34 N. J. L. 183); or state or city parks (People v. Salomon, 51 Ill. 37); or lands used for waterworks (West Hartford v. Hartford Water Comrs. 44 Conn. 360; Rochester v. Rush, 80 N. Y. 302). But a purchase made in excess of what is needed for the particular purpose would be taxable. West Hartford v. Hartford Water Comrs. 44 Conn. 360. The state tax law applies to persons only, and not at all to political bodies, like municipal corporations, which exercise in different degrees the sovereignty of the State. The property of such bodies is not subject to taxation. Louisville v. Conn. 1 Duval, 236; Rochester v. Rush, 80 N. Y. 302.



was conferred for a public use. This is clearly recognized in all the charters. Its acceptance by the city imposed a duty corresponding with the privilege granted. The duty to maintain the ferry could not be performed without a landing place on the Brooklyn side, and authority conferred to maintain the ferry presupposes the right to acquire what was essential to its operation. The one thing is an inseparable incident of the other, and the franchise to maintain the ferry in question, conjoined with the ownership of the landing, constitute together a ferry property belonging to the city, devoted to public use, the revenues from which, by ordinance and statute, are irrevocably pledged for the payment of the public debt. City Ordinances, art. 6, § 52, subsec. 6; Laws 1882, chap. 410, §§ 171, 172.

The supposed hardship to the City of Brooklyn of exempting the landing from taxation while the city bears the burden of maintaining police supervision over it as a part of its territory, if the hardship exists, is an immaterial circumstance. But the City of Brooklyn enjoys compensating advantages in the maintenance of the ferry, and the Legislature, following a policy long established, has not subjected the landing to taxation.

The fact that the City of New York operates the ferry through lessees, and derives its revenues from the rental, and not from the operation of the ferry by its immediate agents and servants, does not make the franchise or the landing taxable. It is to be assumed that the immunity of the property from taxation was in the contemplation of the parties when the lease was made, and was considered by them in fixing its terms. The tax is imposed on the land as the property of the city, and not on the lessees in respect of their interests.

Many authorities on the question presented are cited in the opinions below. We refer to a few of them, which we think fully support the conclusions reached. *Rochester v. Rush*, 80 N. Y. 802; *Rea v. Liverpool*, 7 Barn. & C. 61; *Darlington v. New York*, 31 N. Y. 164; *Cooley, Taxn.* 182, note; *New York v. Purze*, 3 Hill, 612; 2 Dillon, Mun. Corp. 3d ed. § 773, and cases cited.

*The orders of the Special and General Terms should be affirmed.*

All concur.

Albert G. A. HARNICKELL, *Respt.*,

v.

NEW YORK LIFE INS. CO., *Appt.*

(.....N. Y.....)

**The receipt of insurance policies**, under a written agreement that they shall be returned if policies held by the insured in other companies should not be surrendered on terms satisfactory to him, is an acceptance of the policies only upon a condition precedent, and no valid contract is thereby created until the condition is complied with. Whether the agent of the company had power to make such a conditional delivery or not

is immaterial, as, if he had not, the result would still be that no contract was made.

(November 27, 1883.)

**A PPEAL** by defendant, from an order of the General Term of the Supreme Court, First Department, reversing a judgment of the Special Term dismissing the complaint, and granting a new trial in an action to compel the surrender of certain promissory notes, etc. *Affirmed.*

**Statement by Peckham, J.:**

The plaintiff, A. G. A. Harnickell, in the year 1885, was the owner of several policies of insurance, issued upon his life by several different companies, for a total of \$35,500. Some of these were payable to his widow and minor children. One M. L. Hamlin, who was what is termed a "special agent" of the New York Life Insurance Company, came to the plaintiff in the winter or spring of that year, and desired him to take some insurance upon his life in that company. The plaintiff stated to him that he was insured for a sufficient amount, and did not wish double insurance; whereupon, Mr. Hamlin gave him estimates in regard to policies in his company, their cost, value, etc.; and the negotiations finally culminated in an agreement between the plaintiff and the agent that the agent should take the policies which the plaintiff already had in the other companies, and obtain the amount of their surrender value in cash, or paid up policies therefor, to an amount, in either case, which should be satisfactory to the plaintiff; and upon the accomplishment of this the plaintiff would take two policies in the defendant company for \$25,000 each, upon terms agreed upon between him and the agent.

Pursuant to this verbal understanding, the plaintiff signed an application for such policies to the defendant, the agent agreeing to abate largely in the amount of the premiums due thereon, and also that notes, instead of cash, should be paid by the plaintiff therefor. The application was sent on to the company as signed by the plaintiff, and in due time two policies of insurance were presented to him by the company, through its agent Mr. Hamlin.

Up to this time the evidence is undisputed that the policies in the defendant company were only to be taken out by the plaintiff and received by him upon the successful negotiation by the defendant's agent with the other companies in which the plaintiff had policies for the payment of the surrender value of such policies in cash, or the issuing of paid up policies therefor—the amount, in either event, to be satisfactory to the plaintiff.

Before these negotiations were carried through in regard to the disposition of the policies which the plaintiff already had in the other companies, and after he had signed an application, which had been sent to the home office, and after the agent had received back the policies in the defendant company, Mr. Hamlin called upon the plaintiff for the pur-

**NOTE.**—*Conditional delivery.* A policy of insurance may be conditionally delivered. The rule that a deed cannot be delivered conditionally has no application. *Harnickell v. N. Y. Life Ins. Co.* 40 Hun, 558. The question is one of fact as to the 2 L. R. A.

intention of the parties, and is to be submitted to the jury. *Hoyt v. Mutual Ben. L. Ins. Co.* 98 Mass. 530; *Markey v. Mutual Ben. L. Ins. Co.* 106 Mass. 78, 118 Mass. 178, 126 Mass. 158; *Rogers v. Charter Oak L. Ins. Co.* 41 Conn. 97.

pose of carrying out the negotiations, and brought to him the two policies, for \$25,000 each, issued by the defendant company. The plaintiff finally accepted the policies under an agreement entered into between him and Mr. Hamlin as the agent of the defendant, and signed by them respectively, which agreement is as follows:

New York, May 8, 1885.

To M. L. Hamlin, Special Agent of the New York Life Insurance Company—Dear Sir: I have received from you policies No. 204233, for \$25,000, and 204234, for \$25,000, and have given promises of payment for the premiums thereon, less rebate allowed, viz.:

My two notes,.....	\$ 539 13
Cheque,.....	1,000 00
	17 37
	\$2,156 50

I hand you herewith together:

5 Policies endow'ts in Provident Co.,.....	\$ 5,500 00
2 Policies life in Provident Co.,.....	10,000 00
1 do do " Equitable,.....	5,000 00
1 do do " Mutual Ben'f.,.....	10,000 00
1 do do " U. S. L. Co.,.....	5,000 00

—which it is understood is all the policies I have now in force, besides those of your company, above mentioned, and from which I want to realize a satisfactory amount in cash, and, if not obtainable, then paid up policies; and if nothing satisfactory to me can be obtained, then I understand that my old policies shall be left in force, and the above new ones in your company, if found by me necessary to wait, or omit taking them, can be returned to you, and my above promises returned to me.

Yours Truly,

A. G. A. Harnickell.  
M. L. Hamlin.

The agent failed to accomplish the surrender of any of these policies, or the giving in exchange therefor paid up policies, upon any terms satisfactory to the plaintiff; and indeed, in regard to some of the policies, they could not be surrendered or exchanged without the consent of the plaintiff's wife and minor children, unless pursuant to the provisions of the statute. The notes given by the plaintiff to the agent were by him forwarded to the home office, and the account of such plaintiff with the company defendant was credited with the receipt thereof, a check for \$17.87 being retained by the agent.

The agent failing to obtain payment of the surrender value of, or paid up policies in exchange for, the plaintiff's policies, the plaintiff finally refused to continue negotiations any longer, and refused to accept or retain the policies which had been delivered to him conditionally; and on the 6th of August, 1885, he wrote a letter to the company defendant, and to the defendant Hamlin, as its agent, in which he stated the terms upon which the policies had been received by him, and the other policies in other companies given up by him to Mr. Hamlin; and in which, after stating that they had wholly failed to effect a surrender of his policies upon terms satisfactory to him, or to effect any surrender at all, and had returned him such policies, he therefore notified them that he availed himself of the option reserved in his letter of the 8th of May, and re-

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turned the policies to the defendant, and requested it to return to him his two notes for \$800 each, and his check for \$17.87. This letter was duly received by the defendant.

At the time these policies issued by the defendant were brought and given to the plaintiff he had had no communication concerning such policies with the company defendant, except through its agent, Mr. Hamlin. Nor did he, subsequent to that time, have any communication with the company defendant, until he returned the policies to it, inclosed in the letter of the 6th of August, 1885.

In each of these policies were the following provisions: "Inasmuch as only the officers at the home office of the company in the City of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations made in the application for this policy, it is expressly understood and agreed that no information, statements, or representations made or given by or to the person soliciting or taking the application for this policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such information, statements, or representations have been reduced to writing, and presented to the officers of the company at the home office, in the application referred to. No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to issue a permit for residence, travel, or occupation, or to bind the company by making any promise, or receiving any representation or information. This power can be exercised only by the president, vice president, or actuary of the company, and will not be delegated."

The defendant corporation refused to surrender the notes above mentioned, or accept the policies sent back by the plaintiff, but claimed that, by delivering to the plaintiff, through their agent, the two policies and the receipt by the company, through such agent, of the plaintiff's notes, that a valid contract of insurance was entered into between the parties, evidenced by the contents of the application signed by the plaintiff, and by the policies issued thereon by the defendant, and that, as they were wholly ignorant of any arrangement of the nature claimed by the plaintiff to have been made between him and Mr. Hamlin, they were not affected therewith in any manner; and that, by reason of the provisions in regard to the limitation of the power of their agent, as contained in the above extracts from the policies, the plaintiff had no cause of complaint against the company, but must look to the agent as an individual for the fulfillment of the arrangement made with him in regard to the policies.

Thereupon the plaintiff commenced this action to have it adjudged that he had the right to return the two policies of insurance issued by the defendant to him, and obtain the surrender to him by the defendant of the two notes and check given by him. The defendant set up in answer the facts substantially above set forth.

The action came on for trial at a special term of the supreme court, and resulted in a dismissal of the complaint upon the merits as to the defendant the insurance company; the other de-

fendant, the agent Hamlin, although served with process, having made default. The plaintiff appealed to the general term, which court reversed the judgment of the special term, and granted a new trial; and from the order granting such new trial the defendant appeals here, giving the usual stipulation for judgment absolute in case such order should be affirmed.

**Messrs. Wm. B. Hornblower and James Byrne**, for appellant:

All negotiations between the parties and all that was said at the time are conclusively deemed in law to have been merged in the contract evidenced by the policies and the notes.

*Atty-Gen. v. Continental L. Ins. Co.* 93 N. Y. 74; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544 (24 L. ed. 674).

The right of the agent to in any wise bind the company to anything other than the contract contained in the application and the policy was cut off by the provisions therein.

See *N. Y. L. Ins. Co. v. Fletcher*, 117 U. S. 519 (29 L. ed. 984); *Simons v. N. Y. L. Ins. Co.* 88 Hun, 809; *Chase v. Hamilton Ins. Co.* 20 N. Y. 52; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47; *Mercereau v. Phoenix Mut. L. Ins. Co.* 66 N. Y. 274; *Alexander v. Germania F. Ins. Co.* 66 N. Y. 464; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 278.

Under the terms of the clauses in the application and policies the company is in no respect chargeable with any false representations of the agent.

*Simons v. N. Y. L. Ins. Co.* 88 Hun, 814; *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen, 832; *Chase v. Hamilton Ins. Co.* 20 N. Y. 52.

An expression of opinion is not a representation of fact upon which a charge of fraud can be predicated.

*Simons v. N. Y. L. Ins. Co. supra*; *Bigelow, Fraud*, p. 14; *Walker v. Mobile & O. R. Co.* 84 Miss. 245; *Kerr, Fraud & Mistake*, 82.

It may be that the common-law doctrine that a conditional delivery or a delivery in escrow cannot be made directly to the party or his agent, but must be made to a third person (a doctrine recognized and applied in *Worrall v. Munn*, 5 N. Y. 229; *Braman v. Bingham*, 26 N. Y. 483; and *Cocks v. Barker*, 49 N. Y. 107), is to be limited to instruments under seal, though it is difficult to see any logical distinction between an executory instrument under seal, and an executory instrument not under seal. *Benton v. Martin*, 52 N. Y. 570, seems, however, to be an authority in support of the distinction.

Such a delivery, however, upon condition, can only be strictly upon condition precedent. *Hodge v. Security Ins. Co.* 33 Hun, 586; *Tower v. Richardson*, 6 Allen, 851; *Spring v. Lovett*, 11 Pick. 417; *Adams v. Wilson*, 12 Met. 188; *Underwood v. Simonds*, 12 Met. 275; *Henshaw v. Dutton*, 59 Mo. 139; *Isaacs v. Elkins*, 11 Vt. 681; *Hatch v. Hyde*, 14 Vt. 25.

Notice to an agent is not notice to a principal, unless it is within the scope of the authority to receive notice, or unless he is a general agent for the principal.

*Hodge v. Security Ins. Co.* 33 Hun, 588, 587; *Wilson v. Genesee Mut. Ins. Co.* 14 N. Y. 418; *Hermann v. Niagara F. Ins. Co.* 1 Cent. Rep. 707, 100 N. Y. 411; *Atlantic State Bank v. Savory*, 82 N. Y. 291.

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**Mr. John M. Bowers**, for respondent:

An agent with powers such as Hamlin's is, so far as power is concerned, a general agent.

*Desendorf v. Beardsley*, 28 Barb. 656; *Davis v. Lamar Ins. Co.* 18 Hun, 230; *Bodine v. Exchange F. Ins. Co.* 51 N. Y. 117; *Ments v. Lancaster F. Ins. Co.* 79 Pa. 476; *Combs v. Shrewsbury Mut. F. Ins. Co.* 84 N. J. Eq. 408; *Boice v. Thames & M. Marine Ins. Co.* 38 Hun, 246; *Leeds v. Mechanics Ins. Co.* 8 N. Y. 851; *Rouley v. Empire Ins. Co.* 36 N. Y. 550; *Baker v. Home L. Ins. Co.* 64 N. Y. 648, 649; *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 13 Wall. 223 (20 L. ed. 617); *Miller v. Phoenix Mut. L. Ins. Co.* 10 Cent. Rep. 38, 107 N. Y. 292.

Whether Hamlin shall be held to have been the accredited agent, with full power, acting for the company, or a mere messenger to carry the policies, no contract was completed, because the plaintiff did not accept the policies.

*Brackett v. Barney*, 28 N. Y. 833; *Jackson v. Phipps*, 12 Johns. 418; *Crosby v. Hillyer*, 24 Wend. 280; *Fisher v. Hall*, 41 N. Y. 416; *Best v. Brown*, 25 Hun, 223; *Ford v. James*, 4 Keyes, 300.

Consideration for the notes and check having failed by reason of the failure of the contract of insurance, they cease to be legal obligations, and defendant has no right to them in law or equity.

*Benton v. Martin*, 52 N. Y. 570; *Frishes v. Hoffnagle*, 11 Johns. 50; *McAllister v. Read*, 4 Wend. 483; *Whitford v. Laidler*, 94 N. Y. 145.

The premium notes and checks were negotiable, and in the hands of an innocent holder for value plaintiff could not avail himself of his defense against them. For this reason the case falls within the well defined instances in which equity will lend its aid by ordering a cancellation or delivery up of the notes.

*Western R. Co. v. Bayne*, 75 N. Y. 1; 2 Story, Eq. Jur. § 700, note 1; *McHenry v. Hazard*, 45 N. Y. 581; *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Chitty, Bills*, 110; *Daniell, Ch. Pr.* 1651.

**Peckham, J.**, delivered the opinion of the court:

There was no contradictory evidence in this case. At its close the plaintiff requested the court to find the following fact: "That a delivery of the said policies was accepted by the said plaintiff, upon the terms and conditions shown in the agreement signed by the said plaintiff and the said Hamlin, a correct copy of which is attached to the complaint in this action, marked 'A' and also to these findings." The court refused to make such finding, and the plaintiff excepted. If the finding asked for was material, and based upon sufficient and uncontradicted evidence, the request should have been granted, and a failure to grant it was error, for which the judgment should be reversed. We think the fact was material, and was based upon sufficient and uncontradicted evidence. It thus appears that an agent of the defendant enters into an arrangement with the plaintiff, by which the two policies subsequently issued by the defendant were to be accepted by the plaintiff only upon condition that certain other policies then delivered by the plaintiff to the agent should be surrendered by him to the companies issuing them, and their

surrender value in cash paid to him, or paid up policies given in exchange therefor; in either case, in amounts satisfactory to the plaintiff. This, we think, was clearly a condition precedent to the full delivery and acceptance of these policies issued by the defendant, and until such condition precedent was complied with or waived, no fully executed and valid contract of insurance existed between these parties. No question of right to conditionally receive an instrument, not under seal, by a party thereon, can be successfully raised.

*Benton v. Martin*, 52 N. Y. 570, decides this proposition, and leaves it unnecessary for us to discuss the abstract question as to whether there is or is not a good reason for the distinction between the case of a sealed and an unsealed instrument in this respect.

The provisions contained in the policies, which are above quoted, relate to the policies themselves after they should become executed instruments between the parties. All negotiations had before such event, and all parol agreements between the assured and the agent of the defendant, would have been merged in the contract evidenced by the policies themselves, had the negotiations been carried out as intended, and such policies been absolutely delivered to and accepted by the plaintiff; hence, any oral representation or statements made by the agent of the company, and not contained in the contract of insurance, would have formed no part thereof, and could not have been insisted upon by the plaintiff as against the defendant company. Such are the cases which have been cited by the learned counsel for the defendant in relation to the absolute merger of all previous negotiations between the agent and the insured in the written contract of insurance.

The learned counsel for the defendant claims that the condition referred to, assuming it to have been made, was a condition subsequent, and that, at all events, a condition subsequent would be invalid as against the contract evidenced by the policies. He says the contract entered into was to cease to be of any effect in case Hamlin did not obtain the surrender or exchange of the plaintiff's policies in the other companies. We think that, instead of the contract ceasing to be of any effect in case Hamlin failed to accomplish the surrender, the plain meaning was that the contract should not exist until Hamlin had brought about the exchange. In other words, there was not a contract entered into with a provision that it should cease

to bind in case Hamlin failed to redeem his promise in the future, but the contract was not to become binding in any event until the condition was performed by Hamlin; and upon its performance, and not until then, was the contract to become effective.

We think, with the learned court below, that it is wholly unimportant whether Hamlin had any power from the company to make a conditional delivery or not. The plaintiff had power to attach such conditions as he chose to the acceptance of the policies; and, if the agent of the company had no power to make conditional delivery to the plaintiff, the result would still be that no contract was ever made, and no absolute acceptance ever had. It cannot be argued for one moment that an absolute delivery of a paper is made to an individual who has power to and does refuse to accept it, except upon condition, because the person who assumed to make the delivery was an agent, who had no authority from his principal to make a conditional delivery.

Nor do we think that any inconvenience, at least of much weight, will follow the result of holding that an individual can refuse to accept a policy of insurance from a corporation except upon the performance of some condition precedent under an arrangement made between him and an agent of the company, which arrangement the agent fails to communicate to the corporation. Insurance companies may with entire propriety provide in the same manner as the defendant provided in the policies in question, in cases where the contract of insurance becomes executed. There it is highly necessary and important for the company to know exactly how far they are bound, and the entire nature of the contract which has been made between them and the assured. But an agreement between an individual and the agent of a company by which no acceptance of the policy is to be made except upon conditions relating to the same, and an agreement to hold the policy until the performance of those conditions, or a failure to perform, cannot, as we think, result in any serious inconvenience to the company. But whether that is so or not cannot alter the right of an individual to refuse to be bound by a policy of insurance until he has absolutely received and accepted it.

*We think the order of the General Term was right, and should be affirmed, and judgment absolute granted against the defendant, with costs.*

All concur.

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

M. & L. S. FECHHEIMER & CO.

v.

N. B. BAUM & BRO. *et al.*

(.....Fed. Rep.....)

**\* The Courts of the United States, sitting in equity, may administer, in suits of which they**

*\*Head notes by SPEER, J.*

**NOTE.—Fraudulent purchase of goods.** Where a purchase of the goods is made with the previous

have jurisdiction, equitable rights peculiar to the laws of the State where the courts are held.

**2. The fact that the local statute provides that a creditor of an insolvent trader or firm of traders whose debt is mature, unpaid, demanded and payment refused may ask for a receiver, is an exception to the rule making the existence of a lien a prerequisite to such an application.**

design of not paying for them it is such a fraud as will vitiate the sale. *Sellman v. Kalkman*, 8 Cal. 213. And the seller may repudiate the sale. *Dow v. Sanborn*, 8 Allen, 181; *Kellogg v. Turpie*, 93 Ill.

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3. **A person not intending to pay**, by inducing one to sell him goods on credit through the fraudulent concealment of his insolvency is guilty of a fraud which entitles the vendor to disaffirm the contract, if no innocent third party has acquired an interest in the property.
4. **Where a firm of traders in May makes a statement to a commercial news agency** (Bradstreet's) showing entire solvency, which statement is intended to be circulated among merchants selling goods upon credit, and which states that there are no liens or mortgages upon their assets, and that they gave no security for borrowed money except farmers' notes as collateral, and in December it appears that they are in debt more than \$150,000 and utterly insolvent, and that at the time of their statement they had made a written promise to execute mortgages to a favored creditor upon their entire assets, which promise was withheld from the news agency, and that their entire stock was subsequently conveyed by mortgage to such favored creditor, the entire transaction is fraudulent as to creditors who gave them credit on the faith of said statement.
5. **If the traders were insolvent** at the time of their statement to Bradstreet, their statement of complete solvency, made "willfully with the intent to deceive, or recklessly without knowledge," is fraudulent under the Law of Georgia, as to parties who were misled thereby.
6. **The facts stated by the bill and affidavits** make this a proper case for the chancellor to grant the injunction sought and to appoint a receiver.

(January 4, 1889.)

**MOTION** for an injunction and for the appointment of a receiver. *Granted.*

**Statement by Speer, J.:**

The bill was filed by the members of the firm of M. & L. S. Fechheimer & Co. residents and citizens of Ohio, against Baum Bros., a firm do-

ing business at Toombsboro, Irwinton and Dublin, in this district, to assert the right to an injunction and the appointment of a receiver given by the Law of Georgia, Code 3149 (a). This section provides:

"In case any corporation not municipal, or any trader or firm of traders, shall fail to pay at maturity any one or more matured debts, payment of which has been properly demanded of such debtor and by him refused, and shall be insolvent, it shall be in the power of the court of equity under a creditors' bill to which one or more of the creditors who have matured debts unpaid shall be necessary parties, to proceed to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such traders, firm of traders, or corporation."

The averments of the bill, made and sworn to, conform to the requirements of the statute in all respects; and so far as they indicate the existence of matured debts due by the defendants to the plaintiffs, the demand for payment, its refusal and the insolvency of the defendants, the averments are not denied.

In addition the bill alleges other facts not less important to the jurisdiction in equity. They are that on May 21, 1888, the defendants, Baum Bros., made a statement to Bradstreet's Mercantile Agency which showed a condition of prosperous solvency upon their part; which statement is appended as an exhibit to the bill; that plaintiffs in the usual course of business had knowledge of that statement, believed it to be true, and knew this before their merchandise was sold to the defendants; that the defendants owe \$180,000, have made many fraudulent assignments and preferences; that some of these are given to favored creditors upon the goods of the plaintiffs not yet paid for; that the plaintiffs' debts were created for a large stock of clothing, part of which is yet in

265. It is a fraud as between buyer and seller and passes no title. *Bowen v. Schuler*, 41 Ill. 192. A purchase of goods with a preconceived design not to pay for them is fraudulent, and voidable by the seller, although there may have been no actual, express misrepresentations of any material fact. The intent concealed from the seller is sufficient. *Cross v. Peters*, 1 Maine, 376; *Ayres v. French*, 41 Conn. 142; *Morrill v. Blackman*, 42 Conn. 324; *Thompson v. Rose*, 16 Conn. 71; *Buckley v. Archer*, 21 Barb. 585; *Roth v. Palmer*, 27 Barb. 632; *Barnard v. Campbell*, 65 Barb. 286, 58 N. Y. 73; *Johnson v. Monell*, 2 Abb. App. Dec. 470; *Nichols v. Michael*, 23 N. Y. 24; *Wright v. Brown*, 67 N. Y. 1; *Wiggin v. Day*, 9 Gray, 97; *Kline v. Baker*, 99 Mass. 253; *King v. Phillips*, 8 Bosw. 603; *Meacham v. Collignon*, 7 Daly, 407; *Redington v. Roberts*, 25 Vt. 686; *Parker v. Byrnes*, 1 Low, 539; *Shipman v. Seymour*, 40 Mich. 274; *Davis v. McWhirter*, 40 Up. Can. Q. B. 598; *Ex parte Whitaker*, L. R. 10 Ch. 446; *Powell v. Bradlee*, 9 Gill & J. 220; *Dow v. Sanborn*, 3 Allen, 181; *Ferguson v. Cunningham*, 9 Barn. & C. 59; *Read v. Hutchinson*, 3 Camp. 352; *Kilby v. Wilson*, Ryan & M. 178; *Hawse v. Crowe*, Ryan & M. 414; *Noble v. Adams*, 7 Taunt. 59. If the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. *Talcott v. Henderson*, 31 Ohio St. 162; *Powell v. Bradlee*, 9 Gill & J. 220; *Johnson v. Monell*, 2 Abb. App. Dec. 470.

**Fraudulent purchaser acquires no title.** Fraud avoids a contract of sale, and the property does not pass thereunder. *Cary v. Hotelling*, 1 Hill, 311, 37 Am. Dec. 324; *Root v. French*, 13 Wend. 570; *Alhison v. Matthieu*, 3 Johns. 238; *Van Cleaf v. Fleet*, 15 Johns. 147; *Buffington v. Gerrish*, 15 Mass. 156; *Andrew v. Dieterich*, 14 Wend. 31; *Mowrey v. Walsh*, 8 Cow. 238; *Thompson v. Addy*, 8 Cow. 239, note (a); *Badger v. Phinney*, 15 Mass. 364. The title must be considered as remaining in the plaintiffs as the original owners. *Butler v. Collins*, 12 Cal. 462. See

*Van Cleaf v. Fleet*, 15 Johns. 147, 151; *Abbotts v. Barry*, 5 Moore, 98, 102; *Irving v. Motly*, 7 Bing. 543, 5 Moore & P. 880. If delivery of the goods is procured by the fraud of the vendee, the title will not pass to him and the vendor can reclaim the goods if they have not passed into the hands of a bona fide purchaser. *Lupin v. Marie*, 2 Paige, 160. The sale gives no title to purchaser, nor to his assignee for benefit of creditors, as against the party defrauded (*Knowles v. Lord*, 4 Whart. 500; *King v. Fitch*, 2 Abb. App. Dec. 527, 1 Keyes, 444); and an execution creditor who has levied on the goods cannot uphold the sale. *Naugatuck Cutlery Co. v. Babcock*, 22 Hun, 435; *Devoe v. Brandt*, 58 N. Y. 466.

**Fraudulent representations of solvency.** Where a debtor induced a sale of property to himself by fraudulent representations of his solvency, it was such a fraud upon the seller as warranted the latter to avoid the sale and reclaim the goods even as against creditors. *Ensign v. Haffield* (Pa.) 3 Cent. Rep. 534. There can be no valid contract with a swindler, and no valid title can pass to him, or from him even to an innocent third person. *Edmunds v. Merchants Despatch Transp. Co.* 135 Mass. 233. See *Thompson v. Peck*, 1 L. R. A. 201.

**Fraudulent concealment of insolvency.** If a buyer conceals a fact that is vital to the contract, knowing that the other party acts upon the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied or the reverse of it expressly stated. *Nichols v. Pinner*, 18 N. Y. 311. If an insolvent purchaser conceals his insolvency from the vendor and obtains goods with intention not to pay for them, the title to the goods does not pass. *Durell v. Haley*, 1 Paige, 492; *Stewart v. Emerson*, 52 N. H. 816; *Thompson v. Rose*, 16 Conn. 71; *Powell v. Bradlee*, 9 Gill & J. 220, 248, 278; *Bidault v. Wales*, 19 Mo. 30, 50 Mo. 548; *Mitchell v. Worden*, 20 Barb. 253; *Buckley v. Archer*, 21 Barb. 585; *Ash v. Putnam*, 1 Hill, 308;

the possession of the defendants; that the purchase was made by the defendants with the deliberate intention not to pay therefor, and with no reasonable expectation that the defendants would be able to pay; that the sales are void and that the title did not pass; that the statement made to the Bradstreet's Mercantile Agency as to the standing and condition of the firm was made with intent to deceive the public and especially the plaintiffs, and was a part of a scheme to defraud creditors who would extend credit; that the fraudulent preferences amount to \$70,000, which is larger than the annual amount handled in business by the defendants.

The prayer is for an injunction and receiver, and that goods purchased by defendants from plaintiffs be kept separate for the benefit of plaintiffs, and for a general judgment, and for general relief.

The temporary injunction was granted upon consideration of plaintiffs' bill, and thereupon plaintiffs filed an amendment thereto. This prayed that H. M. Comer & Co., a firm of this district, be made parties; that the preferences to Comer & Co. are void; that they consist of certain mortgages to secure an alleged indebtedness of \$35,000 given upon stock worth \$43,000; that in addition to these mortgages the defendants have transferred and assigned to H. M. Comer & Co. notes and accounts worth a sum largely in excess of Comer's demand; that on August 22 these accounts were worth \$50,000; and plaintiffs charge on information and belief that these transferred choses in action have been increased by other transfers to \$75,000; that since the mortgage and preferences were given the debtors Baum Bros. have paid to Comer & Co. \$18,000, which reduces their demand to \$17,000, and yet Comer & Co. hold as collateral and otherwise in mortgages on real

and personal property the full sum of \$100,000 to secure this debt. (This was stated on the hearing without objections to be \$24,600.) The bill alleges that the transaction between Comer & Co. and the debts were the result of a fraudulent confederacy to hinder and delay creditors and to compel them to accept a small pittance in full satisfaction of large debts; that the demands of Comer & Co. should not be paid by the proceeds arising from the sale of the merchandise of the plaintiffs and other creditors not yet paid for; that Comer & Co. had actual notice of the defendants' insolvent condition at the time of certain payments made to them from such proceeds.

The amendment further alleges that prior to the insolvency of the defendants, or at some other time, Comer & Co. obtained from the defendants an agreement in writing that when the defendants should become weak or insolvent they would execute and make to Comer & Co. a mortgage covering their entire property, and should assign to them all of their notes, accounts and choses in action; that said mortgages and preferences were given in pursuance of said agreement; that Comer & Co. permitted the defendants to retain possession of the notes and accounts and choses in action transferred to them; that the large amount of assets in the hands of Comer & Co. over and above their lawful demand will be sacrificed; that to the injury of plaintiffs the defendants bought a large stock of goods on credit with the intention not to pay for them, and to defraud creditors.

The prayer is that Comer & Co. be required to produce the said agreement on the hearing, and that they be enjoined from proceeding to foreclose the mortgage or mortgages, and that they be enjoined from collecting the notes and accounts or from in any way interfering with the assets of the defendants, and that a receiver

Hall v. Naylor, 18 N. Y. 588, 6 Duer, 71. In such case the property does not pass (Durell v. Haley, 1 Paige, 422; Stewart v. Emerson, 62 N. H. 301; Chaffee v. Fort, 2 La. 87; and the vendor may maintain replevin, trespass or trover against the vendee. Goulding v. Davidson, 20 N. Y. 608; Scott v. Simmons, 34 How. Pr. 67; Van Kleek v. Leroy, 4 Abb. Pr. N. S. 433; Ladd v. Moore, 3 Sandf. 591; Wheaton v. Baker, 14 Barb. 597; Hunter v. Hudson River Iron & Mach. Co. 20 Barb. 501; Van Neste v. Conover, 20 Barb. 543. And so if a merchant in good credit purchase goods upon his own responsibility, when he knows himself to be insolvent, but conceals that fact from the vendor, for the purpose of placing them in the hands of an assignee for the benefit of other creditors, it would be such a fraud as would avoid the sale. Rawdon v. Blatchford, 1 Sandf. Ch. 347.

**Remedy of defrauded seller.** In case of fraud on the part of the vendee of chattels, the seller may rescind the contract of sale and reclaim the goods from anyone but an innocent purchaser. Doane v. Lockwood, 3 West. Rep. 76, 115 Ill. 490; Buchenau v. Horney, 12 Ill. 393; Smith v. Doty, 24 Ill. 163; Moriarty v. Stofferan, 89 Ill. 523. To rescind the sale vendor must return the promissory note taken, and this before replevin brought. Doane v. Lockwood, 3 West. Rep. 76, 115 Ill. 490; Farwell v. Hanchett (Ill.) 6 West. Rep. 349; Whitcomb v. Denio, 13 U. S. 323; Williamson v. N. J. Southern R. Co. 20 N. J. Eq. 311; Whitney v. Roberts, 22 Ill. 381; Thompson v. Peck, 1 L. R. A. 201. If the purchaser is not entitled to notice of the rescission, those claiming under him are not, and the seller has no greater rights than the fraudulent vendee. Schwelzer v. Tract, 78 Ill. 845; Am. Merchants Union Express Co. v. Willele, 79 Ill. 32. Until the rescission is rescinded both the title and right to possession remain in the fraudulent vendee. Doane v. Lockwood, 3 West. Rep. 76, 115 Ill. 490. The seller can rescind and maintain replevin only on proof that the vendee never in-

tended to pay. Manheimer v. Harrington, 2 West. Rep. 618, 20 Mo. App. 297. Goods sold on a credit obtained by false representations made by the vendee may be reclaimed by the vendor. Powell v. Bradlee, 9 Gill & J. 248; Davis v. Stewart, 8 Fed. Rep. 803; Talcott v. Henderson, 31 Ohio St. 102. Where a minor purchasing goods fraudulently represents himself to be of full age, the seller on discovering the fraud may repudiate the sale, and recover the goods from the transferee of the minor. Neff v. Landis, 1 Cent. Rep. 133, 110 Pa. 204; Tainter v. Hyneman, 6 Phila. 202. And this without proof of collusion. Neff v. Landis, 1 Cent. Rep. 133, 110 Pa. 204.

**Demand not necessary.** As against the original wrong doer no demand is necessary (Moriarty v. Stofferan, 89 Ill. 523), and the original taking by a fraudulent purchaser is tortious. Oswego Starch Factory v. Lendrum, 57 Iowa, 573. If goods have been unlawfully obtained, proof of demand by the true owner and a refusal to deliver them up is not necessary in an action to recover them. Butters v. Haughwout, 42 Ill. 18; Bruner v. Dyal, 42 Ill. 34; Clark v. Lewis, 35 Ill. 417; Woodward v. Woodward, 14 Ill. 466; Hardy v. Keeler, 56 Ill. 152. Where a man buys goods intending not to pay for them, and induces a belief in the mind of the seller that he does intend to pay for them, the goods are unlawfully obtained, and demand to deliver them up to the seller is not necessary in an action to recover the same. Farwell v. Hanchett (Ill.) 6 West. Rep. 349. The intention is a question of fact and must be proved affirmatively. Bidault v. Wales, 19 Mo. 87; Nichols v. Pinner, 13 N. Y. 296; Bristol v. Wilmam, 1 Barn. & C. 514. Where purchasers from a fraudulent vendee have notice of facts sufficient to put a reasonably prudent person on inquiry, it is enough to charge them with notice of the fraud. Hanchett v. Kimbark, 3 West. Rep. 536, 118 Ill. 121. See Peck v. Bonebright, 1 L. R. A. 155.

be appointed to take charge of all such assets for the benefit of the creditors.

The bill expressly waives discovery.

The several defendants, by answers and affidavits, denied all the allegations of fraud and confederacy, and undertook to explain and justify all their transactions referred to.

On the hearing, plaintiffs put in evidence, *inter alia*, a statement of N. B. Baum & Bros. to their creditors, made December 8, showing large assets over liabilities, and concluding as follows: "After allowing for shrinkages, bad debts, etc., consider ourselves worth fully \$30,000, over liabilities. There are no mortgages or liens of any of our property, either real or personal. Our stock is insured for \$18,000, fixtures \$2,000. When we borrow money from bank we deposit our bonds and stocks as security; from our cotton factors we borrow on farmers' notes as collateral; give no other security. Do an annual business of \$75,000 to \$85,000. In addition to the above we sell 500 or 600 tons of fertilizers per annum, which we buy outright. Give notes for the same payable in fall; to only one company do we give farmers' notes as collateral. At this point we cleared \$10,000 on guano alone."

The plaintiffs also put in evidence the following:

*Exhibit A. Late Report.*

Ticket of Inquiry.

BRADSTREET'S.

No. 82 West Third Street,  
Cincinnati, July 19, 1888.

The Bradstreet Co.:

Give us, in confidence, for our exclusive use and benefit in our business, under our agreement with you, such information as you may have or may be able to obtain concerning the responsibility, character, reputation, credit, etc., of N. B. Baum & Bro., Toombsboro, Wilkinson County, Ga.

M. & L. S. F. & Co.  
2402.

Information will be furnished on the filling up of this blank and the signature of the subscriber.

*Exhibit B.*

We learn they carry an average stock of about \$15,000, and do a large business, sell largely on credit and consequently have considerable due them. Said to borrow considerable money to use in their business and generally put up planters' notes as collaterals. They are reputed to own real estate worth \$5,000 to \$8,000; would be difficult to give correct estimate of their net worth, but it is the general belief that the firm is estimated worth fully \$20,000 of more. They are of good character and steady habits and of fine business ability; appear to do nearly all the business done at this point and are generally prompt in meeting their obligations and are quoted in good credit.

July 20, 1888.

May 21, 1888.

State of Ohio, }  
Hamilton County. } ss.

Before me personally appeared Levi C. Goodale who, being duly sworn, says that he is the superintendent of the Bradstreet Co. Mercantile Agency, office at 82 West Third Street, Cincinnati, Ohio; that on July 19 they received a

ticket of inquiry from M. & L. S. Fechheimer & Co., of Cincinnati, Ohio, asking for information concerning the responsibility character, reputation, credit, etc., of N. B. Baum & Bro., whose postoffice address was Toombsboro, Ga. Said ticket of inquiry is attached hereto, made part hereof, marked "Exhibit A;" that on the 20th day of July, 1888, we made a report in answer to said inquiry, an exact copy of which answer is attached hereto, made part hereof, marked "Exhibit B."

We obtained this information in the regular course of our business, and for our company in that section of Georgia in which the business of N. B. Baum & Bro. is located.

Levi C. Goodale.

Sworn to before me and subscribed in my presence this 19th day of December, 1888.

William S. Little,

Notary Public, Hamilton County, Ohio.

The defendants gave evidence intended to rebut the allegation of the plaintiffs, which evidence included an agreement between N. B. Baum & Bro. and Baum & Co. and H. M. Comer & Co., dated March 10, 1888, which recited that "For and in consideration of certain advances to the amount of \$18,000, as evidenced by five promissory notes for \$3,200 each, signed by M. B. Baum & Bro. and indorsed by Baum & Co. and payable at the office of Comer & Co., as follows: respectively on Sept. 15, Oct. 1, Nov. 1, and Nov. 10; and one note for \$2,000 signed by Baum & Co. and indorsed by Baum & Bro., due October 20, next:

"Now, in order to secure these and any other sum that may hereafter be due them, we agree to deposit with them as collateral security notes, mortgages of good planters and others to whom we sell goods in amount equal to at least \$2 for every \$1 due by us to the said Comer & Co. We also agree to transfer to them as additional security our insurance policies on our buildings and stock of goods; and we further obligate and bind ourselves to give said H. M. Comer & Co. a first lien or mortgage upon all our stocks of goods and real estate in case we shall at any time become financially embarrassed while indebted in any way to them, or in case our said notes above described are not paid promptly at maturity. It is also understood and agreed that all drafts drawn or money advanced on open account or otherwise over and above the \$18,000 herein named, shall be paid out of the proceeds of cotton shipments first and before said proceeds are to be applied to said notes; in other words, only credit balances as may appear from open account are to be paid on said note unless by consent of said H. M. Comer & Co. in writing. It is understood and agreed that 8 per cent per annum will be charged on all advances," etc., etc.—signed N. B. Baum & Bro. and N. B. Baum & Co.

The mortgage dated the 17th day of November to secure the payment of \$38,000, including the five notes before mentioned and three other notes for \$5,000 each, dated October 12, 1888, and due at various dates until December 10, 1888, and one note for \$5,000 due January 12, 1889, and one dated March 10, 1888, for \$2,000 signed by Baum & Co., indorsed by Baum & Bro., payable October 20, 1888, upon 150 half rolls of bagging, 100 bundles cotton ties, 100 sacks of salt, all in the



planters' warehouse at Dublin, and also all goods and merchandise, dry goods, groceries, etc., stored in the store of L. C. Perry & Co. at Dublin, Ga.; also a mortgage made the 18th of November, 1888, to secure \$30,000 being apparently the same notes just mentioned and given upon certain lots of land situated in Toombsboro upon which are erected storehouses; and also certain stocks of general merchandise in said store—describing them particularly—and also all such articles and things as may be hereafter placed in such stocks; also the stock in the store at Dublin—more particularly describing it—with the same provision as to future acquisitions; also a lot of land, one half acre, in Irwinton, with storehouse thereon; and also the stock of goods therein contained; the mortgages comprehend all the safes, showcases, and fixtures of every kind in said three stores.

**Messrs. Patterson & Hodges** for plaintiffs.

**Messrs. Hill & Harris** and **Denmark & Adams** for defendants.

**Speer, J.**, delivered the following opinion: Baum & Bro. and Baum & Co., two firms composed of the same individuals, are traders, in the meaning of the statute of this State, quoted above. That they are insolvent is conceded.

The plaintiffs are creditors, whose demands, as the court is at present advised, are within the class provided for in the statute as giving to the plaintiff the equitable right to the extraordinary remedies applied for.

This right of the creditors to put the debtor's assets, when the latter is an insolvent trader, in the hands of a receiver, is peculiar to the laws of this State. It has no existence in the general jurisprudence of equity which obtains in these courts. It is now settled, however, that the Courts of the United States may administer, in suits of which from other reasons they have jurisdiction, an equitable right granted by the law of the State.

It was urged in argument for the defendant that the creditors, without a judgment at law, have no right to apply in equity for the appointment of a receiver. That this is a general rule is undeniable; but there are exceptions of apparently clear distinctness, as when the law making power has enacted in terms that the debt need only be mature, with payment demanded and refused, as is the law in Georgia.

It is true also, as held in this circuit in *Jaffrey v. Brown*, 29 Fed. Rep. 477, that a party not intending to pay, by inducing one to sell him goods on credit through the fraudulent concealment of his insolvency and of his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. See also *Crittenden v. Coleman*, 70 Ga. 295; *Donaldson v. Farrell*, 98 U. S. 638 [28 L. ed. 994]; *Jaffrey v. Brown*, 29 Fed. Rep. 485, note and authorities cited.

The remedy at law must be quite as complete as that in equity, to defeat the power of equity to proceed.

The demurrer filed to the bill, while not final—

ly overruled, is not deemed sufficient, as the court is at present advised, to defeat the relief sought by the bill, should that relief be granted.

The chancellor has given very anxious thought and careful inquiry to the ascertainment of his duty in the premises. It is true that the prayers of the bill seek to obtain perhaps the most vigorous and far-reaching action in the power of the court—action which should not be taken in cases of this character except in the presence of plain fraud or irreparable injury.

On the other hand, the statements of the defendants themselves show the most utter insolvency and a failure to comply with their duty to their creditors, which evinces either negligence of the most flagrant character, or fraud scarcely less marked and decided. Upon the 21st of May, whatever may have been the motive which led to the publication, it is undeniable that the defendants gave to the mercantile community by means of the usual and most widely known Commercial News Agency (Bradstreet's) a statement which shows remarkable solvency, and indeed prosperity, for their section of the country. "Our total assets," they said, "are \$76,000; our liabilities \$36,000 net for shrinkages, bad debts, etc. We consider ourselves worth fully \$30,000 over liabilities, etc. There are no mortgages or liens on our property either real or personal. Our stock is insured for \$18,000. When we borrow money from bank we deposit our bonds and stocks as security; when we borrow money from our factors we give farmers' notes as collateral; give no other security."

In a little more than six months we find this firm in debt \$150,908.44, with total assets of \$33,926.19, leaving debts to the amount of \$66,976.19—altogether hopeless. In other words, in a half year there had been a change for the worse in their condition of really \$100,000, if their respective statements to Bradstreet's and to their creditors are correct.

For this startling transformation of their condition they offer neither explanation nor excuse. There had been no disaster from flood or fire, no epidemic, none of those extraordinary circumstances which at times cause the stoutest business houses to tremble.

In May there is an indebtedness of \$36,000, in December a debt of \$150,000; in May there are neither liens nor mortgages, in December they approximate \$70,000. In the spring creditors were assured of prompt payment; in the fall they are met by hopeless insolvency; and yet the court is asked to consider this an innocent and unavoidable failure, and this too in the absence of a syllable of proof to account for it. What makes it more remarkable is that the business was conducted in quiet villages and among a rural population, where all legitimate trade was marked by careful purchases and conservative transactions; where every purchaser is personally known to the merchant—his solvency and disposition or ability to pay debts as familiar as household words.

But this is not all. In the proclamation of Baum Bros. to the business community of the country, they say there are no mortgages or liens upon their property. At that moment it was all incumbered with a secret obligation

which in a court of equity in a proper case would have all the effect of a mortgage; in less than six months every cent's worth of their stock or other assets, whether paid for or not, is shingled with mortgages, made in pursuance of that covert stipulation.

In the presence of such facts as these, it would seem futile to urge upon the court the consideration of business capacity and business integrity and mercantile popularity which form so large a part of the defendants' showing. "We give to our factors no security save farmers' notes." As that public pledge was being made, their contract was in existence, not only to give \$2 for one in notes and choses in action for every dollar obtained from their factors, but to give mortgages which are undeniably other and very different security. "Our stock is insured for \$13,000," said they to Bradstreet's. They did not say the policies had been pledged to H. M. Comer & Co. and out of the reach of the other creditors.

It would seem superfluous to analyze the widely varied statements of the defendants, and it requires no elaborate inquiry to ascertain the law controlling the rights of the parties, with such facts before the court.

The statutes of the State are sufficiently explicit.

Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or the peculiar circumstances of the case. Ga. Code, 8175.

Can it be doubted that the fact that the defendants were under a written obligation to execute mortgages upon their entire stock and all their other property was "material to be known" by those giving them credit? Can it be doubted that when the Baums undertook to give to Bradstreet's, for the information of the business world, a statement of their assets, liabilities and methods of borrowing money, that the obligation was upon them to communicate the truth? Will the most credulous believe for a moment that Fehheimer & Co. would have given them credit for \$4,000, that Clafin & Co. would have given them credit for \$11,000, had they known the existence and the nature of their obligation to Comer? We think not.

The statements of such mercantile agencies as Bradstreet's are intended to influence the action of merchants and others who give credit. It is well understood that the mercantile community relies largely upon such statements, and the person giving it is under the weightiest obligation, which will be enforced *in foro conscientia*, to speak the truth; and if there has been deliberate suppression of a vital fact in a statement of this character which does mislead, it is a fraud upon the person misled, which a court of equity will redress if possible.

Again; misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitutes legal fraud. Ga. Code, 8174. See also 2684.

But it appears from the evidence of Messrs. Patterson, Lindsay and Cohen that N. P. Baum admitted in their presence and hearing that he was insolvent at the time the statement to

Bradstreet was made, although he there asserted a net worth, above all liabilities and doubtful assets, of fully \$30,000, but that he did not know his insolvent condition. Conceding, therefore, that this statement was honest, it is none the less fraudulent in contemplation of these provisions of the Code. It follows, in the absence of the Insolvent Traders' Act before quoted, that the plaintiffs would be entitled to the relief they seek if it can be made to appear that there is a prospect of redressing their wrongs thereby. Much more, then, are they so entitled under the provisions of this Act.

It is said, however, for the defendants, that the liens created by Baum Bros. to Comer and others will exhaust the assets, and that the unsecured creditors can get nothing through the action of a receiver, however vigilant he may be; but the defendants themselves admit that the assets amounted to about \$85,000 more than the preferences he has given. It is true that he states that \$72,810.54 of notes and accounts are worthless and doubtful, but the court is not inclined to accept this statement as final. It would be very remarkable if his doubtful debts in December should be as much as his total assets in May. A diligent receiver will collect many of those claims or the court will know the reason why.

Besides, by the same statement there is a balance of \$14,800.89, to be divided among the unsecured creditors. This itself is no mere bagatelle. We have known original suits to be brought for less. But perhaps more important than either of these is the fact that Comer & Co., who only claim \$24,661.07 as the sum of their demands against the Baums, have now in their possession \$50,000 worth of good notes and accounts and mortgages, \$49,000 worth of property, consisting of merchandise and other personalty and certain realty. However valid may be the demand of Comer & Co., when it is paid they will not be permitted to retain a dollar in excess of their proven claims.

It is true that by the Law of Georgia, 1958, "A debtor may prefer one creditor to another; to that end he may *bona fide* give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in each case not to be reserved for his own benefit or that of any other favored creditor to the exclusion of other creditors."

The large surplus conveyed to Comer & Co. to secure their debt they hold as trustees for the creditors of the defendants the Baums. Besides, the balance which Comer & Co. present is ascertained by estimating more than 500 bales of cotton shipped to them at \$38 per bale. They have turned over notes and accounts of the insolvent firm to one of its members for collection. This will not be permitted. The insolvent debtor who has defaulted in the sum of \$150,000 is not the proper custodian for convertible assets of this character.

This investigation has satisfied the court that this is a suit where it is manifestly the duty of the Chancellor to make the orders prayed for.

*A receiver will be appointed and an injunction granted.* Comer & Co., who are now formally made parties defendants to the bill, will be required to make proof of their account, and if

found just and true and a valid lien, as it now appears to be, it will be paid in full if the funds are sufficient. This is true of such other debts of superior dignity, and the remainder of the fund in the hands of Comer & Co. and elsewhere within the reach of the court will be apportioned

to the creditors. The court will appoint receivers of undoubted qualifications, who will at once take possession of the assets of the insolvent firm, and as fast as collected pay the funds into the registry of the court, and the cause will proceed with the utmost expedition.

## PENNSYLVANIA SUPREME COURT.

### Charles S. KEYSER'S APPEAL.

(....Pa....)

1. **A recovery upon a quantum meruit** cannot be had for literary services under a contract which provides that compensation therefor is to be derived solely from a division of profits from sales after publication.
2. **The Statute of Limitations** may be set up in the orphans' court precisely as in a court of law, and is not tolled by a mere demand upon an executor. (*Yorks' Appeal*, 1 Cent. Rep. 354, 659, 110 Pa. 69, 77, restated.)

(January 23, 1890.)

**A** PPEAL from a decree of the Orphans' Court of Philadelphia County, disallowing a claim against the estate of Henry Seybert, deceased, for compensation for literary services. *Affirmed.*

The facts and questions presented appear from the opinion.

*Messrs. John A. Clark and Geo. W. Biddle*, for appellant:

If for any cause proof of a special contract fails or is denied, or the plaintiff has performed work outside of and beyond the special contract, a recovery may be had for a *quantum meruit* outside of the contract altogether, and compensation is to be estimated (the special contract being silent on this subject or failing altogether) at what the services in any case are reasonably worth.

*Planché v. Colburn*, 8 Bing. 14 (21 Eng. C. L. 203); *Dermott v. Jones*, 64 U. S. 23 How. 220 (16 L. ed. 442); *Dermott v. Jones*, 69 U. S. 2 Wall. 1, 9 (17 L. ed. 762, 764); *Amoskeag Mfg. Co. v. U. S.* 84 U. S. 17 Wall. 592 (21 L. ed. 715); *Adams v. Cosby*, 48 Ind. 153; *Shilling v. Templeton*, 66 Ind. 537.

In the presentation of a claim in the orphans' court, as no writ can issue, it is only necessary in order to toll the statute to make a formal de-

mand of the executor or administrator. Any other course would be fraught with inconvenience and possible disaster.

We find the following remarks of *Judge Paxson* in *Yorks' Appeal*, 1 Cent. Rep. 359, 360, 110 Pa. 64, 75, 76:

"This claim was *not presented* until nearly seven years after the letters testamentary were taken out . . . But how are we to say that this debt which was *not presented to the executors* until twelve years after it had matured . . . Had the appellees *presented their claim to the executors* . . . As suits are not brought upon claims in the orphans' court, the *presentation of the demand to the executor or administrator may be regarded as its equivalent, so far as regards the status of the claim.*"

*Messrs. William B. Robins and John G. Johnson* for appellee.

*Paxson, Ch. J.*, delivered the opinion of the court:

In the court below the appellant presented a claim of \$3,000 against the estate of Henry Seybert, deceased, for literary services performed by him for the decedent in his lifetime, in preparing a work entitled "The Chronicles of Independence Hall." That the work was performed, and that it was worth the sum demanded, was not seriously controverted. The difficulty in the case lies deeper.

The appellant sought to recover as upon a *quantum meruit*, by showing that he was engaged by the testator to perform the service and the value of it. The court below, however, has distinctly found that the relation of the parties was not that of employer and employee; that there was no contract by which the decedent was to pay for and become the proprietor of the work, but that on the contrary the appellant's compensation was to be derived solely from the profits arising from sales thereof after publication. We will not review the

**NOTE.—Statute of Limitations; application in equity.** The death of a debtor does not stop the running of the Statute of Limitations. Whatever responsibility the executors may incur by their neglect to give notice to creditors and other persons interested in the estate, such neglect would not toll the statute. *Man v. Warner*, 4 Whart. 455; *Mitchell v. Veach*, 31 Pa. 455; *McCandless' Estate*, 61 Pa. 9; *Campbell v. Fleming*, 68 Pa. 242. In cases where the court of equity exercises its own peculiar jurisdiction, it does not consider itself bound by Statutes of Limitation as obligatory law unless injustice would be the result; it will however usually apply such statutes by way of analogy. *Baker v. Biddle*, Bald. 384; *Badger v. Badger*, 2 Cliff. 137; *Sullivan v. Portland & K. R. Co.* 4 Cliff. 212; *Etting v. Marx*, 4 Fed. Rep. 673; *Crewett v. Moran*, 17 Fed. Rep. 820; *Bisbee v. Evans*, 17 Fed. Rep. 474; *Fogg v. St. Louis etc. R. Co.* 17 Fed. Rep. 871; 2 L. R. A.

*Sherwood v. Sutton*, 5 Mason, 143; *Stevens v. Sharp*, 6 Sawy. 113; *Chapman v. Wilson*, 4 Woods, 80. But where it exercises concurrent jurisdiction it will consider itself bound by, and will apply, the statutes as statutes, rather than by way of analogy. *Wagner v. Baird*, 49 U. S. 7 How. 234 (12 L. ed. 681); *Bank of U. S. v. Daniel*, 37 U. S. 12 Pet. 32 (9 L. ed. 939); *Godden v. Kimmell*, 99 U. S. 201 (25 L. ed. 431); *Pratt v. Northam*, 5 Mason, 95; *Hall v. Russell*, 8 Sawy. 506. And where it operates on the right so that the cause of action is extinguished or barred, the bar prevents prosecution to enforce it in equity. *Elmendorf v. Taylor*, 23 U. S. 10 Wheat. 152 (6 L. ed. 239); *Hunt v. Wickliffe*, 27 U. S. 2 Pet. 201 (7 L. ed. 397); *Peyton v. Smith*, 30 U. S. 5 Pet. 485 (3 L. ed. 200); *Lewis v. Marshall*, 30 U. S. 5 Pet. 470 (3 L. ed. 195); *Coulson v. Walton*, 34 U. S. 9 Pet. 62 (9 L. ed. 51); *R. I. v. Mass.* 40 U. S. 15 Pet. 238 (10 L. ed. 721); *Taylor v. Holmes*, 14 Fed. Rep. 408.

evidence in detail by which this result was reached.

We must accept the findings of the court upon questions of fact, as we have repeatedly said, unless error is clearly made to appear. This has not been done, nor do I see how it could have been, in view of appellant's statement of the contract as contained in his letter to Mr. Seybert of January 17, 1879. The letter was as follows:

Mr. Henry Seybert:

Dear Sir,—Under our agreement, I was to furnish MSS. of the work you desired to be prepared on Independence Hall and its clocks and bells, and you were to pay the expense of publication; the profits were to be divided equally after you first repaid the cost of publication.

To this agreement I must hold you, unless the work I have done after some months of labor is not such a volume as would meet the approval of the most competent judges. I have agreed with you to submit it to the judgment of Mr. Wallace and Mr. Westcott, or any other gentleman of like character and reputation. I am still willing to do so, and would be pleased to hear from you at your earliest convenience, if the names of these gentlemen meet your approval.

This is an entirely different contract from the one set up in the orphans' court, and precludes a recovery upon a *quantum meruit*. An action would indeed lie upon the contract proved, but its breach would be the refusal of the decedent to publish the book. A claim for this breach might have been made in the orphans' court, but it was not, nor was there any evidence by which the damages could have been measured. Speaking for myself, I do not see why a work upon such a subject, written by a gentleman of the appellant's known literary ability, should not prove of general interest and command a ready sale if too much prominence is not given to the decedent and his bells.

We might well stop here. There is, however, another difficulty, equally serious, in the way of the appellant. The appellees set up the Statute of Limitations. Much more than six years had elapsed from the completion of the work and the presentation of the claim in the orphans' court. Mr. Seybert flatly repudiated it in 1879. Thus the matter rested until his death in 1883. After that event a demand was made in writing on his executors for the payment of the sum of \$3,000 as compensation for writing the book. This was on January 17, 1884. The executors refused to recognize the claim, and offered to accept service of a writ. Nothing further was done until the citation was asked for in 1887, after which the claim was presented to the orphans' court for adjudication.

§ L. R. A.

It will thus be seen that for at least eight years the claim was ripe for suit and was all that time repudiated. The statute commenced to run not later than 1879. It was not stopped by the death of the decedent, as all the authorities show. Was it stopped by the demand upon the executors in 1884, a demand not recognized by them and not followed up by any aggressive measure until 1887? It is not pretended that a mere demand upon Mr. Seybert in his lifetime would toll the statute. Was a demand upon his executors after his death of any greater effect? If so, it is an anomaly.

It was urged that *Yorks' Appeal*, 1 Cent. Rep. 354, 110 Pa. 69, sustains the contention of the appellant in this respect, and that a mere demand upon the executor tolls the statute. If this be so *Yorks' Appeal* needs amendment.

I concede that the language cited by appellant is to be found in the first opinion in *Yorks' Appeal*, at page 76, of 110 Pa., 1 Cent. Rep. 360. But the first opinion is not *Yorks' Appeal*; it is only a part, and the least important part of it. In the first we tried to avoid overruling *McClintock's Appeal*, 29 Pa. 380, and the line of cases following it. Speaking for myself, I felt adverse to reversing the opinion of so eminent a jurist as the late *Chief Justice* Black. It was this feeling which prevented our going as far in the first decision as we felt the law would justify. Subsequent reflection satisfied us that it was a mistake to temporize, and we applied the knife. We intended to cut this judicial excrescence out of our system of law, and we are not convinced that we did not succeed. The language quoted by the appellant from the first opinion is as much overruled by the second [1 Cent. Rep. 659, 110 Pa. 77], as was *McClintock's Appeal* itself, and the broad principle was distinctly asserted that the Statute of Limitations may be set up in the orphans' court precisely as in a court of law. Nor can the statute be tolled by anything short of a suit at law, or, what is its equivalent, in the orphans' court. A mere demand upon an executor is not such equivalent and it does not toll the statute. This is as plain as I can make it.

I desire further to say that there was no question in *Yorks' Appeal* of the presentation of the claim to the executors. No such presentation had been made. The language quoted in the opinion was stated argumentatively, and was mere *dictum*, for which I am alone responsible. It was not the point decided in the case.

Subsequent reflection has convinced us that *Yorks' Appeal* was well decided. The court as now constituted is united in sustaining it.

Upon either of the grounds indicated the appellant has no case.

*The decree is affirmed, and the appeal dismissed, at the costs of the appellant.*

## ILLINOIS SUPREME COURT.

Willard H. ALEXANDER *et al.*, *Plffs. in Err.*,

NORTHWESTERN MASONIC AID ASSOCIATION.

(...III....)

A certificate of life insurance payable to the "devisees or heirs at law" of the insured, where he dies intestate without issue, is payable, under Illinois Revised Statutes, chap. 89, § 1, to his widow as sole heir, and not to his next of kin.\*

(November 15, 1888.)

**ERROR** to the Appellate Court, First District, to review a judgment affirming a judgment of the Circuit Court in a bill of interpleader. *Affirmed.*

The facts and question presented are stated in the opinion.

*Messrs. Cratty Bros. & Ashcraft* for plaintiffs in error.

*Mr. E. Walker* for defendant in error.

*Craig, Ch. J.*, delivered the opinion of the court:

A bill was brought by interpleader brought by the Northwestern Masonic Aid Association, a corporation organized under the laws of this State, in which it is alleged that the association was organized on the 27th day of June, 1874; that the object for which it was formed was to secure pecuniary aid to the widows, orphans,

heirs and devisees of deceased members; that on the 28th day of January, 1883, the association issued and delivered to Elijah S. Alexander three certificates, under which it agreed to pay, upon the death of Alexander, the sums therein named, amounting in the aggregate to \$8,500, to his devisees or heirs at law.

It is also alleged that Alexander died on the 28th day of February, 1886, leaving no will or devisee; that proofs of death have been duly made; that the association is ready and willing to pay the amounts named in the certificates to the person or persons entitled thereto; that Josephine P. Alexander, widow; Willard H. Alexander, father; Eunice L. Alexander, mother; Serotia A. Alexander, sister; Charles E., John F. and Edward Frank Alexander, brothers of the deceased—make claim to the \$8,500. The bill prays that the parties named may be made defendants, that they may interplead and settle and adjust their demands and differences between themselves; that the fund should be distributed by decree between those entitled thereto.

Josephine P. Alexander, the widow, answered the bill, admitting in substance all its material allegations, and set up her claim to the entire fund as sole heir of the deceased. The defendants Willard H., Eunice L., Serotia A., Charles E., John F. Alexander answered the bill, and set up that they were entitled to receive five sixths of the fund; and they deny the right of Josephine Alexander, as widow or otherwise, to have or claim any part of the fund. Edward Frank Alexander answered the bill, and

\*See *Aveling v. Northwestern Masonic Aid Assn.*, 1 L. R. A. 628; *Newman v. Covenant Mutual Benefit Assn.*, 1 L. R. A. 659.

**NOTE.**—*Fraternal societies; payment of policy to whom made.* Where the association had among its articles the following: "The object of the order is to establish a widows' and orphans' benefit fund. . . . A sum not exceeding \$3,000 shall be paid to his (the member's) family or those dependent upon him, as he may direct. In case no direction is made by a brother, either by will, entry or benefit certificate, the council may cause the same to be paid to the person or persons entitled thereto; and in case no person or persons are entitled to the benefit, it shall revert back to the widows' and orphans' benefit fund;" under these provisions where the decedent had failed to make the designation, the fund belonged to his widow, and if she were not there to take, the fund would not go to the decedent's administrator for the benefit of creditors (as would an ordinary life insurance policy), but would remain to the association. *Ballou v. Gile*, 60 Wis. 614. In *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 429, the company was authorized by its charter to insure a member for the benefit of his widow and children. The policy, as issued, was made payable to the "heirs" of deceased, who left a widow but no children. The court decided that the corporation had no authority under its charter to make a policy payable to anyone else than the widow and children.

In an association incorporated "with a view to aid the families of deceased members, and to secure to the widow, child or children of deceased members the sum of one dollar from each member of the association," the rule was that the beneficiary fund should be payable "to the widow, child, children, or such person or persons to whom the deceased may have disposed of the same by will or assignment. . . . If there be no widow, child or children, or the deceased shall have no disposition by will or assignment," then the "money shall go to the permanent fund of the association."

Under these provisions it was decided that the 3 L. R. A.

money was not part of the general estate of the deceased, therefore not embraced in the residuary clause in the will. *Maryland Mut. Benev. Society v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52; *Arthur v. Odd Fellows Ben. Assn.*, 29 Ohio St. 567. See *Well v. Trafford*, 3 Tenn. Ch. 108. In *McClure v. Johnson*, 56 Iowa, 620, the object of a Free Masons' Protective Association is stated to be "to secure to the families of deceased members . . . such pecuniary aid as may be provided." The amount was payable to the "wife, husband, children, mother, sister, father or brother of such deceased member, and in the order above named." The deceased left a will in which he directed that the fund should be paid to a certain creditor, but the court decided that it should be paid to the wife. And the same rule was applied where the purpose of the association was to secure pecuniary aid to the "widows and orphans, heirs and devisees of deceased members." Deceased had taken a certificate in which it was stated that the amount should be paid to his "devisees." There being no will found after his death, there were, of course, no "devisees." Suit was brought by the administrator, but it was decided that he could not recover. *Worley v. Northwestern Masonic Aid Assn.*, 10 Fed. Rep. 227, 3 McCrary, 83. To suppose these beneficiary policies to be general assets, and collectible by an administrator, was said to be "utterly repugnant to the whole purpose, scope and design of the association, as provided in the very law of its existence." 10.

**Designation of beneficiary.** If there is nothing in the charter or by-laws of the organization, or in the statutes of the State, restricting the appointment, the member may designate whomsoever he pleases and no one can question the right. *Baye v. Adams*, 81 Ky. 298; *Gentry v. Knights of Honor*, 3 Fed. Rep. 715; *Massey v. Mutual Relief Society*, 3 Cent. Rep. 755, 102 N. Y. 523; *Mitchell v. Grand Lodge Iowa Knights of Honor*, 70 Iowa, 380; *Freeman v. National Ben. Society*, 43 Hun, 252; *Swift v. Railway Pass. & F. Conductors Mut. Aid & Ben. Assn.*, 96 Ill. 309; *Knights of Honor v. Nairn*, 60 Mich. 44; *Supreme Lodge, eta. v. Martin*, 12 Ind. L. J. 623, 13 W. N. C. 160; *Bacon, Ben. Societies & L. Ins.* § 248.

admitted all the material allegations therein. He set up that he was a brother of the deceased, and prayed that the court might make proper distribution of the fund, according to equity. The administrators of the estate of the deceased filed their answers, disclaiming all interest in the fund as administrators.

In addition to the facts disclosed by the pleadings, it may be proper to state that the association furnished blanks for applications, and deceased made his application, which was approved January 28, 1882. The application contains this clause: "To whom do you desire the money to be paid in the case of death? State names, what relations, and how the money shall be divided. A. To my heirs or assigns that I may hereafter elect." Three certificates were issued on same day, January 28, 1882, each in like language in that respect, in which the association "do promise and agree to pay his devisees or to the heirs at law of said Alexander," etc., sums aggregating \$8,500. Alexander died intestate February 23, 1886, leaving no child or descendants of child.

The circuit court entered a decree, April 23, 1887, finding all the material allegations in the bill to be true, and that the "widow is the sole heir at law to the personal property of said deceased, and that said other defendants have no right, title or interest in said sum of money or any part thereof." The decree of the circuit court was affirmed in the appellate court.

There is no controversy in this case in regard to the facts which control the decision of the question involved. Alexander, the person named in the certificates, died intestate, leaving no child or descendant of a child; but he left a widow, father and mother, one sister

and three brothers. It is not claimed, as we understand the argument, by either side that the fund is assets belonging to the estate of the deceased, which would pass to the administrators to be used by them in the payment of debts and in the settlement of the estate; but it is conceded that the fund should be paid to the person or persons named in the certificates.

The real question for determination seems to be one of construction. In other words, What does the contract entered into between Elijah S. Alexander and the Northwestern Aid Association mean? To whom, by the terms of the contract, shall the fund be paid? In placing a construction on the contract of the parties, it must be remembered that in the use of the words named in the policies it will be presumed the parties had in view the disposition of personal assets and not real property, as they were dealing only with the disposition of personal assets.

The association, by the terms of the contract, as stated in the certificates, "within sixty days after receipt of satisfactory evidence of the death of Elijah S. Alexander," "do promise and agree to pay to his devisees or to the heirs at law of Elijah S. Alexander" the amount therein named. If Alexander had executed a will and therein devised the fund to a person or persons therein named, such person or persons beyond all doubt would have been entitled to the fund; but, as no will was made, there are no devisees to take, and we must now determine what was intended by the use of the words "to the heirs at law of said Elijah S. Alexander."

In *Richards v. Miller*, 62 Ill. 420, this court had occasion to place a construction on a clause

Where the person designated by the insured was "my wife or daughter" payment of the death loss should be made to the widow. *Addison v. New England C. T. Assn.* 4 New Eng. Rep. 639, 144 Mass. 580. The intention that the money should be divided between the widow and surviving children is not in accordance with the purpose of the association or the probable object of the applicant, and is not shown by the language of the designation. *Hall v. Hall*, 1 New Eng. Rep. 233, 140 Mass. 267. The law of the place of the contract under which the power is given will govern, and the law of the situs of the subject of the power controls the execution of such power. *Bingham's Appeal*, 64 Pa. 345; *Bacon, Ben. Societies & L. Ins.* § 247. The rule is that in the absence of direction by the decedent, the money should "be paid to the person or persons entitled thereto," and it was decided that the fund went to the family, and not to the administrator of the deceased. The term "legal representatives" includes those parties mentioned specifically, as, for instance, "widow, orphans, heir or legatees." *Fenn v. Lewis*, 10 Mo. App. 478; *Masonic Mut. Relief Assn. v. McAuley*, 2 Mackey, 70.

**Designation by statute.** Where the statute designates the class of persons to be benefited, the corporation cannot create a fund for other persons than the class named; and if no one of the class named is selected during the lifetime of the member, it is still payable to one of the classes named. *American Legion of Honor v. Perry*, 1 New Eng. Rep. 715, 140 Mass. 580. In determining whether the designated beneficiary comes within the class specified or not, the charter and by-laws of the society will be construed liberally so as to carry out the benevolent purposes of its organization, and yet not so as to violate the statute law of the State or contravene public policy. *Knights of Pythias v. Schmidt*, 98 Ind. 374; *Ballou v. Gile*, 50 Wis. 614; *American Legion of Honor v. Perry*, 1 New Eng. Rep. 715, 140 Mass. 580; *Maneely v. Knights of Birmingham*, 7 Cent. Rep. 633, 115 Pa. 305; *Elsley v. Odd Fellows Mut. Relief Assn.* 2 New Eng. Rep. 667, 142 Mass. 224.

**Restriction on power to designate beneficiary.** The

beneficiary must be either one of the member's family, or one who upon his death may be his heir, and not a creditor in no way related to him. *National Mut. Aid Assn. v. Gosner*, 1 West. Rep. 4, 43 Ohio St. 1; *Worley v. Northwestern Masonic Aid Assn.* 10 Fed. Rep. 227; *Elsley v. Odd Fellows Mut. Relief Assn.*, 2 New Eng. Rep. 667, 142 Mass. 224; *State v. People's Mut. Ben. Assn.* 42 Ohio St. 579; *State v. Standard L. Assn.* 38 Ohio St. 281; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Presbyterian Mut. Assur. Fund v. Allen*, 4 West. Rep. 712, 106 Ind. 533; *Dietrich v. Madison Relief Assn.* 45 Wis. 79; *Skilling v. Massachusetts Ben. Assn.* 5 New Eng. Rep. 718, 140 Mass. 217; *Rice v. New England Mut. Aid Society*, 5 New Eng. Rep. 813, 140 Mass. 248. A more liberal view obtains in Pennsylvania. *Maneely v. Knights of Birmingham*, 7 Cent. Rep. 633, 115 Pa. 305. And see *Folmer's Appeal*, 57 Pa. 135; *Lamont v. Grand Lodge Iowa Legion of Honor*, 31 Fed. Rep. 177; *Sup. Lodge K. of H. v. Martin* (Pa.), 12 Ins. L. J. 628; *Bacon, Ben. Societies & L. Ins.* § 245. The designation "my estate" is inconsistent with the statutes, and beyond the power of the parties. *Daniels v. Pratt*, 3 New Eng. Rep. 480, 143 Mass. 221. A stipulation to pay to heirs cannot prevail over the unequivocal provisions of the charter, that it shall be paid to his widow and children. *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 489.

**Revocation of appointment.** Where by the laws of the society and the State the payment of benefits is confined to the heirs of the member, or members of his family, and the member designated his wife, and she afterwards became divorced from him, the appointment was thereby revoked. *Tyler v. Odd Fellows Mut. Relief Assn.* 5 New Eng. Rep. 191, 145 Mass. 134. And where he designated his mother, whom he could lawfully designate as his beneficiary, this appointment was not revoked by his subsequent marriage. *Mass. Catholic Order of Foresters v. Callahan*, 6 New Eng. Rep. 95, 146 Mass. 391; *Grand Lodge of A. O. U. W. v. Child* (Mich.), 14 West. Rep. 454. As the death of the appointee during the life of the testator causes the appointment to fail, so where a member designates a beneficiary who dies during the lifetime of the



in a will where substantially the same language was used as is contained in the certificates under consideration. There Frances Miller, a married woman, executed a will. She first directed the payment of funeral expenses and debts, after which she made various specific bequests, among which was one of \$2,000 to her husband, John H. Miller. The testator then added a residuary clause as follows: "I give, devise and bequeath to my heirs at law the remainder of my estate." The testatrix died without children or descendants of children, but left surviving her a husband and brothers and sisters. During the settlement of the estate a controversy arose between the husband and brothers and sisters of the deceased in regard to the construction to be placed upon the words "heirs at law," as used in the residuary clause of the will; and it was then held that the words employed will be presumed to have been used in their strict and primary sense, unless the context shows them to have been used in a different sense. When not thus explained, their legal and technical meaning will be enforced; that the word "heirs," unexplained by the context, will be held to mean the persons appointed by law to succeed to the estate in case of intestacy. It is there said: "Where the will gave the residue of the estate to the heirs at law, uncontrolled by any other words, the property must descend according to the law of the place where it is situated and where the will is to be carried into effect." We might quote more from the opinion, which has a direct bearing on the case, but it will not be necessary to do so. The court, in plain and unmistakable language, held that, as the husband was an heir under the statute, he was entitled to share in the distribution of the estate.

We are unable to distinguish this case from the one cited *supra*. The language construed in the *Miller Case* was found in a will, while here the same language is found in a certificate or policy of life insurance. But this fact is of no importance. The rule of construction which should control in the one case should also govern in the other. The language used in the *Miller Case* and in this case will be found to be identical. In the former "I give, devise and bequeath to my heirs at law the remainder of my estate;" while in the latter the language is "do promise and agree to pay to his devisees or to the heirs at law of said Elijah S. Alexander." It is, however, said that the fact that provision had been made for the widow of Alexander under other life policies, which had been made payable directly to her, may be taken into consideration in construing the certificates of insurance. It will, however, be observed that in the *Miller Case* there was a special devise of \$2,000 to the husband, and yet he was allowed to take as an heir under the residuary clause in the will.

*Rawson v. Rawson*, 52 Ill. 62, is also a case involving the construction of a clause in a will similar to the provision in the certificates. It provided that the remainder of the testator's property should be distributed to his heirs at law, according to the Statute of Illinois in such case made and provided. The testator left no children, but his widow, parents, brothers and sisters survived him. The court held that under the language used the widow was entitled to take under the will; and, among other things, said: "Our conclusion is that there is nothing in the will calling for a particular or special construction upon the term 'heirs at law.' As used in the will, it must be interpreted according to its strict technical import; that heirs at

member the designation is revoked; and if he dies after the designation and before issuance of the certificate, the designation fails. *Order Mut. Companies v. Griest* (Cal.) 18 Pac. Rep. 652.

*Distinction between benefit policies and life insurance policy.* The policy or beneficiary certificate in mutual or benevolent associations is different in its nature from the ordinary life insurance policy; the latter is supposed to be a mere debt payable by the company to the estate of the insured, and collectible at all events from the company by the legal representatives of the insured, or by the parties named in the policy; while in such associations the former is intended solely for the benefit of the family of the deceased. *Ballou v. Gile*, 60 Wis. 614. In case of an ordinary insurance, a policy made payable to the wife would be irrevocable and would in case of her death have entitled her administrator to the beneficiary fund; yet in insurances of this class the member having the right at all times "to hold, dispose and control the benefit," his mere designation making it payable to her would be revocable. *Richmond v. Johnson*, 28 Minn. 447; *Expressmen's Aid Soc. v. Lewis*, 9 Mo. App. 412; *Masonic Mut. Relief Assn. v. McAuley*, 2 Mackey, 70; *Hirschl, Law of Frat. & Societies*, 22-26. A policy of assurance effected with a fraternal society, if it be not assignable, or if it be less beneficial than a policy effected with an ordinary assurance company, is not within the meaning of a covenant contained in a marriage settlement whereby the husband agreed that he would effect a policy of insurance on his life and assign it to trustees for her benefit. *Courtney v. Courtney*, 3 Jones & La T. 519.

*Appointment by will.* Where the will of a member devised to his children his "estate and property, real, personal and mixed," it was held not to embrace the beneficiary amount which was payable to the widow, and not to the children. *Arthur v. Odd Fellows*, Ben. Assn. 29 Ohio St. 657; but see, *contra*, *Weil v. Trafford*, 3 Tenn. Ch. 108; *Catholic Mut. Ben. Assn. v. Priest*, 46 Mich. 429. The Supreme Court of 2 L. R. A.

Illinois has held that, if a member under the charter could devise the benefits of his policy to a stranger, he might in the first instance take out the policy payable to a stranger, and that, having received the premiums and the contract being executed by the death of the member, the company was estopped to invoke the doctrine of *ultra vires* to defeat an action brought by the beneficiary. *Bloomington Mut. L. Ben. Assn. v. Blue*, 8 West. Rep. 642, 120 Ill. 121. See also *Lamont v. Hotel Men's Mut. Ben. Assn.* 30 Fed. Rep. 817; *Lamont v. Grand Lodge Iowa Legion of Honor*, 81 Fed. Rep. 177; *Bacon, Ben. Societies & L. Ins.* § 245. Where the by-law provided that the premium to be paid in case of the death of a member may be disposed of by will, otherwise it shall belong to and be paid to his widow, it was held that a clause in the will bequeathing all his personal estate according to the provisions of the Statute of Distributions did not embrace the fund which belonged entirely to the widow. *Greno v. Greno*, 23 Hun, 481; *Duval v. Goodson*, 79 Ky. 224.

*Powers of members of benefit societies.* The powers of members of benefit societies are as a rule revocable, and in executing such powers by will, it must be construed to all intents like a will, the conditions of which are that it is ambulatory, revocable and incomplete till the death of the beneficiary; nor can anyone dying in the testator's life take under it. *Oke v. Heath*, 1 Ves. Jr. 139; *Marlborough v. Godolphin*, 2 Ves. Jr. 60; *Burgess v. Mawbey*, 10 Ves. Jr. 319. The reason of the rule is not the lapse of the designation, because it was ambulatory and liable to be revoked by the death of the appointee before that of the member, but a construction of the supposed intention of the member insured. *Masonic Mut. Relief Assn. v. McAuley*, 2 Mackey, 70; *Given v. Wisconsin O. F. Mut. L. Ins. Co. (Wis.)* 37 N. W. Rep. 817; *Duval v. Goodson*, 7 Ky. 224; *American Legion of Honor v. Perry*, 1 New Eng. Rep. 716, 140 Mass. 590; *Hellenberg v. District No. 1 of I. O. B. B.* 94 N. Y. 590.



law are as made so by the statute, and are the person or persons in whom the law casts the estate in case of intestacy; that the widow of the testator is within the contingencies specified in the statutes, and is the heir at law to this estate."

It is said in the argument by the use of the words "my heirs" in the application Alexander intended to designate his next of kin, and not his widow, as the persons who should receive the amount named in the certificates. The question in the application, as heretofore stated, was as follows: "To whom do you desire the money to be paid in case of death? State names, what relations, and how the money shall be divided. A. To my heirs or assigns, that I may hereafter elect."

We do not think there is anything in the answer which discloses any intention on behalf of Alexander to have the fund upon his death pass to his next of kin. Indeed, there is no conflict, as to the persons named as beneficiaries, between the clause in the application and the clause in the certificates of insurance; each names his heirs. The clause in the application throws no light on the intention of Alexander which is not found in the certificates of insurance.

It is also claimed that the words "heirs at law" should be construed in their popular sense; "that Alexander must have intended those persons who in common parlance are understood to be heirs; whom the mass of mankind understand to be heirs." We do not concur in this view. It is to be presumed that Alexander knew who was meant by the words "heirs at law;" and when he accepted a contract containing those words, in the absence of anything in the contract manifesting a different intention, we will presume that he adopted the legal meaning those words have when used in statutes, deeds, and other instruments of writing, by persons skilled in the use of such words.

*Gauch v. St. Louis Mut. L. Ins. Co.* 88 Ill. 252, is a case which has an important bearing in regard to the construction to be placed upon the words involved in this case. There Gauch obtained a policy on his life, payable to "his legal heirs or assigns." He died leaving surviving him a widow and children. By his will the policy was devised to the children. The widow renounced the provisions of the will, and elected to take under the statute. It was conceded that the policy did not pass to the children under the will of Gauch; and the question arose whether the term "legal heirs," as used in the policy, included the widow. In passing upon this question it is said: "In cer-

tain contingencies, brothers, sisters, parents, and even kindred in the remotest degree, are heirs at law; but it would be absurd in the extreme to suppose that an individual having children, who should devise his property to his 'legal heirs,' intended all his kindred should take."

The legal presumption in such case would clearly be that he intended those to whom the law would give his property, real and personal, he dying intestate; and hence it is the actual capacity of inheritance at the time of the death of the owner of the property, and not the fact that a particular person might have inherited from him under a state of facts which did not exist, that determines who is heir.

If, as held in the case last cited, it is the actual capacity of inheritance at the time of the death of the owner of the property that determines who is heir, no argument is needed to establish the right of the widow in the case to hold the fund as an heir of the deceased. The Law of Descent (chapter 39 of the Revised Statutes, and in the third division of section 1, "Rules of Descent") provides that "When there is a widow or surviving husband, and no child or children, or descendants of a child or children, of the intestate, then, after the payment of all just debts, one half of the real estate, and the whole of the personal estate, shall descend to such widow or surviving husband, as an absolute estate forever." This clause of the statute establishes the right of the widow to claim the fund as heir, within the meaning of the terms of the policy.

If Alexander at the time the contract of insurance was made had intended to make provision for his parents and brothers and sisters, doubtless they would have been named as such in the certificates of insurance. It is unreasonable to suppose that he had them in mind when the contract was made; otherwise they would have been mentioned as beneficiaries. The provision in the policy for the payment of the fund to the heirs at law was a very natural one indeed. When the policy was obtained Alexander had no children, it is true; but who can say that he did not intend, by the certificate of insurance, and by the use of the words "heirs at law," to provide for children who might be thereafter born unto him, or, on the event that no living child or descendant of a child should survive him, that then his widow should take the fund as sole surviving heir?

*The judgment of the Appellate Court will be affirmed.*

**Bailey, J.**, having heard this case in the appellate court, took no part in its decision here.

## RHODE ISLAND SUPREME COURT.

Daniel JAMES

v.

Charles L. STEERE *et al.*

(.....B. L.....)

1. An attorney will be compelled to reconvey land conveyed to him by a client in trust for the  
2 L. R. A.

client's children, for the purpose of coercing his wife to a separation on advantageous terms, although it contains no power of revocation, where the client was under a misapprehension as to the trustee's power to reconvey.

2. A reconveyance should not be refused on the ground that the transaction was against public policy and that the grantor was *in part delicto*,

where a deed of trust had been made by a man while sick and under nervous excitement, to a trustee who was acting as his counsel, for the purpose of coercing his wife into a separation on more advantageous terms, and it appears that the grantor and his wife have been since reunited.

(December 6, 1885.)

**B**ILL to set aside a trust deed, executed by plaintiff to defendant Steere. *Relief granted.*

The complainant, a man sixty-six years of age, has brought suit against his three children and Charles L. Steere, representing that in April, 1885, he owned three lots of land in Providence on which there were five houses, and that in November of the preceding year he, being then a widower, married Mary L. James, his present wife, a woman in every way respectable, but on account of the opposition of the children, who were born of his former marriage, he did not take her to his home, but set about preparing to go to live with her in another tenement. These preparations were interrupted by an illness which resulted in great nervous prostration, accompanied by morbid fears and delusions relating to the loss of his property. The children (especially Anna), taking advantage of his debilitated condition, represented to him that his wife was an improper person for him to live with, endeavored to keep her from visiting him, and continually importuned him to make some settlement by which he could be permanently separated from her, also threatening to do nothing for him, and to leave him unless he would make such a settlement.

Influenced by these importunities and actuated by the further fear that Anna would break up the family or poison herself, as she threatened to do, he consulted with Mr. Steere, an attorney-at-law, whom Anna brought to the house, in regard to the best mode of effecting the settlement with his wife, and was advised that as his wife could run him into debt he had better convey his property to a trustee for the benefit of his children and then leave the State until she should agree upon the terms of a separation. Thereupon, he deeded the property to Mr. Steere, in trust for the benefit of his children, with an understanding that it should be reconveyed, after the settlement, to him on request, and left the State. Returning some months later, he entered into a covenant with his wife, and one John Dempsey, who acted as her trustee, by which he agreed to pay her \$2,500 in full satisfaction of all manner of claims against him or his estate, the trustee covenanting to save him harmless of all debts contracted by the wife, who thereupon made a deed of release of her dower rights to Steere in consideration of said sum, which Steere raised by mortgaging two of the lots to the Jackson Institution for Savings.

After the execution of these deeds of settlement, the complainant requested Steere to reconvey to him the property, and on his refusal to do so brought this case to compel such reconveyance.

The children deny the use of any undue influence on their father, and aver that he, of his own accord, in the full possession of his faculties and without any suggestions from them, but greatly

incensed against himself for having any relations with Mary L. James, an unworthy successor to their dead mother, and fearing that through her he might lose his property, arranged the trust conveyance to Steere.

Steere, in his answer, denies any knowledge of influence exerted on the complainant by the children and alleges that, having been sent for by the complainant, he learned his wishes and at his request prepared the trust deed, which was fully explained to the complainant, who showed no evidence of mental weakness, there being no understanding that the property should be reconveyed after a settlement had been effected with the wife.

The complainant is now living with his wife, notwithstanding the separation they agreed upon, in a tenement in one of the houses, the rest of it being occupied by several of the children; the rents of the other houses, after the payment of mortgage interest, taxes, repairs and other expenses, being paid to all the children by Steere.

*Messrs. William H. Greene and Patrick J. McCarthy*, for plaintiff, cited—

*Huguenin v. Baseley*, 2 Lead. Cas. Eq. pt. 2, 4th Am. ed. top 1165 et seq., \*556 et seq.; *Rhodes v. Bate*, L. R. 1 Ch. 252-257; *Everitt v. Everitt*, L. R. 10 Eq. 405; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Coutts v. Acworth*, L. R. 8 Eq. 558; *Hall v. Hall*, L. R. 14 Eq. 865; *Hall v. Hall*, L. R. 8 Ch. 430; *Phillips v. Mullings*, L. R. 7 Ch. 244; *Cooke v. Lamotte*, 15 Beav. 241, 242; *Phillipson v. Kerry*, 33 Beav. 628; *Russell's App.* 75 Pa. 269, 279, 289; *Miskey's App.* 107 Pa. 611, 16 Reporter, 663; *Dutton v. Thompson*, 16 Reporter, 633; *Garnsey v. Munday*, 18 Am. Law Reg. N. S. 345 and notes by Bispham; *May*, Voluntary Alienations, 452; *Whelan v. Whelan*, 8 Cow. 587; *Aylsworth v. Whitcomb*, 12 R. I. 298; *Todd v. Grove*, 38 Md. 188, 189; *Case v. Case*, 26 Mich. 484; 1 Story, Eq. Jur. 18th ed. §§ 800, 810, and notes; *Ford v. Harrington*, 16 N. Y. 285; *Boyd v. De La Montaigne*, 78 N. Y. 498; *Long v. Long*, 9 Md. 348; *Cook v. Colyer*, 2 B. Mon. 72; *Poston v. Balch*, 69 Mo. 115; *Harrington v. Grant*, 54 Vt. 236; *Harper v. Harper*, 28 Reporter, 464.

*Mr. Edward D. Bassett* for respondents.

#### Per Curiam:

The court is of the opinion that the deed from Daniel James to Charles L. Steere, mentioned in the bill, should be avoided so far as it can be without affecting the mortgage given by said Steere to the Jackson Institution for Savings. The deed was a voluntary deed given to Steere, as trustee, for the complainant's children, and contains no power of revocation. When it was given, Steere was acting for the complainant as his counsel, and we think the evidence shows that the complainant understood from the language used by Steere in his conferences with him that under it Steere had power to reconvey the property when the purpose for which the deed was principally given had been accomplished.

This being so, the complainant is entitled to a reconveyance, whether he was intentionally misled by Steere or not, since it was Steere's duty to see to it that he did not act under any misapprehension.

It appears from the evidence that the moving

purpose which led to the making of the deed was to coerce the wife of the complainant to a separation from him upon some terms which would be more advantageous than he could obtain if the property apparently remained his. It is urged that, this being the purpose, the deed was against public policy, and that the court should leave the parties in the predicament in which they have placed themselves.

A court of equity, however, does not always refuse to relieve when the transaction is against public policy, since it may likewise be public policy that the transaction should be avoided. The bill states, and the evidence shows,

that the complainant and his wife have come together again, and are now living happily as husband and wife. It is, in our opinion, in concurrence with public policy that the property should be restored.

Moreover, we think that the parties cannot be regarded as *in pari delicto*. It appears that the complainant had been sick, troubled, and under nervous excitement for a considerable time, and that the deed was made, not by his own suggestion, but while he was acting under the advice of the defendant as his counsel. 1 Story, Eq. Jur. §§ 298, 300; *Poley v. Greene*, 14 R. I. 618.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

James H. DEWIRE

v.  
BOSTON & MAINE R. R.

(....Mass....)

1. **The relation of passenger** is established when one has safely entered a passenger car with the intention of becoming a passenger, at a stopping place not a station, and where no invitation was held out to take train, but where they were permitted to be taken.
2. **A passenger who goes from one car to another of a moving train**, to find a seat, does not, while so upon the platform, take the risk of collision with another train; and when his conduct does not contribute to an injury from such collision, he may recover from the railroad company for its negligence.

(January 4, 1896.)

**ON defendant's exceptions. Overruled.**

Action of tort to recover damages for personal injuries to plaintiff, who was injured while riding on one of defendant's trains, which plaintiff had boarded, not at a regular passenger station of the defendant, but at a point about 500 feet from where defendant's road crossed that of another railroad, where defendant was

obliged by law to stop its trains and wait until signaled to go ahead.

Defendant contended that plaintiff had no right to take the train at this place, and was therefore not a passenger when he was injured. At the trial in the superior court before Sherman, J., the verdict was for plaintiff for \$13,000, and defendant accepted.

Other facts appear in the opinion.

*Messrs. S. Lincoln and W. I. Badger* for defendant.

*Mr. C. G. Fall* for plaintiff.

**Field, J.**, delivered the opinion of the court:

It must be taken that the defendant held out no inducement or invitation to the plaintiff to take the train at the place where he took it, but that the jury might find, on the evidence, that the defendant permitted passengers to take trains at this place, and that the plaintiff in taking the train intended to become a passenger; and it is with reference to a person who takes a train under such circumstances and with such an intent that the correctness of the instructions asked for must be determined.

The plaintiff was not a trespasser in taking the train; and when he had reached in safety the inside of a passenger car, then certainly, if

**NOTE.—Carrier; passengers, who are.** A person waiting at a railroad station for passage upon a train soon to depart, who is invited by the ticket agent to sit in an empty car standing on the side track while the station room is being cleaned, is a passenger in the care of the company. *Shannon v. Boston & A. R. Co.* 1 New Eng. Rep. 681, 78 Maine, 52. But until a person is upon the carrier's premises, or otherwise directly under his control, with the *bona fide* intention of becoming a passenger, he is not entitled to the rights of such. *Allender v. Chicago etc. R. Co.* 37 Iowa, 234. A person who goes into the station with the *bona fide* intention of becoming a passenger is entitled to the care and the rights of a passenger, at least so far as the safety of his person from defects in the station, platforms, etc., is concerned. *Gordon v. Grand Street & N. R. Co.* 40 Barb. 546; 2 Wood, Railway Law, 1037-1045.

**Mail agents and clerks.** A mail agent is a passenger carried by the consent of the company (*Collett v. London & N. W. R. Co.* 16 Q. B. 984); and the company owes the same degree of care to the clerks and mail agents riding in the postal car, in charge of the mails, as they do to passengers riding upon the train. *Seybolt v. N. Y. etc. R. Co.* 31 Hun, 100; *Blair v. Erie R. Co.* 68 N. Y. 313; *Nolton v. Western R. Corp.* 15 N. Y. 444; *Pa. R. Co. v. Price*, 96 Pa. 254.

**Freight owner, as free passenger.** Where there is any consideration for the gratuitous passage, the 3 L. R. A.

person carried is a passenger; as where a person is carried free in consideration that he sends his freight over the road, as a drover with his cattle. *N. Y. Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357 (21 L. ed. 627); *Smith v. N. Y. Cent. R. Co.* 24 N. Y. 22; *Pa. R. Co. v. Henderson*, 61 Pa. 315; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471; *Graham v. Pacific R. Co.* 66 Mo. 536; *Flinn v. Phila. W. & B. R. Co.* 1 Houst. (Del.) 469; *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind. 496; *Thompson, Carriers*, 43-45; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291 (23 L. ed. 898); *Gillenwater v. Madison & I. R. Co.* 5 Ind. 340; *Perkins v. N. Y. Cent. R. Co.* 24 N. Y. 196; *Nolton v. Western R. Corp.* 15 N. Y. 444; *Great Northern R. Co. v. Harrison*, 12 C. B. 578. Where a drover obtained a pass for his wife, by fraudulently representing that she was the owner of part of the stock, it was held that she was not a passenger. *Brown v. Mo. K. & T. R. Co.* 64 Mo. 638. So, a person riding upon a pass which contains certain conditions with which the passenger refuses to comply thereupon ceases to be a passenger. If the conductor so elects. *Elliott v. Western & A. R. Co.* 58 Ga. 454.

**Tyamps not passengers.** A trespasser upon a regular railway train is not a passenger within the meaning of the term. *Higley v. Gilmer*, 3 Mont. 90. A person who secretes himself upon the carrier's vehicle with the intent of "stealing" a passage, being there, fraudulently and without the carrier's

not before, he became a passenger. *Merrill v. Eastern R. Co.* 139 Mass. 238.

After he became a passenger we cannot distinguish his rights and duties from those of the other passengers.

The injury was caused by a locomotive engine of the defendant company which was carelessly driven by a servant of the company against the car on the platform of which the plaintiff was standing. There were no vacant seats in the car which the plaintiff first entered, and he passed towards the rear of the train through one or two cars in search of a seat, which he did not find. "While seeking a seat he came to the front platform of the last passenger car but one, and was standing upon this platform looking through the door or window of the car in search of a seat. While he was standing in this position, the train continuing its motion at the rate of from five to eight miles an hour," the engine struck the car, checked or stopped its motion and partially overturned it, and the plaintiff fell backwards and was injured.

The instructions given to the jury upon the principal question were, in substance, that, if the plaintiff was upon the platform of the car intending to ride there, he could not recover, but if he was there "in the exercise of reasonable promptness in attempting to secure a seat," and "his stop there was a reasonable one," and "he was not there for the purpose of riding," he might recover.

In *Stewart v. Boston & P. R. Co.* 6 New Eng. Rep. 273, 146 Mass. 605, it is said that "In going from one car to another of a rapidly moving train merely for his own convenience, the plaintiff took upon himself the risk of all accidents not arising from any negligence of the defendant."

In the case at bar the accident arose from the negligence of the defendant's servant, which must be regarded as the negligence of the company; and the question is whether there was carelessness on the part of the plaintiff which contributed to the injury. If it be assumed that a passenger who goes from one car to another of a moving train for the purpose of finding a seat takes all risks which are obvious

or are incident to the motion of the train, yet it cannot be held that he takes the risks of a collision with a locomotive engine or another train. He could not foresee that such a collision was likely to happen, and his going upon the platform of a car would not tend in any degree to bring about such a collision; and if a collision were to occur, it is difficult to say that a position on the platform would be more dangerous than one inside the car.

Passengers have the right to assume, in the absence of any warning or evidence to the contrary, that one passenger car is as safe as another; and if there is no regulation of the company forbidding it, it must be that passengers have the right to go from one car to another while the train is in motion when their convenience requires it, and subject to the risks which are incident to such a proceeding.

In the case at bar, we think that there was no want of ordinary care on the part of the plaintiff so far as any injury from collision was to be apprehended, and that the plaintiff's conduct did not contribute in any degree to bring about the collision or the injury which resulted from it. There is no evidence that the consequences of the defendant's negligence could have been avoided by the exercise of reasonable care on the part of the plaintiff. The presence of the plaintiff upon some part of the train which was struck or displaced by the colliding engine was a necessary condition of the plaintiff's being injured thereby, but it was not in a legal sense a contributing cause of the injury.

Whether the plaintiff would have been hurt more or less than he was if he had been inside the car can only be conjectured, for all the passengers on the car were put in peril because the car was partially overturned by the collision. The plaintiff could not reasonably anticipate any danger from collision in going from one car to another; and he was injured because he happened to be on one part of the train rather than on another, and not because his position upon the platform peculiarly exposed him to such a danger. We think that the instructions given were sufficiently favorable to the defendant.

*Exceptions overruled.*

assent, is not a passenger. In *Chicago & A. R. Co. v. Michie*, 88 Ill. 427, it was held that a railway company is not liable for an injury to a person who is riding by stealth on the engine in violation of the rules of the company, known to him, even though with the permission of the engineer. The conductor upon a train is the only train hand who can bind the company by his assent to a person riding free. A person who gets aboard a train with the deliberate purpose of not paying his fare is not a passenger, and if injured no recovery can be had by him, except where the negligence producing the injury is gross or wanton. *Higley v. Gilmer*, 3 Mont. 90.

*Person riding free, entitled to protection as passenger.* Where a person is riding free, by the consent of the company fairly obtained, he is a passenger, and entitled to all rights and privileges as such. *Austin v. Great Western R. Co.* 1 L. R. 2 Q. B. 448; *Todd v. Old Colony & F. R. Co.* 3 Allen, 18; *Phila. & R. R. Co. v. Derby*, 55 U. S. 14 How. 468 (14 L. ed. 502); *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 126; *Rose v. Des Moines Valley R. Co.* 36 Iowa, 246. So, where he rides free at the invitation of an agent of the carrier, although the agent has violated his duty by inviting him, yet, if there is no collusion on his part with the agent to defraud the company, he is not deprived of his rights or remedies as a passenger as to injuries received through the negligence of the company. *Wilton v. Middlesex R. Co.* 107 Mass. 108; *Pittsburg, A. & M. Pas. R. Co. v. Caldwell*, 2 L. R. A.

well, 74 Pa. 421; *Washburn v. Nashville & C. R. Co.* 3 Head, 628; *Creed v. Pa. R. Co.* 86 Pa. 130; 2 Wood, *Railway Law*, 1039. But where a person knowing the rules gets upon a freight train, even with the assent of the conductor, and pays no fare, he cannot be regarded as a passenger. *Houston & T. C. R. Co. v. Moore*, 49 Tex. 81, 30 Am. Rep. 98; *Eaton v. Del. etc. R. Co.* 57 N. Y. 882. The true rule in such a case is where a person fraudulently induces an agent of the company to disregard his duty, and permit him to ride free, he is not a passenger in the strict legal sense of the word. *Toledo, W. & W. R. Co. v. Brooks*, 61 Ill. 245. Even if a person boarded the train without the permission or knowledge of the conductor, yet if the conductor, after he became aware of his presence on the train, suffered him to remain, he was entitled to the same protection as if he had paid his fare. See *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 65; *Muehlhausen v. St. Louis R. Co.* 6 West. Rep. 860, 61 Mo. 832. It is not important that the plaintiff did not take passage as an ordinary passenger, or that he paid no fare (*Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125), nor whether the plaintiff stood in the proper relation to the defendant of a passenger toward whom it owed the peculiar duty which grows out of such relation. *Creed v. Pa. R. Co.* 86 Pa. 130; *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 251; *Lucas v. Milwaukee & St. P. R. Co.* 83 Wis. 41; *Wilton v. Middlesex R. Co.* 107 Mass. 108; *Gradin v. St. Paul & D. R. Co.* 30 Minn. 217.

**CHEMICAL ELECTRIC LIGHT &  
POWER CO.**

v.

**James H. HOWARD.**

(....Mass....)

1. **An English patent**, if regular in form and in existence as a document, is, by force of the English decisions, sufficient consideration to support a promissory note made in Massachusetts, even although the patent is in fact invalid for want of novelty, and notwithstanding the fact that under the Massachusetts decisions a note given for an invalid United States patent is without consideration.
2. **A clause in a contract**, made in the United States, by citizens thereof, for the sale of a certain English patent, that "It is understood that said English patent is in full force and effect, otherwise said H. is to be relieved from payment," etc.—construed to mean that the patent was to be "of effect" in a sense that a United States patent must be to obtain recognition in our courts.

(January 4, 1889.)

**ON** defendant's exceptions. *Sustained.*

Action of contract, founded upon the following note, release and agreement:

**NOTE.**

\$1,000.00. Boston, Mass., April 23, 1886.

July 1, 1886, or fifteen days after I have permission to give publicity to the fact that the Chemical Electric Light & Power Company own foreign patents of Thos. John Handford, covering the use of bichromate of soda in galvanic batteries, I promise to pay to the Chemical Electric Light & Power Company the sum of one thousand dollars, value received, as per agreement executed this day.

Jas. H. Howard.

**RELEASE.**

*Whereas*, A certain agreement, a copy whereof is hereto annexed, was entered into on the 23d day of April, 1886, between the Chemical Electric Light & Power Company and James H. Howard, by which said company agreed, among other things, to sell, assign, transfer and deliver to said Howard certain patent rights, purchased for it in France by Alfred Rodman, and also to deliver to said Howard certain papers and letters patent; *and whereas*, It is desired to have said patent rights purchased by said Rodman assigned directly to said Howard by said Alfred Rodman, or by Stephen M. Weld of Boston, in case said assignment from said Jarriant to said Weld is this day in existence, excepting an assignment covering said rights for the United States, instead of by said Chemical Electric Light & Power Company, and to relieve said company of any further obligation to deliver to said Howard the aforesaid papers, documents and letters patent and rights,—*Now, therefore*, in consideration of the sum of \$1.00 and other valuable considerations to me, said Howard, in hand paid, the receipt of which is hereby acknowledged, I, the said Howard, hereby accept the assignment of said Rodman, dated the third day of August, 1886, and the assignment

of said Weld, dated August 5, 1886, covering the aforesaid patent rights purchased by said Rodman in France. Due execution and delivery of said assignments is hereby acknowledged, in full substitution for the assignment covering such rights to be made by said company in accordance with the agreement aforesaid; and I relieve said company of all further liability to deliver to me the papers, letters and patent rights under said agreement, provided said assignment by said Rodman and Weld conveys to me all rights acquired by said Rodman from Jarriant, excepting for the United States.

In witness whereof, I hereunto set my hand and seal at Boston, County of Suffolk and Commonwealth of Massachusetts, this 5th day of August, A. D. 1886.

Jas. H. Howard. [SEAL.]

**AGREEMENT.**

This agreement, made this 23d day of April, 1886, between the Chemical Electric Light & Power Company, a corporation organized under the Laws of Maine, and doing business in Boston, Mass., and James H. Howard, of Medford, Massachusetts.

*Witnesseth: Whereas*, The said company, through its president, Stephen M. Weld, and Mr. Alfred Rodman, have bought and acquired certain patent rights, respecting the use of bichromate of soda, from the inventor, Benoit Jarriant, of Paris, for the United States, and also for "everywhere," meaning all countries outside of the United States where Benoit Jarriant or Thos. John Handford of England, his patent agent, have any rights which are or may be secured to him or them by reason of the issue to said Handford of a certain English patent, numbered 1956 of A. D. 1882, 25th of April, and sealed on the 17th day of October, 1882; *and whereas*, Said Howard desires to acquire and own all of said patent rights so purchased and acquired by said company for all the countries outside of the United States—

*Now, therefore*, It is agreed as follows: For and in consideration of one hundred shares of stock of the Chemical Electric Light & Power Company transferred by said Howard unto said Alfred Rodman and delivered to Stephen M. Weld, the receipt whereof is hereby acknowledged, and the sum of one thousand dollars (\$1,000) cash, to be paid unto said Stephen M. Weld for said company by said Howard, the Chemical Electric Light & Power Company hereby agree to sell, assign, transfer and deliver unto said Howard, each and every patent right covering all countries outside of the United States purchased for it by said Rodman in France, recently, and to deliver the necessary petition, power of attorney, and other papers executed by said Thos. John Handford, or Benoit Jarriant, necessary to secure to said Howard the issue of such letters patent as he may desire to have issued, and to deliver to him all letters patent that have already been issued to said Handford in countries outside of the United States, provided said company incur no expense. Any expense necessary to accomplish above to be paid for by said Howard.

In consideration of the above, said Howard agrees to pay the sum of one thousand dollars

(\$1,000) unto said company, on or before the first day of July, 1886, or sooner if the patent to be applied for in the United States covering said Handford's invention should be issued before that date, and further agrees to transfer, assign and deliver to said company two (2) certain patents already applied for by him, covering improvements in galvanic batteries, so far as said inventions relate to the United States, so soon as said letters patent are granted and issued by the United States Patent Office. It is further agreed that said company shall bear the expense of obtaining the Handford patent in the United States, and that said Howard is to bear the expense of obtaining the two (2) patents already applied for by him; and further, that if it is found that the English patent No. 1956, hereinbefore referred to, does secure unto said Handford or Jarriant and his assigns the exclusive use of bichromate of soda in all galvanic cells wherein soda can be used, then said Howard is to pay unto said company a further consideration of 10 per cent of the net profits received by him from the sale of said English patent right, and also 10 per cent of the net profit received from the sale of rights under said Handford or Jarriant in all countries where it gives Handford or Jarriant, or his assigns, the exclusive use of bichromate of soda in galvanic batteries.

It is further agreed that should the entire cost of obtaining said English patent of Handford prove to be less than \$1,000 (aside from the one hundred shares of stock paid to Alfred Rodman), then and in that event the said company shall return all excess over and above the actual amount of expense incurred by said Rodman in obtaining for said company said English Handford patent, and the other foreign rights purchased from him, or from said Benoit Jarriant.

It is understood that said English patent No. 1956 is in full force and effect, otherwise said Howard is to be relieved from the payment of said \$1,000 in cash under this agreement.

It is likewise understood that said Howard is to make no claim upon said company for compensation for his management of its business and finances up to May 1, 1886, and for such further time as he may continue to manage its business and finances without a written agreement as to compensation.

Chemical Electric Light & Power Co.

Stephen M. Weld, President.

Jas. H. Howard.

Witness: H. S. Thompson.

At the trial in the superior court before Sherman, J., and a jury, the plaintiff put in evidence the originals of these documents, and the defendant admitted that the plaintiff had taken out the United States patent, and paid the expense thereof, as required in said agreement. The parties agreed that, instead of calling experts, the Law of England, so far as material, might be proved by reading from the statutes and the reported decisions of English Courts, but not from text books.

The plaintiff put in evidence the English Patent Act of 1853, 16 & 17 Victoria, chap. 5, ditto of 1858, 46 & 47 Victoria, chap. 57; also the English Patent Office receipts, and the de-

fendant admitted that the English Patent Office fees had been duly paid. The plaintiff also put in evidence the cases to be found in Good-eve's Patent Cases, it being agreed that both sides might use the full reports of the cases from the original sources quoted by Goodeve, also the following cases:

*Gray v. Billington*, 21 Up. Can. C. P. 288; *Hall v. Conder*, 2 C. B. N. S. 22; *Smith v. Neale*, 2 C. B. N. S. 87; *Wiles v. Woodward*, 5 Exch. (W. H. & G.) 557; *Bowman v. Taylor*, 2 Ad. & El. 278.

The defendant objected to the admission of the first case above mentioned, on the ground that it was an Upper Canada, and not an English, case, and so not within the scope of the agreement of parties. But the court admitted the case, and the defendant excepted.

The plaintiff proved that it duly gave Howard permission "to give publicity to the fact that the Chemical Electric Light & Power Company owned foreign patents of Thomas John Handford covering the use of bichromate of soda in galvanic batteries."

The defendant offered evidence tending to show:

*First.* That he was induced to execute the agreement by conduct and statements of the plaintiff's officers, which, as he claimed, amounted in law to false and fraudulent representation.

*Second.* That there was an absolute failure of consideration both for the agreement and note.

*Third.* That the release was obtained of the defendant under the following circumstances: Rodman had taken the assignment from Jarriant in his own name, and had subsequently assigned his interest therein to Weld, and it was supposed that Jarriant had also assigned to Weld; that to simplify matters, and to avoid a succession of transfers to the company and from the company to Howard, it was decided to have the assignments made directly from Rodman and Weld to Howard, Weld saying that he would only do it on condition that that made a clear end of the whole thing; that at the time of the execution of the release, the assignments were in possession of Weld, the president of the company; that Howard was led to expect, and did expect, to receive the assignments upon signing the release, but that instead, after signing, he was informed by Weld that the directors had instructed him that, instead of giving the assignments to Howard, he should put them in trust; that he, Weld, did not feel authorized in giving up the papers until the amount of Howard's note had been paid, and that the only way he could deliver them would be that they should go to Kidder, Peabody & Co's and put the papers in trust with instructions; that Howard then wrote a letter to Kidder, Peabody & Co., inclosing the assignments, authorizing them to send them to London, to be there delivered to one Burroughs, only upon payment of a certain draft, out of the proceeds of which, if paid, Weld was to receive \$1,000. If the draft should be dishonored, the assignments were to be returned to Boston, and to Mr. S. M. Weld, and this letter and inclosed assignments were by mutual agreement delivered by Howard to Kidder, Peabody & Co.; that thereafter the draft on

Burroughs was dishonored (on the ground of the alleged invalidity of the Handford patent), and the assignments being returned from London to Kidder, Peabody & Co. were by them delivered to and receipted for by Weld, and have ever since remained in the possession of the plaintiff company.

*Fourth.* That the English Handford patent, No. 1856 of 1882, was invalid by reason of a prior publication of that portion thereof relating to the use of bichromate of soda in galvanic batteries, in an English patent of one Highton, No. 1648, of 1871, claiming that by reason thereof said Handford patent was not at the time of the signing the Howard agreement in full force and effect; and he asked the court to make certain rulings in the construction of the Howard agreement, the Howard release, the Handford and Highton patents, and as to the English Law relating to the novelty and validity of a patent; and further, to instruct the jury that if they should find the Handford patent to have been originally invalid, they should find for the defendant, as the grant of an interest in or right under a void patent is not a valid consideration for a promise by the grantee.

The plaintiff objected to the admission of any evidence to show want of consideration for the note; or that the Handford patent was invalid; or that the instruments referred to in the release, as having been delivered to Howard, had not been delivered; or that the plaintiff company was not the owner of the "Jarriant rights;" contending that the defendant was estopped from setting up any of these defenses, by reason of the release and other documents in evidence.

The plaintiff also objected to the admission of any evidence to show fraud, or that the cost of obtaining the Jarriant rights was less than \$1,000.

But the court admitted the evidence, *de bene*, subject to the plaintiff's exception, with a view to submitting certain questions, to be thereafter framed, to the jury, for them to return a special verdict thereon, the understanding of the court being that both counsel agreed to this course; but after the evidence was all in, the counsel for the defendant stated to the court that such was not his understanding, and that he wished to go to the jury generally, leaving them to bring in a general verdict. This the court declined to permit, and without any specific rulings of law, at the request of the plaintiff ordered a verdict for the plaintiff in the sum of \$1,000, with interest from the date of the plaintiff's writ—to all of which the defendant excepted.

**Mr. George A. O. Ernst** for defendant.  
**Mr. W. S. Rogers** for plaintiff.

**Knowlton, J.**, delivered the opinion of the court:

The promissory note upon which this suit is brought was only a part of a contract of which the rest appears in the writing called the Howard agreement, executed on the same day. The defendant at the trial, introduced evidence tending to show that the English Handford patent, referred to in the contract, was invalid by reason of a prior publication "of that portion thereof relating to the use of bichromate

of soda in galvanic batteries, in an English patent of one Highton," in 1871.

So far as appears by the reference to the patent in the several contracts before us, this use is all that it professed to cover, and if there was such prior publication it is void. And even if it purported to include an additional invention which is new and useful, under the English Law, which differs in this particular from the American, a prior publication of this part would render the whole invalid. *Morgan v. Seaward*, 2 Mees. & W. 544; *Brunton v. Hawkes*, 4 Barn. & Ald. 541.

We must assume, therefore, that the jury might have found the patent to be void because the invention was not new.

The only consideration for the defendant's promise to pay the \$1,000 was the plaintiff's agreement to assign this patent; and it has often been held in this Commonwealth that a promissory note, given for an assignment of an invalid patent, is without consideration. *Dickinson v. Hall*, 14 Pick. 217; *Leester v. Palmer*, 4 Allen, 145; *Nash v. Lull*, 102 Mass. 60; *Harlow v. Putnam*, 124 Mass. 558.

If this had been an American, instead of an English, patent, there would be no doubt that the evidence offered, if convincing, would have shown the note to be worthless for want of consideration. But the English Courts have given to assignments of patents, and to contracts purporting to grant licenses and convey rights under patents, an interpretation different from that which is given them here. Perhaps from a disinclination to go so far as the American Courts in holding that a vendor impliedly warrants his title to a chattel sold while in his possession, and perhaps in part on account of the practice there in relation to issuing patents, the Courts in England hold that one who purchases a patent, or rights under a patent, in the absence of fraud and of express stipulation, must be presumed to look to the existence of the patent as a document which *prima facie* gives a right, rather than to the facts behind the patent, upon which its validity depends. *Hall v. Conder*, 2 C. B. N. S. 22, 58; *Noton v. Brooks*, 7 Hurl. & N. 499; *Trotman v. Wood*, 16 C. B. N. S. 479; *Adie v. Clark*, L. R. 3 Ch. Div. 134; *Lawes v. Purser*, 6 El. & Bl. 980; *Smith v. Neale*, 2 C. B. N. S. 67.

Of such a contract *Lord Campbell* said in *Hall v. Conder*: "The thing contracted for was a real patent under the Great Seal, although, by reason of circumstances not within the knowledge of either party at the time of the contract, it might ultimately prove valueless." See also cases in which it is held that one contracting in reference to a patent is estopped to deny its validity. *Bowman v. Taylor*, 2 Ad. & El. 278; *Hills v. Lamington*, 9 Exch. 256; *Cutler v. Bower*, 11 Ad. & El. N. S. 973; *Wiles v. Woodward*, 5 Exch. (W. H. & G.) 557.

The subject matter of the contract in the present case is a patent, which can have no existence outside of the country in which it was granted. Its nature, and to a great extent its value, depends upon English Law. Under the decisions of the English Courts, it is so far property that it may constitute a valuable consideration, and may be a subject of a valid contract, even if void for want of novelty. We are of opinion, therefore, that the evidence



offered would not have warranted a verdict that the note was without consideration.

The contract contains this clause: "It is understood that said English patent No. 1956 is in full force and effect; otherwise, said Howard is to be relieved from the payment of said \$1,000 in cash under this agreement." The plaintiff contends that the first part of this clause means no more than that all the formal requirements of the law in relation to granting patents had been complied with. The defendant contends that the words "full force and effect" relate, not merely to the form of the patent, but to its substance and validity. We must look carefully at the situation of the parties when the contract was made, to see if we can ascertain their meaning.

The plaintiff had just purchased of Jarriant his patent for France and for England, with such rights as could be conveyed, to the use of the invention in other parts of the world, and had paid him therefor \$392. The entire expense incurred by the plaintiff in obtaining these rights was about \$1,000. The last clause of the contract indicates that the defendant was the plaintiff's business and financial manager, and was presumably familiar with this part of its business.

The plaintiff retained the invention for use in the United States, and arranged to apply for a patent here, which the bill of exceptions shows that it afterwards obtained. It agreed with the defendant to convey him the patent for England for one hundred shares of the stock of the plaintiff corporation, which were then delivered; and for \$1,000 cash, to be paid according to the terms of the note; and for an agreement by the defendant to transfer to it two patents, for which the defendant had already applied in the United States, and which he was to pay the expenses of obtaining; and for an agreement to make no claim for services as business manager of the plaintiff up to May 1, 1886.

It can hardly be supposed that either of the parties was in doubt as to there being an English patent in proper form, upon which the required fees had been paid to the government; for the purchase had just been made through an agent sent from America to transact the business, and the last fees due upon the patent had been paid about two years before. But they may well have been doubtful as to the "force and effect" of the patent in securing the exclusive rights for which the defendant wanted it.

The plaintiff, in his argument, seems to disregard the ordinary meaning of the words in question. The existence of the patent as a document formally correct, is assumed throughout all the contracts. The provision as to its "force and effect" relates to something more. Upon this question of interpretation, the fact that the parties were Americans, contracting here in reference to property in a foreign land, is proper for consideration. They may be presumed to have known that an American patent, void for want of novelty, would not even be a sufficient consideration for a promise. This stipulation seems intended to require a patent which should be "of effect," in a sense that an American patent must be to obtain recognition in our courts.

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Moreover, it is to be observed that this provision relieves the defendant only from the payment of the money. It leaves the plaintiff to retain the one hundred shares of stock, and the two American patents, and the defendant's services as manager. If the parties had been providing for a mistake as to the existence of the patent as a document, or for a case where a patent had become void for nonpayment of fees, they naturally would have contracted for a restoration to the defendant of the entire consideration.

The provision that the defendant should pay an additional sum, if the patent secured "the exclusive use of bichromate of soda, in all galvanic cells wherein soda can be used," should not be overlooked. We have not the patent before us, and have no means of knowing its contents except as they are referred to in the several contracts, and so we can only draw inferences doubtfully.

But it seems probable that the parties not knowing whether the patent was in force and effect in reference to the public use of the invention named in it, and of other similar inventions, intended to stipulate that, if it should prove to be void for want of novelty or for other like cause, the defendant should lose all that he had given for it in stock, patents and services, but should not pay the \$1,000 in cash; and that if, on the other hand, it should not only secure the use of bichromate of soda in the particular way described in it, but should also cover the use of it in galvanic cells in every possible way, he should pay an additional sum. The evidence in reference to the invalidity of the patent should therefore have been submitted to the jury.

The contract of August 5, 1886, called the Howard release, and the acts of the parties on that day and subsequently, were equivalent to a performance by the plaintiff of the contract of April 23, 1886. The delivery to Kidder, Peabody & Co. was assented to by the defendant, and no fraud was practised upon him in connection with it; but his execution of the release puts him in no worse position than if the English patent had been assigned to him in the manner contemplated by the first agreement. If that had been done, he would still have been entitled to be relieved from paying the note, if it appeared that the patent was invalid.

The exception in regard to the evidence of a decision in Canada was waived at the argument.

We discover no other error in the ruling at the trial. The bill of exceptions does not show that evidence was introduced which would have warranted a finding that the defendant was induced to execute the original agreement by fraud.

We do not understand that any question was raised in regard to the cost of obtaining the English patent, except whether the reasonably necessary expenses of transacting the business, beyond the payments to the inventor, to the patent solicitors, and to the consul for fees, should be included. By the ruling of the court, that question was properly answered in the affirmative.

*Exceptions sustained.*

Thomas HURLEY

v.

Dania. T. HURLEY *et al*

(.... Mass. ....)

1. One who redeems property, in which he afterwards becomes a tenant in common, from a tax sale, is entitled to have the lien kept alive as against his cotenant, until the latter shall have paid his share of the taxes, if there are no special fiduciary relations between the parties, although he takes no steps to assert and preserve his lien as prescribed by Pub. Stat. chap. 12, §§ 63, 64, 65.
2. Pub. Stat. chap. 12, §§ 63, 64, 65, relating to the preservation of a lien in favor of one tenant in common who pays taxes, as against his cotenants, apply simply to a payment in the first instance, not to a redemption of the premises after a sale when the tenant takes a deed which is put on record.
3. A suit for partition, brought by a tenant in common, will be defeated by a valid adverse claim to the premises, made by his cotenant, under a tax title.

(January 14, 1889.)

ON petitioner's exceptions. *Overruled.*  
Petition for partition.

The facts sufficiently appear in the opinion of the court.

Mr. E. B. Callendar for petitioner.

Messrs. A. & J. R. Churchill, for respondent D. T. Hurley:

The petitioner had not, at the time of filing his petition, any right of entry and possession, as the law requires.

Pub. Stat. chap. 178, § 3; *Hunnewell v. Taylor*, 6 Cush. 472; *Parker v. Baxter*, 2 Gray, 185; *Coughlin v. Gray*, 131 Mass. 57; *Newton Bank v. Hull*, 10 Allen, 144; *Phelps v. Palmer*, 15 Gray, 490.

Under the tax deed respondent had an absolute and indefeasible title to the estate. If defeasible, by reason that there remained in the petitioner a right of redemption, or that respondent's title was in trust for the petitioner's and respondent's use and benefit, this action must equally fail.

*Fuller v. Bradley*, 23 Pick. 8, 9; *Blodgett v. Hildreth*, 8 Allen, 186.

If the trust among cotenants might have been implied, it fails where the consent or acquiescence or laches of the claimant appears, or the fact that they, the tenants in common, come in under different purchases or instruments or titles.

*Michoud v. Girod*, 45 U. S. 4 How. 561 (11 L. ed. 1102). See *Stackhouse v. Barnston*, 10 Ves. Jr. 467; *Bonney v. Ridgard*, 1 Cox, Ch. 149; *Campbell v. Walker*, 5 Ves. Jr. 678, 18 Ves. Jr. 601.

NOTE.—*Partition between tenants in common.* It is not admissible in actions for partition to try conflicting claims to the legal title, but the equitable rights and claims may be determined. *Knapp v. Hungerford*, 7 Hun. 590. See *Town v. Needham*, 8 Paige, 545; *German v. Macken*, 6 Paige, 288; *Canon v. Lomax*, 1 L. R. A. 637.

*Cotenant paying taxes.* Where one of the tenants in common of an undivided tract of land pays the taxes upon his share of the tract, and a certain number of acres, undivided, are sold out of the whole tract, to pay the taxes upon the shares of his cotenants, his legal interest in the whole tract will not be diminished by such sale; but the sale will

Holmes, J., delivered the opinion of the court:

This is a petition for partition. In 1870 the petitioner, Thomas Hurley, inherited one undivided half of the premises from his mother, subject to his father's tenancy by the curtesy. On November 14, 1879, the father died and the other half which had belonged to him under a separate conveyance descended to the petitioner and the respondents, two sons of the father by a later wife. On September 8, 1879, before the father's death, the premises were sold for taxes, to one Capen. On December 6, 1880, the respondent, Daniel T. Hurley, paid Capen the amount necessary to redeem the premises and took a release from him. At that time the respondent's mother was in possession. In the spring of 1882 Daniel T. Hurley took possession. The petitioner has never offered to repay any part of the sum paid to Capen, and the question raised by the exceptions is whether Capen's deed to him is a bar to this petition.

There has been some uncertainty as to the extent and grounds of the principle that a purchase of a tax title by one tenant in common inures for the benefit of all. *Frente v. Klotsch*, 28 Wis. 812, 818; *Conn. Mut. L. Ins. Co. v. Bulle*, 45 Mich. 118, 120; *Rothwell v. Deucees*, 67 U. S. 2 Black, 618, 618 (17 L. ed. 809, 811).

Some cases dwell principally on the existence of a fiduciary relation (*Lloyd v. Lynch*, 28 Pa. 419, 424; *VanHorne v. Ronda*, 5 Johns. Ch. 888, 407; *Plinn v. McKinley*, 44 Iowa, 68; *Weare v. Van Meter*, 43 Iowa, 128; *Venable v. Beauchamp*, 3 Dana, 321, 324); while others put the proposition in the narrower form, that a tenant in common cannot take advantage of a title created by his own default as against his cotenant. *Choteau v. Jones*, 11 Ill. 300, 322; *Voris v. Thomas*, 12 Ill. 442; *Dubois v. Campau*, 24 Mich. 860, 308; *Lacey v. Davis*, 4 Mich. 140, 152; *Downer v. Smith*, 88 Vt. 484, 468. See *Platt v. St. Clair*, 6 Ohio, 227; *Bernal v. Lynch*, 86 Cal. 135, 146; *Carithers v. Weaver*, 7 Kan. 110.

Undoubtedly, as is said by Dixon, Ch. J., dissenting, in *Smith v. Lewis*, 20 Wis. 350, 356, it will be found in most of the cases that the party setting up the tax title was under an obligation to pay the taxes.

It has been held that a tenant in common could purchase a tax title from a stranger after the period of redemption had expired, and hold it for his own benefit (*Reinboth v. Zerbe Run Improvement Co.* 29 Pa. 139; *Keels v. Cunningham*, 2 Heisk. 288; *Watkins v. Eaton*, 80 Maine, 529, 536; *Coleman v. Coleman*, 3 Dana, 398, 403); and in this Commonwealth, it is decided that he may take an assignment of a paramount mortgage, and rely on it to defeat a petition for a partition. *Blodgett v. Hildreth*, 8 Allen,

only diminish the interests of his cotenants in the undivided tract. *Braker v. Devereaux*, 8 Paige, 513; *Knapp, Partition*, 205. A tenant in common who buys on a state tax title cannot set it up in equity as paramount to that of his cotenant, but he has a charge on the land, as against him, for reimbursement. *Allen v. Poole*, 54 Miss. 323. The purchaser does not lose what he pays beyond what is useful for discharging the lien upon his own interest. His cotenants must refund to him such portion as is found to be just. *Baker v. Whiting*, 8 Sumn. 476; *Burbans v. Van Zandt*, 7 N. Y. 523; *Phelan v. Boylan*, 26 Wis. 679; *Chickering v. Fells*, 38 Ill. 342; *Anson v. Anson*, 20 Iowa 54; *Maul v. Rider*, 51 Pa. 377.

186. On the other hand, it has been held that a purchase of a tax certificate before the period of redemption has expired, by one who is not a tenant in common at the time, will inure to the benefit of the other tenants in common if he becomes such before he gets the tax deed. *Flinn v. McKinley*, 44 Iowa, 68; *Tice v. Derby*, 59 Iowa, 812, 814. Compare *Sneed v. Atherton*, 6 Dana, 276, 279.

There are strong grounds for saying that there were no special fiduciary relations between the petitioner and the defendant in this case. Their titles were in part derived from different sources. *Prentz v. Klotzsch*, 28 Wis. 312, 318.

According to the bill of exceptions, the defendant was not in possession when he took the tax deed (*Wright v. Sperry*, 21 Wis. 331, 337), and he had no interest in the premises when the tax was assessed or until after they were sold; while the petitioner owned one half subject to his father's tenancy by the curtesy. It is at least consistent with the facts stated to assume that the petitioner was not relying on the respondent in any way. See *Matthews v. Bliss*, 23 Pick. 48, 52.

Again; it would be pressing the notion of default very far to say that, although the defendant was a stranger to the estate at the time of the sale, yet, since he might have redeemed, he could not found a title on his failure to do so.

But it is unnecessary to decide what would have been the effect if the defendant had taken a conveyance of the tax title to a third person and had given the transaction the form of an assignment. For whether the defendant had a right to take an assignment or not he certainly had a right to redeem and pay off the incumbrance. Pub. Stat. chap. 12, § 49. See *Coughlin v. Gray*, 131 Mass. 56, 58; *Langley v. Chapman*, 134 Mass. 82; *Coxe v. Wolcott*, 27 Pa. 154.

Which of the two transactions took place may be a question for the jury under some circumstances. *Coxe v. Wolcott*, *supra*. But, as was said in *Watkins v. Eaton*, 30 Maine, 529, 534, a case very similar in principle to the one at bar, "When a part owner obtains a conveyance of his own share and the share or shares of cotenants by payment of the precise amount

required to redeem them, he must be presumed, in the absence of all rebutting testimony, to have done so in the exercise of a legal right. And in such case the whole so conveyed will be redeemed from the sale." See *Sherwin v. Boston Five Cent Sav. Bank*, 137 Mass. 444, 449.

It is plain on the face of the deed accepted by the defendant Daniel T. Hurley that he redeemed the premises in the exercise of his legal right so to do; and it follows that the lien of the tax sale was discharged in such a sense that it could not ripen into a legal title as against his cotenants, except upon their refusal or neglect to pay their share. *Watkins v. Eaton*, and *Weare v. Van Meter*, *supra*.

When the question arises whether, as the respondent has paid the tax and has not taken the steps to assert and preserve his lien prescribed by Public Statutes, chap. 12, §§ 63-65, his rights are not gone altogether. But we think that it would be too harsh a construction of those sections to hold that they apply to a redemption of the premises after a sale, when the tenant takes a deed which is put on record. We interpret the statute as intended to apply to a payment in the first instance, when, unless a certificate is filed as provided, there will be nothing in the registry to show the tenant's claim, and when no other statutory mode of divesting the title of his cotenants has been set in motion.

We are of opinion that although the tax is legally paid, as we have said, yet the respondent Daniel Hurley is entitled to have the lien kept alive for his benefit until the petitioner shall have paid his share. Until that time the petitioner has no right to the possession of any part of the land, in equity or at law. *Watkins v. Eaton*, 30 Maine, 529, 535. See *McCabe v. Swap*, 14 Allen, 188, 191; *Gibson v. Orehore*, 3 Pick. 475, 5 Pick. 146, 150; *Popkin v. Bumstead*, 8 Mass. 491. Therefore the petition was rightly dismissed. Pub. Stat. chap. 178, § 8; *Blodgett v. Hildreth*, *supra*; *Bradley v. Fuller*, 23 Pick. 1, 8; *Hunnewell v. Taylor*, 6 Cush. 472; *Coughlin v. Gray*, 131 Mass. 57; *Husband v. Aldrich*, 135 Mass. 317, 318.

*Exceptions overruled.*

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

HARDMAN *et al.*

v.

BRETT.

(....Fed. Rep.....)

A ship owner who, to exonerate himself, has, as bailee of the cargo, recovered and received from

the owner of another vessel, in a suit in admiralty for damages for a collision, the value of the cargo as well as damages for injury to his ship, is answerable to the owner of the cargo (or to the insurer subrogated to such owner's right) for the whole value thereof so received, without deduction for the expenses of the litigation in which it was obtained.

(February 6, 1880.)

NOTE.—Responsibilities of carrier by water. Carriers of merchandise by water are insurers, and liable for every loss or damage to the merchandise, unless it happened by the act of God, the public enemy, the shipper, or by some other cause excepted in the contract of shipment. *Germania Ins. Co. v. The Lady Pike*, 68 U. S. 21 Wall. 1 (22 L. ed. 499); *The Niagara v. Cordes*, 62 C. S. 21. How. 7 (16 L. ed. 41); *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 22 (20 L. ed. 423). A common carrier who insures a cargo, accepted by him to carry from New York to 2 L. R. A.

Buffalo, against all losses excepting those occasioned by theft, robbery or barratry of the master or crew of the vessel on which they are shipped or want of care and skill, may recover the full value of the goods insured by him on showing a loss by fire, for which he is answerable. *Van Natia v. Mutual Security Ins. Co.* 2 Sandf. 490; *Edwards, Bailments*, 356. By the general custom, or, as it is termed in England, the custom of the realm, which is the foundation of the common law on the subject, the common carrier intrusted with goods for carriage

**A**CTION for money had and received. Tried by the Court (Wallace, J.), without a jury. *Judgment for plaintiffs.*

The case appears from the opinion.

**Mr. J. Langdon Ward** for plaintiffs.

**Mr. William W. Goodrich** for defendant.

**Wallace, J.**, delivered the following opinion:

The plaintiffs are underwriters who had insured a cargo of lumber shipped in July, 1878, on the schooner "S. B. Hume," which cargo was lost by a collision between the schooner and a steamship, and sue to recover a sum of money, representing the value of the cargo, which came to the hands of the defendant in the progress of a suit in admiralty brought by the owners of the schooner against the steamship to recover damages sustained by the collision, including the loss of the cargo. The plaintiffs have succeeded to the rights of the owners of the cargo by subrogation. The defendant was the managing owner of the schooner, and the active party in prosecuting the suit in admiralty in behalf of the owners.

The libel in the admiralty suit averred, in respect to the cargo, that the owners of the schooner were entitled as carriers to recover the value. The court decided in the admiralty suit that both the schooner and the steamship were in fault for the collision, and decreed that both parties to the suit were liable to the owners of the cargo lost for the full value thereof; and also decreed against the steamship in favor of the owners of the schooner for one half the damages sustained by the schooner in the collision. The sum found by the decree to be owing for loss of the cargo was \$3,496.92; and the sum awarded for the half of the dam-

ages to the owners of the schooner was \$4,426.22.

After the decree was rendered, and pending an appeal from the district court to the circuit court, the owners of the steamship paid into court so much of the sum awarded against the steamship as would satisfy the claims of the owners of the cargo, to wit: \$3,496.92; and this was done in order that the owners of the steamship might discharge themselves from liability to the cargo owners in a suit threatened or brought in another jurisdiction by the cargo owners against the steamship. The decree of the district court having been affirmed by the circuit court upon the appeal, the owners of the steamship paid the balance of the decree to the proctor for the owners of the schooner; and shortly thereafter such proctor made an application to the court, and obtained an order, that the \$3,496.92 which had been paid into the registry of the court by the owners of the steamship be transferred to him in behalf of the owners of the schooner. This order was applied for by the instructions of the present defendant, and the defendant received the money from the registry of the court, less the sum of \$1,000 which was retained by the proctor for his services in the cause.

The theory of the present action is that the money paid into court, and withdrawn by the intervention of the defendant, is the proceeds of the cargo for which the defendant is liable to the plaintiffs, who are the real owners, as for money had and received. The defendant insists that he is entitled to retain out of these moneys such proportion of the expenses of the litigation between the owners of the schooner and the steamship, including counsel fees, as the amount recovered for the cargo bears to the whole amount of the recovery against the

is responsible at all events for every injury arising in any other way than by the act of God or of public enemies. *Coggis v. Bernard*, 2 *Ld. Raym.* 919; *Dale v. Hall*, 1 *Wils.* 281. Loss by flood or storm is loss by the act of God; and a common carrier is excused when the damage resulted from this cause immediately. *Memphis & C. R. Co. v. Beeves*, 77 *U. S.* 10 Wall. 176 (19 *L. ed.* 900). His responsibility is established with a view to public policy, to the reward which he receives, to his character as an insurer, and to the terms of his contract, express or implied. *Jeremy Carriers*, 31-38. He must answer for all losses not caused by the act of God or the King's enemies. *Mors v. Slue*, *Raym.* (Sir T.) 220, 1 *Vent.* 190, 238; *Colt v. McMechen*, 6 *Johns.* 160. The act of God means something quite different from what is expressed by the terms "inevitable accident" as these are ordinarily used. In fact, the carrier has been held answerable for losses caused by accidents which were to him entirely inevitable. *Abb. Shipp.* pt. 8, chap. 4, § 1; *Forward v. Pittard*, 1 *T. R.* 34; *McArthur v. Pears*, 21 *Wend.* 108; *Trent Nav. Co. v. Wood*, 8 *Esp.* 127. Where the loss happens in any way through the agency of man, it cannot be considered the act of God. *Forward v. Pittard*, 1 *T. R.* 37; *Campbell v. Morse*, 1 *Harper, L. R.* 468; *Elliott v. Russell*, 10 *Johns.* 11; *Robertson v. Kennedy*, 2 *Dana*, 430; *Gordon v. Buchanan*, 5 *Yerg.* 62; *Turney v. Wilson*, 7 *Yerg.* 340; *Amies v. Stevens*, 1 *Strange*, 128; *Edwards, Bailments*, 456.

*Carrier may recover for loss, or destruction of cargo.* The owner and master is the bailee of the cargo, and so responsible to the shippers or insurers for the safe transportation and delivery thereof; and to fulfill his obligations and secure his reward, he was entitled to possession, and might maintain an action for its destruction. *Commercial Transp. Co. v. Fitzhugh*, 66 *U. S.* 1 *Black*, 582 (17 *L. ed.* 110); *Newell v. Norton*, 70 *U. S.* 3 *Wall.* 287 (18 *L. ed.* 273). The owners of a vessel wrongfully injured by a collision may recover for injury done to the cargo (*Commercial Transp. Co. v. Fitzhugh*, *supra*; *The Com-*

*mander in Chief*, 68 *U. S.* 1 *Wall.* 48, 17 *L. ed.* 609; to its full value if totally lost (*The Narragansett*, Olcott, 235; *The Russia*, 3 *Ben.* 477; *The Commander in Chief*, *supra*); the value to be estimated from the value at the port of shipment, including expenses of transportation to the place of collision, the lading of the cargo, etc., and interest at 6 per cent per annum (*The Monticello v. Mollison*, 58 *U. S.* 17 *How.* 152, 15 *L. ed.* 68; *The Glaucus*, 1 *Low.* 371; *The Alcyon*, 7 *Ben.* 126; *The Anna Maria*, 15 *U. S.* 2 *Wheat.* 327, 4 *L. ed.* 252; *The Ocean Queen*, 5 *Blatchf.* 494; *Smith v. Condry*, 42 *U. S.* 1 *How.* 28, 11 *L. ed.* 35; *The Livezey*, 1 *Call.* 315; *Seaman v. The Crescent City*, 1 *Bond.* 113; *The Mary J. Vaughan*, 2 *Ben.* 50, 81 *U. S.* 14 *Wall.* 253, 20 *L. ed.* 907; interest on value of cargo (*The Apollon*, 22 *U. S.* 9 *Wheat.* 362, 8 *L. ed.* 111; *The Anna Catharina*, 6 *Chr. Rob.* Adm. 10; the value of the cargo at the market price at the home port of the injured vessel at the time it would ordinarily have arrived there (*Swift v. Brownell*, 1 *Holmes* 467; *The Joshua Barker*, *Abb. Adm.* 215); its value at the time and place of shipment, without including loss of profits which would have been realized by completing the voyage. *The Mary J. Vaughan*, 2 *Ben.* 47; *Smith v. Condry*, 42 *U. S.* 1 *How.* 28 (11 *L. ed.* 35). Future profits may be allowed as damages, but speculative and merely possible profits cannot be allowed. *The Mayflower*, 1 *Brown*, Adm. 387; *Lacour v. New York City*, 3 *Duer*, 408; *St. John v. New York City*, 6 *Duer*, 315; *Walter v. Post*, 6 *Duer*, 363; *Allison v. Chandler*, 11 *Mich.* 542; *Sewall's Falls Bridge v. Fisk*, 23 *N. H.* 171; *Griffin v. Colver*, 16 *N. Y.* 489; *Desty, Shipp. & Adm.* § 401. The respondent in the action is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured parties, he cannot be made liable to another suit at the instance of any merely equitable claimant. *The Monticello v. Mollison*, 58 *U. S.* 17 *How.* 152 (15 *L. ed.* 68; *Newell v. Norton*, 70 *U. S.* 3 *Wall.* 287 (13 *L. ed.* 273).

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steamship; and he asserts that upon an adjustment of the expenses incurred in the litigation upon that basis only the sum of \$873.84 remains due to plaintiffs.

The delivery of goods to a carrier for transportation vests in him a special property which authorizes him to maintain an action against any person who disturbs his possession or does any injury to the goods. Every bailee has a temporary qualified property in the thing of which possession is delivered to him by the bailor which entitles him to maintain an action against any stranger who injures it; and the reason is because he is answerable over to the bailor, and ought not to be responsible for the loss without being able to resort to the person who was the original cause of the injury. Story, Bailments, § 98.

A carrier by vessel for hire, whether strictly a common carrier or not, assumes the ordinary obligations of a common carrier, and is bound to carry the goods shipped to their destination unless prevented by the act of God, or the public enemy, or the act of the shipper, or one of the excepted perils expressed in the contract of shipment. *The Maggie Hammond*, 76 U. S. 9 Wall. 435 (19 L. ed. 712); *The Commander in Chief*, 68 U. S. 1 Wall. 43, 51 (17 L. ed. 609, 611); *The Niagara v. Cordes*, 62 U. S. 21 How. 7 (16 L. ed. 41).

It is just, therefore, that he should be permitted to indemnify himself from a wrong doer against his liability to the shipper or owner.

In prosecuting the suit against the steamship the defendant did not assume to act as an agent for the owners of the cargo, but he claimed to recover the value of the goods lost by virtue of his special property in them as a carrier. It is familiar law that the special right of property conferred by a bailment is sufficient to enable the bailee to recover the full value of the property of a wrong doer who destroys it—and this whether the bailment is for a consideration, or is merely a naked bailment. Thus a traveler was allowed to recover in trover against a steamboat company the full value of a satchel entrusted to his care by a friend (*Moran v. Portland Steam Packet Co.* 35 Maine, 55), and the finder of a jewel was permitted to recover its whole value for a conversion by a stranger, in the leading case of *Armory v. Delamirie*, 1 Strange, 503.

Inasmuch as the law does not allow a defendant to be vexed twice for the same wrong, a recovery by the person having a special property, and satisfaction by the wrong doer, discharges the latter from all liability to the own-

er. *White v. Webb*, 15 Conn. 805; *Smith v. James*, 7 Cow. 328; *Harker v. Dement*, 9 Gill, 7.

When the defendant received the money in question from the owners of the steamship he thereby absolved them from any further liability to the plaintiffs. The plaintiffs took no part in the suit, were not consulted, and had no opportunity to intervene in any way. As is said in the opinion of the court in *The Commander in Chief*, *supra*, doubtless they might have intervened and petitioned the court for the transfer of the money to them at any time before the distribution of the fund in the registry of the court. But they were under no obligation to do this, and were at liberty then, as they had been at any time after their right accrued, to bring an action against the owners of the schooner and recover the value of the cargo which had not been delivered pursuant to the duty of the carrier.

In such an action it could not be maintained by the carrier with any color of plausibility that he should be permitted to retain, or recoup against the demand of the cargo owner, any sum which he might have expended in prosecuting a suit brought for his own protection and indemnity against a wrong doer by whose act the cargo was lost. Such a defense would be preposterous in a case where the loss of the cargo was caused by the misconduct of the carrier; and such was the fact in the present case.

Instead of bringing such a suit for the value of the cargo, the plaintiffs have elected to sue the defendant who has received a fund which in legal contemplation is the cargo itself. If the defendant had sold the cargo and received the proceeds the plaintiffs could maintain an action against him for the amount, upon the promise, implied by law, to pay them to the true owners. What the defendant has done is equivalent to that, because he had no right to appropriate the fund to any other object than that of paying it to the true owners in order to exonerate himself. Although he has not been guilty of a technical conversion he has sought to retain money to which, as against the plaintiffs, he has no equitable claim.

The action for money had and received, which is sometimes termed an equitable action, affords an appropriate remedy to the plaintiffs. If defendant has allowed his proctor to retain part of the money he must account for it as though he had received it himself and paid over to the proctor the amount which the latter retained.

*Judgment is ordered for the plaintiffs, for the sum of \$3,496.92, with interest from October 13, 1885.*

## NEW YORK COURT OF APPEALS.

John Charles ANDERSON, *Appt.*,

v.

Laura V. APPLETON, Impleaded with  
Kate Anderson *et al.*, *Resp.*

(....N. Y....)

1. A devisee of the legal estate in land, in pos-

*NOTE.*—Suits to determine validity of devise, jurisdiction of surrogates' court. In 1801 the surrogates 2 L. R. A.

session of the property devised, and there being no trust, cannot, in New York, maintain an action to establish the will against the heir at law.

2. The inherent jurisdiction of courts of equity in New York does not extend to such an action—the power to determine questions arising upon the due execution of alleged wills having

were clothed with the same power as the judge of probate, to cite the administrators to account, to

been committed to the courts of probate; nor is jurisdiction of such an action conferred by statute.

**3. Chapter 316 of New York Laws of 1879**, which provides that the validity of a devise or will may be determined by the supreme court in a proper action for that purpose, brought by any heir-at-law or devisee, was repealed by implication by sections 1866 and 1867 of the Code of Civil Procedure.

**4. Section 1866 of the Code of Civil Procedure** is to be construed as providing for an action to determine the validity of a devise in a will whose proper execution is assumed, and not for an action to determine the validity of the will itself.

(January 15, 1890.)

**APPEAL** by plaintiff, from an order of the General Term of the Supreme Court, First Department, reversing an order of Special Term granting an injunction. *Affirmed.*

The case is stated in the opinion.

*Mr. Calvin Frost*, with *Mr. Thomas M. North*, for appellant.

*Mr. Edward C. James*, with *Messrs. Dill, Chandler & Seymour*, for respondent.

**Peckham, J.**, delivered the opinion of the court:

This action is brought to establish, by a judgment of the supreme court, the will of the late John Anderson. The case comes here on an appeal from an order of the General Term reversing an order of the Special Term granting an injunction restraining defendant from the prosecution of any action based upon the invalidity of the alleged will. Ordinarily no appeal lies to this court from an order dissolving an injunction; but the General Term has incorporated in its order a statement that the order of the Special Term granting the injunction is reversed on the ground that the action cannot be maintained, and hence a question of law is raised which is reviewable here. *Allen*

decees distribution or the payment of bequests and legacies, and compel it by execution. *Brick's Estate*, 15 Abb. Pr. 23. See *Foster v. Wilber*, 1 Paige, 587; *Dakin v. Hudson*, 6 Cow. 221. The provision of the Revised Statutes conferring jurisdiction upon surrogates was intended to provide an inexpensive and summary mode for bringing executors, etc., to account; but did not take away the power theretofore exercised by courts of equity to afford this species of relief. It still exercises a concurrent, and in some cases an exclusive, jurisdiction. *Christy v. Libby*, 5 Abb. Pr. N. S. 200, 2 Daly, 418, 35 How. Pr. 119. The surrogate granting administration, has power to call the administrator to account. Jurisdiction belongs to that surrogate's court alone, which granted the administration. *Dakin v. Hudson*, 6 Cow. 224; *Pittman v. Johnson*, 35 Hun, 41; *Brick's Estate*, 15 Abb. Pr. 23; *Ritch v. Bellamy*, 14 Fla. 543; 1 Pom. Eq. Jur. 375; *First Baptist Church v. Roberson*, 71 Mo. 841. Equity refuses to take jurisdiction and interfere with the ordinary exercise of the powers of the surrogate in the settlement of the accounts of administrators and the distribution of the estate, without some special reason set forth in the bill. *Chipman v. Montgomery*, 63 N. Y. 236; 1 Pom. Eq. Jur. 375. It is not optional with executors and administrators accounting on their own motion, or creditors, legatees or next of kin, calling them to an accounting, to pass by the surrogates' court having ample jurisdiction in the premises, and, without assigning any special reasons, proceed by formal action in equity, making all persons whose presence is necessary to a final accounting, parties to the action. It would be unreasonable to subject the parties to the vexation and delay, and the estate to the unnecessary costs, 2 L. R. A.

*v. Meyer*, 73 N. Y. 1; *Tolman v. Syracuse, B. & N. Y. R. Co.* 92 N. Y. 353.

The will which is here sought to be established devises the absolute title in fee simple to the larger part of the estate of the testator to the plaintiff, and he or his vendees are in possession; and the question to be decided is whether a devisee of the legal estate, being in possession of the property devised, can maintain an action to establish the will against the heir at law.

It is claimed that such an action could be maintained in England, and that the old court of chancery in this State could have taken cognizance thereof, and that such jurisdiction was transferred to the supreme court under the present Constitution as an inherent, equitable jurisdiction of that court. It is also claimed that it exists by virtue of chapter 316 of the Laws of 1879, or if that has been repealed that it still exists by virtue of sections 1866 and 1867 of the Code of Civil Procedure.

We think that the jurisdiction claimed does not exist in this State. The question has been decided in England in a manner favorable to the views of the learned counsel for the plaintiff. It was so decided in the case of *Boysse v. Rossborough*, Kay, Ch. 71; *S. O.* on appeal in *Chancery*, 3 De G. M. & G. 817, and in the *House of Lords*, 6 H. L. 2, in 1857.

The affirmance in the House of Lords was upon the admission of the counsel that such an action would lie. By the several opinions of the learned judges it appears that they were unable to determine the origin of the jurisdiction with any certainty, but the claim that it was to be limited to cases in which trusts were created by the will was not thought by them to be satisfactory. They said there was no special equity against the heir which arose by reason of the existence of the trusts, because the only question in which he was interested was the question of will or no will, which existed just the same whether trusts were or were not created by the instrument.

of such a litigation. *Seymour v. Seymour*, 4 Johns. Ch. 409; *Adams v. Adams*, 22 Vt. 50; 1 Pom. Eq. Jur. p. 375.

*Chancery will not interfere with proceedings before the surrogate.* The court of chancery will not interfere with proceedings before the surrogate, except in special cases. *Seymour v. Seymour*, 4 Johns. Ch. 409; *Ritch v. Bellamy*, 14 Fla. 544; *Chipman v. Montgomery*, 63 N. Y. 236; 1 Pom. Eq. Jur. 375. The jurisdiction of courts of equity in respect to accounts in the course of administration, and the marshaling of assets, grew out of the defects in the process and powers of ecclesiastical courts, and the early courts of probate. The jurisdiction over cases of administration was made to rest upon the notion of a constructive trust in executors and administrators, as well as the necessity of taking accounts and compelling a discovery. But these considerations do not apply in ordinary cases to the settlement of estates in this State; and to withdraw a case of mere settlement of an estate, disconnected with the enforcement of a special and express trust, as distinguished from what is called a constructive trust in all administrations, from the tribunal created for that purpose with ample powers, special reasons should be assigned, and facts stated to show that full and complete justice cannot be done in that court. 1 Pom. Eq. Jur. p. 375.

*Concurrent jurisdiction in equity.* Courts of equity, as a general rule, have concurrent jurisdiction with surrogates' courts in matters of accounting, as against executors and administrators. *Wood v. Brown*, 84 N. Y. 345; *Busch v. Busch*, 12 Daly, 480; *Bowen v. Irish Presby. Cong.* 6 Bosw. 248. The supreme court has concurrent jurisdiction with the

It is true that the question in which the heir is interested is whether there is or is not a will; and still the jurisdiction of chancery to establish the will might depend upon its general jurisdiction over trusts, and that jurisdiction might depend upon the question of whether there was a valid will or not; and thus by reason of its jurisdiction over trusts it could exercise the incidental jurisdiction of establishing the instrument in which they were created, as properly executed by a competent testator.

However that may be, the case cited does decide that such an action could be maintained in England. In a note to the report of the case in 3 De Gex, M. & G. 817, it is stated that by reason of the passage of the Act of 20 and 21 Vict. chap. 27, § 12, providing for the probate of a will of real estate in a court of probate, the practice of establishing it in chancery is of comparatively rare occurrence.

The English rule is stated in Pomeroy's work on Equity Jurisprudence (3 Pom. Eq. Jur. § 1158); and in a note it is said that the sole ground of the jurisdiction was a condition in England which does not exist in a single American State, and no longer exists in England because of the passage of the Act of 20 and 21 Vict. *supra*, establishing courts of probate for wills of real estate.

In this country jurisdiction is granted to courts of probate to pass upon the question of the due execution of wills of both real and personal property; and unless special and exceptional cases are shown to exist for the interposition of a court of equity, bills for the mere purpose of establishing a will in equity in the case of a devise of a legal estate who is in possession under the will ought not to be maintained.

Story, in his work on Equity Jurisprudence (2 Story, Eq. Jur. § 1447), gives the English rule on the subject and cites no American case to sustain it. Actions have been permitted, both in England and in this State, to be

brought in equity by an heir at law against a devisee, where the heir sought to set aside the will, and where there was an outstanding term granted by the testator in his lifetime, by reason of the existence of which an action of ejectment could not be maintained by the heir. In such cases the heir has been permitted to come into a court of equity and ask for an injunction against the devisee enjoining him from setting up in an action of ejectment to be brought by the heir against him, the existence of the outstanding term as a defense to the action; and in such cases it has been held that the court was not bound to proceed only to the extent of granting the injunction, but that it might also grant an issue to be tried at law as to the validity of the will, or it might simply grant the injunction and leave the heir at law to his action of ejectment. This doctrine is very fully stated in the English case above cited, of *Boyes v. Rossborough*, in the report in Kay. It is also thus decided in the case of *Brady v. McCosker*, 1 N. Y. 214.

I have been unable to find any reported case in this State holding that the supreme court has any such inherent jurisdiction as is claimed by the learned counsel for the plaintiff.

The case of *Van Alst v. Hunter*, 5 Johns. Ch. 148, was the case of an action by the heirs at law against the defendants as devisees to set aside the will as made by an incompetent testator. The defendants had taken possession of the real estate under the will. Why an action of ejectment was not brought by the heirs at law is not stated in the case. Nor was the question of jurisdiction once raised, or the subject adverted to in any manner whatever. The chancellor had granted a feigned issue upon the question of the competency of the testator, which had been once tried at law, and the verdict was in favor of the will, and the judge trying the case certified his satisfaction therewith. Counsel for the heirs at law moved for a new trial as matter of course, and contended that in such a case where the result of the ver-

surrogate in enforcing the payment of legacies. Such jurisdiction has been maintained for a long period of time anterior to the adoption of the statutes. *Pittman v. Johnson*, 35 Hun. 41, 15 Abb. N. C. 477; *Spelman v. Terry*, 74 N. Y. 448. The tribunal which first takes cognizance of the matter will retain it to the exclusion of the other unless for some special reason it is made to appear that the probate court cannot administer adequate and complete relief between the parties. *Ritch v. Bellamy*, 14 Fla. 543. The equitable jurisdiction, although displaced in all ordinary cases by the probate system, is not expressly abrogated by anything in the statutes, and the surrogate court is made the only appropriate tribunal for the control of administrations under all ordinary circumstances; yet under peculiar circumstances where the action of the surrogates' court and its remedies are imperfect and inadequate the equity court will exercise jurisdiction, which is auxiliary rather than concurrent. So a court of equity may maintain a suit to construe a will, to enforce a trust created by will to set aside a surrogate's decree obtained by fraud, and to grant relief in particular instances not included within the powers conferred on the surrogates' court by statute. *Seymour v. Seymour*, 4 Johns. Ch. 409; *Thompson v. Brown*, 4 Johns. Ch. 619; *Whitney v. Morris*, 4 Edw. Ch. 5; *Chipman v. Montgomery*, 63 N. Y. 235; *Peyser v. Wendt*, 67 N. Y. 822; *Haddow v. Lundy*, 59 N. Y. 320; 3 Pom. Eq. Jur. 114.

**Auxiliary jurisdiction.** The supreme court may entertain jurisdiction and exercise its powers by action for purposes of discovery, and in aid of proceedings for accounting, etc., in another tribunal having jurisdiction and limited powers.

2 L. R. A.

*Niagara County Nat. Bank v. Lord*, 38 Hun. 566. Creditors may come into the court of chancery for the discovery of assets; but that draws the whole settlement of the estate into chancery, which certainly is not to be encouraged. *Thompson v. Brown*, 4 Johns. Ch. 619; 1 Pom. Eq. Jur. p. 375. A bill of discovery is proper, where plaintiff needs matters disclosed to supplement and aid evidence which he furnishes. 1 Pom. Eq. Jur. 122; *Seymour v. Seymour*, 4 Johns. Ch. 409. Unless the bill states affirmatively that the discovery is really wanted for the defense at law, and also shows that the discovery might be material to that defense, it does not appear to be reasonable and just that the suit at law should be delayed. 1 Pom. Eq. Jur. 190; *Leggett v. Postley*, 2 Paige. 599, 601; *Lane v. Stebbins*, 3 Edw. Ch. 431; *Chipman v. Montgomery*, 63 N. Y. 235; *Pegram v. Carson*, 18 How. Pr. 524, 10 Abb. Pr. 347; *Woods v. De Figanlere*, 25 How. Pr. 528, 1 Robt. 631; *Bell v. Pomeroy*, 4 McLean, 68; *Howell v. Ashmore*, 9 N. J. Eq. 85.

**Suit retained in court whence process first issued.** If both tribunals, whose interference has been invoked, have equal or concurrent jurisdiction, it should continue to be exercised by that one whose process was first issued. *Schuehle v. Reiman*, 86 N. Y. 273; *Groshon v. Lyon*, 16 Barb. 461; *Travis v. Myers*, 67 N. Y. 542; *German Sav. Bank v. Sharer*, 25 Hun. 411; *Taylor v. Taylor*, 43 N. Y. 578; *Gillian v. Norton*, 33 How. Pr. 378; *Story, Eq. Jur.* § 793, 797. Where there are two proceedings pending between the same parties for the same object, the proceedings first commenced are a bar to those commenced afterwards. The principle governing such cases is, that if full relief can be had in the one proceeding or action, no other shall be allowed. *Lewis v. Maloney*, 12 Hun. 208.



dict was to disinherit the heir that a new trial by the English rule was invariably granted. The only question decided by the chancellor was that there was no such inexorable rule for the granting of a new trial as matter of right; that it remained discretionary with the chancellor, and in that particular case he exercised it by refusing to grant a new trial.

*Clarke v. Sawyer*, 2 N. Y. 498, was a suit by the heirs at law to annul a will on the ground of imbecility and undue influence. The assistant vice-chancellor held the will to be good. The chancellor reversed that decision and the reversal was affirmed in this court. The question of jurisdiction was raised for the first time in this court, and it was held to be raised too late—the court adding that it would not entertain jurisdiction to set aside a will of real estate on the ground of the testator's incompetency where there was a perfect remedy at law, and where the objection was taken in due season. The report of the same case in 2 Barbour's Chancery, 411, shows that the only question raised or considered in that court by the chancellor was whether the decedent was of sound and disposing mind at the time of the execution of the will.

In *Brady v. McCosker*, *supra*, the plaintiff claimed as heir at law and in hostility to the will, and was out of possession and charged that the will was procured by fraud. An obstacle existed to the maintenance of ejectment by the plaintiff, being an outstanding term in trust, and part of the estate being subject to an unexpired lease under which the lessee or his assignee was in possession. This outstanding legal term was held an impediment to the proper maintenance of the action at law on the part of the heir in the nature of ejectment, and consequently equity had jurisdiction.

In *Bailey v. Briggs*, 56 N. Y. 407, the question was not decided and was not before the court.

These are all the cases cited by counsel upon the question as to the inherent jurisdiction of the court of equity in this State over the subject matter of an action like this. We do not see that they support the contention that such a jurisdiction exists. On the contrary, the jurisdiction of courts of equity in considering doubtful or disputed clauses in a will has been held with entire uniformity by the courts of this State to result from its jurisdiction over trusts, and that exists only when the court is moved on behalf of an executor, trustee or *cestui que trust*, and to enforce a correct administration of the power conferred by the will. We think that the jurisdiction in cases where the question arises as to the competency of the testator to make a will is certainly not broader than in cases arising upon the construction of doubtful or disputed clauses in the will; and unless such trusts exist in the instrument propounded as a will the supreme court has no power to establish the will (except in cases expressly provided by statute) where the devisee is in possession and the heir brings no action. We do not say that it would exist even then; that question is not here. We say that it does not exist as part of the inherent jurisdiction of a court of equity in this State.

But it is claimed that if there be no inherent

jurisdiction, yet the Act, chapter 816 of the Laws of 1879, \* confers it.

In *Horton v. Cantuelli*, 11 Cent. Rep. 308, 108 N. Y. 255, it was held that the Act of 1879 was repealed by implication by the Code of Civil Procedure, §§ 1866 and 1867.

The learned counsel for the plaintiff, however, claims that it was not necessary to the decision of the case mentioned to hold that the Act of 1879 was repealed, and that we are at liberty to re-examine the question.

In the case cited the plaintiff claimed to maintain the action by virtue of that Act; and as she was an heir at law and the terms of the Act provided that such an action might be brought by an heir at law, it was thought necessary to determine the question whether that Act had been repealed or not. It was determined that it had. A re-examination of the question convinces us that the decision was correct. It is true that the Act of 1879 is not repealed in terms. The sections of the Code of Civil Procedure [§§ 1866 and 1867], we think furnish the whole statutory law upon the subject of which they treat. The Legislature was dealing in those sections directly with the subjects of the prior Acts of 1853 and 1879, and we think it was plainly intended to furnish the only statutory rule governing the general subject matter treated of in them.

Whether a subsequent statute repeals a prior one in the absence of express words depends upon the intention of the Legislature. We cannot believe that when stating the cases in section 1866 of the Code, in which an action of the nature therein mentioned might be brought, it was intended by the Legislature to repeal only such portions of prior Acts as were minutely and directly covered by the provisions of that section, while leaving a portion of such prior Acts in force which were yet intimately related to and connected with the general subject matter treated of by that section of the Code. The effect would be to leave a portion of a sentence of the old Act in force, while the remainder of the sentence and a portion of a balance of the section would be repealed. Confusion and uncertainty would be the result where a plain, unambiguous and direct provision was the end aimed at. No such intention ought to be imputed to the Legislature,

\*This Act is as follows:

"Sec. 1. The validity of any actual or alleged devise or will of real estate may be determined by the supreme court in a proper action for that purpose, in which all persons interested, or who claim an interest, in the question, may be made parties, and such action may be brought by any heir at law of the actual or alleged testator or testatrix, or by any devisee under any actual or alleged will; and thereupon after final judgment in such action any party may be enjoined from setting up or from impeaching such devise or will, as justice may require. The court may also, in its discretion, during the pendency of any such action, restrain the commencement or prosecution of any other action involving the trial of the same question. Such adjudication, however, shall not determine nor affect the validity of any such will as to any personal property; nor shall this Act, or any proceeding taken by virtue thereof, affect or interfere with any suit or proceeding in any court of this State relating to the probate of any will. Issues of fact in such actions may be tried by a jury or the court, as the nature of the case may require and the court shall direct." (Rep.)

and no such result should be permitted if it be possible within the rule of law to prevent it.

We think the case comes within the principle of *Heckmann v. Pinkney*, 81 N. Y. 211, and *People v. Jaehne*, 4 Cent. Rep. 165, 103 N. Y. 182, 194. It appears to us that the failure to repeal the Act of 1879 in terms, was a pure inadvertence on the part of the Legislature.

It follows that the plaintiff can receive no benefit from the Act of 1879.

The last question arising is whether the action can be maintained under section 1866 of the Code of Civil Procedure. The material part of the section is as follows: "The validity, construction or effect, under the laws of the State, of a testamentary disposition of real property, situated within the State, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed purporting to convey land may be determined. The judgment in such an action may perpetually enjoin any party from setting up or from impeaching the devise or otherwise making any claim in contravention to the determination of the court, as justice may require."

What is meant by the expression "validity, construction or effect of a testamentary disposition of real property," etc.? Does it refer to the validity of the instrument itself making the disposition, or only to the validity, etc., of the disposition the instrument makes? The language certainly is not apt to express the idea of an inquiry into the validity of the instrument itself as to whether it was duly executed by a competent testator or not. It would seem rather to assume the valid execution of the paper and to permit an inquiry in regard to the validity, construction or effect of a disposition of real property which the instrument thus executed makes. Some force is given to this construction of the language by the provision in the section that the judgment in such an action may properly enjoin a party from setting up or impeaching, not the instrument itself, but the devise which is contained in it. This language would seem to provide for the case of a devise contained in an instrument whose due and proper execution is assumed, but which devise was to be adjudged good or bad as it should be determined that it was in accord with or against the law upon the subject of such devise.

We think that the language of the section in question does not include the right to bring an action in equity for the purpose of determining the validity of the will itself, as to whether it was executed by a competent testator without restraint, etc., and with proper formalities.

To hold otherwise would be to draw into the supreme court a vast amount of litigation in regard to the proof of the due execution of wills concerning real estate which is now exercised in a very satisfactory manner by surrogates' courts. By statute the probate of a will by a surrogate is conclusive as to personal, and *prima facie* evidence as to the due execution of the will in relation to real estate. Having obtained the probate of a will of real estate before the surrogate, the devisee stands with the great advantage of a judicial decision in his favor,

and with the burden resting upon those who contest it to show the invalidity of the instrument. The general policy of this State is and has been to commit to the courts of probate the decision of questions arising upon the due execution of an alleged will; and no well grounded complaint exists, as we believe, in regard to the manner in which that jurisdiction has been exercised. As was said by the Lord Chancellor in *Boyse v. Rossborough*, *supra*, "An heir may choose his own time for asserting his title, *prima facie*, and the *onus* rests upon him who contends that he has a right to say to the heir that he must assert his title now or never assert it to show under what right and for what reason such assertion is made." We think none can be given in cases where by the law of the State a tribunal is furnished for the proof of wills in the first instance and where all issues of the nature set up in this case may be determined.

Added force is given to our construction of the above section by a reference to other sections in the same article in which this section occurs. Section 1861 provides for an action to procure a judgment establishing a will, and says that it may be maintained by any person interested in the establishment thereof in either of the cases named in the section, which does not include a case like the one at bar. Subsequent sections (2611 *et seq.*) when providing for the proceedings upon the probate or for the proofs necessary to be made thereon, speak of the instrument as a will, and not as a testamentary disposition. This language would seem to show that when the inquiry is to extend to the question of the proper execution of the instrument by a competent testator, etc., the Code describes the instrument as a will; but when the validity, etc., of the devise, separated from the validity of the instrument which creates it, is alone to be inquired into, the "testamentary disposition of real property" is the expression used.

Three cases have been cited in the supreme court as authorities for holding that an action like this may be maintained under the section of the Code in question. They are *Pryer v. Howe*, 40 Hun, 388; *Drake v. Drake*, 41 Hun, 366; and *Adams v. Becker*, 47 Hun, 65.

The first of these cases was decided under the Acts of 1853 and 1879 above cited. It was an action in equity brought by the plaintiff as heir at law to set aside a will alleged to have been obtained by fraud and undue influence. I gather from the case that the devisees were in possession under the will, as it is stated that the complaint was demurred to, the point of the demurrer being that equity had no jurisdiction of the action, the plaintiff's remedy being by a suit in ejectment.

The case of *Allen v. McPherson*, 1 H. L. Cas. 191, decided that an action of the same nature as that of *Pryer v. Howe* could not be maintained in equity because a will of personal estate might be set aside in the ecclesiastical court for fraud, and if of real estate the action would have to be tried at law.

In *Meluish v. Milton*, L. R. 8 Ch. D. v. 27, the doctrine was affirmed, and the learned judge who delivered the opinion in *Pryer v. Howe* states that it was conceded that prior to the Act of 1853 an action of that nature could not be maintained. It is not an authority upon the

question as to whether such an action could be maintained under the section of the Code under discussion.

*Drake v. Drake* was an action brought to determine the validity, construction and effect of certain provisions of the last wills and testaments of Mary H. Drake and James Drake respectively; but no question was raised as to the validity of the execution of the instrument.

The case of *Adams v. Becker*, 47 Hun, 65, simply holds that under section 1866 an action can be brought for the construction of a disputed and doubtful devise contained in a will, although no trust is created therein. Whether that section has wrought such a change in the law upon that subject we do not say. That question is not now before us.

In *Horton v. Cantuelli*, *supra*, there was a valid devise of all the property in trust for the life of the plaintiff, and for her benefit, and we held that in order to permit her action to be maintained to obtain a construction of another devise in the will it would have to appear that the property devised therein might possibly be enjoyed in possession by the plaintiff in her lifetime in case the devise in question should prove invalid; and as such was not the case the plaintiff showed no appreciable interest in the question, which was as to her a mere abstraction, and that courts did not sit to give opinions in such cases.

There was no implication contained therein that an action such as this could be maintained under this section, and certainly none was intended; for the question was not in the case, and was not in way discussed or any opinion intimated regarding it.

None of the cases, we think, is an authority for maintaining this action.

In *Weed v. Weed*, 94 N. Y. 243, it was held that a devisee who claimed a mere legal estate in the real property of the testator, when there is no trust, cannot maintain an action for the construction of the devise, but must assert his title by a legal action, or, if in possession, must await an attack upon it and set up the devise in answer to the hostile claim. It is true that was an action for the construction of certain clauses in a will, and hence is not directly in point here. But it shows the tendency of the court to continue in the same path it has trodden for many years, by denying jurisdiction in equity in matters regarding wills separated from trusts, and to send to the legal branch of the court questions of that nature for determination. See also *Chipman v. Montgomery*, 63 N. Y. 221, *Wager v. Wager*, 89 N. Y. 161.

We think very little weight is to be attached to the allegation that a devisee in possession of lands may be compelled to await an attack upon his title by an heir at law until his proofs in regard to the proper execution of the will by a competent testator have been lost. The heir stands in the same danger in regard to losing his evidence of an improper execution of the will by an incompetent testator, while the devisee has the great advantage by proving the will before the surrogate of having a judicial determination in his favor upon the very question, and which stands in the place of proof until attacked and overthrown. In addition to that, in the case of adult heirs at law he is simply required to wait for three years; and if at the end of that time he remain in possession

and his title has not been attacked, he may take proceedings to compel the determination of any claim to the real estate as provided for by the Code. It is true it does not reach the case of infant heirs, but that alone does not furnish adequate reason for assuming a jurisdiction in a case like this, the effect of which would be, as we think, to largely increase litigation in matters of this nature in the supreme court, and tend to confusion in matters of the probate of wills, arising out of a concurrent jurisdiction of surrogates' courts and the supreme court.

We see nothing in any of the other allegations of the complaint which would give jurisdiction to the court in this species of action.

Upon careful examination of the whole case we think the General Term was right in holding the action could not be maintained, and its order reversing the order granting the injunction should be affirmed, with costs.

All concur.

PEOPLE, *ex rel.* UNION INS. CO. of Philadelphia *et al.*, *Appts.*,

Stephen P. NASH *et al.*, *Respds.*

(....N. Y.....)

**An express agreement not to revoke, and to waive any right to revoke, a submission to arbitration, does not prevent a revocation thereof, under New York Code Civil Procedure, § 2383, at any time before the closing of the proofs and the final submission of the cause for decision; and upon such revocation the foundation of the arbitrator's power is gone, and no further action can be had under the submission.**

(November 27, 1888.)

**A** PPEAL by relators, the Union Insurance Company of Philadelphia and the Insurance Company of the State of Pennsylvania, from an order of the General Term of the Supreme Court, First Department, affirming an order of Special Term denying a motion for a peremptory mandamus to compel Stephen P. Nash, John R. Read and James E. Carpenter, to proceed to act as arbitrators under a certain agreement for arbitration. *Affirmed.*

**NOTE.**—*Submission to arbitration; effect of. A submission of a pending suit to arbitrators is a discontinuance of the action.* Bank of Monroe v. Widner, 11 Paige, 629; Buel v. Dewey, 22 How. Pr. 343; McNulty v. Solley, 95 N. Y. 244; Camp v. Root, 18 Johns. 22; *Ex parte* Wright, 6 Cow. 399; Smith v. Barse, 2 Hill, 387; Resseque v. Brownson, 4 Barb. 541; Wilson v. Williams, 66 Barb. 206; People v. Onondaga Common Pleas, 1 Wend. 314; Larkin v. Robbins, 2 Wend. 505. If the agreement provide for a judgment to be entered in the action, the award and the judgment upon it are subject to the same rules which are applicable to awards at common law, and to be set aside for like causes; but the ordinary remedies against an erroneous judgment do not apply. No appeal lies therefrom. Wilson v. Williams, 66 Barb. 210; Dederick v. Richley, 19 Wend. 103, 2 Hill, 271; Blunt v. Whitney, 3 Sandf. 4. *Revocation of powers of arbitrators.* The section declaring that neither party shall have power to revoke the powers of the arbitrators after the cause shall have been finally submitted, is applicable to all cases of submission to arbitration. Bloomer v. Sherman, 5 Paige, 578; Cope v. Gilbert, 4 Denio, 847; Bank of Monroe v. Widner, 11 Paige, 534. By the Revised Statutes a party is permitted to revoke the powers of arbitrators at any time before the cause is finally submitted to them for their de-

Reported below, 47 Hun, 542.

In 1883 Thomas C. Crosby and Lorenzo Dimick, composing the firm of Crosby & Dimick of Buffalo, were the general agents of the Union Insurance Company of Philadelphia, and the Thames & Mersey Marine Insurance Company (Limited) of England; Crosby was also the general agent of the Insurance Company of the State of Pennsylvania, and Dimick was the general agent of the Continental Insurance Company of the City of New York.

Early in 1884 the Union Insurance Company, the Insurance Company of the State of Pennsylvania and the Thames & Mersey Marine Insurance Company (Limited) began suits against Dimick, charging him with systematic fraud in the conduct of such agency, and suits against the Continental Insurance Company, charging it with having benefited by such frauds.

On October 10, 1885, an agreement of arbitration was entered into by and between the Union Insurance Company of Philadelphia, the Insurance Company of the State of Pennsylvania, the Continental Insurance Company of the City of New York, and Dimick, whereby all disputes between the said four parties were referred to a board of arbitration, consisting of Stephen P. Nash, John R. Read and James E. Carpenter. This agreement of arbitration contained the following provision:

"And it is hereby further agreed by and between the said parties, in consideration of the agreements, and covenants herein contained, to be kept and performed by the respective parties hereto, that neither of the parties hereto shall have the right to revoke the submission to arbitrators herein provided for, or this agreement or any part thereof; and such arbitration shall not terminate or be revoked by the dissolution or death of either or any of the parties hereto, but in case of such dissolution or death of either or any of the parties hereto during the pendency of such arbitration, the same shall continue against the personal representatives of such deceased person, or against the successor or person or officer charged with the duty of administering the assets of such

corporation; and any revocation by operation of law, and any and all right of revocation given or permitted by statute or otherwise, is hereby expressly waived and abandoned."

The arbitrators commenced proceedings under the submission, and after they had taken a large amount of testimony, Dimick, on October 27, 1887, caused to be served upon them a writing purporting to be a revocation of the arbitration agreement. A majority of the arbitrators deemed that their powers were thereby terminated, and stopped the proceedings. Thereupon this application was made to compel them to proceed.

Section 2388, New York Code of Civil Procedure, is as follows: "A submission to arbitration, made either as prescribed in this title or otherwise, cannot be revoked by either party, after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision. A revocation, when allowed, must be made by an instrument in writing, signed by the revoking party, or his authorized agent, and delivered to the arbitrators, or one of them; and it is not necessary, in any case, that the instrument of revocation should be under seal. Any party to a submission may thus revoke it; whether he is a sole party to the controversy, or one of two or more parties on the same side."

*Messrs. Treadwell Cleveland and Norris Morey* for appellants.

*Mr. William Allen Butler* for respondents.

*Gray, J.*, delivered the opinion of the court:

The position taken by the appellants with respect to the agreement of arbitration in question here is that the character of revocability, inherent in such submissions, is affected by that article of the agreement which provides against any revocation, and expressly waives and abandons the right to revoke. They do not dispute the common-law rule that submissions to arbitration are revocable in their nature; and, indeed, that such was the rule is too well established and recognized by early and late English cases and by the New York Statutes

cision. *Heath v. N. Y. Gold Exchange*, 38 How. Pr. 169, 7 Abb. N. S. 261; *Curtis v. Barnes*, 30 Barb. 226; *Allen v. Watson*, 16 Johns. 206; *Bloomer v. Sherman*, 2 Edw. Ch. 452, 5 Paige, 576; *Bank of Monroe v. Widner*, 11 Paige, 684. A party to an arbitration bond may before award revoke the power granted to the arbitrators, and they cannot proceed to make the award. *Allen v. Watson*, 16 Johns. 206. Where a submission is made a rule of court, a revocation would be a contempt; yet until actually made so, it is revocable, and the party by revoking is not placed in contempt. *Frets v. Frets*, 1 Cow. 336; *Milne v. Gratrix*, 7 East, 608. Where a submission is under seal a claim within it cannot be withdrawn, by parol, at the hearing so as to prevent the award operating as a bar to a subsequent suit respecting such claim. *Howard v. Cooper*, 1 Hill, 44; *Van Antwerp v. Stewart*, 6 Johns. 126; *Greig v. Talbot*, 2 Barn. & C. 179. Where the submission is by one on one side and two on the other, one of the two cannot revoke the powers of the arbitrators without the assent of the other. *Robertson v. McNiel*, 12 Wend. 583.

*Judgment on the award.* The courts will not aid in enforcing the judgment of a tribunal sought to be created by private compact except in cases of a submission to arbitration of specific matters of controversy. *Austin v. Searing*, 16 N. Y. 112. An agreement of the parties to a foreclosure suit to refer it to a solicitor to hear and decide, stipulating that a decree should be entered on his decision, 2 L. R. A. .

is binding on the parties, and the defendant had no right to revoke the power of the referee so as to prevent his making the decree of foreclosure and sale on the coming in of the master's report. *Bank of Monroe v. Widner*, 11 Paige, 629; *Re New York L. & W. R. Co.* 40 Hun, 184. A judgment entered by the clerk without objection, and pursuant to the order of the court and the agreement of the parties, is valid. *Hecker v. Fowler*, 60 U. S. 2 Wall. 183 (17 L. ed. 762). The report of the referees appointed, when regularly made to the court pursuant to the rule of reference, and duly accepted, is now universally regarded in the state courts as the proper foundation of judgment. *Hecker v. Fowler*, 60 U. S. 2 Wall. 181 (17 L. ed. 761). See *Hall v. Mister*, 1 Salk. 84; *Feeter v. Heath*, 11 Wend. 423; *Graves v. Fisher*, 5 Maine, 70; *Miller v. Miller*, 2 Pick. 570; *Com. v. Pejepout Proprietors*, 7 Mass. 420. On the coming in of the award, showing a sum due to the plaintiff on the disputed items, the duty devolved on the court, of rendering the appropriate judgment on all the facts, those admitted and those reported. *Merritt v. Thompson*, 27 N. Y. 223. Where a submission purported to be made pursuant to the statute, but it contained no clause agreeing that judgment be entered in a summary manner upon the award, it was not a submission under the statute. *French v. New*, 20 Barb. 498. Under a plea of no award defendants may show that the arbitrators awarded on a matter not submitted to them. *Macomb v. Wilber*, 16 Johns. 237.

and decisions to admit of dispute. *Allen v. Watson*, 16 Johns. 205; *Bank of Monroe v. Widener*, 11 Paige, 529; 2 Rev. Stat. N. Y. p. 544, § 23; *Tobey v. Bristol Co.* 3 Story, 800; *Vynior's Case*, 8 Coke, 81 a; *Marsh v. Bulteel*, 5 Barn. & Ald. 508; *Re Rouse*, L. R. 6 C. P. 212; *Fraser v. Ehrensperger*, L. R. 12 Q. B. Div. 810.

Whatever may have been decided elsewhere in this country, we are satisfied that that is the better rule of law which has been recognized in England and in this State, and which considers a submission revocable until its nature is changed by legal enactment, as was done by English Statutes. As it was said in *Vynior's Case*, 8 Coke, 82 a: "Man cannot by his act make such authority, power or warrant not countermandable which is by the law or its own nature countermandable;" he cannot "make that irrevocable which is of its own nature revocable."

But, the learned counsel for the appellants say, the facts underlying this submission, in the discontinuance of suits, the abandonment of advantages, and the peculiar and unusual agreements contained in this submission, by which the right to revoke is waived and abandoned, take it out of the common-law statute rule. They say that here was an express waiver of the right to revoke, based on a valuable and executed consideration; and they argue that, failing the reason of the rule, the rule itself fails.

No unusual character is imparted to the agreement by its being based on such a consideration. All such agreements must be based on a good consideration; and if the discontinuance of the pending suits and the loss of advantages thereby occasioned are the features which constitute the executed consideration, they are but the incidents of the agreement of submission. That was the decision of this court in *McNulty v. Solley*, 95 N. Y. 242, where Danforth, J., collects authorities to sustain the proposition that by submission to arbitration *eo facto* the discontinuance of the pending litigation is effected.

The flaw in the argument of appellants' counsel is in its assumption that the character of the mandate to the individuals selected to determine the controversy between parties can be changed by their private agreements, or affected by the circumstances which were its producing cause, or which the execution of the agreement induced. The source of the mandate or power by virtue of which the arbitrator's act is in the private agreement which the parties have entered into, for reasons satisfactory to themselves, in order to have an end to dispute and to legal strife, and the force of the mandate to them is in the consent of the parties that they shall act. But in the execution of the power, or in the thing they are to accomplish, the arbitrators have no interest; and thus the case is altogether different from one where the mandatory has an interest in the execution of the power, and in the result of its exercise. In such a case the mandate which goes forth with the execution and delivery of the agreement to the mandatory becomes irrevocable.

We are at a loss to understand how the nature of the agreement between the parties, or any resulting incident of that agreement, adds anything to the power of the arbitrators. The agreement of submission is executory until the 2 L. R. A.

controversy is completely ended between the parties by the submission to the arbitrators of the controversial facts for their decision; and not till then can it be said that the agreement has been executed and passed beyond the power of the parties to withdraw from or to break. Until that ultimate stage has been reached every article of the agreement which relates to the future conduct of the parties lies in the region of promise; and that promises can be and are broken, regardless of their weight or the consequences, is as proverbial as it is certain.

The express agreement not to revoke is executory, of course, like every other agreement to do or not to do a certain thing. Although the parties agreed not to revoke, the fact is that one of them has done so, notwithstanding his agreement; and the other is left to such legal remedies as may offer themselves to protect or compensate him for the breach. The agreement to waive any right to revoke does not help the situation. A waiver, to be effectual and beyond recall, must be of some present existing right, conferred by statute or otherwise. When the agreement to waive relates to the future conduct of the party, it is purely executory, and amounts to nothing more than the agreement not to revoke. The difficulty is that, as the arbitrators have no interest in the result of the arbitration, and derive their power to act from the continuing consent of the parties to the agreement, when the agreement, while yet executory, is broken by the refusal of a party to be bound by it or to perform it, the foundation of the arbitrator's power is gone, and they have no more authority over the withdrawing party to bind him by their acts.

The Legislature of this State, in enacting section 2883 of the Code of Civil Procedure, have set at rest any existing conflict in the decisions, and have enlarged the rule as recognized in the previous statutory enactment. 2 Rev. Stat. p. 544, § 23. By its provisions a submission to arbitration, whether made as prescribed in that title or otherwise, may be revoked at any time before the closing of the proofs and the final submission of the cause for decision. The revocation must be in writing, signed by the parties, and delivered to the arbitrators; and it is competent for one of several parties on a side to effect such a revocation.

We perceive no reason for qualifying the force of this section in the way suggested by appellants' counsel, who say that it is only available to a party when revocation is allowable; and as, by express agreements in this submission, the right of revocation was stipulated away, the provisions of the section are inapplicable. We think the language of this section is broad enough to cover all cases of submission, and that the only restriction is as to the time and the mode of the act of revocation. And as to the agreement not to revoke, as we have suggested, like any other agreement relating to the future conduct of parties, it was executory, and, if broken, left the other party helpless thereunder, and under the necessity to seek redress for the breach elsewhere.

We have preferred to express our views upon the main question, as to this submission, in view of its importance, and, while, doubting the power of the court to compel by writ of mandamus the performance by these arbitrators

of their functions, we do not now express any opinion upon that question.

For the reasons expressed we think *the order of the General Term, affirming the order of the Special Term denying a motion for a peremptory mandamus, should be affirmed, with costs.*

All concur.

Louise M. KERNOCHAN, Admrx. of John A. Kernochan, Deceased, Appt.,

Angeline A. MURRAY *et al.*, Exrs. of Richard M. DeMill, Deceased.

(.... N. Y. ....)

1. A guaranty creating a continuing pecuniary obligation, the consideration for which is given once for all, is not terminated by the death of the guarantor, unless such intention is plainly in the guaranty itself.
2. A guaranty of a certain per cent per annum in dividends so long as the purchaser should retain the stock sold him, given by a firm as an inducement for the purchase from them of shares of stock, is not limited to the duration of the partnership or the lives of the copartners.
3. A guaranty of the amount of dividends that shall be received from stock, made by the seller as an inducement to the purchase of the stock, is an original and not a collateral undertaking; and the guarantor is the principal, and not a surety, in such obligation.

(November 27, 1888.)

**A PPEAL** by plaintiff, from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment entered on a verdict for the defendants by direction of the court, in an action upon a guaranty. *Reversed.*

In August, 1871, the firm of De Mill & Co., composed of Richard M. De Mill (defendants' testator) and Thomas A. De Mill, sold to John A. Kernochan (plaintiff's intestate) forty shares of stock of an incorporated company, known as the "Albemarle Swamp Land Company,"

Mr. Kernochan paying to said firm \$3,200, the agreed price, and receiving from said firm a certificate for said shares made out in his (Kernochan's) name on its face, and said Kernochan at the same time receiving from said firm the following agreement in writing:

"In consideration of your having purchased, upon my representation as to their value, forty shares of the capital stock of the Albemarle Swamp Land Company, and of one dollar to me in hand paid, I do hereby guaranty that you shall receive, as long as you hold said stock, dividends equal to 7 per cent per annum, or I will make good to you all deficit in such amount. De Mill & Company, New York, August 21, 1871. Witness: John S. Leng."

This agreement was signed with the firm name by Thomas A. De Mill, one of the members of said firm; it was ratified by Richard M. DeMill, the other member; and for several years after Thomas A. De Mill's death he (Richard) made the payments called for by the agreement. Richard De Mill subsequently refused to make the payment called for by the agreement, and upon such refusal suit was brought for the amount due August 1, 1882.

Judgment was given in favor of Kernochan. The case was carried, on appeal, to the general term of the supreme court. This judgment was sustained, and, no further appeal being taken, the amount of the judgment was paid by the executors of Richard M. De Mill, he having died during the litigation.

Demand was then made by Kernochan upon the estate of Richard M. De Mill for the amounts coming due under said agreement for the two years next succeeding, namely: 1883 and 1884. Payment was refused. Suit was again brought by Kernochan in the Supreme Court in the County of New York. On trial before a judge and jury a verdict was directed for the defendant on the ground that the guaranty was a personal contract and was terminated by the death of the guarantor. This was sustained by the General Term, First Department, and appeal taken to this court by Louise M. Kernochan, administratrix of John A. Kernochan, he having died in the mean time.

*NOTE.—Guaranty; contract construed.* Where a guaranty is, from its terms, clearly not a continuing one, but is limited to one transaction, parol evidence is not admissible to show the guaranty to be a continuing one, for that would be to contradict the instrument, and not explain an ambiguity. *Boston & S. Glass Co. v. Moore*, 119 Mass. 435; *Fennell v. McGuire*, 21 Up. Can. C. P. 134; *Mussey v. Rayner*, 22 Pick. 223; *Martin v. Wright*, 8 Q. B. N. S. 417; *Menard v. Scudder*, 7 La. Ann. 385; *Ross v. Burton*, 4 Up. Can. C. P. 367; *Hotchkiss v. Barnes*, 34 Conn. 27; *Nottingham Hide, S. & F. Market Co. v. Bottrill*, L. R. 8 C. P. 694; *Boehne v. Murphy*, 48 Mo. 57; *Grant v. Kildsdale*, 2 Har. & J. 186; *Hargreave v. Smees*, 6 Bing. 244; *Melendy v. Capen*, 120 Mass. 222; *Allan v. Kenning*, 9 Bing. 618; 2 Moore & S. 793; *Lewis v. Dwight*, 10 Conn. 95; *Williams v. Rawlinson*, Ryan & M. 233; *Whelan v. Keegan*, 7 Ir. C. L. 544; *Bent v. Hartshorn*, 1 Met. 24; *Crist v. Burlingame*, 62 Barb. 351; *Mason v. Pritchard*, 12 East, 227; *Rudger v. Judson*, 24 N. Y. 84; *Gates v. McKee*, 13 N. Y. 232; *Laurie v. Scholefield*, L. R. 4 C. P. 623; *Hatch v. Hobbs*, 12 Gray, 447; *Mayer v. Isaac*, 6 Mees. & W. 605; *Douglas v. Reynolds*, 32 U. S. 7 Pet. 112 (8 L. ed. 626); *Rapelye v. Bailey*, 5 Conn. 149; *Lawton v. Maner*, 10 Rich. L. 323; *Keith v. Dwinell*, 38 Vt. 286. For other examples of continuing guaranties, see *Hitchcock v. Humfrey*, 5 Man. & G. 559; 4 Scott, N. R. 540; *Farmers & M. Bank v. Kercheval*, 2 Mich. 504; *Hemfield v. Meadows*, L. R. 4 C. P. 635; *Coles v. Paok*, L. R. 8 C. P. 65; *Burgess v. Eve*, L. R. 12 Eq. 450; *Simpson v. Manley*, 2 Crompt. & J. 12; *Bas-*

*low v. Bennett*, 3 Camp. 220; *Merle v. Wells*, 2 Camp. 413; *Tanner v. Moore*, 9 Q. B. 1; *Hoad v. Grace*, 7 Hurl. & N. 491; *Woolley v. Jennings*, 5 Barn. & C. 185; *Brandt*, Sur. 183. The question in these cases depends, not merely upon the words, but, when the words are at all ambiguous, requires a consideration of the circumstances, to aid the construction. *Wood v. Priestner*, L. R. 2 Exch. 68, per Kelly, C. B., affirmed in *Wood v. Priestner*, L. R. 2 Exch. 282. When the words of a guaranty will equally well bear the construction that it is or is not continuing, an ambiguity arises which may be explained by parol evidence of the situation and surroundings of the parties and the construction which they have put upon it. *Hotchkiss v. Barnes*, 34 Conn. 27.

*Effect of death of guarantor.* The efficacy of contracts does not cease upon the death of one of the contracting parties. *Green v. Young*, 8 Maine, 14. A general guaranty continues in force till it is shown by the guarantor to have been rescinded (*Knight v. Fox*, Morris (Iowa) 805), or until it is ended according to its terms. *Knotz v. Butler*, 10 Rich. Eq. 143, per Wardlaw, Ch. J.; *Fennell v. McGuire*, 21 Up. Can. C. P. 134; *Brandt*, Sur. 159. When the engagement of a surety is a contract, and not a bare authority, it is not usually revoked by his death and his estate remains liable, the same as he would have been if he had lived. *Hightower v. Moore*, 46 Ala. 387; *White v. Com.* 39 Pa. 167; *Royal L. Ins. Co. v. Davies*, 40 Iowa, 469. The estate of the guarantor is liable for goods supplied after his

**Mr. J. Frederic Kernochan, with Mr. William G. Alger, for appellant:**

It is a presumption of law that parties to a simple contract intend to bind not only themselves but their personal representatives.

2 Parsons, Contracts, 6th ed. p. 530.

The cases in which the act to be performed is by its very nature a personal act have no application—a mere payment of money can be made as well by the estate as by the person.

*Stillman v. Northrup*, 12 Cent. Rep. 631, 109 N. Y. 473.

Even if the agreement be construed to be a contract of guaranty, defendant, having received consideration, is not a mere naked surety and his estate is not discharged.

*Richardson v. Draper*, 87 N. Y. 344.

**Mr. Sidney V. Lowell, for respondents:**  
The surety paper looked to purely personal relations between the parties. It contained no words binding the successors or administrators, etc., of the signers, and from its general language and the context was evidently not meant to extend beyond the lives of the parties.

*Royal L. Ins. Co. v. Davies*, 40 Iowa, 469; *Dickinson v. Calahan*, 19 Pa. 227; *Quain's App.* 23 Pa. 510; *Bland v. Umstead*, 23 Pa. 316; *Tasler v. Shepherd*, 6 Hurl. & N. 575; *Campanari v. Woodburn*, 15 C. B. 80 Eng. C. L. 400.

The cessation of a claim at the death of a party whose liability was that of a surety only, having no other responsibility, is familiar to the law.

*Risley v. Brown*, 67 N. Y. 160; *Hauck v. Crathead*, 67 N. Y. 432; *Wood v. Fisk*, 63 N. Y. 245; *Getty v. Binns*, 49 N. Y. 385.

**Andrews, J.**, delivered the opinion of the court:

We think the judgment below proceeds upon a misconstruction of the contract of guaranty. The guaranty did not in terms purport to bind the executors or administrators of De Mill & Co. But it is a presumption of law, in the absence of express words, that the parties to a contract intend to bind, not only themselves, but their personal representatives. 2 Pars. Cont. 530, and cases cited; 2 Co. Litt. 209 a.

death. *Bradbury v. Morgan*, 1 Hurl. & C. 249; *Mernard v. Soudder*, 7 La. Ann. 885; *Gordon v. Calvert*, 2 Sim. 253; affirmed in 4 Russ. 681. In cases where the guaranty is determinable by notice of the death, and no such notice is given by the surety's executor or administrator, the right of the creditor to the benefit of the guaranty in respect of advances made or liabilities incurred subsequent to the death would appear to depend upon the creditor's knowledge of such death having taken place. See *Harris v. Fawcett*, L. R. 15 Eq. 311, L. R. 8 Ch. App. 866. See also *Bradbury v. Morgan*, 8 Jur. N. S. 618.

**Revocation by death.** With respect to subsequent transactions and liabilities, whether a guaranty is revoked by the death of the surety depends, it would seem, upon the nature of the guaranty given. If it be a guaranty which the surety could himself have determined by notice, then it appears that notice of his death will operate as a revocation. *Coulbart v. Clementson*, L. R. 5 Q. B. Div. 42; *Harris v. Fawcett*, L. R. 8 Ch. App. 866. See also *Beckett v. Addyman*, L. R. 9 Q. B. Div. 783, 791. *Re Sherry*, L. R. 25 Ch. Div. 682, 703, 705, 63 L. J. Ch. 404; 50 L. T. 327, 32 Week. Rep. 394; *Col. Guar. & S. B. ed.* 349. But if, on the other hand, the surety could not himself have put an end to the guaranty by notice, then his death does not revoke the instrument, nor does it extinguish his liability thereunder. *Lloyds v. Harper*, L. R. 18 Ch. Div. 290, 50 L. J. Ch. 140, 43 L. T. 841, 23 Week. Rep. 452. Where a guaranty was revocable, it was held it could not

In case of a contract for the payment of money, or the sale or purchase of property, or of a covenant of warranty, it would be an unreasonable supposition that the parties intended that the obligation should not survive against their representatives, although not specially named. It is of course competent for parties to agree that a contract shall not survive, and that all obligation under it should terminate on their death. So a contract may be of such a nature as to admit only of a personal performance, or as to imply that it is to be operative only during the continuance of personal relations, although not so expressed in terms, and will be deemed dissolved by death or other disability which renders performance according to the intention impossible. Contracts for the rendition of personal or professional services are of this character, and they terminate with the death or disability of the party owing them.

The guaranty in this case had no such personal quality. It was given by De Mill & Co. as an inducement to the plaintiff's testator to purchase from them forty shares of the stock of the Albemarle Swamp Land Company. They represented the stock to be valuable, and claimed to be selling it for some parties who held it, and who desired to realize upon it, but whose names were not disclosed. They guarantied that the plaintiff, so long as he held the stock, should receive dividends thereon equal to 7 per cent per annum, and that they would make good any deficiency.

The contract is plain and unambiguous. The obligation of De Mill & Co. was not limited in terms to the duration of the partnership, or to the lives of the copartners. The only limitation of time was the period during which the purchaser should hold the stock. The guaranty protected the purchaser while his interest should continue; and this presumably was what he required, and both parties intended. Any other construction would subject the purchaser to the risk of losing the benefit of the guaranty on the death of the guarantors, which might happen at any time.

There are cases cited holding that a continu-

be revoked so as to prejudice the party who was already acted upon it, nor prevent him from renewing obligations which he had taken on the faith of it. *Williams v. Reynolds*, 11 La. 230; *Brandt*, Sur. 159.

**Effect of death of a cosurety.** Where three persons joined in the guaranty, which was not in terms several to a bank, it was held that the death of one of the sureties did not discharge the liability of the survivors (*Re Sherry*, L. R. 25 Ch. Div. 682, 63 L. J. Ch. 404, 50 L. T. 327, 32 Week. Rep. 394), nor determine the future liability thereunder of the survivors. *Beckett v. Addyman*, L. R. 9 Q. B. Div. 788.

**Guaranty of dividends on corporate stock.** In a guaranty that the stock was equal in value to stock yielding annual dividends of 6 per cent, and not merely a guaranty that the assignee should receive 6 per cent annually for three years on the par value of the stock, the measure of damages was the difference between the actual value of the stock assigned, and stock which would have yielded dividends of 6 per cent for the three years. *Struthers v. Clark*, 50 Pa. 210; *Brandt*, Sur. 155. A guaranty that the owner of stock in a corporation shall receive dividends thereon of a specified amount, for a certain number of years, by paying to the guarantor all he receives above that amount, is valid. It is not a wager, but "not only in words, but also in its plain design, a guaranty to the plaintiff of a certain yearly profit on railroad stock owned by them." *Elliot v. Hayes*, 8 Gray, 164, per Metcalf, J.



ing guaranty of advances to be made to a third party, in the absence of any express provisions is revoked as to subsequent advances by the death of the guarantor, and notice. *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42; *Harris v. Fawcett*, L. R. 15 Eq. 811.

These cases stand upon a perfectly equitable principle, each advance constituting a separate consideration. But a guaranty creating a continuing pecuniary obligation, the consideration for which is given once for all, is very different, and it would be very inequitable to hold that it was terminated by the death of the guarantor, unless this intention is plainly in the guaranty itself. See *Lloyds v. Harper*, L. R. 16 Ch. Div. 290.

The judgment in the case cannot therefore, we think, be supported on the theory that the guaranty by fair intendment was limited to the lives of the guarantors. Equally unfounded we think is the claim of the defendants that De

Mill & Co. were sureties, and for that reason their obligation terminated on the death. *Getty v. Binase*, 49 N. Y. 885.

Their undertaking was original, and not collateral. They entered into the guaranty for their own benefit, upon a consideration moving to them as principals. If they were in fact acting as agents in selling this stock, not having disclosed their principal, they stood in respect to the purchaser as the owner and vendor. *Cobb v. Knapp*, 71 N. Y. 848.

In entering into the guaranty, they assumed no obligation resting on the company. The company was under no legal obligation to declare dividends to stockholders, and least of all to declare dividends of any particular amount. The contract of De Mill & Co. was clearly original, and they were principals, and not sureties.

*We think the judgment should be reversed, and a new trial granted.*

All concur.

## WISCONSIN SUPREME COURT.

John G. WIGHTMAN, *Respt.*

v.

CHICAGO & NORTHWESTERN R. CO.,

*Appt.*

(....Wis....)

1. It is not improper for the court, when the jury has rendered inconsistent findings and has failed to observe the instructions of the court, to intimate that fact and give the liberty to hold further consultation, where the court scrupulously avoids anything like dictation as to whether the finding should be in favor of one party or the other, but merely insists upon having the questions submitted determined with a correct understanding of the instructions; and a request to poll the jury before the verdict was thus perfected was premature.

2. A round trip ticket having the words "Not good for passage" on the going part of the ticket, and the words "if detached" on the returning part, is valid when both parts are presented to-

gether at the same time, to the same conductor on the going trip, although the parts have become separated by inadvertence.

(December 4, 1888.)

**A**PPEAL by defendant, from a judgment of the Circuit Court of Juneau County (Stewart, J.), in favor of the plaintiff in an action for damages for expulsion from a train. *Affirmed.*

Statement by **Cassoday, J.**:

It appears from the pleadings, and is admitted, that April 15, 1886, the plaintiff purchased of the defendant, at its depot in Elroy, and paid for, what is known as a "round trip ticket," from said Elroy to Wonewoc and return; that one half of said ticket was white, and upon that half were the words and figures: "R. T. Going. Elroy to Wonewoc, 9-8986. 2563. Not good for passage;" and the other half of the ticket was red, and upon that were the words and figures: "2563. C. & N. W. Ry.

have decided the issue between the parties, but have failed to return a complete verdict, as, for instance, where, in an action on a promissory note, they have found for the plaintiff the amount of the note with interest, but have not specified in dollars and cents that amount, they may with propriety be returned to their room to make the computation of interest. *Hitchcock, J., in Sutliff v. Gilbert*, 8 Ohio, 405; *Proffatt, Jury Trial*, § 458. So, in an action for trover for certain promissory notes, the judge directed that the jury retire and return a new verdict for the amount of the notes and interest, and it was held good. *Bolster v. Cummings*, 6 Maine, 85; *Proffatt, Jury Trial*, § 453.

**Poling the jury.** The right to have the jury polled is waived by omitting to exercise it when the verdict is opened and received in their presence. *Higg v. Cook*, 9 Ill. 336; *State v. Allen*, 1 McCord, L. 525, 10 Am. Dec. 687; *Root v. Sherwood*, 6 Johns. 68, 5 Am. Dec. 191; *Walters v. Junkins*, 16 Serg. & R. 414.

**Round trip tickets.** By purchasing a round trip ticket the passenger acquires the right to ride on the proper train subject to the reasonable regulations of the company. *Claybrook v. Hannibal & St. J. R. Co.*, 2 West. Rep. 175, 19 Mo. App. 432; *Logan v. Hannibal & St. J. R. Co.*, 71 Mo. 609.

**Regulations respecting tickets.** If while detaching the coupons the passenger's attention is called

**NOTE.—Verdict; direction of court, to modify or amend.** Until the verdict is actually rendered and recorded, the jury have power over it, either to alter it or to withdraw from it. Until received by the court, and discharged from its consideration, they have full control over it. *Root v. Sherwood*, 6 Johns. 68; *Thomas v. Zushlag*, 25 Tex. Sup. 225; *State v. Waterman*, 1 Nev. 543; *Proffatt, Jury Trial*, § 456. But a verdict cannot be amended after the jury is discharged, when it does not appear upon its face that the alteration would be agreeable to the intention of the jury. *Settle v. Allison*, 8 Ga. 201; *Rigg v. Cook*, 9 Ill. 336. The court may direct the jury to amend when the verdict is imperfect and informal, and may send them back to the jury-room for that purpose. *Finn v. Barlow*, 16 Ill. 89; *Goodwin v. Appleton*, 22 Maine, 453; *Cook v. State*, 28 Ga. 598; *Holmes v. Humphries*, 2 Mills (Const.) 371; *Proffatt, Jury Trial*, § 457. The court may mold the verdict so as to meet the facts of the case and the ascertained conclusions of the jury. *McMahan v. McMahan*, 13 Pa. 389. Where the meaning intended to be conveyed by the jury can be ascertained from their verdict, the court may instruct the jury to alter the expressions, preserving the substance so as to render it good in law; and the court should give effect to the verdict when its meaning can be ascertained. *Truebody v. Jacobsen*, 2 Cal. 299; *Proffatt, Jury Trial*, § 458. Where the jury

R. T. Returning. Wonewoc to Elroy. W. A. Thrall, Genl Ticket Agt. if detached." The words "Not good for passage" were on a line with the words "if detached."

"It is also conceded that July 26, 1886, the plaintiff, at Elroy, boarded one of the defendant's way freight trains, with a caboose attached for passengers to ride in, then on its way southerly through Wonewoc; that, after said train started from Elroy with the plaintiff on board, the conductor in charge demanded fare of the plaintiff, who thereupon tendered the conductor the ticket mentioned, which the conductor refused to receive; that, upon the plaintiff's refusal to pay fare, the conductor stopped the train, and caused the same to run back to Elroy Station, where the plaintiff was compelled to leave the train. This action is for damages by reason of such expulsion.

The following rules of the defendant, in force at the time of the occurrence, are in evidence: "Rule 46. Passengers must not be ejected from the cars for any cause, except at a station. Use no unnecessary force. Rule 47. Wood or construction trains must in no case carry passengers. Freight trains must not carry passengers without tickets."

The evidence is in conflict as to whether the plaintiff presented to the conductor the red half of the ticket, as well as the white half, when he first demanded fare, or not until after the train was stopped; and also as to some of the facts and circumstances attending such refusal of the conductor to receive the ticket, the refusal of the plaintiff to pay fare, and the ejecting of the plaintiff from the train.

At the close of the trial the jury returned a special verdict, to the effect: (1) that the plaintiff had "the round trip ticket from Elroy to Wonewoc and return given in evidence, No. 2563," on July 26, 1886, and above described; (2) that the plaintiff on that day entered the caboose of the defendant's freight train, which carried passengers, at Elroy, for the purpose of being carried therein from Elroy to Wonewoc on said ticket; (3, 4) that said ticket was broken apart and separated at the place where punctured for the purpose of separation, before it was offered to the conductor for passage, (5, 6) but not by nor with any carelessness or negligence of or on the part of the plaintiff; (7) that when the conductor first came to the plaintiff to collect his fare the plaintiff produced and

exhibited to him both the going and returning part of said ticket, (8) and not the going part only; (9) that the plaintiff did not omit to produce and exhibit to the conductor both parts of said ticket until after the conductor had stopped the train to back up to Elroy; (10) that the plaintiff left the train by order of the conductor; (11) that the conductor refused to carry the plaintiff on said ticket, because it was not a good and valid ticket, (12) through an unintentional mistake on his part as to its validity; (13) that the plaintiff still holds said ticket, and both parts thereof, without having offered to return them to the defendant; (14) that the conductor called the plaintiff a liar before the plaintiff called him a liar; (15) that the plaintiff's damages are assessed at \$300; (16) that in estimating such damages they gave him \$299.54 for injury to his feelings.

Thereupon, the court ordered judgment for the plaintiff upon said special verdict for the sum of \$299.60, being the amount of damages assessed by the jury, less the sum of forty cents paid for the ticket, for which the court held that the plaintiff was not entitled to recover in this action.

From the judgment entered thereupon, accordingly, the defendant brings this appeal.

*Messrs. Winkler, Flanders, Smith, Bottum & Vilas* for appellant.

*Messrs. B. C. Smith and F. S. Veeder* for respondent.

*Cassoday, J.*, delivered the opinion of the court:

When the jury first announced their verdict the answer to the fifteenth question was \$300, and the answer to the sixteenth question was, in effect, nothing, instead of the amounts above stated. The court thereupon intimated to the jury that such findings were inconsistent with themselves; that the jury had failed to observe the instructions of the court; that by reason thereof they were at liberty to go to their room for further consultation; that if they meant to answer as they had indicated, then, when they came in, they should say so.

Thereupon, the counsel for the defendant asked to have the jury polled, to see if that was in fact their verdict; but the court declined, for the time being, to receive such verdict, until the jury should go to their room for consultation; that the court thereupon indicated

by the conductor to the fact that it is his duty to detach them, the passenger should at once desist and hand the ticket and coupons to the conductor, whose duty it would be, if he saw the coupons detached or could readily ascertain by inspection that they had been detached from the ticket, to accept them. But he is not bound to receive the detached coupon without seeing the ticket. *Louisville, N. & G. S. R. Co. v. Harris*, 9 Lea, 180. A regulation that a railroad ticket shall be subject at any time to inspection by the conductor is reasonable. *Cresson v. Phila. & R. R. Co.* 11 Phila. 600.

*Through tickets.* Through passenger railway tickets in the form of coupons, entitling the holder to pass over successive roads, are regarded as distinct tickets for each road, sold by the first company as agent for the others, as far as the passenger is concerned. *Young v. Pa. R. Co.* 5 Cent. Rep. 861, 115 Pa. 112; 2 Redf. 4th ed. 276; *Knight v. Portland, S. & P. R. Co.* 56 Maine, 234. The rights and liabilities of the parties are the same as if the tickets had been purchased of each company separately at its own depot or station. *Knight v. Portland, S. & P. R. Co.* 56 Maine, 234. The liability of each company in turn continues, in regard to such pas-

senger, from the place and time of receiving the ticket, until they reach the point where the liability of the next one of the connecting lines commences. *Knight v. Portland, S. & P. R. Co.* 56 Maine, 234. It is the duty of each company to see its passengers safely over the whole route to the next connecting line, as far as the utmost care will effect the same. 2 Rorer, Railroads, 975; *Townsend v. N. Y. Cent. etc. R. Co.* 56 N. Y. 235. A ticket good for a continuous passage over several lines is good for a continuous passage over each line, and not merely over the entire connecting lines. *Auerbach v. N. Y. Cent. etc. R. Co.* 89 N. Y. 231. In the absence of an express contract for through transportation, or circumstances from which it will be implied, the holder of coupon tickets is not bound to pursue his journey without intermission when it has been once begun, as in the case of a passenger whose trip is confined to the route of a single carrier, but may, at the end of each of its stages represented by such tickets, temporarily discontinue his passage without losing his right to resume it within a reasonable time. *Brooke v. Grand Trunk R. Co.* 15 Mich. 332; *Hutch Carriers*, 464.

the nature of some of the instructions which had previously been given to them; that no opinion had been intimated to them as to whether they should find anything for injury to feelings or not; that that question was left entirely to them.

The defendant's counsel thereupon requested the court to receive and record such verdict, which was refused, and the jury thereupon retired for further consultation. Upon returning into court they answered the fifteenth question forty-six cents, and the sixteenth \$300; and thereupon the court, for the same reasons, again refused to receive said verdict, and ordered the jury to again retire, for further consultation, which they did; and thereupon they again returned into court with the verdict complete and substantially as found in the above statement of facts; and the same was thereupon received by the court, and entered of record.

The jury had been told in the general charge, in effect, that if they found for the plaintiff, and that he was entitled to damages for injury to his feelings, then, in answering the fifteenth question, they should state the total amount of damages allowed, as for loss of time, which should be "simply nominal—six cents," and damages for injury to his feelings, and the amount he paid for the ticket, in one general sum; and then, in answer to the sixteenth question, that they should "state what damages," if any, "he suffered for injury to his feelings."

It is manifest that the jury misapprehended these instructions until their last consultation. The learned trial judge scrupulously avoided anything like dictation as to whether the jury should find in favor of the one party or the other upon any of those items, but merely insisted upon having the questions submitted determined by the jury, with a correct understanding of the instructions which had been given to them on that subject. Such action was manifestly within the province of the court. *Fick v. Mulholland*, 48 Wis. 419; *State v. Clementson*, 69 Wis. 628; *McMahon v. McMahon*, 18 Pa. 376, 53 Am. Dec. 483; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671; *The Work of the Advocate*, 676, and cases there cited.

The request to poll the jury was before the verdict was thus perfected, and hence, as a peremptory right, was premature.

The several findings of the jury are all supported by the evidence. A railway company may, undoubtedly, make reasonable regulations for the safe and orderly conduct of its business, and to protect itself against impositions. *Plott v. Chicago & N. W. R. Co.* 63 Wis. 511; *Mosher v. St. Louis etc. R. Co.* 127 U. S. 890 [32 L. ed. 249]; 2 Am. & Eng. Encyclop. Law, 759.

But this does not authorize such company, under the guise of regulations, to abridge or impair a passenger's statutory or legal rights. The statute required the defendant, upon application "at its ticket station" in Elroy, and payment of the price, to sell to the plaintiff "round trip tickets, good for first class passengers" from that station to Wonewoc and return. Section 1808.

It stands confessed that the defendant did so sell and deliver to the plaintiff the ticket in question upon such application, payment and purchase. It is, moreover, confessed that such

ticket, in the condition it was at the time of purchase, entitled the plaintiff at the time and place he did to board the train in question, and ride thereon to Wonewoc, and thereafter to return therefrom to Elroy by any train stopping at those stations, and carrying such first class passengers.

The only defense to this action for expelling the plaintiff from the train is the facts, as found by the jury, that the white portion of the ticket was broken apart and separated from the red portion, without any carelessness or negligence of or on the part of the plaintiff, at the place where punctured for that purpose, before it was offered to the conductor for passage. But the respective parts of the ticket were numbered alike, and each contained the letters "R. T."—the one having thereon, "Going. Elroy to Wonewoc;" and the other, "Returning. Wonewoc to Elroy." The jury, moreover, found that both parts of the ticket were produced by the plaintiff, and exhibited to the conductor when he first came to the plaintiff to collect his fare, and that the plaintiff still held both parts of the ticket.

Manifestly, the two parts of the ticket belonged together, and had formerly been attached to each other. The plaintiff appears to have been unable to account for their separation, except that he had carried the ticket in his pocket for some months. The ticket was "punctured for the purpose of separation;" and, of course, with the expectation that it would be separated when first used.

It is claimed, however, that the words "Not good for passage," on the going part of the ticket, and the words "if detached," on the returning part of the ticket, were, together, in effect, a stipulation that the ticket should be deemed forfeited if such parts should be separated by any other person than the conductor. But such are not the words of the contract, and, if such is to be deemed its legal effect, then it is because such stipulation is to be implied from the words employed. Had the going part of the ticket alone been presented to the conductor, there might have been some force in the argument; for to allow that part alone to be used, unaccompanied by the other part, would have the effect to convert this "round trip ticket" into two separate single trip tickets, to be used promiscuously. That would permit the returning part to be used before the going part, and hence give to the holder a right not secured by the statute.

The words "Not good for passage if detached" would seem to have been so placed upon the ticket to prevent imposition by a separation of the parts, and the use of each as a single trip ticket. But where such parts of the tickets became separated by such inadvertence and are then in good faith both presented together, and at the same time, to the same conductor, on the going trip, the purpose of such words would seem to be as fully attained as though the two parts of the ticket had not been previously separated. In other words, the presentation to the conductor of the two parts of the ticket, under the circumstances found, are the same, in legal effect, as though such parts had not been detached when so presented.

It is to be remembered that the ticket was the mere evidence of the contract of carriage,

and that such evidence consisted of two parts designed for separation. To imply such forfeiture of the contract from such mere inadvertent separation, under the circumstances found, when no word, letter or figure on either part of the ticket was thereby obliterated, and when no perceivable injury to the defendant could result therefrom, would be to destroy a statutory right upon the merest technicality, and in the absence of a clearly expressed stipulation to that effect. Even a strict literalism is not to be so rigidly enforced as to defeat the

manifest purpose of a contract under a statute. Whether a different rule should prevail where the passenger willfully, and against the protest of the conductor, separates the coupons or parts of a ticket, as in some of the cases cited, need not be here considered.

It follows that, upon the facts found, we must hold the defendant liable. Upon the whole record, and the repeated rulings of this court, we cannot say that the damages are excessive.

*The judgment of the Circuit Court is affirmed.*

## NEBRASKA SUPREME COURT.

### CASS COUNTY, *Plff. in Err.*, v. CHICAGO, BURLINGTON & QUINCY R. CO.

(....Neb.....)

**"1. Section 39 of chapter 77 of the Compiled Statutes of this State, entitled 'Revenue,' requires the officers of the railroad corporations within the State to return to the auditor of public accounts for assessment and taxation the number of miles of railroad in each organized county, and the total number of miles in the State, including roadbed, right of way and superstructure thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs, or successful operation of the railroad; but does not require a return of the bridges constructed across the Missouri River, said river being a navigable stream, the right to bridge which can be obtained only by a law of**

Congress, and not by the authority of the State—such bridge, when constructed, not being a part of the roadbed, nor superstructure thereon, under the meaning of the section alluded to.

**2. The state board of equalization would have no jurisdiction or authority to include such bridge within the line of roadbed of the railroad for taxation, and could therefore levy no legal tax thereon.**

**3. Such bridge not being within the definition of "roadbed, right of way and superstructure thereon," it was held that such part thereof as is within any county of this State would be liable to assessment and taxation by the local assessing and taxing officers of such county.**

(January 2, 1890.)

**ERROR** to the District Court of Cass County (Field, J.), brought by the defendant below to review a judgment in favor of the plaintiff below in an action to recover taxes alleged to have been illegally exacted. *Reversed.*

The case is stated in the opinion.

#### \*Head notes by the COURT.

**NOTE.—Assessment and taxation of railroads.** The difficulties of assessing lines of railroad which extend through many municipalities are so great that in many States it is not attempted; and different methods are adopted in different States. In some States railroads are taxed on the road and property as a unit, or as an entirety, and the value then apportioned among the different counties and townships and municipalities, by some standard prescribed by law. *Toledo & W. R. Co. v. Lafayette*, 22 Ind. 282; *Applegate v. Ernst*, 3 Bush, 648; *Mo. River etc. R. Co. v. Morris*, 7 Kan. 210; *Smith v. Leavenworth Co.* 9 Kan. 236; *Mo. River etc. R. Co. v. Blake*, Id. 489; *State Railroad Tax Cases*, 92 U. S. 375 (23 L. ed. 663); *Law v. People*, 57 Ill. 385; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 518 (28 L. ed. 1039); *State v. Severance*, 55 Mo. 378; *Franklin Co. v. Nashville etc. R. Co.* 12 Lea, 321; *Richmond & D. R. Co. v. Alamance Co.* 84 N. C. 504; *Dubuque v. Chicago, D. & M. R. Co.* 47 Iowa, 196; *Chicago etc. R. Co. v. Davenport*, 51 Iowa, 451; *Cooley, Taxn.* 2d ed. 383, where the law treats a railroad and all its appurtenances as one entire thing, not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for state revenue, and cannot be a fit subject for local taxation by the separate counties through which it runs. *Applegate v. Ernst*, 3 Bush, 648, cited in *Virginia & T. R. Co. v. Washington Co.* 30 Gratt. 481; and see *Mo. River etc. R. Co. v. Morris*, 7 Kan. 210; *Chicago etc. R. Co. v. People*, 4 Ill. App. 468; *Chicago & A. R. Co. v. People*, 66 Ill. 850, 99 Ill. 484. Where a road is thus to be assessed as a whole, bridges, tunnels, easements in and over streets, and other things and rights of a like nature, are to be taken into account, and are not subjects of separate assessment. *Baltimore Appeal Tax Court v. Western Md. R. Co.* 50 Md. 274. Under the Statute of Missouri, the land contracts of a railroad company

were to be taken into the account and valued with the road. *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294; *Wright v. Southwestern R. Co.* 64 Ga. 793. In other States the line of the railroad in each county is separately assessed; and in some they are to be appraised by the appraisers of all the counties through which it runs, at a meeting to be held on the line of the road. *Albany & S. R. Co. v. Osborn*, 12 Barb. 223; *Albany & W. S. R. Co. v. Canaan*, 16 Barb. 244; *The Tax Cases*, 12 Gill & J. 117; *State v. Ill. Cent. R. Co.* 27 Ill. 64; *Sangamon & M. R. Co. v. Morgan Co.* 14 Ill. 163; *Providence & W. R. Co. v. Wright*, 2 R. I. 450; *Indianapolis etc. R. Co. v. Kilner*, 69 Ind. 71; *People v. Fredericks*, 48 Barb. 173. In valuing railroad property it must be estimated by the same standards as other property is valued by (*The Tax Cases*, 12 Gill & J. 117; *Chicago & A. R. Co. v. Livingston Co.* 68 Ill. 458); while property not held or used for railroad purposes, but of which the corporation may have become owner, should be separately listed and taxed, unless the statute plainly makes a different provision. *Savannah etc. R. Co. v. Morton*, 71 Ga. 24.

**State board of equalization.** The duties of the state board of equalization are pointed out in the statute recited in the opinion reported in the principal case. Its authority is exclusive of that of the county boards. *People v. Sacramento Co.* 59 Cal. 321. Where the board discovers that assessors have not assessed property at its fair cash value as provided by the Constitution, but have assessed at half value only, it may assess railroad property in like proportion. *Law v. People*, 57 Ill. 385; *Bureau Co. v. Chicago etc. R. Co.* 44 Ill. 229; *Chicago & A. R. Co. v. Livingston Co.* 68 Ill. 458. Where the value of a railroad is apportioned among the counties, a provision that the auditor shall not thus apportion the value until after equalization is mandatory. *State Auditor v. Jackson Co.* 65 Ala. 142; *Perry Co. v. Selma etc. R. Co.* 65 Ala. 391; *Cooley, Taxn.* 2d ed.

*Messrs. Beeson & Sullivan and Covell & Polk* for plaintiff in error.

*Messrs. Marquett & Deweese* for defendant in error.

*Reese, Ch. J.*, delivered the opinion of the court:

This action was instituted in the District Court of Cass County, for the purpose of recovering from the county certain taxes which were alleged to have been illegally paid, on the west half of the railroad bridge across the Missouri River at Plattsmouth.

It was alleged in the petition that the Precinct Assessor of Cass County assessed the property for the years 1881, 1882, 1883, 1884 and 1885, and upon his return of the same to the county officers the taxes were levied thereon the same as upon other property in the county; and that the taxes were paid under protest in writing. That they were unlawfully levied and collected, for the reason that the bridge was at all times a part of the line of railroad of defendant in error and legally taxable only as the other portions of the road were taxable, and that the same was for each year reported to the state board of equalization as a part of the railroad and taxed accordingly, all of which taxes had been paid.

The answer of plaintiff in error consisted mainly in specific denials of the allegations of the petition, in so far as the illegality of the taxation was concerned, and it was alleged that the bridge was not legally taxable by the state board of equalization; that it was not a part of the roadbed of defendant in error's road; that it was not operated as a part of railroad; that it was listed to the precinct assessor for taxa-

tion by the duly authorized officers of the railroad company, and that it was legally subject to taxation by the county.

A jury trial was had, when, upon the close of the testimony, the district court instructed the jury to find a verdict for defendant in error for the sum of \$5,468.66, which was accordingly done, and upon which, after a motion for a new trial had been made and overruled, judgment against the county was rendered.

The county, as plaintiff in error, brings the cause to this court for review.

The petition in error contains twenty-five assignments of error. These assignments and the brief of plaintiff in error are devoted, to a considerable extent, to the presentation of the question of the compliance by the agents of defendant in error with the requirements of the law in the payment of the taxes under protest and the written notice thereof.

While we think that in many instances there was a failure to comply with the provisions of the law in the respect named, yet we are disposed to examine but one question involved in the case, and that is whether or not the tax was legally assessed and levied—this being, as we think, the controlling question in the case.

The law in the State for the assessment and taxation of railroad property is contained in sections 39 and 40 of chapter 77 of the Compiled Statutes, entitled *Revenue*. These sections are as follows:

Sec. 39. "The president, secretary, superintendent or other principal accounting officers within this State, of every railroad or telegraph company, whether incorporated by any law of this State or not, when any portion of

423. The apportionment is a mere clerical act, and may be done by the clerk of the board (Union Trust Co. v. Weber, 96 Ill. 346; Wilson v. Weber, 96 Ill. 454), and a deputy clerk might act in the absence of his principal. *Mo. River etc. R. Co. v. Morris*, 7 Kan. 210. A failure to enter the amount apportioned to a township on the township assessment book, or other mere irregularity, will not affect the validity of the assessment. *Smith v. Leavenworth Co.* 9 Kan. 296; *Mo. River etc. R. Co. v. Blake*, 9 Kan. 489; *Sioux City & St. P. R. Co. v. Osceola Co.* 45 Iowa, 168; *Wilson v. Weber*, 96 Ill. 454. In some States the assessing board apportions the aggregate value according to the estimated value of that portion of the road with its improvements lying within the limits of each municipality (*State v. Severance*, 55 Mo. 378); while in others the buildings and local improvements are left to be assessed like such property of natural persons (*State v. Maine Cent. R. Co.* 74 Maine, 376; *San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 12); and the rolling stock is considered as real estate and is estimated with the road itself. *Maus v. Logansport etc. R. Co.* 27 Ill. 77; *Union Trust Co. v. Weber*, 96 Ill. 346; *Sangamon & M. R. Co. v. Morgan Co.* 14 Ill. 163; *Bangor & P. R. Co. v. Harris*, 21 Maine, 538; *Cumberland Marine R. Co. v. Portland*, 37 Maine, 444; *Louisville & N. A. R. Co. v. State*, 25 Ind. 177; *Dubuque v. Ill. Cent. R. Co.* 39 Iowa, 56; *Phila. etc. R. Co. v. Baltimore Appeal Tax Ct.* 50 Md. 397; *State v. Severance*, 55 Mo. 378; *Randall v. Elwell*, 52 N. Y. 521. In assessing the road as a whole the law in some States requires the board to take into account and value the franchise as property. *Ottawa Glass Co. v. McCaleb*, 51 Ill. 566; *Huck v. Chicago & A. R. Co.* 86 Ill. 352; *Franklin Co. v. Nashville etc. R. Co.* 12 Lea, 521.

*Limitation of taxing power of State.* While the taxing power of the State is unlimited over subjects within its jurisdiction, it cannot, however, be exercised over persons and property beyond its territorial jurisdiction. *State v. Pullman Palace Car Co.* 16 Fed. Rep. 193; *Baltimore Appeal Tax Court v. Pullman Palace Car Co.* 50 Md. 462; *Phila. etc. R.* 2 L. R. A.

*Co. v. Baltimore Appeal Tax Court*, 50 Md. 397; *Desty, Taxn.* 406. Only that which is within its own jurisdiction, or the proportion of stock representing that part of the road, can be taxed. *State Treasurer v. Auditor General*, 46 Mich. 224. Where the road of a corporation runs through two States, a tax upon the income or franchise of the road is properly apportioned by taking the whole income or value of the franchise and the length of the road within each State as the basis of taxation. *Delaware Railroad Tax Case*, 85 U. S. 18 Wall. 208 (21 L. ed. 888); *Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 492 (22 L. ed. 595). A bridge erected by a railroad company under authority granted by two separate States is not taxable in the manner provided for in the Railroad Taxation Acts of one of those States. *State, Lehigh Valley R. Co. v. Mutchler*, 48 N. J. L. 461. Steamers used by a railroad company in transporting freight cars across water intervening between the termini of the tracks are not taxable as a part of the roadway or roadbed. *San Francisco v. Central Pac. R. Co.* 63 Cal. 467.

*Taxation for county and municipal purposes.* A statute providing for the taxation of certain corporations for state purposes does not relieve them from taxes for county and municipal purposes. *People v. Davenport*, 26 Hun. 630. Counties are quasi corporations and governing agencies connected with the state government and the general taxing power. 2 *Desty, Taxn.* 1059. They have no powers but such as are expressly granted, or such as are incidentally necessary to carry such powers into effect. *Id.* The levy of county and municipal taxes must be made on property subject to general taxes, at a time and in the manner prescribe by law; but mere informality in the levy will not invalidate it. *Id.* 1067. The Statutes of Nebraska require the annual levy of taxes for county purposes to be made upon an estimate prepared by the board of county commissioners. *State v. Harvey*, 12 Neb. 81. County commissioners are agencies of the state government, and perform public duties. *State v. St. Louis County Ct.* 34 Mo. 571.

the property of said railroad or telegraph company is situated in more than one county, shall list and return to the auditor of public accounts, for assessment and taxation, verified by the oath or affirmation of the person so listing, all the following described property belonging to such corporation on the first day of April of the year in which the assessment is made within this State, viz.: the number of miles of such railroad or telegraph line in each organized county in this State, and the total number of miles in the State, including the roadbed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of said railroad or telegraph lines; *Provided, however,* That all machine and repair shops, general office buildings, store houses, and also all real and personal property outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad or telegraph companies, shall be listed for the purpose of taxation by the proper officers or agents of said companies, with the precinct assessors of any precinct in the county where said real estate or personal property may be situated, in the manner provided by law for listing and valuation of real and personal property."

Sec. 40. "The return to the auditor of public accounts herein provided shall be made on or before the 5th day of April annually. If the return aforesaid be not received by said auditor by the 10th day of April, he shall thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for that purpose may address a written communication to the corporation, or to some officer of the corporation who has failed to make the return aforesaid. As soon as practicable after the auditor has received the said return, or procured the information required to be set forth in said return, a meeting of the said board of equalization, consisting of the Governor, state treasurer and auditor, shall be held at the office of said auditor, and the said board shall then value and assess the property of the said corporation at its actual value for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of such road or line.

"In making up such valuation or assessment, the state board shall examine and consider the return herein required to be made; or the information procured by the auditor in default of such return, together with such other reliable information relative thereto as they may be able to procure. Said board shall not assess the value of any machine or repair shop, or general office buildings, store houses or any real or personal property situated outside the right of way or depot grounds of such company.

"That on or before the 15th day of May, or so soon thereafter as the said board, or any two thereof, shall have made or determined said valuation and assessment, the auditor shall certify to the county clerks of the several counties in which the property of the aforesaid corporation or any part thereof may be situated, the

assessment per mile so made on the property of such corporation, specifying the number of miles and amount in each of such counties. All such property shall, for the purpose of taxation, be deemed personal property and placed upon the tax list, as hereinafter provided."

By these sections, it appears that the officers of railroad corporations are required to certify or return to the auditor of public accounts the number of miles of their railroad in each organized county and the total number of miles in the State, which is to include the roadbed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of the road.

The roadbed, as defined by Webster, is "The bed or foundation on which the superstructure of a railroad rests." The term "right of way" is defined in *Bodfish v. Bodfish*, 105 Mass. 819, as meaning "The right to pass over another's land," etc.

In *Stuyvesant v. Woodruff*, 21 N. J. L. 186, it is said: "A right of way, in a legal sense of the term, is a right to pass, for all or for certain purposes, at all certain times, over and upon another man's land or close." Webster defined the word *superstructure*, referring to railroad engineering, to be "the sleepers, rails and fastenings, in distinction from the roadbed—called also permanent way."

Using these definitions instead of the language of the statute, it is the duty of the officers of railroad companies to make a report to the auditor, showing the number of miles of their railroad line, including the bed or foundation on the land over which the company would have the right to pass, and the sleepers, rails and fastenings thereon—this to include both the main and side tracks. It will be observed that from the reports made to the auditor, the assessment must be made; and when such reports are filed with the auditor, it is the duty of the board to "then value and assess the property of said corporation at its actual value for each mile of said road or line," etc.—the facts being given the state board, as to the number of miles of the roadbed, right of way and superstructure, depot buildings, depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, reparation and operation of the road. It then becomes the duty of the board to make the valuation—such valuation not being necessarily furnished by the officers of the corporation making the report.

It is specifically declared in section 40 that the board in making the assessment and valuation should "not assess the value of any machine, or repair shop, or general office buildings, store houses, or any real or personal property situated outside of the right of way or depot grounds of such company." There is nothing, therefore, in the letter of the law, which can be held to include the bridge in question.

It is well known that the right to construct a bridge across a navigable stream, as the Missouri River is declared to be, cannot be obtained by any grant or authority of the State, the right to grant a license being vested alone

in the General Government by an Act of Congress.

It was claimed in the trial below that the bridge and railroad of defendant in error were treated and considered by it as a continuous line of road. For that purpose, witnesses were placed upon the stand, who testified that the railroad was operated, west from Pacific Junction in Iowa, as one continuous line. But it was also shown by the same witnesses that much higher rates were charged for the transportation of passengers and freight across the bridge than over any portion of defendant's road; and that while in fact, so far as the running of trains and the transportation of passengers and freight was concerned, no change or transfer was made, yet, an additional burden was placed upon all for crossing the bridge. To that extent, at least, the road was not operated as a continuous line.

For the purpose of showing that the officers of defendant in error, as well as the officers of the State, had treated the bridge in question as a part of the road, certified copies of the list of property returned to the state auditor for the years 1881 to 1885, inclusive, were introduced and admitted in evidence, doubtless for the purpose of showing that the number of miles of roadbed reported to the state officers for those years included the whole of the line from the center of the bridge to the west line of Cass County.

But there is nothing in these reports which tends in any way, unless it be in the number of miles reported, to show that the bridge was included in the report. No mention is made of it and no part of the trackage reported is noted as consisting of any portion of the bridge. These reports seem to be made in strict compliance with the letter of the law above quoted. It appears from the testimony that the bridge in question is a very costly structure, consisting of stone and steel or iron; and this great cost, no doubt, serves as a basis for the greatly increased charge for the transportation of persons and freight. We cannot believe, from the language used by the Legislature, that it was ever the intention that such structures should be erected and conducted as this one is shown to be; and that they should be assessed and taxed as a part of the roadbed and superstructure thereof, without some additional report of their value or cost being made to the state board of equalization. Nothing of the kind is required by law. Nothing of the kind is shown by the reports to the state auditor. It would be manifestly unjust that such a bridge should be added into the railroad mileage without some method being provided for taxing it according to its value, either separately or in the general mileage of the line.

One witness for defendant in error testified that he did add an assessment of \$40,000 value, so as to raise the value of the bridge over that of other portions of the track. But how or when this addition was made does not appear from reports made by him and introduced in evidence. Further, the law provides for no such report, and we doubt not none was made.

If the theory advanced by counsel for defendant in error, that the bridge in question constitutes a part of the roadbed, is true, it  
 ? L. R. A.

seems to the writer that the same portion of the road would be within the provisions of the law regulating the fare for passengers, which is fixed by section 1 of article 9 of chapter 73 of the Compiled Statutes; at three cents per mile, and also under the jurisdiction of the board of railroad commissioners; and that, not only would defendant in error be subject to the law and jurisdiction named, but that the charges testified to by the witnesses would be clearly in violation of the law; for we know of no exception of such bridges being made in either case. We apprehend that should such jurisdiction be assumed by the board of railroad commissioners, or should it be contended by the officers of the State, or others, that the charges named were being made in violation of law, it would be insisted that such authority was not given by the statutes.

We have been cited to the case of *Anderson v. Chicago, Burlington & Quincy Railroad Company*, 4 West. Rep. 157, 117 Ill. 26, decided by the Supreme Court of Illinois. This case is, in many respects, similar to the one at bar, and it was there held that the county in which the eastern end of their bridge at Burlington, Iowa, was situated, could not impose taxes under local assessments, but that the bridge should be listed and assessed with, and as a part of, the line of the road. There are some distinctions between the law of the State of Illinois and that of this State, providing for the assessment of railroad property, which we will notice.

By the Act of 1872, under which that decision was rendered, it was made the duty of railroad corporations to report to the county clerk of each county into or through which their roads were constructed, in addition to the requirements of the law of this State, the value of improvements and stations located on their right of way. It is also provided that the right of way including the superstructure of main, side, or second track and turnouts and the stations and improvements of the railroad company on such right of way shall be held to be real estate for the purpose of taxation and denominated "railroad track" and be so listed and valued; and shall be described in the assessment thereof, as a strip of land extending on each side of the railroad track and embracing the same with the stations and improvements thereon, commencing at a point where such railroad track crosses the boundary line entering the county, city, town or village and extending to the point where such track crosses the boundary line leaving such county," etc.

It is also provided that, at the same time the statements are made to the county clerk, similar ones shall be made to the auditor of state, but containing, in addition, the number of ties in track per mile, the weight of track, iron or steel per yard, what joints or chairs are used in track, the ballasting of road, whether gravel or dirt, the number and quality of buildings or other structures on "railroad track," the length of time iron in track has been used, the length of time the road has been built, the amount of capital stock authorized, and the number of shares into which it has been divided, the amount of capital stock paid up, its market value, or if no market value, then its actual value, the total amount of indebtedness (except



for current operating expenses), and the total listed valuation of all its tangible property in the State.

These, and other sources of information are furnished the auditor and from which the state board assesses the "railroad track" and causes such assessment to be certified to the county clerk of the counties through which the railroads are constructed. These and other provisions of that law render it certain that it was the purpose and intent of the Legislature that all the "railroad track" within the boundaries of each of the counties should be assessed as real property and that the assessing board and officers should be furnished with full information as to the improvements and elements of value, necessary to enable them to act with an enlightened judgment as to the value of the whole

of the "railroad track;" these words being in almost every instance, when used in the Act, placed in quotation marks as herein. The purpose of the Act, expressed as clearly as language would permit, being to tax the whole line of track, instead of "the roadbed, right of way and superstructures thereon," as expressed by our law. For the reasons here given, we do not think that the case cited can in any sense be held as decisive of this case.

We therefore hold that under our statute the tax was legally levied by the county officers, and that the district court erred in its instruction to the jury. The judgment of that court is reversed and the cause is remanded for further proceedings.

*Reversed and remanded.*

The other Judges concur.

## UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

### MEALMAN v. UNION PACIFIC R. CO.

(....Fed. Rep.....)

**To hold an employer-corporation liable for an injury to an employé resulting from the**

negligence of a superior employé in control there must not only be subordination, but the party in control should have such an extended authority that the court may justly say that he is a vice-principal; and a complaint which does not disclose such authority is demurrable.

(January 10, 1899.)

**NOTE.—Master and servant, liability for negligence of vice-principal.** The superintendent and assistant superintendent acting as train dispatchers are vice-principals. *Sheehan v. N.Y. Cent. etc. R. Co.* 91 N. Y. 332; *Chicago etc. R. Co. v. McLallen*, 84 Ill. 109. See *Booth v. Boston & A. R. Co.* 73 N. Y. 38; *Pittsburgh etc. R. Co. v. Henderson*, 37 Ohio St. 532; *Washburn v. Nashville & C. R. Co.* 3 Head, 638; *Darigan v. N. Y. & N. E. R. Co.* 52 Conn. 285. A railroad company is liable for injury to a fireman, caused by a negligent order given by a train dispatcher. *Smith v. Wabash etc. R. Co.* 8 West. Rep. 729, 92 Mo. 359. Where a section foreman had the authority to hire laborers and to "lay them off" and had immediate charge and control of them while at work under his supervision, he is to be deemed a vice-principal and his knowledge of defect in an implement used in the work is the knowledge of the principal who is liable for injury caused thereby to one of the laborers. *Clovers v. Wabash etc. R. Co.* 8 West. Rep. 416, 21 Mo. App. 213; *Whalen v. Centenary Church*, 62 Mo. 326; *Cook v. Hannibal & St. R. Co.* 63 Mo. 397; *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 66; *Dowling v. Allen*, 74 Mo. 13; *Condon v. Mo. Pac. R. Co.* 73 Mo. 567; *Chicago etc. R. Co. v. Ross*, 112 U. S. 377 (28 L. ed. 787). A laborer in the employ of one who contracts with a railroad company to do grading is not a fellow servant of an engineer engaged by the company. *Louisville etc. R. Co. v. Conroy*, 63 Miss. 562. A road master of a railroad company is not a fellow servant with a laborer engaged under him, and the company is liable for injuries to such laborer, caused by his negligence. *Hoke v. St. Louis etc. R. Co.* 4 West. Rep. 71, 83 Mo. 390; *Moore v. Wabash etc. R. Co.* 85 Mo. 588.

**Servants and agents distinguished.** There is a clear distinction to be made between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence. *Chicago etc. R. Co. v. Ross*, 112 U. S. 377 (28 L. ed. 787). If there is a natural or necessary connection between the different classes of service, such as necessarily brings the servants into contact with each other in the prosecution of their work, they are co-servants, however dissimilar their occupation may be. Even foremen, superintendents, etc., are co-servants with others in the same employment, except as to matters in which they are charged with some duty which the master owes to the servant as a personal duty. *Crispin v. Babbitt*, 2 L. R. A.

81 N. Y. 516, 37 Am. Rep. 521; *Hoke v. St. Louis etc. R. Co.* 11 Mo. App. 574; *Dwyer v. Am. Express Co.* 55 Wis. 453. In some of the States it is held that servants are not to be treated as fellow servants unless they are subject to the same immediate control, and engaged in the same department of labor. *Union Pac. R. Co. v. Fort*, 84 U. S. 17 Wall. 559 (21 L. ed. 740); *Flike v. Boston & A. R. Co.* 63 N. Y. 549; *Morgan v. Vale of Neath R. Co.* L. R. 1 Q. B. 149; *Feltham v. England*, L. R. 2 Q. B. 38; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174; *Lawler v. Androscoggin R. Co.* 62 Maine, 463. Superiority in grade or rank does not change the relation of fellow servants unless the superior servant is charged with the duties of the master to the servant, so that he may fairly be said to stand in the place of the master in reference to the particular duty from a breach of which injury results, which is in all doubtful cases a question for the jury. *Mullan v. Phila. & S. Mail Steamship Co.* 73 Pa. 23; *Thayer v. St. Louis etc. R. Co.* 22 Ind. 26; *O'Connell v. Baltimore & O. R. Co.* 20 Md. 212; *Wright v. N. Y. Cent. R. Co.* 25 N. Y. 562; *Sherman v. Rochester & S. R. Co.* 17 N. Y. 153; *Albro v. Agawam Canal Co.* 6 Cush. 75; *Shauck v. Northern Cent. R. Co.* 25 Md. 462; *Wood, Railway Law*, 1499.

Where a superior servant employs and discharges subalterns the corporation is liable for his neglect or omission of duty and in the conduct of the work committed to his care. *Rowland v. Mo. Pac. R. Co.* 8 West. Rep. 196, 20 Mo. App. 463; *Malone v. Hathaway*, 64 N. Y. 5; *Marshall v. Schricker*, 63 Mo. 308. The real test of co-servitude is subjection to the same general control, and co-operation to secure a common result. *Farwell v. Boston & W. R. Corp.* 4 Met. 49; *Morgan v. Vale of Neath R. Co.* L. R. 1 Q. B. 149; *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336; *Svenson v. Atlantic Mail Steamship Co.* 57 N. Y. 108; *Abraham v. Reynolds*, 5 Hurl. & N. 143. This embraces all persons controlled by the same general master, and engaged in the same common business in whatever department or sphere. The true rule seems to be, that the master is liable where the negligent servant is placed in such a position of authority as fairly to represent the master. *Flike v. Boston & A. R. Co.* 63 N. Y. 549. A corporation is liable for negligence in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance. *Wright v. N. Y. Cent. R. Co.* 25 N. Y. 562; *Albro v. Agawam Canal Co.* 6 Cush. 75; *Wigmore v. Jay*, 5 Exch. (W. H. & G.) 354.

ON demurrer to a complaint against a railroad company for damages for a personal injury sustained by an engineer in the employ of the defendant. *Demurrer sustained.*

The case is stated in the opinion.

*Messrs. Teller & Orakood* for defendant, for the demurrer.

*Messrs. Browne & Putnam* for plaintiff, *contra.*

**Brewer, J.** delivered the following opinion:

In this case there is a demurrer to the complaint. The demurrer charges that Muhlman, the deceased, was an engineer in the employment of the defendant in its yards, running a switch engine; that driving that engine towards the round house, there was a collision between it and another engine driven by another employé of the defendant, the collision resulting in the death of Muhlman. His widow is the plaintiff in this suit.

The complaint avers that engineers were authorized to move their engines only at the direction of the helpers and upon their signals, and that such was the rule of the company. That Muhlman saw the helper of the other engine, and saw no signal, and that in fact he gave no signal, but that the engineer of that engine started his engine on to the track upon which Muhlman was, in obedience to the signal of some other party.

Now, if it stopped there, it would be a case where there would be the negligence of one engineer causing injury to another engineer in the operation of two engines at the same point. Within the rule laid down in *Randall v. Baltimore & Ohio Railroad Company*, 109 U. S. 478 [27 L. ed. 1003], and within the case of *Howard v. Denver & Rio Grande Railroad Company*, in which I wrote an opinion (26 Fed. Rep. 837), there would be no liability on the part of the defendant, it being one employé's negligence causing injury to another.

Beyond that the complaint goes on to aver that the party who gave the signal in obedience to which the engineer of the other engine started his engine and brought on the collision, was the master mechanic, having sole control of the yard; so the case presented is, where one, having sole control of a yard, issues an order in disregard of the rules of the company, whether that act is negligence imputable to the company.

There is a line of cases, and there is a doctrine which was recognized by my predecessor, *Judge McCrary*, to the effect that the mere matter of subordination determines the liability of the employer. That wherever one party stands subject to the orders of another party whom the company employs, the negligence

of the latter is the negligence of the company; so that if a section boss is guilty of negligence, whereby a section hand working under him is injured, the company is responsible.

In the case of *Ross v. Chicago Railroad Company*, 2 McCrary, 235, he laid down that doctrine in so many words. The case went to the supreme court, and while the judgment was affirmed, that court declined to commit itself to that doctrine; and while it sustained the judgment, it did it upon the theory that the party guilty of negligence in that case was the conductor, one having the sole control and management of a moving train, and said that by virtue of the large control and great responsibility vested in him, it was proper to hold him as a representative of the company, its *alter ego*, a sort of vice-principal, and his negligence the negligence of the company.

The other proposition has never yet been decided by that court. I know that intentionally it declined to pass upon it in that case. I do not believe the proposition as laid down by my brother McCrary is law. I think it is necessary, not merely that there should be subordination, but that the party in control should have such a departmental control, such an extended authority that the court may justly say he represents the principal, that he is the vice-principal, the general superintendent, superintendent of a division, superintendent of roads and bridges, any party who has a department under his control—and the supreme court says that a conductor stands in the same category.

It does not appear from the allegations of this complaint further than that this master mechanic had sole control of this yard. Whether it was a yard with one switch or two, a side track or two; whether it was a trifling matter or a large and extensive responsibility; whether this sole control was limited to the repairs of engines or things of that kind, or whether it went to the entire business of a yard of such size, and so extensive works and duties, that the company is bound to put in charge some man of experience, information and character, one for whose acts in all respects it should be held responsible, is not sufficiently disclosed by a mere statement that the party was a master mechanic, having sole control of this yard. The size of the yard, amount of responsibility or vastness of the business intrusted to him, the extent of his control, is not discussed.

I do not mean to say that he does occupy such a position that he cannot properly be considered as in control of a department, so that the company may be responsible. I simply hold that the complaint as it stands is defective in that respect, and *the demurrer will be sustained.*

## NEW YORK COURT OF APPEALS.

*Re* Judicial Settlement of the Accounts of  
A. Matilda Piffard *et al.*, as Executors of  
the WILL OF David PIFFARD, Deceased.

(...N. Y....)

A will giving property to a daughter with power to dispose of it by her own will in case she die be-

fore her father, and directing payment in that case to the executors or trustees named in her will, operates, in case of her death leaving a will, to devise and bequeath the property by its own force in accordance with her will, although her power of appointment, considered as a power, could not be executed in her father's lifetime.

(November 27, 1886.)

**A**PPEAL by the executors of the will of David Piffard, deceased, from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a decree of the Livingston County Surrogates' Court, adjudging that a legacy given by said will to the testator's daughter, Sarah Eyre Piffard, did not lapse by her decease before the testator's *affirmed*.

Reported below, 42 Hun, 84.

The facts are stated in the opinion.

**Mr. John R. Strang**, for appellants:

By the death of Sarah Eyre Piffard, without descendants, in the lifetime of the testator, the devise or legacy to her lapsed, unless prevented by the terms of the first codicil to his will.

2 Rev. Stat. 66, § 52.

The powers created, defined and regulated by 1 Revised Statutes, p. 737, § 126, are in terms confined to "lands," but they are now held applicable to personal property also.

*Cutting v. Cutting*, 86 N. Y. 522; *Hutton v. Benkard*, 92 N. Y. 296.

The will of Sarah Eyre Piffard is not an execution of the power of appointment contained in her father's will, and her executors are not entitled to receive the one fifth part of her father's estate devised to her. There is no reference in her will to the power, nor to the fund which is the subject of the power, and there is nothing in it from which any intent to execute the power can be inferred.

See *White v. Hicks*, 83 N. Y. 883; *Jones v. Southall*, 82 Beav. 81, 38; *Hutton v. Benkard*, 92 N. Y. 295, 801; *Wildbore v. Gregory*, 1 L. R. 12 Eq. 482.

She could not execute such power in the lifetime of the testator.

1 Jarman, Wills, 5th Am. ed. 676, note; Sugden, Powers, 1st Am. ed. p. 532; 2 Wms. Exrs. 6th Am. ed. foot p. 1212, *et seq.*; *Jones v. Southall*, 82 Beav. 81, 38.

The lapse of a legacy by the death of the legatee in the lifetime of the testator is not prevented by the fact that the legacy is given, in terms, to the legatee, his executors or administrators, unless it was plainly the intent of the testator that it should not lapse, but that the executors should take it in lieu of the legatee.

1 Roper, Legacies, 2d Am. ed. 466; *Thurber v. Chambers*, 66 N. Y. 42; *Bolles v. Bacon*, 3 Dem. 48.

**Mr. George F. Yeoman**, with **Mr. Herbert L. Ward**, for executors of Sarah Eyre Piffard, respondents:

The fact that after Sarah Eyre Piffard's death the testator executed a codicil confirming the will and all former codicils operated as a re-execution of them all.

*Brown v. Clark*, 77 N. Y. 369; *Redfield, Surrogates*, 3d ed. 227; 1 Jarman, Wills, Rand. & T. ed. 28.

If two modes of interpreting a will are possible, that mode will be preferred which will prevent either a total or a partial intestacy.

*Redfield, Surrogates*, 255; *Vernon v. Vernon*, 63 N. Y. 851; *Lyman v. Lyman*, 22 Hun, 261.

Where the intention is plain upon the whole will, it is the duty of the court to subordinate the language to the intention.

*Phillips v. Davies*, 92 N. Y. 199; *Wager v.* 3 L. R. A.

*Wager*, 96 N. Y. 164; *Redfield, Surrogates* 251.

The testator's intention was to give this property to those entitled to the estate of Sarah Eyre Piffard under her will, and to make her executors instruments for thus disposing of it.

See *Chamberlain v. Hutchinson*, 23 Beav. 444; *Brickenden v. Williams*, L. R. 7 Eq. 810.

**Mr. F. H. Wilson**, for Emma M. Piffard, a legatee under will of Sarah Eyre Piffard, respondent.

**Finch, J.** delivered the opinion of the court:

The testator, by his last will, duly executed, gave to his daughter Sarah one fifth of all his real and personal property. The devise and bequest was absolute and without condition, and such as to vest in her a complete title to the property given. Of course such legatee and devisee, if she lived until her father's will took effect, would have the absolute ownership and power of disposition, and could transfer it by will to whomsoever she pleased. By a codicil, made a few years later, the testator again referred to the devise and bequest to Sarah, and made a further provision relative thereto. It reads thus:

"I do hereby direct that my said daughters, Sarah Eyre Piffard and Ann Matilda Piffard, named in my said will, shall have power, by their several wills heretofore or hereafter duly made and executed, to dispose of, devise and bequeath the share of my estate devised and bequeathed to them severally in and by my said will; and to that end I direct that such share or shares shall be paid over by my said executors to the executors or trustees named in and by the several wills of my said daughters in case of the death of them, or either of them, in my lifetime, instead of to my said daughter or daughters. But if my said daughters shall survive me, then such shares shall be paid to them severally, as now provided in and by my said will."

It seems to me impossible to misunderstand the purpose of this provision. It was clearly intended to reach and cover a contingency which has actually occurred, and to prevent a lapse of the legacies by the death of a daughter in the testator's lifetime. To that event the provision of the codicil was confined, and only in that event could it be consistent with the absolute devise and bequest, and essential to make it effectual. And while, to reach this result, the testator gave a power of appointment which, as a power, the donee could not execute in her father's lifetime, because she could not herself dispose of what remained wholly in another's power and ownership, yet the further language of the codicil shows its intent to be that, in case of the death of the daughter in the lifetime of the father, the latter intended to devise and bequeath by force of his own will the daughter's one fifth to such person or persons, and in such shares and proportions, as by an existing will, made before or after the date of the codicil, she had determined and directed, or should determine and direct, in the disposition of her own property; and "to that end," in aid of that result, he explicitly declares that the one fifth given to her shall be paid over to her executors for

the evident purpose of passing to her devisees and legatees that share precisely as if it had been her property at her death, and had become distributable as such by force of her will. And this view is very greatly strengthened by the fact that, after her death, leaving a last will, the testator, with full knowledge of the existing situation, made two other codicils confirming his will, and the provisions contained in it now in question.

While, therefore, it may not be possible to sustain the power of appointment as such, and so enable Sarah's devisees and legatees to take the one fifth by force of her will, it is possible to see in the will of the father a clear intent to prevent a lapse, and avoid a partial intestacy,

by carrying over the one fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed. Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom, and the proportions in which, the one fifth should pass by the father's will in case of the death of the daughter in his lifetime. What she would have done by her will, but could not, that he did for her by his own will. This was the construction adopted by the general term, and we concur in it.

*The judgment should be affirmed.*

All concur.

## OREGON SUPREME COURT.

### BOARD OF RAILROAD COMMISSIONERS of Oregon, *Repts.*,

v.

### OREGON R. & NAV. CO., *Appt.*

(.....Ore.....)

**\*1. A power conferred by the Legislature upon a board of commissioners,** required to be exercised with reference to the affairs of certain corporations, will not be extended by implication; and the acts which the board attempts to do under the power will not be upheld, unless the authority to do them is affirmatively shown to be included in it.

**2. Where the Legislative Assembly of the State passed an Act creating a board of railroad commissioners,** empowering it to examine into the affairs of railroad corporations doing business within the State, and required it to make a biennial report, with such suggestions "as to what changes in the classification of freights, or what changes in the rate of freights or fares, are advisable for the public welfare," but conferred no express authority upon the board to regulate the price of freight, or to determine when freight charges were unreasonable—*held:* that the board had no jurisdiction to require a

railroad company to refund to a shipper a sum of money alleged to have been exacted from him in excess of a reasonable charge for the shipment

**3. Held: that where such Act directed the board to examine into such affairs,** and specially required it to report the result of its investigation concerning certain specific matters to the Legislature, evidently for the purpose of its action thereon, it would not be presumed that the Act intended to give the board authority to adjust these matters, although it was empowered by certain provisions therein contained to hear complaints made by persons against railroad companies on account of acts in general done or omitted to be done by them.

**4. And held, further: that a provision in the Act to the effect that whenever any railroad company violated, refused or neglected to obey any lawful order or requirement of the board, it shall be the duty of the commission to enter complaint in the circuit court of the State, sitting in equity, and that such court should have power upon notice to the company to proceed to hear and determine the matter speedily, etc., did not authorize such a proceeding in order to enforce the repayment of money charged on freight claimed to be in excess of a reasonable charge; that a claim of that character can only be enforced by a common-law action.**

#### \*Head notes by the COURT.

**NOTE.—Authority of Railroad Commissioners.** Federal courts have jurisdiction of a suit against state railroad commissioners, brought to restrain them from the enforcement of a schedule of rates prepared under a state statute. Such suit is not in effect a suit against the State. *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, 2 Interst. Com. Rep. 325. The authority conferred upon the commissioners to make and put in effect a schedule of rates for transportation within the State is not an unconstitutional delegation of legislative power. *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, 2 Interst. Com. Rep. 325; *McWhorter v. Pensacola & A. R. Co. (Fla.) post.*

The Eleventh Amendment of the Constitution which restrains the jurisdiction granted by the Constitution over suits against States is of necessity limited to those suits in which a State is a party on the record. *Osborn v. Bank of U. S.*, 22 U. S. 9 Wheat. 857 (6 L. ed. 232); *Davis v. Gray*, 88 U. S. 16 Wall. 203 (21 L. ed. 447). But recent cases establish the rule that the amendment covers not only suits brought against the State by name, but those against the officers, agents and representatives, where the State though not named as defendant is the real party against which relief is asked and the judgment will operate. *Re Ayers*, 123 U. S. 443 (31 L. ed. 216).

The rule which forbids the officers of a State to be sued because in effect it is a suit against the State. *2 L. R. A.*

State applies only where the interest of the State is through some contract of the State, and which, though nominally against state officers, was construed as in fact a suit to compel performance by the State of its contract or to prevent it from carrying into effect measures intended to work a repudiation. *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, 2 Interst. Com. Rep. 325; *McWhorter v. Pensacola & A. R. Co. (Fla.) post.*; *Louisiana v. Jumel*, 107 U. S. 711 (27 L. ed. 448); *Antoni v. Greenbow*, 107 U. S. 769 (27 L. ed. 468); *Hagood v. Southern*, 117 U. S. 52 (23 L. ed. 805); *Weston v. Dane*, 51 Maine, 461; *Marshall v. Clark*, 22 Tex. 23; *Houston Tap. & B. R. Co. v. Randolph*, 24 Tex. 317. A suit brought by a railroad company to enjoin the state railroad commissioners from promulgating a schedule of unreasonable and unjust rates of transportation is not in effect a suit against the State; but the statute having prescribed a penalty for violation of the rates fixed, and authorized the commissioners to institute action in the name of the State to recover the penalty, in so far as the bill seeks to enjoin them from doing this, it is in effect a suit against the State. *McWhorter v. Pensacola & A. R. Co. (Fla.) post.*

A Mississippi Statute creating a commission with supervisory powers over railroad rates was held constitutional, although there was vested in the commission authority to regulate and charge rates. *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607; *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307 (29 L. ed. 636).

(November 5, 1888.)

**A**PPEAL by defendant from a judgment of the Circuit Court, Umatilla County, in favor of the Board of Railroad Commissioners of the State of Oregon, in an action by such board against a railroad company to compel the return of a sum of money alleged to have been unjustly exacted from a third party. *Reversed.*

The questions presented are stated in the opinion.

**Mr. C. B. Bellinger** for appellant.

**Mr. J. H. Slatar** for respondent.

**Thayer, Ch. J.**, delivered the opinion of the court:

The respondent herein instituted a proceeding in said court against the appellant, to require it to refund to one E. J. Summerville the sum of \$11, claimed to be an excess over and above a reasonable compensation exacted by the appellant from said Summerville for transporting for him a car load of wheat from Pendleton to Portland.

The respondent was created by an Act of the Legislative Assembly of the State entitled "An Act to Create and Establish a Board of Railroad Commissioners, and to Define and Regulate its Powers and Duties, and to Fix the Compensation of its Members," approved February 18, 1887. The appellant is a railroad corporation organized under the laws of the State, and maintains a line of railroad between the points mentioned and at other places within the State. The proceeding was taken under the said Act; and the main question presented for the consideration of this court is whether it authorizes such board to maintain a proceeding to obtain relief of the character claimed therein.

I suppose it has become the settled doctrine that the Legislature has authority to establish reasonable regulations for the control in certain particulars of all corporations whose business is of a quasi public character; and that to enable it to exercise such authority prudently and intelligently it may provide for an inspection of the affairs of the corporations which concern the general community. This authority arises out of the principle that such institutions enjoy privileges and franchises created for the benefit of the public and is exercised in order that the public may not fail to receive it. Such regulations must not be arbitrary or capricious. Their aim and object must be to promote the welfare of society; otherwise, they cannot be enforced. The Legislature has the right to judge as to when the public necessity requires the adoption of such measures; but the courts may determine whether a particular regulation is a reasonable exercise of the power.

It is difficult to ascertain from an examination of said Act what power the Legislature conferred upon the said board. Counsel for the appellant claims that no power whatever has been conferred upon it, except to find out as to the freights and fares charged by common carriers, and certain other facts, and report the same to the Legislature.

Section 9 of the Act provides that "Said board may inquire into, ascertain and report to itself the method by which the accounts of corporations operating railroads or street railways are kept."

2 L. R. A.

Section 10 provides that "The board shall make a biennial report to the Legislative Assembly including such statements, facts and explanations as will disclose the actual workings of the system of railroad transportation of freight and passengers, and its bearing on the business prosperity, etc., with such suggestions in relation thereto, etc., as to them may seem appropriate. They shall also at such times as they shall deem advisable examine any particular subject connected with the condition and management of railroads, and report to the Legislative Assembly their doings thereon, and their reasons therefor."

Section 11 provides that "Said Commissioners shall examine into the condition and management of all other matters concerning the business of the railroads of this State, so far as the same affect or relate to the interests of the public and to the accommodation and security of passengers or persons doing business therewith, and whether such railroad companies or corporations, their officers, etc., comply with the laws of this State now in force or which shall thereafter be in force concerning them, and such other matters as they shall deem important; and for such purpose said commissioners shall have the right to examine all the books, etc., of any railroad company or corporation in this State; and they shall have power to examine under oath, etc., any and all directors, etc., of any such railroad corporation, and any other person, concerning any matter relating to the condition and management of the business of such corporation or company."

Section 12 provides that "Any person, etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon, a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matter complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Section 13 provides that "Whenever an investigation shall be made by said commission it shall be its duty to make a report in writing in respect thereto, which shall include the finding of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such finding so made shall thereafter in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found. All

reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

Section 14 provides that "If in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, etc., that anything has been done or omitted to be done in violation of the provisions of this Act or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation or to make reparation for the injuries so found to have been done, or both, within a reasonable time to be specified by the commission; and if within the time specified it shall be made to appear to the commission that such common carrier has ceased from such violation of law and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission; and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

Section 15 provides that "Whenever any common carrier, as defined in and subject to the provisions of this Act, shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this Act named, it shall be the duty of the commission, and lawful for any company or person interested in such order or requirement, to enter complaint in the circuit court of the State, sitting in equity, in the judicial district in which the violation or disobedience of such order or requirement shall arise, alleging such injury; and the said court shall have power to hear and determine the matter at any time after service of the complaint, in the usual way, on such short notice to the common carrier complained of as the court shall deem reasonable; and said court shall proceed to hear and determine the matter speedily, in such manner as to do justice in the premises, and on such hearing the report of said commission shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to such court on such hearing that the lawful order or requirement of said commission, exercised in pursuance of the provisions of this Act, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be enforced by proper process issued out of said court."

Section 17 of said Act provides to the effect that whenever the commissioners deem that re-

pairs are necessary upon any railroad, or an addition to or change of its stations or station houses, or change in its rates of fares for transporting freight or passengers, or in the mode of operating its road and conducting its business, they shall in writing inform the corporation of the improvements or changes which they consider proper; and a report of the proceedings of compliance or of a refusal to comply with such suggestions shall be included in their biennial report to the Legislative Assembly.

Section 18 of the Act requires the board to investigate the cause of any accident on any railroad resulting in loss of life, and invests it with discretionary power to investigate any accident on such road.

Section 19 requires every railroad company or corporation on request to furnish said board any information required by it concerning the condition, management and operation of the road or business of such company or corporation.

Section 20 of said Act provides that the board may prescribe the form of the annual statement required to be transmitted to the secretary of state by every company or corporation owning or operating a railroad in this State provided for by Act of the Legislative Assembly of the State of Oregon approved February 26, 1885, and empowers the board to make changes and additions to such form, and requires it to examine such statements when filed, and if the same be defective or appear erroneous to notify the corporation to correct it.

Section 22 of said Act provides that in case any railroad company or corporation refuses to submit its books, etc., to the examination of the board, or to furnish information provided for in that Act, or fails, neglects or refuses to do or perform any of the requirements of the Act, it shall forfeit and pay to the State of Oregon for every such offense a sum of not less than \$100, nor more than \$500, to be recovered in an action in the name of the State of Oregon against such company or corporation.

And section 23 of the Act empowers the board to enter the cars, depots, stations and other places of business of such corporations for the purpose of inspecting the same, and to observe the manner and methods in which the business of such corporation is done.

These sections of the Act contain, so far as I am able to discover, all the provisions bearing upon the question submitted; and it must be ascertained from them whether the proceeding can be maintained or not. The main object of the Act was to ascertain the condition of railroad affairs in the State, and the manner in which they are being conducted. Sections 9, 10 and 11 thereof clearly indicate that such was its purpose. Said sections endow the board of commissioners created by the Act with ample power to investigate the subject. This was obviously done in order to enable the Legislature to judge as to whether the railroad management was such as was calculated to conserve the best interests of the public; whether the public were being dealt fairly with by those in charge of such management, and whether changes could not be made which would be beneficial to the community. The State has an interest in such matters, and it is

highly proper that the Legislature should inquire into them; and should it ascertain that the railroad companies were pursuing a selfish, mercenary course, and disregarding the rights of their patrons, it could provide suitable regulations to remedy the mischief.

Whether a railroad company is employing suitable means and appliances for the transportation of freight and passengers over the line of its road with reasonable safety and dispatch, and as cheaply as it can afford to do and obtain a fair profit, in view of the amount of its investment, is always a pertinent subject of inquiry for the Legislature; and the object of the Act, it seems to me from the general spirit and tenor of it, in creating the board of commissioners and clothing it with the functions it possesses, was for the purpose of making such inquiry. I cannot conclude that the Legislature undertook to correct the abuses of railroad companies before it could know with any certainty whether they had been committed. It would not be likely to appoint a commission for execution to precede one of inquiry; nor that it would delegate its discretion in so important a matter to an inferior board to be exercised. The railroad enterprises in this State are as yet in their infancy. The people are greatly interested in having them extended into every district where marketable articles are produced, and it would be very unwise, as well as unjust, to pursue a rash and narrow policy towards them.

It is not contended on the part of the respondent that said Act invested the board of commissioners with authority to fix the rate to be charged for the transportation of freight or passengers; nor, as I view it, were they empowered to determine what charges were reasonable or unreasonable. They were required to make a biennial report to the Legislative Assembly, with such suggestions "as to what change in the classifications of freight or what change in the rate of freight or fares are advisable for the public welfare." Act, § 10, also § 17. This is the only provision in the Act I have been able to find which imposes any duty upon the board in regard to rates and fares.

Section 12 of the Act requires the board to investigate complaints made by certain persons against common carriers, subject to the provisions of the Act, on account of anything done or omitted to be done by any such common carrier in contravention of its provisions. Section 13 makes it the duty of the board to make a report of an investigation made by it, including findings of fact upon which its conclusions are based. Section 14 makes it the duty of the board, in any case in which an investigation is made, and it appears to the satisfaction of the board that anything has been done or omitted to be done in violation of the provisions of the Act or of any law of which the board has cognizance, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation, to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, etc. And section 15 makes it the duty of the board, whenever any such common carrier shall violate or refuse or neglect to obey any lawful order or requirement of the board,

to enter complaint as therein provided. Neither of these sections, however, specifies the particular subjects to be investigated, nor what acts done or omitted to be done by such common carrier would be a violation of the Act or of the law of which the board has cognizance, or what would be a lawful order or requirement of the board; nor does any section of it indicate of what law the board has cognizance.

The result is that the Act is hopelessly ambiguous as to the jurisdiction of the board beyond the authority before referred to. It has power in conducting its investigations to compel railroad companies to furnish it information as provided in section 19 of the Act, and also to compel them to adopt such form of annual statement, required by the Act of February 26, 1885, to be transmitted to the Secretary of State, as it may prescribe by virtue of section 20 of the Act; but an attempt on the part of the board to adjust claims between railroad companies and persons, firms, corporations or associations, etc., and to enforce obedience to its orders made in respect thereto in the manner specified in section 15 of the Act, would be groping in the dark.

The first question arising would be, Of what contentions between the railroad company and such persons, firms, etc., has it jurisdiction? The answer to that question cannot be left to speculation. The jurisdiction of such commissions is not given by implication. Commissions of that character are mere creatures of the statute, and possess no power except what the statute expressly confers upon them. Again, if the board had jurisdiction to investigate complaints for overcharges on freight, its order to refund the excess could not be enforced in the manner provided in section 15 of the Act. The recovery of money unjustly exacted in such cases is a common-law remedy; and the party against whom the claim is made, whether a natural person or a corporation, has the right to a trial by jury before its repayment can be enforced. A summary remedy, of the character of the one provided for, cannot be used to enforce a claim for damages arising *ex contractu* or *ex delicto*, though it might be employed to compel the performance of a specific duty necessary to the administration of public affairs.

The several sections of the Act taken together present an incongruity, and leave an impression that it was made up by a sort of patchwork. Sections 9, 10, 11 and 17 clearly indicate that the object of the investigation of the affairs of railroad corporations is for the purpose of ascertaining facts to be included in the biennial report which the board is required to make to the Legislative Assembly; while it might be inferred from sections 12, 13 and 14 that its object was to constitute the board a kind of tribunal of conciliation to adjust the claims of persons against the railroad companies and to establish *prima facie* evidence of their validity; and section 15 makes a very lame attempt to compel satisfaction of them. What kind of claims it was intended the board should adjust and require to be satisfied does not appear. If its jurisdiction, however, in that particular is coextensive with its authority to investigate such affairs, it must necessarily extend to claims arising out of torts as well as contracts; as it is required by section 18 of the Act to investigate



the causes of any accident on any railroad resulting in the loss of life, and of any accident not so resulting, which it may deem to require investigation.

Under this view the board would be the most important tribunal in the State. It could adopt its own code of procedure, formulate its own rules of evidence, be unembarrassed by the presence of a jury, and adjudicate in accordance with its own caprices; and if its orders or requirements were violated or refused or disobeyed it could enter complaint in the circuit court, "sitting in equity," and have a "mandatory process" issued to enforce them. It cannot be presumed that any Legislature would confer so important a prerogative upon a board of commissioners; still, we must conclude that it was done in the present case if we sustain the view that the authority of the board to adjust matters between persons and railroad companies is coextensive with its authority to investigate them. The counsel for the respondent does not claim that the board has jurisdiction to the extent suggested; but I fail to discover any point short of it to stop, if it is conceded that the jurisdiction includes the matters involved in the present case. It will not be contended that the Act gives the board jurisdiction in express terms to determine when freight charges are unreasonable; and if the question is left to inference there is no limit to the extent of its jurisdiction except the limitation of its authority to investigate, and that

seems to extend to all the affairs between the railroad corporations and individuals or associations, and to involve every breach of duty of the former and the consequences attending it.

It has for a very long time been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the Legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. There is too strong a desire in the human heart to exercise authority, and too much of a disposition upon the part of those intrusted with it to extend it beyond the design for which and the scope within which it was intended it should be exercised, to leave the question of its extent to inference. Should it be so left serious disturbances might arise, involving a conflict of jurisdiction, which would be highly detrimental to the community. It is not, it seems to me, requiring too much of the legislative branch of the government to exact that when it creates a commission and clothes it with important functions, it shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent.

Under the view we have indicated in the foregoing opinion it follows that *the judgment appealed from must be reversed, and the complaint dismissed; and it is so ordered.*

## OHIO SUPREME COURT.

PITTSBURG, CINCINNATI & ST.  
LOUIS R. CO., *Pf. in Err.*,

v.

BOSWORTH.

(...Ohio St....)

### "1. A written agreement by the grantor of the right of way to a railroad com-

\*Head notes by the COURT.

NOTE.—*Grant to corporation; covenants in.* A grant to a corporation for a special purpose, which ends with the existence of the corporation, should be construed as a grant for the life of the corporation, and the same rule ought undoubtedly to be applied to a grant of new franchises or rights by the State. *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 68, 68 (24 L. ed. 661, 662); *Morawetz, Priv. Corp.* § 330. A covenant of a railroad company in consideration of the grant of a right of way to erect a "flag station," and to permit cultivation of land embraced in the grant, and not used by the railroad, and if a depot was built, not to permit the sale of ardent spirits on the premises, runs with the land and is binding on an assignee with notice. *Gilmer v. Mobile & M. R. Co.* 79 Ala. 560. According to the doctrine of equity, effect must be given to the intention of the parties so as to fix a particular restriction on the use of the land, not merely on the original contracting party, but on his successors in title. In order for a covenant to run with the land the words *heirs, assigns*, or others of like meaning, need not be used, although they will aid the conclusion that the covenant runs with the land. *Hart v. Lyon*, 90 N. Y. 663; *Pollock, Cont. Bl. ed.* 239.

*Covenants in deed running with the land.* Where performance or nonperformance of a covenant affected the mode of enjoyment of the granted premises, and their value or quality, so as to render the title acquired by the vendee a subordinate

pany, to fence it on each side through his lands, will not affect the right of a subsequent purchaser to require the company to fence its road, under the provisions of sections 3324 and 3325, Revised Statutes, where the purchase was made without actual or constructive notice of the existence of such agreement.

### 2. Such agreement not being recorded, the mere use and occupation of the right of way

one; this is one of the tests by which to decide whether the covenant is inherent in the land itself. In other words, if the covenant of the vendee qualified the estate which he took, and attached itself to that estate, it is a covenant running with the land. *Watertown v. Cowen*, 4 Paige, 510; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569, 58 Am. Rep. 624. See *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Morse v. Aldrich*, 19 Pick. 449; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Woolscroft v. Norton*, 15 Wis. 193; *Norman v. Wells*, 17 Wend. 139; *Van Rensselaer v. Read*, 28 N. Y. 558; *Fulton v. Stuart*, 3 Ohio, 215, 15 Am. Dec. 542, note; *Robbins v. Webb*, 68 Ala. 393; *Webb v. Robbins*, 77 Ala. 176; *Dorsey v. St. Louis, A. & T. H. R. Co.* 58 Ill. 65; *Lydick v. Baltimore & O. R. Co.* 17 W. Va. 427. The covenant to share in the repairs is a covenant running with the land, and by the transfer of the grantor's title to the defendants it became binding upon them. *Watertown v. Cowen*, 4 Paige, 510; *Denman v. Prince*, 40 Barb. 213. See *Demarest v. Willard*, 8 Cow. 206; *Norman v. Wells*, 17 Wend. 148; *Allen v. Culver*, 3 Denio, 235. A personal agreement does not run with the land so as to bind the grantees for failure to perform the same. *Newbury Petroleum Co. v. Weare*, 7 West. Rep. 783, 44 Ohio St. 604; *Mason v. Rogers*, 1 Cent. Rep. 94, 108 Pa. 319. While a parol agreement to maintain fences does not run with the land, but affects the parties to the agreement only, yet a written agreement showing an intention to charge the land runs with it, and is enforceable against subsequent grantees. *Kentucky Cent. R. Co. v. Kenney*, 52 Ky. 154, 19 Cent. L. J. 93. In

by the company and its successors for the purpose of a railroad will not constitute constructive notice of the existence of such agreement.

(November 13, 1888.)

**ERROR** to the Circuit Court of Clinton County, to review a judgment (rendered on error to the Common Pleas) in favor of the plaintiff below. *Affirmed.*

**Statement by Minshall, J.**

In the original action the plaintiff sought to recover of the defendant \$570 as the reasonable cost of building a fence on each side of its right of way through his lands, under the provisions of sections 8324 and 8325 of the Revised Statutes, imposing the duty on railroad companies of fencing their roads, and giving the abutting owner the right to build the fences, and to recover the reasonable costs of the company, when it fails to do so.

The defendant answered, relying on an agreement by which one A. W. Miller, who in 1852 granted the right of way to its predecessor, bound himself to keep up and maintain the fences on the line through his lands, and from whom the plaintiff by intermediate conveyances derives his title. A demurrer to this having been overruled, the plaintiff replied, denying the existence of the agreement, or any knowledge of it at the time he purchased. The case was submitted to the court on an agreed statement of the facts, which is as follows:

"The parties to this action agree that the following statement contains and shall constitute the facts therein: 1. That the facts stated in the petition are true. 2. That the plaintiff derived his title to the lands described in the petition through, by and under Andrew Miller. 3. That on the 17th day of June, A. D. 1852, the said Andrew Miller was the owner of said lands, and on that day executed and delivered to the Cincinnati, Wilmington & Zanesville

Railroad Company a certain paper writing, in the words and figures as set forth in a copy thereof hereto attached, marked 'Exhibit A,' and made a part of this agreed state of facts, and under and by virtue of which said company entered upon said lands, and built its road through the same. 4. That the railroad stock specified in said paper writing was delivered to said Andrew Miller, and said crossing and cattle guards built, as in said paper writing required. 6. That said paper writing was, on the 31st day of January, A. D. 1884, recorded in the office of the Recorder of Clinton County, Ohio, and after the commencement of this action, and at no other time. 6. That the plaintiff had no actual notice of the existence or contents of said paper writing; his only notice being the use and occupation of the roadway through said lands by the defendants and the several companies through and under which it claims, as stated in its answer. 7. That the defendant occupies and possesses said railroad by virtue of a lease thereof from the Cincinnati & Muskingum Valley Railway Company for the term of ninety-nine years, not yet expired. That said Cincinnati & Muskingum Valley Railway acquired the title to said railroad and all interests and property connected therewith, including rights of way by means of certain mortgages and judicial sales thereof, thereunder, and at and from the said Cincinnati, Wilmington & Zanesville Railway Company, as fully as such proceedings could transfer them, and the said Cincinnati, Wilmington & Zanesville Railway Company has long since ceased to exist as a corporation. The above agreed statement of facts is submitted to the court as containing all of the facts on the case to be entered of record as such, and upon which the court is asked to pronounce the law alone."

*Exhibit A.*

*State of Ohio, Clinton County.* In consideration of one dollar, to me paid by the Cincinnati

classes of covenants where there must be privity of estate, it only means that the covenant must impose such a burden on the land of the covenantor, as to be in substance, or to carry with it, a grant of an easement or quasi easement, or must be in aid of such a grant as a quasi easement to have fences maintained. *Bronson v. Coffin*, 108 Mass. 175, 118 Mass. 156. Repairs are dealt with on the same footing, and were likened to estovers and other rights of common. See *Norcross v. James*, 1 New Eng. Rep. 329, 140 Mass. 188. A vendee of land charged with notice, actual or constructive, of easements covenanted by his vendor, will be bound thereby whether such covenant runs with the land or not. *Willoughby v. Lawrence*, 3 West. Rep. 472, 116 Ill. 11.

*Personal covenants binding on purchaser.* A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. *Watertown v. Cowen*, 4 Paige, 510; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Brouwer v. Jones*, 23 Barb. 153; *Tallmadge v. East River Bank*, 20 N. Y. 106; *Gilbert v. Peteler*, 38 N. Y. 165; 2 Pom. Eq. Jur. 139. It is binding because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform. *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 408, 14 Abb. Pr. N. S. 266. An acceptance of a deed without signing it may constitute a covenant on the part of the grantee that he will fence and keep fenced the demised premises. No notice of such covenant was required to charge the subsequent purchaser of the land, bound by the burden of the covenant; the covenant in the original deed was sufficient. *Countryman v. Deck*, 13 Abb. N. C. 113. The benefit of the covenant in the original conveyance runs to the assignee; it does not depend on the existence of tenure. *Tyler v. Heidorn*, 46 Barb. 452.

§ L. R. A.

*Enforcement of restrictive covenants in grant.* A covenant that a strip of land should not be subject to fences, and should be used as a way, was enforced by the subsequent grantee of other land benefited thereby. *Peck v. Conway*, 119 Mass. 546; 3 Pom. Eq. Jur. 814. Where the stipulations of the covenant and the breach thereof are of such a nature that there is no basis upon which to estimate damages, the covenant may be enforced in equity; and this applies to affirmative as well as to restrictive covenants, and as rendering the owner liable to the affirmative duty of specifically performing the covenant, as well as to the negative remedy of restraint from violating it. *Haywood v. Brunswick Permanent Ben. Bldg. Society*, L. R. 8 Q. B. Div. 403; *London & S. W. R. Co. v. Gomm*, L. R. 20 Ch. Div. 562. Such covenant, being and continuing for the benefit of future purchasers, may be enforced against an earlier purchaser by a later purchaser. *Lattimer v. Livermore*, 72 N. Y. 174. The test of jurisdiction in equity is the inadequacy of the legal remedy of damages. There is sufficient to justify the interference of the courts, if there has been a breach of a restrictive covenant creating an equitable easement. *Leech v. Schweder*, L. R. 9 Ch. 483; *Tipping v. Eekersley*, 2 Kay & J. 264; *Dickenson v. Grand Junction Canal Co.* 15 Beav. 200; *Western v. MacDermot*, L. R. 1 Eq. 499, 2 Ch. 72; *Evans v. Davis*, L. R. 10 Ch. Div. 747; *Kemp v. Sober*, 1 Sim. N. S. 517.

*Discretion of court.* The court may at its discretion refuse to enforce restrictive covenants when by lapse of time or change of circumstances they have become obsolete, vexatious or useless. *Bedford v. British Museum*, 2 Myl. & K. 562; *Renals v. Cowlishaw*, L. R. 11 Ch. Div. 898; *Sayers v. Collyer*, L. R. 24 Ch. Div. 180; *Sayers v. Collyer*, L.

nati, Wilmington & Zanesville Railroad Company, I do hereby grant and release to said company the right to enter upon any lands I own, which lie on the line of said company's road, surveyed and adopted by them (or intended to be surveyed or adopted by them), and the right to run in curves and amend the line on the final construction of such railroad over said land, and to hold and use a strip thereof, to be selected by the engineers, not exceeding 100 feet in width, for the purpose of a railroad, so long as may be necessary, and to use the material standing or lying on said strip for the construction and repair of said road. I also agree to build and sustain all fences on each side of said roadway, and to pay all taxes on said land during the occupancy by said company of the same. And also the right of crossing other parts of my land to get at said railroad in construction and repair of said road. I will require said company to construct a farm crossing at the nearest surface grade, or within two feet thereof, where I select; also a cattle guard on either side. And I hereby demand for said privilege \$450, to be paid in stock of said company.

Witness my hand and seal the seventeenth day of June, A. D. 1852.

A. W. Miller. [Seal.]

In presence of Lawrence Fitzhugh.

Received January 31, 1884. Recorded February 1, 1884. E. B. Howland, Recorder.

The common pleas rendered judgment for the defendant below. This was reversed on a proceeding in error by the circuit court, and judgment rendered for the plaintiff for the amount of his claim, and this proceeding is now prosecuted to reverse the circuit court, and affirm the common pleas.

Mr. John S. Brasee for plaintiff in error.

Mr. J. B. Foraker for defendant in error.

Minshall, J., delivered the opinion of the court:

R. 28 Ch. Div. 103. The equitable jurisdiction to enforce such covenants is subject to one most important limitation. If the restrictive covenants in deeds of lots were made with evident reference to the continuance of the existing general condition of the property and its surroundings, but in the lapse of time there has been a complete change in the character of the neighborhood, so as to defeat the purposes of the covenants and to render their enforcement an inequitable and unjust burden on the owner of the lots, then the equitable relief will not be granted, and the plaintiff will be left to his remedy at law. *Columbia College v. Thacher*, 87 N. Y. 311. Equity will no more enforce every restriction that can be devised than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must "touch and concern" or "extend to the support of the thing" conveyed. *Spencer's Case*, 5 Coke, 16 a; *Dean & Chapter of Windsor's Case*, 1d. 24 b. They must be "for the benefit of the estate." *Cockson v. Cook*, Cro. Jac. 123. New or unusual incidents cannot be attached to land either by way of benefit or burden. *Keppell v. Bailey*, 2 Myl. & K. 517; *Ackroyd v. Smith*, 10 C. B. 164; *Hill v. Tupper*, 2 Eurl. & C. 121, cited in *Norcross v. James*, 1 New Eng. Rep. 323, 140 Mass. 183.

*Possession as notice to purchaser.* Mere possession is not conclusive upon the purchaser. The effect is to put him upon inquiry; and if it can be shown that, prior to purchase from the holder of the record title, he followed up the inquiry in good faith, the presumption arising from possession by another will be overcome. *Fair v. Stevenot*, 29 Cal. 486;

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A number of questions presented in argument, as arising upon the record, need not, from the view we take of the case, be disposed of here.

1. Thus it is claimed that the rights conferred by the agreement between the original parties did not pass to the present owner of the railroad, because "successors" are not named, and that therefore the right of way itself, as well as the agreement as to fencing, was limited to the original company, and that the present owners can take nothing under that agreement. But, speaking for myself, I think this is not so. Being a grant to a corporation aggregate, it might last forever, and so the word *successors* was not necessary to create a perpetuity of right, or a fee simple. Words of perpetuity are only necessary to create such right when the grant is to a corporation sole. 2 Bl. Com. 109; *Ang. & A. Corp.* § 172; *Overseers of the Poor v. Sears*, 23 Pick. 122, Shaw, Ch. J., 126; 1 *Morawetz, Priv. Corp.* § 330.

2. Again, it is contended that the obligation to build the fence was a personal one, binding upon the grantor only, and that it was not susceptible of being imposed upon the land, so as to run with it, as against subsequent purchasers. But, speaking for myself, I am inclined to think, after a pretty full examination of the authorities, that there is nothing in the nature of the burden that would prevent its being made to run with the land of the grantor, as against subsequent owners, in favor of the right of way granted. That it would not have been so at common law may be conceded. It, with characteristic rigidity, proceeded upon a few inelastic principles. It did not admit of any new or unusual burdens being imposed upon land, and required, in all instances, that a privity of estate should subsist between the parties—the owner of the land on which the burden was placed, and the owner of the land enjoying the benefit.

But equity recognized and applied a differ-

*Thompson v. Ploche*, 44 Cal. 508; *Wade, Notice*, § 274. And if the inquiry be made, it will be presumed, in the absence of evidence to the contrary, that it resulted in knowledge of any title or interest in the premises, pursuant to which the occupant held. *Butler v. Stevens*, 36 Maine, 464; *McLaughlin v. Shepherd*, 32 Maine, 143; *Hackwith v. Lamron*, 1 T. B. Mon. 236; *Johnson v. Clark*, 18 Kan. 157; *Watkins v. Edwards*, 23 Tex. 448; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 163; *Rogers v. Hussey*, 86 Iowa, 664; *Smith v. Gibson*, 15 Minn. 59; *Tunison v. Chamblin*, 88 Ill. 878; *Wade, Notice*, § 277. So, the sight or knowledge of visible material objects, upon or connected with the subject matter, which may reasonably suggest the existence of some easement or other similar right, will overcome the presumption. *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 468; *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Randall v. Silverthorn*, 4 Pa. 173; *Hervey v. Smith*, 23 Beav. 206; *Paul v. Connersville & N. J. R. Co.* 61 Ind. 527.

A well recognized exception to the doctrine of notice by possession is where possession is relied upon as notice or evidence of notice of a parcel reservation of an easement, upon a conveyance of the legal title to the premises, when such easement is essential to the enjoyment of adjacent premises, the title to which remains in the grantor and possessor of such easement. *Wade, Notice*, § 300. A pure negative restriction on the use of land is in form within the equitable doctrine of notice. *Whitney v. Union R. Co.* 11 Gray, 350; *Parker v. Nightingale*, 6 Allen, 841. It is of that class of covenants which run with the land, as distinguished from covenants running with the estate. *Norcross v. James*, 1 New Eng. Rep. 327, 140 Mass. 183.

ent principle to such covenants. It took into consideration the convenience of the parties, and their intention in the matter, rather than the technical rules of the common law; and generally gave effect to the intention, when the covenant concerned the land, and would promote the convenience of the parties in the use and enjoyment of it. Such covenants were not regarded as collateral, and were made to attend the land, and affect its ownership, as against purchasers with notice. *Whitney v. Union R. Co.* 11 Gray, 359, 364; *Columbia College v. Lynch*, 70 N. Y. 440, 449; *Spencer's Case*, 1 Smith, Lead. Cas. 6th Am. ed. 167; Pom. Eq. Jur. §§ 689, 1295, 1843; Holmes, Com. Law, 392 *et seq.*

There are, however, cases and authorities which limit the doctrine to what are called "restrictive" covenants, and stop short of affirmative ones, like that in this case. Pol. Cont. 227, 228. But they are not general.

Many cases are to be found where affirmative covenants have been held to run with the land, on the ownership of which the burden of performing them is imposed. *Blain v. Taylor*, 19 Abb. Pr. 228; *Burbank v. Pillsbury*, 48 N. H. 475; *Bronson v. Coffin*, 108 Mass. 175; *Kellogg v. Robinson*, 6 Vt. 276; *Holmes v. Buckley*, 1 Eq. Cas. Abr. 27; *Allen v. Culver*, 3 Denio, 284-293; Pom. Eq. Jur. § 689, and note 5, § 1295; Holmes, Com. Law, 402.

And in *Huston v. Cincinnati & Z. R. Co.* 21 Ohio St. 236, an agreement of the railroad company to keep up the fences and crossings was held by this court to run with the land, so as to be binding as between the assignees or grantees of both the parties.

And in the prior case of *Easter v. Little Miami R. Co.* 14 Ohio St. 48, the agreement of the owner in his grant of the right of way to the company to keep up the fences was also held to run with the land. Gholson, J., in delivering the opinion, said: "The construction and maintenance of a fence on each side of the strip of land, over which the right of way was to be exercised, manifestly affected the mode of enjoying it, and it may properly be added, beneficially to both parties." In this case "assignments" were mentioned. But this is not material, when it may be inferred from the circumstances that such was the intention.

Thus, in *Masury v. Southworth*, 9 Ohio St. 340, it was held that a covenant by a lessee to insure ran with the land, and might be asserted by the assignee of the reversion against the assignee of the lessee, though not mentioned, where it appeared from the circumstances that such was the intention of the parties to the covenant.

The addition of the agreement to sustain, to the agreement to build the fences, necessarily makes the obligation coextensive with the duration of the grant, and compels the inference that the parties intended to treat it as attending the land of the grantor, so long as the way granted should be used for the purpose of a railroad. "An owner may subject his lands to any servitude, and transmit them to others charged with the same; and one taking the title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities, and 2 L. R. A.

such right or claim, and stands in the place of his grantor, bound to do, or forbear to do, whatever he would have been bound to do or forbear to do." Allen, J., in *Columbia College v. Lynch*, 70 N. Y. 449.

In equity, the precise form of the covenant or agreement is immaterial, if the intention is reasonably clear. Thus it is said: "It is not essential that it should run with the land at law. A personal covenant or agreement will be valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." *Whitney v. Union R. Co.* 11 Gray, 364, Bigelow, J.

But it is not necessary to determine either of the questions. The suit was brought to enforce a claim based upon the obligation of the company, created by statute (§§ 3824, 3825, Rev. Stat.), to fence its track. It, by way of defense, relied upon a certain agreement as bringing it within the provisions of section 3829. The agreement obliges the owner of the land from which its predecessor acquired its right of way to keep up and maintain the fences along the track on each side, and the plaintiff derives his title from the same person. This agreement, whether susceptible of being admitted to record or not, was not recorded until after the suit was brought. And the agreed statement is "that the plaintiff had no actual notice of the existence or contents of said paper writing." Now, conceding that there may be some question as to whether such an agreement may be made to run with the land so as to affect a subsequent purchaser, yet, in every case when it is so held, it is subject to the equitable qualification that the purchaser had notice of the agreement.

In treating the subject, Mr. Pollock says: "All these rights and liabilities, being purely equitable, are, like all other equitable rights and liabilities, subject to the rule that purchase for value without notice is an absolute defense." Pol. Cont. 226; 2 Pom. Eq. Jur. § 689.

And we may further observe that to give them such effect as against a purchaser without notice would not only be inequitable, but contrary to the policy of our recording statutes.

The fact that the defendant was in the possession and occupation of its road over the land at the time the plaintiff purchased, does not amount to constructive notice of the existence of such agreement. Such possession would be notice of the usual incidents of such a right of way, but not of such as are exceptional. The general duty to fence its track is imposed by statute upon a railway company. This was the statute at the time the plaintiff purchased. The right asserted by the defendant is exceptional to its statutory duty, and its possession was not, therefore, constructive notice to the plaintiff of its existence. There must be some visible, material object upon or connected with the land, the sight or knowledge of which would reasonably suggest the existence of the right, to constitute constructive notice. 2 Pom. Eq. Jur. § 600.

No such object is shown to have existed in this case, from which it might reasonably

have been inferred that the owner of the land purchased by the plaintiff was under an obligation to fence as claimed. Nor had there been any such exaction of the right upon the one hand, or performance of the duty upon the other, as would, by its notoriety, amount to notice. Had the instrument been properly executed, acknowledged and recorded, it would have constituted notice; but such was not the case, and the rights of the defendant under it are purely of an equitable nature, and cannot avail against a purchaser without notice.

The provision contained in section 3829, Revised Statutes, to the effect that section 3824 shall not be held to affect "any contract or agreement" between "any railroad" and "the proprietor of lands adjoining" for "the construction and maintenance of fences," is limited by its terms to parties to the agreement; and, while we have no doubt but that such agreements may be made to attend the ownership of the lands adjoining the road, yet this can only be done against such as purchase with notice, actual or constructive.

*Judgment affirmed.*

## MICHIGAN SUPREME COURT.

Fred H. WARREN, *Relator*,  
v.  
BOARD OF REGISTRATION.

(.....Mich.....)

1. The residence, for purposes of registration as an elector in Detroit, of a single man having no family relations in the city, and who lodges in one ward and boards in another, is the ward in which he boards.

2. An inveterate usage for half a century under express sanction of law should be able to continue without further re-enactment, unless the legislative will is expressed to the contrary. There can be no presumption against it from mere silence with no substituted rule on the subject.

(Morse, J., dissents.)

(November 1, 1888.)

**PETITION** for a writ of mandamus to compel the Board of Registration of the Fourth Precinct of the Second Ward of Detroit to register the relator as an elector. *Granted.*

The decision granting the mandamus was rendered October 25, 1888.

The facts are stated in the opinion.

Mr. Fred H. Warren, relator, *pro se.*

Mr. J. W. McGrath, City Counsel, for respondent.

Campbell, J., delivered the opinion of the court:

In this case, which was one of urgency, it was impossible to prepare a written opinion before decision. But the confusion which seemed to exist in the minds of the board of registration makes it desirable to give our reasons, but as briefly as is consistent with the necessity of the occasion.

Relator was not denied or doubted to have chosen the City of Detroit as his actual and only domicile, and, being a citizen of the United States and of Michigan, it was open to him to choose it anywhere in the State or city. Being a citizen and qualified voter of Detroit, the only question to be determined is that of the ward and precinct in which he must be registered. It appears that he is a single man, not having any family relations in Detroit, and having no household of his own over which he presided, or of which, with some other head, he is a member. He has a separate lodging in one ward, and a boarding place in another. We held that in such a case as this, where the voter is a resident, and the only question of residence for purposes of election is whether his lodging room or his boarding place governs, he should be registered where he boards. Had the question been merely one of statutory construction on this one subject, it would need but a few words to explain why we think the construction given is the proper one in this

**NOTE.**—*Domicil as fixing the national character.* In general the national character of a person is to be decided by that of his domicile. *The San José* (Indiana), 2 Gall. 288; *Murray v. The Charming Betsy*, 6 U. S. 2; *Cranch*, 64 (2 L. ed. 338); *Maley v. Shattuck*, 7 U. S. 3; *Cranch*, 438 (2 L. ed. 498); *The Ann Green*, 1 Gall. 274; *Wildes v. Parker*, 3 Summ. 563. A party can have only one domicile. *Abington v. North Bridgewater*, 23 Pick. 170. The place of residence must be taken to be the domicile of choice. *Butler v. Farnsworth*, 4 Wash. C. Ct. 101; *Rogers v. The Amado*, 1 Newb. Adm. 400. It is a fixed residence in any place with an intention of remaining. *Vattel*, bk. 1, chap. 19, § 218. If a party has two residences he may elect which shall be his domicile. *Burnham v. Rangeley*, 1 Wood. & M. 7; *Brent v. Armfield*, 4 Cranch, C. Ct. 579. Residence is the source and foundation of domicile, and length of residence is evidence of intention. *Johnson v. Falconer*, 2 Paine, 602; *Van Ness*, Prize Cas. 1. Domicil is the place where a person lives or has his home—the place to which when absent he has the intention of returning. *Story*, Conf. Laws, 35. The presumption arising from actual residence is conclusive that the party is there *animo manendi*. *Rogers v. The Amado*, 1 Newb. Adm. 400. *Bailey's Case*, *Clarke & H.* 411. Residence, however short, if tak-

en *animo manendi*, establishes domicile. *Johnson v. Falconer*, 2 Paine, 602; *Van Ness*, Prize Cas. 1; *Case v. Clarke*, 5 Mason, 70; *Re Walker (Ex parte Wiggin)* 1 Nat. Bankr. Reg. [90] 386. A change of domicile depends on intent. *Harris v. Firth*, 4 Cranch, C. Ct. 710; *Hayes v. Hayes*, 74 Ill. 312; *Jennison v. Hapgood*, 10 Pick. 77. Domicil of origin is presumed retained until residence elsewhere has been shown. *Ennis v. Smith*, 55 U. S. 14 How. 401 (14 L. ed. 472); *Burnham v. Rangeley*, 1 Wood. & M. 7; *Prentiss v. Barton*, 1 Brock. 335; and it easily reverts. *Catlin v. Gladding*, 4 Mason, 308; *Johnson v. Falconer*, 2 Paine, 601; *The Nerelide*, 1 U. S. 9 Cranch, 389 (3 L. ed. 504); *Prentiss v. Barton*, 1 Brock. 339; *Clarke v. Territory of Washington*, 1 Wash. Terr. 68. See *The Freundschaft*, 16 U. S. 3 Cranch, 14 (4 L. ed. 322); *The Frances*, 12 U. S. 3 Cranch, 335 (3 L. ed. 581). Domicil can only be destroyed by an actual departure, and not then if removal is without intent to remain, unless suited. *Johnson v. Falconer*, 2 Paine, 602; *Van Ness*, Prize Cas. 1; *Beardstown v. Virginia*, 81 Ill. 541; by a *bona fide* change. *Cooper v. Galbraith*, 8 Wash. C. C. 548; *Butler v. Farnsworth*, 4 Wash. C. Ct. 101; *Jones v. League*, 59 U. S. 18 How. 76 (15 L. ed. 283); *Case v. Clarke*, 5 Mason, 70; *Evans v. Davenport*, 4 McLean, 574; *Catlett v. Pacific Ins. Co.* 1 Paine, 594.

State, and especially in Detroit. But the somewhat extraordinary and technical notions which are stated on the argument to have prevailed on the subject make it proper to refer to some of those elementary principles which are often carelessly overlooked.

There can never, in the eye of the law, be more than one domicile of citizenship; and that continues, in the case of a citizen, till he himself renounces it absolutely, and takes up another in its stead. And such a domicile is not lost by absence in the State or out of the State, whether within or without the United States. In the case of *Harbaugh v. Cicott*, 83 Mich. 242, that doctrine was very fully explained, and applied to a registered elector in Detroit whose family had lived for some years in Royal Oak, where he paid them weekly visits. It was held that he could not lose his residence in Detroit, unless he intended to renounce it in fact, no matter how long he or his family might be away.

No light can be thrown on the subject by the technical rules applicable to dwellings. Burglary and arson are crimes against the habitation; and it has always been held that an inhabited house, or part of a house, might be a dwelling, if used as such at the time, or left with a purpose of returning. But no one ever imagined that a dwelling must be regarded as a domicile of citizenship. There is no legal difficulty in one man's owning as many dwellings, and in as many parts of the world, as his choice and means may enable him to buy or occupy. All are his dwellings, and protected as such. But it is not impossible that none of them is his domicile in this sense. This subject of legal domicile, in the strict sense, is referred to in the *Case of Rue High*, 2 Doug. (Mich.) 515, and *Campbell v. White*, 22 Mich. 178.

Our own Constitution is full on this subject, where it lays down expressly, what would perhaps be implied, that certain continuous presences or absences shall have no effect on elective residence. By article 7, § 5, it is provided that no elector "shall be deemed to have gained or lost a residence by reason of his being employed in the service of the United States or of this State, nor while engaged in the navigation of the waters of this State or of the United States, or of the high seas, nor while a student of any seminary of learning, nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison." And by section 7 it is declared: "No soldier, seaman nor marine in the army or navy of the United States shall be deemed a resident of this State in consequence of being stationed in any military or naval place within the same."

These provisions do not prevent such persons from becoming residents, if such is their purpose, and if they are able to choose.

In the case of *People v. Blodgett*, 13 Mich. 127, where it was held that the language of the Constitution, as it then existed, prevented voting outside of the township or ward of residence, it was not suggested or imagined that absence from the ward lost a residence; and, in the amendment allowing soldiers in the field to vote, the vote, when taken, is to be credited to the place of residence. Mere bodily presence or absence can have no effect in determining

residence, when once existing. There is probably not a precinct in any city which has not resident and qualified voters who spend most of their time in pursuits out of the ward or State; and persons who travel for pleasure or business, for long or short periods, do not lose their residence by such absence. Senators and representatives and other persons often occupy residences in Washington, but they are not disfranchised for doing so. As explained in *Harbaugh v. Cicott*, a person cannot lose his residence, unless he voluntarily renounces it for another. It is equally true that temporary abode in a city or ward does not make a person an elector. Unless the person coming in does so with the honest and settled intention of obtaining a new domicile, he gains no rights. There is nothing in the law which makes colonized voters, imported for present purposes, entitled to claim the privilege of voting.

The inquiry before us, as already suggested, is, Which of the two, lodging or boarding, determines the act of residence, when not otherwise determined? It is always to be remembered that a citizen who has elected his domicile is entitled to enjoy it. The only question is as to the particular action which indicates his choice. It cannot be said that, where a man is isolated from all home belongings, there can be any particular preference in nature between one criterion and another. It will probably be found that the same rule does not prevail everywhere; and in the absence of legislation it is therefore a question of usage and local understanding, more than of principle.

In our opinion the long settled law and usage in this State have made this matter, as applied to different wards and precincts of the same city, one of no great difficulty. The question naturally arose as soon as cities were divided into wards. Detroit was for many years the only city so situated. As far back as 1839, and possibly earlier, we find mention of the matter in "An Act Relative to Ward Elections in the City of Detroit, and for other Purposes" (Laws 1839, pp. 31, 32), containing this provision: "The residence of an elector, under this Act, shall be in the ward in which he boards or takes his regular meals." This exact provision continued in force till 1857, when the city received an entirely new and elaborate charter, wherein, by section 2 of chapter 3, it was made the voter's place of residence "where he takes his regular meals." This was amended in 1861 by making the district that "in which his family resides, or in which is his regular boarding house." Laws 1861. This change, introducing family relations, was very probably called for by some narrow construction which someone had given to the law as it stood. The family or household, whether composed only of relatives, or including, as it commonly does in law, all the members of the household, is the natural group of fellow residents. Under the law of Nations, the ambassador's family includes all the persons attached to or employed in the embassy, and shares his immunity. A man who has any species of family ties is usually identified in residence, unless having a contrary intent. But the provision as to persons having no such relationship was continued, in substance as before. Several charter amendments covering

this section were afterwards made, but this was retained.

In 1883 an entirely new charter was adopted, which, as we have had reason to discover, left out a good many things by evident carelessness, but retained this whole provision as to families and others, with no change in meaning. Local Laws 1883, p. 585. In 1885 this section was recast, but these provisions were still kept. Local Acts 1885, p. 286. In 1887 a change was made in the method of securing election inspectors, introducing radical changes, and departing entirely from the old charter methods—making, practically, an entirely new chapter on elections. By the substitution of this new system the old one dropped out; and in this way the chapter, which in its new shape has little or nothing to say about electors' qualifications, left no provision in force defining residence. Local Acts 1887, p. 908.

It is the silence of this new law which led the respondents to raise the question of relator's residence. Had the old clauses been modified by simply dropping out the residence qualifications, and if this had appeared to be its purpose, it might, perhaps, have had some significance, if the part repealed had been a new innovation. But the change actually made was on entirely distinct matters; and it would be a rather strained construction which should assume any such radical purpose from mere silence. Where long and inveterate usage has existed for half a century unchanged, it is of itself, unless repugnant to some principle, of great force as a public custom. But here there was a legal determination begun under the old Constitution, and several times re-enacted under the new, with no legislative restriction or censure. A usage for so long a period, under express sanction of law, should be able to continue without further re-enactment, unless the legislative will is expressed to the contrary. There can be no presumption from mere silence, with no substituted rule on the subject.

It cannot be presumed that any Legislature means to set up different rules of suffrage in different parts of the State, so as to create inequalities among voters. What was the rule in Detroit was presumptively admissible elsewhere, in the absence of a different one. And no such idea has been promulgated by authority. On the other hand, the Legislature has on several occasions applied the same test elsewhere. In 1873 a law was passed providing uniform rules for the government of cities to be incorporated or reincorporated, and not provided with specific charters of their own. Laws 1873, p. 244; How. Stat. chap. 80. By that statute it was provided that "The residence of any elector, not being a householder, shall be deemed to be in the ward in which he boards or takes his regular meals." Section 2420. From that time to this many cities have been incorporated, and made subject to the provisions of this Act. In no instance that has been brought to our attention has any charter adopted a different rule. On the contrary, going no further back than 1881 for comparison, no legislative session has passed without incorporating this provision into several charters. It would not be of much use to hunt up all these charters. A few will suffice to show

that each Legislature has held the same views. We find this provision, in 1881, in Stanton and Bay City (Local Acts 1881, pp. 89, 177); in 1883, in Escanaba, Menominee, St. Ignace, and West Bay City (Local Acts 1883, pp. 47, 160, 840, 240); in 1885, in East Saginaw and Port Huron (Local Acts 1885, pp. 854, 475); and during the same session, and at or about the same time when the Detroit Charter was last amended, the Legislature of 1887 enacted the same rule in Adrian and Sault Ste. Marie (Local Acts 1887, pp. 141, 170). These are examples only. There is no contrary rule. We do not feel justified in departing from what is so clearly indicated as the legislative understanding. Should we attempt doing so, it could only be set up as a rule of our own, for there is certainly no clearly established legal rule to the contrary.

It would also be going beyond our province to try to determine what reasons exist in favor of one rule or another. It has not been found necessary to devise any statutory rule, except where one municipality is subdivided into smaller precincts for one purpose or another. It can make no practical difference, in principle, where officers represent an entire ward, in what precinct of that ward a citizen votes, if he is a resident of the ward and only votes once. A ward is the smallest election precinct required by the Constitution; but convenience requires some subdivision, and the registration system favors residence in a precinct as a test of capacity. Some persons may think a man's whereabouts most easily known, publicly, where he lodges. Others may think daylight knowledge more certain to be publicly held. Either rule would be competent for the Legislature so long as no one is disfranchised; but where there is local voting and local registration it is necessary to have some criterion, and this is the one which prevails here.

There is not much need of discussing the metaphysical or exceptional possibilities of difficulty from unreasoning verbal criticism. They cannot be very numerous, and are chiefly imaginary. It must be remembered that the right of voting is one which cannot be taken away by direct law or impossible conditions. As already said, a man has a right to choose his domicile, and cannot be shut out of it. If sailors, travelers, public officers, or others, who have honestly chosen their domicile, cannot be found to come within the letter of any such provision as this, although there is less difficulty in it than extreme ingenuity might suppose, they cannot be disfranchised; and the rule must be applied, as it was meant to be applied, to cases where it can be. The primary rule of elections must always be to save the voter his rights. On the other hand, no one who is not a *bona fide* resident can eat himself into the quality of a voter. The period of residence required means actual and permanent sole residence, and not a few days' commorancy for the purposes of one election. A temporary resort to a precinct for no other honest purpose of residence is a fraud, and no residence, and gives no rights.

*The mandamus has already been allowed.*

Sherwood, Ch. J., and Champlin and Long, JJ., concurred.



**Morse, J., dissenting:**

The relator in this case is without question a resident of the City of Detroit, and entitled to be registered and to vote in said city. During his entire residence in said city he has taken his meals regularly at the Antisdel House, which is located in the fourth precinct of the second ward. For several months last past he has had his room, where he lodges, sleeps and keeps his trunk, clothing, private library and ornaments, at No. 69 John R. Street, which is located in the fifth precinct of the fifth ward. The relator is unmarried. The respondents, who constitute the election inspectors of the fourth precinct of the second ward, refused to register him as an elector, upon his application.

I cannot agree with the majority of the court that Warren is a voter in the precinct in which he takes his meals. I attach no significance to the fact that the Charters of the City of Detroit have heretofore contained provisions to this effect. The charter at present contains no clause determining what place shall be considered the residence of a voter. I am not authorized to assume that the Legislature left out the former provisions by mistake. We must assume, if we assume anything, that the Legislature did what they intended to do. The general registration law of the State, governing the registration in the townships of this State, has never, since the policy of registration of voters was adopted in this State, particularly specified what the word *residence* meant, as applied to voters. I must take it for granted that the Legislature intended that hereafter the residence of an elector in Detroit must be established as it would be under the general law.

What is a man's residence? It is his home. Where is his home? Is it where he rushes in and hurriedly takes three meals a day; where he spends just time enough to eat? Or is it where he has his room, and keeps his personal goods and chattels; where he spends his evenings and Sundays among his books, and keeps his easy chair and other articles of personal comfort or adornment? If the inspectors had asked the relator where his home was, I think he would have answered, No. 69 John R. Street, instead of the Antisdel House. Warren had something more than a mere lodging, a bed, at No. 69 John R. Street. He had an abode, a dwelling, a habitation, a home, at John R. Street. These words are all synonymous with "residence." If Warren had been a married man, rooming with his wife at this place, although both of them took their regular meals at the Antisdel House, no one would assert that their home or residence was at the hotel. Nor is it any more the home of Warren because he is single. The domicile of Warren was in his room, the same as if, instead of occupying one room, he had owned or rented a house, and lived in it as a single man. This has been the common understanding and ruling under the general laws of the State throughout the State, as far as I have been able to learn of the ruling of election boards upon the question. It seems to me the only proper ruling, and one less liable to result in the perpetration of frauds in registration and in voting than the other. In all the large cities in this country, many single men are living upon what is called the "European plan." They have furnished

rooms, and take their meals at no regular place; eating at some restaurant or hotel, wherever they may happen to be at meal times. Their homes are in their rooms, and not at the eating tables.

The election inspectors were right, and the mandamus ought not to issue.

Mina LORSCHER

SUPREME LODGE, KNIGHTS OF HONOR, *Appt.*

(.... Mich. ....)

1. When a benefit certificate, properly signed and sealed, is sent by the Supreme Lodge of the Knights of Honor to a subordinate lodge—for a person who has applied for membership, been balloted for, elected and had a degree conferred upon him, and has paid his fees and passed a medical examination which has been approved—the contract relations between the applicant and the supreme lodge are complete, although the subordinate lodge has not delivered the certificate to him.
2. An action on a benefit certificate of the Knights of Honor may be maintained without producing it at the trial, when it is in the possession of a subordinate lodge to which it had been sent by the supreme lodge, and which had refused to deliver it on the ground of fraud, which is relied upon as defense to the action.
3. In an action on a benefit certificate, the failure of defendant to deny an explicit averment of the declaration that there was duly prepared a paper in the usual form assuring to plaintiff the sum demanded on the occurrence of death, etc., is an admission of the execution of the certificate for the purpose of the trial, under Rule 79 of the Michigan Circuit Court.

(November 1, 1888.)

**ERROR** to the Circuit Court of Berrien County (O'Hara, J.), to review a judgment in favor of the plaintiff, in an action on an alleged contract of insurance upon the life of plaintiff's deceased husband. *Affirmed.*

On rehearing. (No opinion was promulgated on the original hearing.)

The case is stated in the opinion.

*Messrs. Padgham & Padgham* for defendant, appellant,

*Messrs. Clapp & Bridgman* for plaintiff, appellee.

**Champlin, J.,** delivered the opinion of the court:

Defendant is a corporation organized under the Laws of the State of Missouri. The object of the corporation is stated in section 2 of the certificate of organization, as follows:

"Sec. 2. The objects of the corporation shall be to unite fraternally all acceptable white men of every profession, business and occupation; to give all possible and material aid in its pow-

**NOTE.**—Benefit certificate of relief association. No claim can be made against a mutual aid association unless a certificate has been issued designating the person who is to receive payment. *Bishop v. The Grand Lodge, 48 Hun, 472.* See *Burdon v. Mass. Safety Fund Assn.*, 1 L. R. A. 146; *Davidson v. Old People's Mut. Ben. Society*, 1 L. R. A. 482.

er to its members, and those depending on its members, by holding moral, instructive and scientific lectures, by encouraging each other in business, and by assisting each other to obtain employment; and to promote benevolence and charity by establishing a widows' and orphans' benefit fund, by contributions from members of the order of Knights of Honor, from which, upon satisfactory evidence of the death of a member of the said order, who is a contributor to said fund at the time, and who has complied with its lawful requirements, a sum not exceeding five thousand dollars (\$5,000) shall be paid to member or members of his family, or person or persons dependent on him, as he may direct and designate by name; to provide for creating a fund or funds for the relief of sick and distressed members, and to ameliorate the condition of humanity in every possible manner."

Section 7 of said certificate provides: "The said supreme lodge shall have power to create, hold and disburse the funds named in the objects of the corporation for promoting benevolence, and relieving the sick and distressed, under such constitutions, laws and regulations as it has now adopted, or may deem necessary to adopt; and said fund shall be exempt from execution, and shall under no circumstances be liable to seizure or appropriation by any legal or equitable process, or to any debt or debts of its living or deceased members; and said fund shall be exempt from the laws, rules and regulations governing the insurance bureau of this State."

The corporation adopted constitutions, laws and regulations for creating, holding and disbursing the funds referred to, forming a complete system which constitutes the laws and rules by which all the rights, interests, duties and obligations of the members are defined, regulated, controlled and enforced, and the rights and obligations of the corporation are prescribed. These constitutions, laws and regulations prescribe and point out the method of becoming members of the supreme and subordinate lodges, and when and in what manner the beneficiary named by a member of a subordinate lodge becomes entitled to share in the fund provided for the benefit of widows and orphans. A candidate, possessing the requisite qualifications, must sign a written application in a prescribed form, in which he must designate the beneficiary. A committee of three is then appointed to investigate his character, and, if found favorable, one of the committee accompanies the candidate to the lodge medical examiner, who makes an examination, and the applicant is required to answer in writing certain questions, and the medical examiner is required to make a certificate; and his examination and certificate, if he approve the candidate, is forwarded to the state medical examiner, who makes a report thereon, and, if favorable, then upon payment of the fees prescribed by the lodge, and the amount required to be paid into the fund for the benefit of the widows and orphans, he is initiated into the lodge, and receives the degree of "Manhood." The assessments which he must thereafter pay depend upon his age when initiated. If between eighteen and forty-five, it is one dollar for each assessment, and every member must pay at

least two assessments each month, unless otherwise ordered by the supreme reporter—which assessments are to be made on or before the end of each month. After the member is initiated, the initial assessment must be forwarded by the lodge with the first assessments called to the supreme lodge subsequent to the date of his obtaining the degree. Such assessments are required to be forwarded to the supreme treasurer between the first and tenth day of each month.

Every lodge is required to forward to the supreme reporter all applications for beneficiary membership immediately after the applicant receives the degree, and with each application \$1 to pay for a benefit certificate, and for making record of membership. Each applicant must enter upon his application the name or names of, and relationship or dependence of, the members of his family, or those dependent upon him, to whom he desires his benefit paid; and the same is required to be entered in the benefit certificate according to said direction, and no will is permitted to control the appointment or distribution of, or rights of, any person, to any benefit payable by the order.

On receipt of the application and fee, the supreme reporter enters the name, age, occupation, date of taking the degree, amount of one assessment, and such other facts as may be deemed necessary, upon a register, the roll of each lodge by itself, and indexed. He numbers and files the application in his office, and returns to the reporter of the subordinate lodge a benefit certificate, signed by the supreme dictator and himself, under the seal of the supreme lodge, and made payable as the member shall have directed in his application; and the subordinate lodge is required to enter upon record the number thereof. It is this benefit certificate which completes the contract relations between the corporation and the members of the subordinate lodges.

These benefit certificates contain the only engagement and promise to pay which the member receives from the corporation; and it is designated in the constitutions, laws and regulations as the document which creates the liability of the corporation to pay the beneficiary therein named according to its terms. The only purpose for which the name of the beneficiary is inserted in the application is to apprise the supreme reporter to whom the benefit is to be paid, that he may insert the name in the benefit certificate. After it is inserted in the certificate, that becomes the guide and controlling document in all future transactions with the member and with the beneficiary. The beneficiary has no present interest, during the life of the member, either in the certificate or fund from which payment is to be made.

The member may at his pleasure, upon complying with the regulations of the supreme lodge, change the beneficiary named in his benefit certificate; and hence the beneficiary named in the application may not be the beneficiary to whom the corporation is obliged to pay.

If the benefit certificate be lost or destroyed or beyond the control of the member, he may in writing surrender all claim thereto, and direct a new certificate to be issued to him, payable to the same or other beneficiary, in accord-

ance with the laws of the order. The issuing of such new benefit certificate shall cancel and render void all previous certificates issued to such member.

A full rate member may change to a half rate member; but he must first surrender his benefit certificate, and receive a new half rate benefit certificate. He may withdraw entirely from the order, and receive a "final card" by paying in full all assessments and dues, and surrendering his benefit certificate.

By article 7, §§ 14, 15, the subordinate lodges, reporters, financial reporters and treasurers of subordinate lodges, in making remittances for the widows' and orphans' fund, in giving notice of assessments, and in collecting and forwarding assessments to the supreme treasurer, are declared to be the agents for the members of their lodges, and shall not be the agents of the supreme lodge. Failure to pay assessments by a member operates as a suspension, and terminates his right, and that of his beneficiary, to any payment from or participation in the widows' and orphans' fund. Likewise any failure or neglect of the subordinate lodge to forward all assessments due from its members to the supreme treasurer before the tenth day of each month operates *ipso facto* to suspend from the lodge, and every member of such lodge, after the lapse of thirty days from the recording of such suspension, is precluded from the benefits of said fund. Provision is made for reinstatement within thirty days; but unless it is done in that time no member dying after that time is entitled to any payment from the corporation, unless he held a withdrawal or traveling card, unexpired.

The beneficiary's right to receive anything from the fund provided for widows and orphans arises only on the death of a member, and complying with certain requirements of the constitutions, laws and regulations. These requirements are that the member at the time of his death shall have been in good standing in his lodge, and shall have paid all the assessments to the widows' and orphans' fund.

Article 7, § 5, provides: "On the death of a member who has attained the degree of the subordinate lodge, the reporter of his lodge shall immediately forward to the supreme reporter a notice of such death. Such notice must state the number of his benefit certificate, his name and age, the date he was admitted to the degree, the date of his death, the amount he has paid into the widows' and orphans' benefit fund, and that he was in good standing, and entitled to the half or the whole of the benefit this order pays, and should state therein to whom he has directed his benefit to be paid."

Section 12 of article 8 provides: "Duplicate death notices shall be sent to the state medical examiner by lodge reporters; and it shall be the duty of the state medical examiner to investigate all doubtful cases, and, when the true cause of death is ascertained, forward the notice to the supreme reporter. No order shall be drawn on the W. O. B. fund until the notice of death has been passed upon by the state medical examiner of the grand jurisdiction where such death occurred, whose duty it is hereby made to report thereon without delay."

Section 4, article 8, provides that the supreme

reporter "shall, when properly notified by a subordinate lodge reporter of the death of a member entitled to the benefits of the order, within sixty days after the receipt by him of satisfactory proof of the death of a member, draw and attest an order on the supreme treasurer for the amount due on said death, payable to the person or persons designated as the beneficiaries in the benefit certificate, and forward the same to the reporter of the subordinate lodge to which such deceased member belonged."

Section 5 of article 8 provides: "The supreme treasurer shall receive from subordinate lodges all money for the widows' and orphans' benefit fund . . . and shall pay all orders drawn on him in accordance with the laws of the order. He shall keep a separate account of the widows' and orphans' benefit fund, and should pay out of it no money whatever, except on orders drawn on him for the payment of death benefits."

On the 21st day of January, 1887, John Lorsch, then a resident of Millburg, Mich., applied to Bell Lodge, No. 2143, Knights of Honor, to become a full rate member of the lodge. He was thirty-seven years of age, and in his written application agreed, in consideration of his being received into the order of the Knights of Honor, and admitted to a participation in the widows' and orphans' benefit fund, that he would faithfully obey all the constitutions and laws of the order, in all the departments thereof, and that a compliance on his part with the laws, rules and regulations then in force or thereafter enacted by the order was the express condition which he and his beneficiaries should be entitled to participate in said benefit fund to the extent and amount provided in the constitution and laws of the order, and that the benefit certificate to be issued to him should have no binding force whatever unless he contributed and continued to contribute his share and portion to the widows' and orphans' benefit fund when due and ordered in accordance with the rules and regulations of the order. He directed that his benefit be paid to his wife, Mina Lorsch. He was duly investigated, and examined by the local medical examiner, and such examination was approved by the state medical examiner, and Lorsch was balloted for, elected, and the degree conferred upon him on the 26th day of January, 1887. He paid his fees to the lodge, and \$1 to the widows' and orphans' benefit fund, to the reporter of Bell Lodge. He died on February 23, 1887.

This action was brought by Mina Lorsch to recover from the corporation called "The Supreme Lodge, Knights of Honor" the sum of \$2,000 alleged to be due to her as the beneficiary of said John Lorsch.

The declaration contains three special counts and the common counts. In each of the special counts the plaintiff sets forth the membership of John Lorsch in Bell Lodge, No. 2143, Knights of Honor, the payment of all fees, dues and assessments, and in the first and second counts the preparation of a paper in the nature of an assurance of his life, thereby promising to pay plaintiff \$2,000 upon his death; avers that she is unable to set this paper forth in full, for the reason that some person or persons connected with the local lodge, un-

known to the plaintiff, keeps the same away from her. In the third count the declaration alleges that the defendant is a co-operative beneficiary society, authorized to assure the lives of members of subordinate lodges, and cause assessments to be made to pay such insurance; that Bell Lodge, No. 2143, Knights of Honor, was such subordinate lodge, authorized to receive members for a certain membership fee, which was, among other things, a premium, and would entitle the member to an insurance upon his life to the amount of \$2,000, to be paid on his death to his widow, and thereby made the defendant liable for such sum in the event of the death of said member; that her husband became a member, and paid the membership fee, and she was then and thereby assured by the defendant for the sum of \$2,000, and was entitled to receive the same as soon as he died.

The declaration further avers the death of John Lorsch on the 22d day of February, 1887, and that the said sum of \$2,000, assured to the said John Lorsch, was payable, by the agreement made with him by defendant and its local lodge, to the plaintiff, as soon as he died; avers that she has made all necessary proofs to the defendant, and its local lodge and officers thereof, of his death, and has requested that it pay said \$2,000, which defendant refuses to do; nor does its local and subordinate lodge cause any assessment to be made to pay the plaintiff, nor do they pay, to her injury, etc.

It will readily be seen that the action can be maintained under the first count. The constitutions, laws and regulations enter into and form part of the contract between the corporation and its members. The right of a member or his beneficiary to be paid any part of the fund provided for the benefit of the widows' and orphans' fund is governed entirely by his benefit certificate, and the constitutions, laws and regulations of the order. The agreement of the defendant is not to pay absolutely \$2,000 to the beneficiary named, notwithstanding the member has paid his assessment. The agreement is, further, that such assessment shall be paid by the subordinate lodge to the supreme treasurer. The parties are bound by just such contracts as they have made, which are free from fraud or illegality.

Courts cannot make contracts for parties, or render a party liable on a different basis from that upon which his liability was mutually stipulated for. Both the act of incorporation and the constitution require as a condition precedent to payment to the beneficiary that satisfactory proof or evidence of the death of the member be furnished to the specified corporate official. The testimony is returned in full in the record before us, from which it appears that evidence was introduced of the incorporation of defendant corporation under the Laws of the State of Missouri; of the application for membership; the examination of the lodge medical examiner, and its approval by the state medical examiner; the records of the lodge, showing that Lorsch was balloted for and elected, and the conferring of the degree upon him; the payment by him of the lodge fee and assessment for the widows' and orphans' benefit fund: his death on the 22d day of February;

and the fact that the money had not been paid by defendant to plaintiff.

On the former hearing of this case it did not clearly appear that any benefit certificate had been issued by the supreme lodge, and forwarded to Bell Lodge for Lorsch. It was admitted upon the reargument of this case, by the counsel for defendant, that the certificate had been executed and forwarded to Bell Lodge, but it refused to hand it over to Lorsch or his wife on account of the fraud set forth in their notice under the plea of the general issue. This notice asserted that Lorsch had become a member of Bell Lodge, No. 2143, by fraudulent practices; that in his application he had falsely represented that he had never been addicted to the excessive or intemperate use of malt, alcoholic or narcotic stimulants, when in fact he was at the time addicted to the excessive and habitual use of hard cider and other intoxicating drinks as a beverage; that he falsely represented that he had never had a habitual cough, or disease of the lungs or of the stomach, and falsely represented that he was in good health, and free from any symptoms of disease, and there was nothing to his knowledge or belief in his physical condition, family or personal history or habits, tending to shorten his life, which was not distinctly stated in his application. On the contrary, the defendant asserts that he will show on the trial that Lorsch did have a habitual cough, and did have disease of the lungs and stomach, and was afflicted with pulmonary consumption, and had before that consulted a physician in Chicago, and frequently within a year before he made application he was under the care of physicians at Benton Harbor and Chicago for chronic sickness, and immediately after his medical examination he was obliged to apply to physicians for medical aid and treatment; and that if he ever had any contract of assurance it was void on account of such fraud; and immediately on the discovery of such fraud by the officers of Bell Lodge they at once sought said Lorsch, to tender him back the fees he had paid, and inform him that they had been deceived and defrauded by him—but said Lorsch was dead before such tender could be made, and such fees were tendered to the plaintiff, and she refused to receive them; that on account of the false and fraudulent practices towards said Bell Lodge by said Lorsch the supreme lodge refused to issue any papers entitling him to membership, and refused to issue or deliver any "benefit certificate" to him, or to any other person designated by him, or to plaintiff, and for the reasons above stated.

Under this plea and notice the issue between the parties was pretty clearly defined. If the plaintiff succeeded in establishing the contract relations between her husband and the defendant which are usually evidenced by the "benefit certificate," then she would, under her evidence, be entitled to recover, unless such contract was impeached for the fraud set up in the plea, and the burden of proving such fraud was upon the defendant.

Under the constitutions and regulations of the order, when the supreme lodge signs the benefit certificate, and forwards it to the subordinate lodge, the contract is complete. It is the duty of the lodge to deliver it, and it holds

it for the member until it is handed over to him. In this case it appears that it had been received by Bell Lodge but not handed over. The local lodge assumed the right to retain it because of the alleged fraud, and the defendant asserts and relies upon such fraud as a defense to the action. The written contract being in the possession of the defendant, or under its control, the plaintiff may be excused from producing it at the trial, under the circumstances of this case.

There was testimony enough in the case from which the jury could determine what the contract between Lorsch and defendant was, and if the certificate contained any special provisions or limitations which did not appear from the constitutions and regulations and other evidence in the case, it was its duty to produce it. Good faith and fair dealing with the beneficiary required the defendant to do this, in view of the provisions of section 4, art. 5, of the Constitution, governing subordinate lodges; which makes it the duty of the reporter of the subordinate lodge, immediately on the death of a member of his lodge, to report such death to the supreme reporter and to the grand reporter for statistical purposes, stating the time the deceased received the degree, and the amount paid by him into the widows' and orphans' benefit fund, and to make a report to the state medical examiner of the circumstances of the last illness and death of the member, in such form as may be required of him. "He shall also forthwith notify the beneficiary or beneficiaries named in the benefit certificate that it is not necessary to employ or pay any person for obtaining payment of the benefit."

Insurance, if it may be so called, of this kind, is usually for the benefit of the widow or other person dependent upon the member in his lifetime; and the intention is manifest that the officers of the lodge of which he was a member undertake to make and certify the proofs of death, and to do everything required to place the beneficiary in the possession of the benefit secured by the certificate. It will be presumed that it was done in this case, when the notice given under the general issue sets up the death, and refuses to pay on the ground of fraud.

The defendant offered no testimony of the facts set up as a defense, but insisted that the plaintiff had not made out a case.

The only defect that I perceive is the failure to introduce the benefit certificate in evidence. It is not denied that the benefit certificate was in the usual form of certificates issued by this corporation; and the plaintiff avers in her declaration "That there was duly prepared a paper, in the usual form, assuring to him, and to this plaintiff, the said sum of \$2,000 on occurrence of the death of said John Lorsch."

This explicit averment of the execution of the contract is not denied by the defendant under Rule 79 of the circuit court, and therefore its execution is deemed admitted for the purposes of the trial. Such admission by the pleadings was sufficient to support the verdict of the jury, and it would not comport with justice to send the case back for a new trial for the mere formal omission to read the certificate in evidence.

*The judgment of the Circuit Court must be affirmed.*

2 L. R. A.

**Sherwood, J.**, delivered the following concurring opinion:

The plaintiff brought suit to recover of the defendant \$2,000, which she claimed she was entitled to have of the defendant by reason of the death of her husband, who she alleged had made application to become, and was at the time of his death, a member of the order, and had paid all the moneys required of him for that purpose, and to obtain a certificate entitling him to all the benefits of the association.

Defendant is a Missouri corporation. There was a subordinate lodge of the order located at Benton Harbor, in the County of Berrien, called "Bell Lodge, No. 2143, Knights of Honor." It was in this lodge that Mr. Lorsch became a member, and it was through this lodge that the defendant did business in the County of Berrien. The supreme lodge was made up of the several subordinate lodges throughout the country, and which constituted the same. Mr. Lorsch made his application to become a member of the lodge the 21st day of January, 1887, and was admitted about the 26th of the same month. He died February 22, 1887. He complied with all the requirements of the order, and paid all moneys due from him to the order, while he lived, including the charges for the benefit certificate, and there is no pretense but that he was entitled thereto when he died. A copy of the application in this case may be seen below.\*

The benefit certificate never reached Mr. Lorsch, as appears by the testimony; but upon the argument it was admitted that such certificate was issued, but Lorsch died before it could be delivered, and it was then withheld from plaintiff. It is substantially conceded that the plaintiff is entitled to the benefits of the order, if anyone is, under the application; and nothing has ever been paid to her by the order. The defendant denied all liability to the plaintiff from the beginning, and all the time refused payment on that ground. The fact of death and notice thereof were sufficiently given. The constitution and general laws of the order were put in evidence; and upon what is therein contained, and the foregoing facts, the case was heard at the circuit. The jury rendered a verdict in favor of the plaintiff for the sum of \$2,079.83. The defendant brings error.

When the trial closed the defendant asked the court to charge the jury that the defendant was entitled to a verdict, on the ground that the plaintiff had shown no contract with the

\*Petition for Membership in the Knights of Honor. [Subordinate Lodge Seal.] *To the Officers and Members of Bell Lodge, No. 2143, K. of H.* Having been made acquainted with the objects of your order, and fully indorsing them, I desire to become a full rate member of your lodge. I am of sound bodily health; 37 years of age; was born on the 22d day of July, 1849; weigh 175 pounds; am 5 feet 8½ inches high, and am married; by occupation a blacksmith, and reside at Millburg, State of Michigan. I hereby declare that I have never been expelled from this order; have not within six months been rejected, nor am I now under suspension by any lodge of this order; that I am not now a member of the order. I declare and promise that I do not now, nor will I, practice any pernicious habit that tends to shorten life. I hereby agree and contract, in consideration of my being received into the order of the Knights of Honor, and admitted to participation in the widow and orphans' benefit fund of the order, that I will faithfully obey all the consti-

defendant upon which she could recover. The court refused the instruction, and defendant's counsel excepted. The court then submitted the case to the jury upon a general charge as to the law, with the result above stated.

The application for membership in the order contains the contract and promises on the part of the applicant, upon which he is to receive the benefits conferred by the order upon its members. It is signed by the applicant; and when received by the order, and has been acted upon, and he has been received into the order by an election, the contract becomes completed between the parties, and is binding upon both; and so long as he complies with its provisions he is entitled to all the benefit it confers.

The application when accepted by the subordinate lodge, and the applicant has been admitted to membership, brings him in contract relations with the supreme lodge; and these facts proved entitle the beneficiary named in the contract to have of the defendant all the benefits the contract calls for in case of the death of the applicant. The filing of the application with the supreme lodge only becomes necessary to secure the certificate which will be evidence of those facts. The promise to pay contained therein is only a repetition of what has been given by its agent, the subordinate lodge, in pursuance of its constitution and the authority therein conferred. It is the existence of the facts which gives the beneficiary the right to benefits; and their existence may be shown by any competent evidence, whenever it shall appear that such certificate has not been made, or, if made, not delivered. Any other conclusion would give more importance to form than substance. This law will not allow. The rules made regulating the manner of doing business between the subordinate and superior lodge, in which the applicant does not participate, cannot be made to deprive the beneficiary of her rights, even if omitted or entirely disregarded. She has no control over them. I think the Circuit Judge was right in refusing the instruction asked.

Section 1, art. 9, of the Constitution and general laws of the order, provides that "Every lodge shall forward to the supreme reporter all applications for beneficiary membership immediately after the applicant receives the degree, and with each application one dollar to pay for a benefit certificate and for making record of membership. Each applicant shall

enter upon his application the name or names and relationship or dependence of the members of his family, or those dependent upon him, to whom he desires his benefit paid; and the same shall be entered in the benefit certificate according to said direction." And section 2 says: "On receipt of the application and fee, the supreme reporter shall enter the name, age, occupation, date of taking the degree, amount of one assessment, and such other facts as may be deemed necessary, upon a register; the roll of each lodge to be kept by itself, and indexed. He shall number and file the applications in his office, and return to the reporter of the subordinate lodge a benefit certificate, signed by the supreme dictator and himself, under the seal of the supreme lodge, and made payable as the member shall have directed in his application; and the subordinate lodge shall enter on record the number thereof." And it further provides: "In case of loss of certificate, a new one may be issued," etc.

These provisions relate to the internal business of the order, about which the applicant has no concern to know. It will be noticed, also, that the provisions of neither of these sections make a compliance therewith necessary to the carrying into effect the provisions of the contract contained in the application. They are not conditions precedent, and form no part of the applicant's contract. None of them are to be performed by him. These sections relate entirely to the duties of the officers of the subordinate, general and supreme lodge; and I find nothing in any of the articles in the general laws or constitution governing the Knights of Honor invalidating the contract contained in the application, if the same is not forwarded to the supreme lodge, and certificate issued thereon.

If any certificate had been issued in this case, it should have been presented upon the trial by the defendant; and, if none had been issued, it was its duty to cause the same to be issued at once. The honor of the order, as well as the law and justice of the case, require this, and under such circumstances it is the duty of courts to see to it that after the voice of the husband has been silenced by death, and he can no longer urge his rights, that the order shall not be allowed to break faith with the widow or children, and deprive them of the provision he had made and paid for while living. I do not think any such results will be

tutions and laws of the order, in all the departments thereof, and that compliance on my part with the laws, rules and regulations now in force, or that may be hereafter enacted by the order, is the express condition upon which I and my beneficiaries are to be entitled to participate in said benefit fund, to the extent and amount provided in the constitution and laws of the order. I further agree and contract that the answers I shall make to the questions propounded by the medical examiner, as shown by the medical examiner's blank hereto attached, so far as the facts are in my own knowledge, shall be the truth, and, so far as not in my own knowledge shall be true to the best of my information and belief; and I agree that they shall form the basis of my contract with the said supreme lodge and the said order. I further agree and contract that the benefit certificate to be issued to me shall have no binding force whatever, unless I contribute and continue to contribute my share and portion to the widow and orphans' benefit fund, when due and ordered in accordance with the rules and regulations of this order. I further agree and contract

that the payment of the proposition fee, or the entertaining of this application, unless I am duly elected and initiated according to the ritual and laws of the order, does not, and shall not, constitute membership, or give me any of the rights of a member. I furthermore agree and contract that if, for any cause as provided by the constitution and laws of the supreme, grand or subordinate lodge to which I belong, I should be suspended, I shall not be entitled to any benefit whatever during such suspension; nor shall it be lawful, in case of my death during such suspension, for any of my heirs, devisees or legatees to receive any benefit or endowment whatever from the supreme or any grand or subordinate lodge of the Knights of Honor; and in case of expulsion from the order I agree to renounce for myself, my heirs and representatives, all the benefits granted by said order. I direct that my benefit be paid to my wife, Mina Lorsch. Given under my hand at Benton Harbor, State of Michigan, this 21st day of January, 1887.

John Lorsch.



reached, from a proper construction of the law and rules of the order applicable to the facts in this case.

I find no error in the remaining rulings of the court excepted to, and *the judgment ought to be affirmed.*

This opinion was written before a rehearing was ordered, which has been had. Nothing, however, has been suggested changing the views I have above expressed.

**Morse, Campbell and Long, JJ.,** concurred.

## SOUTH CAROLINA SUPREME COURT.

LOUISVILLE ASPHALT VARNISH CO.,

*Appl.,*

*v.*

Preston C. LORICK *et al.*, Partners, trading  
as Lorick & Lowrance.

(.... S. C. ....)

**1. The provisions of the Statute of Frauds** in reference to a note or memorandum in writing of an agreement for the sale and purchase of goods, signed by the party to be charged, does not require the whole agreement to appear in a single writing; but it may be made out from several instruments or written memoranda referring one to the other and which when connected together are seen to contain all the necessary elements.

**2. A memorandum in writing**, sufficient under the Statute of Frauds to support an action for the price of goods sold,—*held*, to have been made out, where a verbal order for paints, containing all the necessary particulars of the bargain, was given by the buyer to a traveling salesman of the seller, who immediately entered it in a book and sent a copy to his principal, and the buyer subsequently, but after the goods were shipped, wrote to the seller "Don't ship paint ordered through your salesman; we have concluded not to handle it."

(*Stimpson, Ch. J., dissents.*)

**NOTE.—Statute of Frauds; memorandum of agreement.** The form of the memorandum is entirely immaterial; but it must be such as to import a transaction of the nature which is claimed to be proved by it; so a letter properly signed and containing the necessary particulars of the agreement is a sufficient memorandum. *Forster v. Hale*, 3 Ves. Jr. 696; *Tawney v. Crowther*, 3 Bro. Ch. 318; *Allen v. Bennet*, 3 Taunt. 169; *Brettell v. Williams*, 4 Exch. 623; *Hurley v. Brown*, 98 Mass. 546; *Bish. Cont.* § 1242. It is immaterial whether it is written in ink or pencil, or otherwise, or whether it be printed or stamped. *Clason v. Bailey*, 14 Johns. 484; *Vielie v. Osgood*, 8 Barb. 132; *McDowel v. Chambers*, 1 Strob. Eq. 347; *Draper v. Pattina*, 2 Speers, L. 292.

**Must be in writing and signed.** The memorandum shall be in writing and signed by the party to be charged, or his agent. *Browne*, Stat. Frauds, 381. A member of a corporation is a competent agent when duly authorized to sign for the corporation. *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & J. 227. The statute clearly supposed the probability of there being a signature by one person only. *Welford v. Bazely*, 3 Atk. 503; *Cotton v. Lee*, cited in 2 Bro. Ch. 564; *Morison v. Turnour*, 18 Ves. Jr. 183; *Egerton v. Mathews*, 6 East, 307; *Saunderson v. Jackson*, 2 Bos. & P. 238; *Champion v. Plummer*, 1 Bos. & P. N. R. 252; *Baker, Sales*, § 450. Whatever the form of memorandum, there must still be a signature of the party to be bound. *Bailey v. Ogden*, 3 Johns. 399; *Anderson v. Harold*, 10 Ohio, 399; *Barry v. Law*, 1 Cranch, C. C. 77. A memorandum satisfies the Statute of Frauds if it is subscribed by the party to be charged, or by his authorized agent, and the terms of the contract can be gathered from the writing when taken together. *Tallman v. Franklin*, 14 N. Y. 584, 588, reversing 3 Duer, 395; *Grafton v. Cummings*, 99 U. S. 100 (25 L. ed. 366); *Beckwith v. Talbot*, 95 U. S. 289 (24 L. ed. 496). The statute is satisfied if the memorandum be signed

2 L. R. A.

(November 27, 1888.)

**A PPEAL** by plaintiff from a judgment of the Common Pleas Circuit Court of Richland County (Presley, J.), in favor of the defendants, on a nonsuit in an action for the price of goods alleged to have been sold by plaintiff to defendants. *Reversed.*

The facts are stated in the opinions.

**Messrs. Bachman & Youmans** for appellant.

**Mr. Saml. W. Melton**, for respondents:

There being no evidence of acceptance, there was nothing to go to the jury, unless the contract was taken out of the statute by the letter of the defendants dated the 17th of October, 1885, addressed to the plaintiffs. This does not import a sale. It imports only some indefinite arrangement, in relation to paint, "ordered through" a salesman of the plaintiff. It fails in the most essential particulars, of evidencing a sale.

*James v. Muir*, 33 Mich. 223, 230.

Suppose that, at the instance of the salesman, defendants had consented to "handle" the goods, to try the market; if they proved salable, to pay for the goods when sold; if not sold, to return them.

Under the Statute of Frauds a memorandum

by the vendor, although it be not signed by the vendee, and notwithstanding it could not have been enforced against the latter. *Allen v. Bennet*, 3 Taunt. 169; *Johnson v. Dodgson*, 2 Mees. & W. 653; *Douglass v. Spears*, 2 Nott & McC. L. 207; *Champion v. Plummer*, 1 Bos. & P. N. R. 252. Where initials only of the party are signed, such signature may, with the aid of parol evidence, be held valid. *Barry v. Combe*, 26 U. S. 1 Pet. 640 (7 L. ed. 295); *Samborn v. Flagler*, 9 Allen, 474; *Salmon Falls Mfg. Co. v. Goddard*, 55 U. S. 14 How. 447 (14 L. ed. 493).

**May be in several papers.** Several writings may be taken together to make the memorandum. *Salmon Falls Mfg. Co. v. Goddard*, 55 U. S. 14 How. 447 (14 L. ed. 493); *Parkhurst v. Van Cortland*, 14 Johns. 15; *Lerned v. Wannemacher*, 9 Allen, 416. See *Browne*, Stat. Frauds, 359. The American authorities quite agree with the English, that the note or memorandum need not be made at one time, or on one paper. *Lerned v. Wannemacher*, 9 Allen, 412; *Rhoades v. Castner*, 12 Allen, 132; *Peck v. Vandemark*, 99 N. Y. 29; *Lee v. Maloney*, 9 Iowa, 344; *Jelks v. Barrett*, 52 Miss. 315; *Fisher v. Kuhn*, 54 Miss. 480. The signed paper must incorporate and draw down into itself the unsigned one; otherwise there can be no complete memorandum "duly signed," etc. *Moale v. Buchanan*, 11 Gil & J. 322; *Frank v. Miller*, 38 Md. 461. Oral evidence may be necessary, indeed, not to connect them together, but to show that they both apply to the subject matter of the pending suit, and not to some other sale; but this is equally so in case of only one paper. See *Thayer v. Luce*, 22 Ohio St. 62. It is a sufficient memorandum to satisfy the statute, where the defendant signed a letter canceling a contract and referring to an inclosed invoice, which contained all the terms of the contract. *Elliott v. Dean*, *Cababé & Ellis*, N. P. R. 283. And such letter may be taken in connection with a previous writing not signed. *De Bell v. Thomson*, 3 Beav. 469; *Dodge*



may consist of two or more separate writings; but they must all be signed by the party to be charged, or the writing signed must intelligibly refer to the other writings, so as to connect them together; their mutual relations must appear upon their face, and cannot be established by parol evidence.

Browne, Stat. Frauds, § 346; 1 Benj. Sales, § 220; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Johnson v. Buck*, 35 N. J. L. 838, 10 Am. Rep. 243, 248; *Wiener v. Whipple*, 53 Wis. 298, 40 Am. Rep. 775, 776.

The note in the private book of the salesman does not appear to have been read to the agent of plaintiffs, or made in his presence, or in any way brought to his knowledge. It has no more verity or dignity than the oral statements of the witness. Both are parol evidence. In the letter, no reference is made to it; it is not signed, and there is nothing to connect it with the letter so as to make it available to supplement the letter.

*Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Johnson v. Buck*, 35 N. J. L. 838, 10 Am. Rep. 248.

This alleged memorandum, then, must stand by itself, if the rule be, as we submit, that such a memorandum cannot be supplemented by parol.

See Benj. Sales, § 208 *et seq.*, 4th Am. ed., and Corbin's notes, 6 and 7, to § 210; *Elmore v. Kingscote*, 5 Barn. & C. 583; *Goodman v. Griffiths*, 1 Hurl. & N. 574; *Acebal v. Levy*, 10 Bing. 876; *Ashcroft v. Morrin*, 4 Man. & G. 450; *Hoadly v. McLaine*, 10 Bing. 482; *Caulkins v. Hellman*, 47 N. Y. 449; *Hicks v. Cleveland*, 48 N. Y. 84, 91; *Keller v. Webb*, 126 Mass. 393; *Kinloch ad. Savage*, 1 Speers, Eq. 464, 471; *Hyde v. Cooper*, 18 Rich. Eq. 250.

To be available as evidence of an antecedent

parol contract sufficient to bind the bargain, the "note or memorandum" must intelligibly express all the substantial terms of the bargain as orally made; it must contain everything that belongs essentially to the bargain.

*Meadows v. Meadows*, 8 McCord, L. 458; Browne, Stat. Frauds, chap. 18; Smith, Cont. \*120, 121; 3 Parsons, Cont. 5th ed. 13, and note c; 1 Benj. Sales, § 261, and note 47, § 254; Story, Sales, § 467; *Bailey v. Ogden*, 3 Johns. 399, 3 Am. Dec. 512, 518; *Stone v. Browning*, 68 N. Y. 598, 604; *McConnell v. Brillhart*, 17 Ill. 854, 65 Am. Dec. 665.

McIver, J., delivered the opinion of the court:

This was an action to recover the sum of \$83.05, the price of certain varnish and paint alleged to have been sold by plaintiff to defendants. The defense was a general denial. At the trial the plaintiff offered testimony tending to show that on the 16th of October, 1885, one of its traveling salesmen, Hutchinson by name, took from Moore, a clerk of defendants, who, it was admitted, had authority to give the order, a verbal order for the articles specified in the account sued on, which Hutchinson immediately entered in his memorandum book as follows:

No. 65.

Columbia, S. C., Oct. 16, 1885.  
Louisville Asphalt Varnish Co., Louisville, Ky.; Ship Lorick & Lowrance, Columbia, S. C.:  
1. Bbl. No. 1 Turp. Asphalt Black Varnish, 55c.  
1. " " D. Roof Paint C. 55c.  
12. 5 gal. Falls D. Roof, do. 55c.  
Cr. by 2c. gal. on acct. freight.  
60 days.

H. L. Hutchinson, Salesman.

On the same day a copy of this order was sent by mail, by said salesman, to the plaintiff, who received it on the 19th of October, 1885,

v. Van Lear, 5 Cranch, C. C. 278; Gale v. Nixon, 6 Cow. 448; Toomer v. Dawson, Cheves, L. 68.

In *Leather-Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140, the defendant wrote a letter admitting the purchase, and referred to the plaintiff's letter containing the invoice, but repudiated any liability because the goods had been sent by a wrong route; and it was held that there was a sufficient note of the bargain to satisfy the seventeenth section. Benj. Sales, § 252. And it may even repudiate the contract and refuse to be bound by it, and yet be sufficient. Benj. Sales, 3d ed. Benn. notes, 200. In *Wilkinson v. Evans*, L. R. 1 C. P. 407, 35 L. J. N. S. (C. P.) 224, the defendant refused the goods, writing on the back of the invoice: "The cheese came to-day, but I did not take them in, for they were very badly crushed; so the candles and the cheese is returned." Held, that this was evidence for the jury that the invoice contained all the stipulations of the contract, and that defendant's objection was not to the plaintiff's statement of the contract, but related to the performance of it. It is not necessary that the note or memorandum pass between the parties, or be addressed to the plaintiff or to his agent. It is quite sufficient if it is in a letter addressed to a third person (*Moore v. Mountcastle*, 61 Mo. 424), even to the defendant's agent (*Kleeman v. Collins*, 3 Bush, 467), and never comes to the knowledge of the plaintiff at all, or it may be merely an entry on the defendant's own private books never communicated to anyone. *Gibson v. Holland*, L. R. 1 C. P. 1; *Peabody v. Speyers*, 56 N. Y. 230; *Johnson v. Trinity Church Society*, 11 Allen, 128; *Tufts v. Plymouth Gold Min. Co.* 14 Allen, 407; *Argus Co. v. Albany*, 55 N. Y. 485.

*What must contain.* The memorandum must contain the essential terms of the contract, without recourse to parol evidence to show intention of the parties. 2 Kent, Com. 511; *Abel v. Rudcliff*, 13 Johns. 200. To satisfy the Statute of Frauds it is necessary that the memorandum should show who are the parties to the contract, but it is sufficient if

this appears by description instead of names; and if the promisor or promisee is described instead of named, parol evidence is admissible to apply the description and identify the person who is meant by it. Benj. Sales, § 257; *Gowen v. Klous*, 101 Mass. 449; *Jones v. Boston & M. V. R. Co.* 2 New Eng. Rep. 693, 142 Mass. 190. As the consideration is part of the agreement, it should be in writing. *Wain v. Warites*, 5 East, 18. This case was disapproved in *Ex parte Gardom*, 15 Ves. Jr. 286; and *Ex parte Minet*, 14 Ves. Jr. 190, and was afterwards affirmed in *Saunders v. Wakefield*, 4 Barn. & Ald. 665; and from that time appears to be the English law on that point. Browne, Stat. Frauds, 407. In this country, the doctrine of *Wain v. Warites*, *supra*, is repudiated in Massachusetts, which State has expressly provided by statute that the consideration need not appear in the memorandum. Gen. Stat. 1880, title 6, chap. 105, § 2; *Packard v. Richardson*, 17 Mass. 122. The doctrine is repudiated in other States besides Massachusetts, but has received the sanction of several States of the Union, the controversy turning on the discrimination between the "promise" and the "agreement," contained in the fourth section of the statute. See *Egerton v. Mathews*, 6 East, 307; Browne, Stat. Frauds, 410.

*As evidence.* Where the memorandum of a contract is not sufficient to satisfy the Statute of Frauds, its admission as evidence becomes harmless error, when later evidence shows that the contract was modified, and the action was predicated upon the altered contract. *Smith v. Fisher*, 50 Vt. 53, 3 New Eng. Rep. 424. A distinction has sometimes been drawn between proof of a contract, and proof of a compliance with the Statute of Frauds. *Coddington v. Goddard*, 16 Gray, 438; *Sicewright v. Archibald*, 17 Q. B. 115, 20 L. J. N. S. (Q. B.) 523; *Jeffcott v. North British Oil Co. Ir. R.* 8 C. L. 17; *Heyworth v. Knight*, 17 C. B. N. S. 298, 33 L. J. N. S. (C. P.) 298; *Cropper v. Cook*, L. R. 3 C. P. 194; *Baker, Sales*, § 444.

and on the next day shipped the goods, by rail, to defendants.

On the 17th of October, 1885, the defendants wrote to plaintiff as follows:

"Louisville Asphalt Varnish Co.,  
Louisville.

Gents: Don't ship paint ordered through your salesman. We have concluded not to handle it."

This letter, however, was not received by plaintiff until after the goods had been shipped; and upon its receipt plaintiff wrote defendants, saying that the shipment had gone before the request to cancel was received.

When the goods arrived in Columbia the defendants declined to receive them, but what became of them the testimony does not show.

At the close of plaintiff's testimony defendants moved for a nonsuit, which was granted, upon the ground that section 2020, General Statutes (Statute of Frauds), was fatal to a recovery. Plaintiff appeals, upon the several grounds set out in the record which make these two questions: *first*, whether there was such a note or memorandum, in writing, of the bargain as would satisfy the requirements of section 2020 of the General Statutes; *second*, if not, whether there was such an acceptance and actual receipt of the goods as would take the case out of the operation of that section.

It is quite certain that there was no formal agreement in writing, signed by the parties to be charged, for the sale of the goods in question; and we think it equally certain that there was no single instrument or memorandum in writing sufficient to satisfy the requirements of the statute; for the letter of the defendants, copied above, did not specify the necessary particulars as to the quantity, nature and price of the goods which were the subjects of the alleged contract of sale, and the copy of the order sent by the salesman to the plaintiff, which did contain all the necessary particulars, was not signed by the defendants. It is plain, therefore, that neither one of these papers, standing alone, would be sufficient. But as it is well settled that the whole agreement need not appear in a single writing, but may be made out from several instruments or written memoranda referring one to the other, and which, when connected together, are found to contain all the necessary elements, the precise, practical question in this case is whether the letter of defendants can be connected with the written order sent by the salesman, so that the two together may constitute a sufficient note or memorandum in writing to satisfy the requirements of the statute.

In *Saunderson v. Jackson*, 2 Bos. & P. 238, the action was for not delivering certain articles alleged to have been sold by defendant to plaintiff, and the question was whether there was a sufficient note or memorandum in writing of the bargain, under the Statute of Frauds. It seems that when the plaintiff gave the verbal order for the goods, he was furnished by the defendant with a bill of parcels, not signed, but written on a piece of paper, with a printed heading containing the name and place of business of defendant. Shortly after this defendant wrote a letter to plaintiff, saying: "We wish to know what time we shall send you a part of your order," etc. The court held that 2 L. R. A.

the requirements of the statute were complied with, saying: "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract, within the meaning of the statute . . . At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds; for, although it be admitted that the letter, which does not state the terms of the agreement, would not alone have been sufficient, yet, as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff, signed by the defendants." This case has been expressly recognized and followed in this State, in *Toomer v. Dawson*, Cheves, L. 68.

The same doctrine was applied in *Western v. Russell*, 3 Ves. & B. 188. See also, to the same effect, *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343, where, as in the case now under consideration, the letter of defendant was written for the purpose of withdrawing from the contract; but as it referred to the previous order, the two, taken together, were held to satisfy the terms of the statute. In a note to that case, at page 347 of the volume of American Reports above cited, we find the following:

"In *Cave v. Hastings*, L. R. 7 Q. B. Div. 125, an action for breach of a contract for the hire of a carriage for more than a year from the date of the agreement, at a specified sum per month, it was proved that the plaintiff agreed to let the carriage to the defendant. A memorandum of the terms of the agreement was signed by the plaintiff, but not by the defendant. The defendant subsequently wrote a letter to the plaintiff, desiring to terminate the agreement, in which he referred to 'our arrangement for the hire of your carriage,' and 'my monthly payment.' There was no other arrangement between the parties, to which the expressions of the defendant could have any reference, except the agreement contained in the memorandum signed by the plaintiff. Held, that the letter of the defendant was so connected, by reference, to the document containing the terms of the arrangement, as to constitute it a note and memorandum of the contract, signed by him, within the fourth section of the Statute of Frauds.

"The court said: 'There is abundant evidence that there was an agreement which was not rescinded; but the defendant now contends that he is not liable, because he signed no memorandum in writing of the contract. It has, however, been long settled that the whole agreement need not appear in one document, but the agreement may be made out from several documents. The only document signed in this case by the defendant was the letter of the 11th February, which does not, in itself, contain the terms of the contract. In *Dobell v. Hutchinson*, 3 Ad. & E. 355, Lord Denman states the law on this subject to be as follows:

" 'The cases on the subject are not, at first sight, uniform; but on examination it will be found that they establish this principle: that when a contract or note exists which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him,

provided it either contains in itself the terms of the contract, or refers to any writing which contains them. This letter in question refers to 'our arrangement.' Mr. Gully, in his argument, contended that that might refer to some other and different parol arrangement; but it seems to us that this reference to the former document is sufficient, in accordance with the principle laid down in *Ridgway v. Wharton*, 6 H. L. Cas. 237, where 'instructions' were referred to, and it was held that parol evidence might be given to identify the instructions referred to with certain instructions in writing. This principle was applied in *Baumann v. James*, 16 L. T. N. S. 165, and carried still further in *Long v. Milkar*, 41 L. T. N. S. 306, in which Bramwell, L. J., says: 'The first question to be considered is whether there is a contract, valid according to the provisions of the Statute of Frauds, section 4. I think that there is a sufficient memorandum. The plaintiff has signed a document containing all the terms necessary to constitute a binding agreement, so that, if he committed a breach of it, he would be liable to an action for damages or to a suit for specific performance. But the point to be established by the plaintiff is that the defendant has bound himself; and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt also uses the word *purchase*, which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence.' He then goes on to add: 'I may further illustrate my view by putting the following case: Suppose that A writes to B saying that he will give £1,000 for B's estate, and at the same time states the terms in detail, and suppose that B simply writes back in return, "I accept your offer." In that case, there may be an identification of the documents by parol evidence; and it may be shown that the offer alluded to by B is that made by A without infringing the Statute of Frauds, section 4, which requires a note or memorandum in writing.'

These observations, coming as they do from high authority, seem so appropriate to the present case that we have felt justified in inserting them at length.

In *Beckwith v. Talbot*, 95 U. S. 289 [24 L. ed. 496], it was held that while the general rule is "that collateral papers adduced to supply the defect of signature of a written agreement, under the Statute of Frauds, should on their face sufficiently demonstrate their reference to such agreement, without the aid of parol proof," yet such rule is not absolute, as "there may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof." Accordingly, it was held in that case that "The defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign."

Even in the case of *Johnson v. Buck*, 35 N. J. L. 338, which seems to be much relied on 2 L. R. A.

by the counsel for respondents, it is conceded that parol evidence may be received "to identify papers which, by a reference in the signed memorandum, are made parts of it."

While it is true that some of the cases which we have cited arose under the fourth section of the Statute of Frauds, and not under the seventeenth section, which controls the present case, yet it is admitted by Kent, *Ch. J.*, in *Bailey v. Ogden*, 8 Johns. 412, that the words of the two sections are in this respect similar, and require the same construction; and it was so held in *Townsend v. Hargraves*, 118 Mass. 325. It seems to us, therefore, that the letter of defendants, taken, as it must be, in connection with the order sent to plaintiff by the salesman, to which it expressly referred, and which was in writing, and specified all the necessary particulars as to price, quantity, quality and time of payment, constituted a sufficient note or memorandum in writing of the bargain to take the case out of the Statute of Frauds. In the absence of any evidence that any other order was given, the language of the letter—"Don't ship paint ordered through your salesman"—must necessarily be regarded as referring to the order of which a memorandum in writing was taken at the time by the salesman, and a copy thereof immediately forwarded to the plaintiff, who at once filled the order, and shipped the goods to the defendants.

This is a stronger case than that of *Beckwith v. Talbot*, *supra*, for there the letter of the defendant simply referred to the agreement, without indicating when or how it had been made, while here the letter refers to a particular article "ordered through your salesman," and we hear of no other order through the salesman or in any other way. The only necessity for any parol evidence at all, if, indeed, there was any, was to identify the order sent by the salesman; and for this purpose, as we have seen, such evidence would be competent. Suppose the plaintiff had, on the 16th of October, 1885, written a letter to defendants, proposing to sell them the articles mentioned in the salesman's order, in the quantities there stated, and at the prices and on the time there mentioned, and that defendants had replied by letter, simply saying, "I accept your offer," without repeating the particulars as to quantity, price, etc., it could not be doubted that, although defendants' letter—the only paper which they signed—did not contain in itself the necessary particulars of the bargain, yet the two letters, taken together, would be held a sufficient compliance with the statute. It seems to us that the transaction here in question was in principle practically the same as that in the supposed case, and we think there was error in holding that the contract sued on was void under the Statute of Frauds.

We do not see how it is possible to regard the letter of the defendants as a denial of the order given to the salesman by their clerk, Moore, who, it was conceded, had authority to give the order; for the only testimony upon the subject is that of the salesman, who says distinctly that Moore gave him the order, and he entered it in his memorandum book, and there is no evidence to the contrary. Moore was not examined as a witness. It is true that, after the controversy between these parties had arisen, the defendants, in a letter as late as the

31st of December, 1885, addressed to the attorney who had been consulted by the plaintiff, do repudiate the purchase; but that is not the letter relied upon by plaintiff to establish the contract. On the contrary, the one relied on is that of the 17th of October, 1885, which has been copied above, and the question is whether the last mentioned letter can be regarded as a denial of having given the order. The manifest purpose of that letter was to countermand the order, and this necessarily presupposed that the order had been given. The terms used clearly show this: "Don't ship the paint ordered through your salesman. We have concluded not to handle it." This clearly means that the paint had been ordered, but that defendants had subsequently changed their minds and "concluded not to handle it;" and we do not see how it can be construed to mean anything else. We have then an admission in writing that an order for the goods in question through the salesman had been given, and we have the order referred to, likewise in writing; and the two together fully satisfy the requirements of the statute.

Under the view which we have taken of the first question raised by this appeal, the second question becomes immaterial, and need not, therefore, be considered.

*The judgment of this Court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that Court for a new trial.*

**McGowan, J., concurs.**

**Simpson, Ch. J., dissenting:**

The plaintiff brought the action below to recover the sum of \$88.95, alleged to be due for certain paints claimed to have been sold defendants by the plaintiff. The defendants denied the purchase of said paints. At the trial, the plaintiff offered testimony showing that a traveling salesman of plaintiff called at the place of business of defendants in Columbia, and, after an interview with one Moore, a clerk of defendants, who had power to make purchases of the kind mentioned, entered an order in his memorandum book as follows:

No. 65. Columbia, S. C., Oct. 16, 1885.  
Louisville Asphalt Varnish Company, Louisville, Ky.: Ship Lorick & Lowrance, Columbia S. C.:  
1. Bbl. No. 1 Turpt. Asphalt Black Varnish, 55c.  
1. " D. Roof Paint C. .... 50c.  
12. 5 gall. Pails D. roof, do. .... 55c.  
Cr. by 2c. gal., on acct. freight.  
60 days.

H. L. Hutchinson, Salesman.

—embracing the goods which Hutchinson swore he sold to defendants through their agent, Moore.

A copy of this order was immediately sent to plaintiff at Louisville, Ky., which on the 19th of October put up said goods for shipment, and on the 20th of October received from the Cincinnati Southern Railway a bill of lading executed in duplicate. After this shipment, the plaintiff received a letter from Lorick & Lowrance, dated the 17th of October, of which the following is a copy:

"Louisville Asphalt Varnish Company, Louisville—Gents: Don't ship paint ordered through your salesman. We have concluded not to handle it. Resp't'y, Lorick & Lowrance. M."

2 L. R. A

To this the plaintiff replied, October 22, 1885, that the goods had gone forward before receipt of defendants' letter above. The defendants then answered, denying that they had ever purchased from plaintiff, stating that one of its salesmen had visited Columbia and had offered to sell, but that their Mr. Moore had declined to purchase, and that the goods on arrival had been promptly reshipped to plaintiff.

Upon testimony of plaintiff, substantially as above, on motion of defendants a nonsuit was granted, on the ground that section 2020, General Statutes, was fatal to a recovery. The plaintiff has appealed, both from the order granting the nonsuit and from the judgment entered, upon the following grounds: *first*, that there was sufficient evidence to go to the jury, and His Honor erred in holding otherwise; *second*, that the evidence produced by plaintiff clearly took the case out of the Statute of Frauds, and out of section 2020, General Statutes, of this State; *third*, that the evidence clearly showed the acceptance of the goods sold and the actual receipt thereof by the defendants; *fourth*, that the evidence clearly showed the note and memorandum in writing of the bargain, signed by the agent lawfully authorized.

It is conceded that plaintiff's action was subject to the application of the Statute of Frauds (section 2020, Gen. Stat.), and the plaintiff based its right to a recovery upon a compliance with that statute in two of its requirements, to wit: *first*, that the goods, after being ordered, were accepted and actually received; and *second*, that a sufficient memorandum in writing had been made to bind the defendants.

Now the question before us is not as to the merits of the case, but simply whether enough testimony had been introduced, as to one or both of the grounds above, to carry the case to the jury, and prevent a nonsuit. The rule as to nonsuits is well understood, and we need only state here, what has often been said before, that a nonsuit is proper, and in fact demandable, where there is an absence of all relevant testimony as to one or more of the material disputed issues in the case. If, however, there is testimony upon said issues the truth, force and effect of which is to be weighed and determined, the case must go to the jury, because, under our system, the jury is alone invested with power to determine disputed facts in cases at law. As to what amounts to an acceptance and an actual receipt under the statute, see 1 Chitty on Contracts, 11th ed. 555 *et seq.*

We have found no pertinent testimony upon this point. His Honor, in the absence of such evidence, was, therefore, right in holding that there was no ground upon which the case could go to the jury, in so far as this question was involved.

Was there evidence of a note or memorandum in writing, signed by the defendants or their agent thereunto lawfully authorized, sufficient to carry the case to the jury? There is no pretense that the order sent by plaintiff's salesman was signed by the defendants or their agent. On the contrary, the order was prepared and sent by the plaintiff's agent, and no doubt was sufficient to bind the plaintiff if it was the party sought to be charged, although the defendants might not be bound. It is not

necessary that both parties should sign the contract. It is sufficient that the defendant, whether he be vendor or vendee, has signed the contract, and it is no objection that he has no remedy thereon against the plaintiff, inasmuch as the latter has not signed it. *Id.* 568.

It may be urged, however, that it is not necessary that the whole of the terms of the contract should be confined in one memorandum, it being sufficient if they can be collected from several distinct writings having reference to the same subject matter. This is true; and it has been held that if, after the transaction has taken place, it be recognized in a letter written by the party to be charged, which refers to the specific contract, and not merely to the subject matter, this will satisfy the statute. *Id.* 546. Under this principle, plaintiff contends that defendants' letter, in which they wrote: "Don't ship paint ordered through your salesman. We have concluded not to handle it"—was sufficient to carry the case to the jury, on the question whether a note or memorandum in writing, of the contract, sufficient to comply with the statute has been executed by the defendants.

The rule upon this subject, as will be seen from its discussion by Mr. Chitty, 11th ed. 544 *et seq.*, and the cases there cited in notes, seems to be this: The letter relied on must in itself contain the terms of the contract, quantity, quality and price of the goods, etc., or it must refer to some other paper containing them in such way as by its own terms to connect itself with said paper.

Now, the letter here might possibly be construed as an admission by the defendants that they had ordered certain paints from the plaintiff, and that since said order they had concluded not to take said goods. But there is

nothing in this letter which points distinctly to the contract sued on. It could as well apply to any other contract as this, and therefore a most important link is wanting, which could be supplied only by verbal testimony. If the case had gone to the jury, there was no testimony by which the memorandum made by plaintiff's salesman could have been connected with defendants' letter.

It was said in *Waterman v. Meigs*, 4 Cush. 497, that "A letter from the purchaser to the vendor, alluding to a parol agreement for the sale of goods, and inquiring whether they will be ready at the time agreed upon, but not mentioning the quantity, quality or price of the goods, or the time of payment, is not a sufficient memorandum to take the agreement out of the Statute of Frauds." See also *Salmon Falls Mfg. Co. v. Goddard*, 55 U. S. 14 How. 446 [14 L. ed. 498]; *Bailey v. Ogden*, \* 8 Johns. 399.

We think there was an absence of all testimony connecting defendants' letter distinctly and clearly with the memorandum made by plaintiff's agent, and sent by him as an order for the goods, so that the two could constitute one memorandum in writing, signed by the defendants; and, the letter itself failing to embody the contract as to the quantity, quality and price of the goods, the nonsuit was inevitable.

Thus far it has been admitted that the letter of defendants, impliedly, at least, acknowledged an order for paints, but there is great doubt whether such is a proper construction of said letter. It may well be construed as a denial of the order. This view strengthens the conclusion we have reached.

\*See editorial note, *Law. ed.* [Rep.]

## KANSAS SUPREME COURT.

LEROY & WESTERN R. CO., *Plff. in*  
*Err.*,  
*v.*

ROSS & PACKER.

(....Kan. ....)

*1. St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419; *Hunt v. Smith*, 9 Kan. 137; *Reisner v. Atchison Union Depot & R. Co.* 27 Kan. 382, followed.

\*Head notes by the COURT.

**NOTE.**—*Appropriation of right of way; elements of damage.* That a farm would be depreciated in value from the inconvenience and danger of crossing the track, the danger to horses and cattle, the liability of teams to be frightened, and danger from fire, etc., are proper elements of damage. *Parks v. Wisconsin Cent. R. Co.* 53 Wis. 413.

*Inconvenience caused.* The inconvenience of having one's land temporarily thrown open in the progress of constructing a railway over the same may be a material element of damage, and justly require compensation. *St. Louis J. & S. E. Co. v. Kirby*, 104 Ill. 345. 10 Am. & Eng. R. R. Cas. 214. If the effect of constructing a railway through a farm is to make it more inconvenient and expensive to cultivate and manage the remaining land of the owner, this is a proper element of damage for the consideration of the jury. *Tucker v. Mass. Cent. R. Co.* 118 Mass. 546, 9 Am. R. Rep. 279. The element

**2. Under the provisions of sec. 4, art. 12, of the Constitution** of the State, a railroad company must make full compensation for the right of way appropriated to the corporation, irrespective of any benefits or supposed benefits from the construction of the road, or any improvement thereby.

**3. A farmer not engaged in buying and selling real estate**, not knowing the market value of real estate, not living in the neighborhood of the land inquired about, and who does

composing damages is not only the value of the land taken for the way, but also the injury to his remaining land, arising from the increased difficulty of communication between the severed parts. *St. Louis, A. & T. R. Co. v. Anderson*, 39 Ark. 167; *Galena & S. W. R. Co. v. Birkbeck*, 70 Ill. 208. The damages occasioned by the severance of land should be considered, although such damages are largely conjectural. *McReynolds v. Burlington & O. R. Co.* 106 Ill. 152. As elements of damage, the fact that a railroad separates the wood, water and timber from the balance of the farm, the inconvenience to the owner from the perpetual use of the track for moving trains over it, danger to stock kept on the farm, and many other things, may be considered, as well as the actual increase or decrease in the market value of the farm, occasioned by the road. *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316; *Bowen v. Atlantic etc. R. Co.* 17 S. C. 574; *Hartsborn v. Burlington etc. R. Co.* 52 Iowa, 513. The manner in which the land is cut, and all the sur-

not know its situation and fertility, its advantages and disadvantages, cannot, as a witness, give his evidence as to the value of the land before and after the appropriation of the right of way by a railroad company. A farmer, conversant with the land as to its situation, soil, advantages, etc., is competent as a witness to the value, as having particular knowledge of the facts in issue.

4. **Where a railroad is laid through a farm or tract of land used for stock purposes,** or adapted to stock purposes, the accidental danger to which stock thereon will be exposed, may be considered in giving compensation to the land owner for the right of way appropriated for the railroad, so far as the same affects the value or depreciation of the land or tract of land. The jury, however, should be instructed not to consider any danger or probable injury to stock, resulting from the fault or negligence of the railroad company in operating or failing to fence its road; but in the absence of any evidence showing that the farm or tract of land has stock thereon, or is adapted to stock purposes, an instruction to consider the increased risk, or the probability of stock upon the premises being accidentally killed or injured in the operation of the railroad, is misleading and erroneous.

5. **When a part of a farm or tract of land is appropriated for the right of way of a railroad,** danger from fire to buildings,

fences, timber, or crops upon the remainder, in so far as it depreciates the value of the property, may be properly considered in giving compensation to the land owner; but as tending to show the depreciation in the value of the property by reason of the danger from fire all the facts in regard to the situation of the property and improvements relatively to the railroad should be introduced in evidence. The distance from the road to which the danger extends may also be shown. In the absence of all evidence tending to show a decrease in the rental value of the premises, or any increase in the cost of insurance on account of the danger from fire, and in the absence of all evidence tending to show any depreciation in the value of the property by reason of such danger, an instruction to the jury to consider accidental danger from fire to the premises, resulting from the operation of the road, will be misleading and erroneous. When there is sufficient evidence, upon which to base instructions to the jury to consider, in so far as it depreciates the value of the property, accidental danger from fire to buildings, etc., the jury should also be instructed that they should only take into consideration the risk or exposure of fire set out by trains or engines, without the fault or negligence of the company. If a fire occurs through the fault or negligence of the company, its servants or employees, the company is liable therefor; and under the statute of this State, fires from trains

rounding circumstances should be considered in estimating damages. *Dreher v. Iowa S. W. R. Co.* 50 Iowa, 599, 10 Am. & Eng. R. R. Cas. 221; *Brooks v. Davenport & St. P. R. Co.* 37 Iowa, 99.

**Damages reasonably anticipated.** An award of damages, under the statutes, embraces only those damages which may reasonably be anticipated upon the assumption that the line will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way. *Burlington & M. R. Co. v. Schluntz*, 14 Neb. 421. A compensatory, not a speculative, remuneration is guaranteed. *Powers v. Hazleton & L. R. Co.* 33 Ohio St. 429. The owner is entitled to recover for the expense of any additional fencing of cultivated lands made necessary by reason of the construction of the road; but the expense of fencing uncultivated land should it at any future time be cleared or cultivated, is too remote and uncertain to be estimated; the same should not be taken into consideration. *Raleigh & A. A. L. R. Co. v. Wicker*, 74 N. C. 220. The jury may consider how much the burden of fencing would detract from the value of the land. (*Moutour R. Co. v. Scott*, 1 Pennyp. (Pa.) 508; *Peoria & R. I. R. Co. v. Birkett*, 62 Ill. 332); and the necessity of making additional fences may be properly considered. *Baltimore, P. & C. R. Co. v. Lansing*, 52 Ind. 239; *New York & G. L. R. Co. v. Stanley*, 35 N. J. Eq. 233; *Pennsylvania & N. Y. R. Canal Co. v. Bunnell*, 81 Pa. 414. In estimating damages arising to a land owner, the consequential damages resulting necessarily from the construction of the improvement are to be considered, and not alone those which are direct and immediate. *Hoffer v. Pennsylvania Canal Co.* 67 Pa. 221.

**Special damages.** Special damage suffered by an orchard may be allowed. *Selma, R. & D. R. Co. v. Redwine*, 51 Ga. 470. If a building stands in the way of a road, which it is necessary to destroy, its value must be paid by the corporation; and the jury, in estimating its value, will take into consideration, not the value of the materials composing the building, but the value of the building as such. *Lafayette, B. & M. R. Co. v. Winslow*, 66 Ill. 219. If growing crops were destroyed by the appropriation of the right of way and entry thereunder, the owner may prove their value as an element of damage. *Lance v. Chicago, M. & St. P. R. Co.* 57 Iowa, 636, 5 Am. & Eng. R. R. Cas. 617.

**Injury to farm as a whole to be considered.** In estimating the damages for the location of a railroad over a farm, the injury should not be limited to the legal subdivisions of land traversed by the road, but the injury to the farm as a whole should be considered. *Hartshorn v. Burlington etc. R. Co.* 63 Iowa, 613; *Reisner v. Atchison Union Depot & 2 L. R. A.*

*R. Co.* 27 Kan. 332; *Sheldon v. Minneapolis & St. L. R. Co.* 29 Minn. 318; *Wyandotte, K. C. & N. W. R. Co. v. Waldo*, 70 Mo. 629. The farm must be considered as a unit, but what such unit includes the jury must determine. If a separate parcel of land was a part of the farm, they might consider the effect of the road upon respondent's convenience and safety in cultivating it from his dwelling in connection with his other land constituting his farm; otherwise not. *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500. Where a railroad ran through one quarter section of a stock farm of nine hundred and sixty acres, it was held that the damage to the tract as a whole should be considered. *Kansas City, E. & S. R. Co. v. Merrill*, 25 Kan. 421. Plaintiff being the owner of sixty acre tracts lying in one body, over two of which defendant's railway has been built, there was no error in permitting him to prove the diminution in value of the whole of said tract by reason of such taking. *Parks v. Wis. Cent. R. Co.* 33 Wis. 413. Where a farm consisted of two hundred and forty acres, and the petition describes the road as running through both the quarter section and the eighty acre piece, the jury, in assessing damages should consider the damage done to the whole farm. *Kelthsburg & E. R. Co. v. Henry*, 79 Ill. 200. Where a creek was a boundary line between Atchison and Doniphan Counties, and some sixty acres of the farm were in Atchison, and the balance in Doniphan County, the court did not err in permitting an inquiry as to the damages to the farm as a whole, including that part in Atchison County, and in rendering judgment for such damages. *Atchison & N. R. Co. v. Gough*, 29 Kan. 94. In assessing the damages to another portion of a farm, aside from the value of the land taken for a right of way, the jury should consider the road as running only through the farm, and not consider any general benefit which the road may prove in making a better market or convenience for travel. *St. Louis, J. & S. R. Co. v. Kirby*, 104 Ill. 345.

**What injuries not considered.** Injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered. *Fremont, E. & M. V. R. Co. v. Whalen*, 11 Neb. 585. Danger to teams and persons is too uncertain an element of damage to be considered. *McLennolds v. Burlington & O. R. Co.* 103 Ill. 152; *Atchison & D. R. Co. v. Lyon*, 24 Kan. 745; *Parks v. Wis. Cent. R. Co.* 33 Wis. 413. The jury should not consider the failure to maintain the fences as an element of damage. *Jones v. Chicago & I. R. Co.* 68 Ill. 380. The increased danger of the destruction of buildings, and the like, by fire, is too remote and contingent for legal inquiry (*Lance v. Chicago etc. R. Co.* 57 Iowa, 636; *Fleming v. Chicago, D. & M. R. Co.* 34 Iowa, 333; *Re Union Village & J. R.*

or engines, in the operation of a road, are *prima facie* evidence of negligence on the part of the company.

(January 5, 1890.)

**ERROR** from the District Court of Sedgwick County, to review a judgment on a verdict assessing damages for land taken by a railroad company for its right of way. *Reversed.*

The facts are stated in the opinion.

**Messrs. Geo. R. Peck, A. A. Hurd and Robert Dunlap** for plaintiff in error.

**Messrs. Sluss & Stanley** for defendants in error.

**Horton, Ch. J.**, delivered the opinion of the court:

Ross & Packer are the owners of the S. W.  $\frac{1}{4}$  of Sec. 25, Tp. 29, R. 2 W., in Sedgwick County. On the 15th day of March, 1888, the District Judge of that county appointed commissioners to appraise the lands along the line of the Leroy & Western Railroad Company through the county, and to assess the damages for the right of way of the road. On the 26th day of April, 1888, the commissioners after viewing the said southwest quarter and the proposed route of the railroad over the land,

assessed the damages as follows: Value of land taken for right of way, \$120.50; damage to land not taken, \$50; damage to crops, \$8—aggregating \$178.50. The right of way cut off from the north side of the quarter about six acres of land; this six acre strip is a long, wedge shaped piece, at the lower end about 200 yards wide running to a point nearly eight rods in length. At the trial, the jury assessed the damages at \$312, and judgment was rendered accordingly. The railroad excepted, and brings the case here. Upon the trial the railroad company requested the court to give the following instruction:

"You are instructed, in assessing the amount of plaintiff's recovery, that you may take into consideration any benefits by reason of construction of railroad through the premises of plaintiff, which may be special and peculiar to the tract of land in question—that is, benefits different from and in excess of benefits resulting to other adjoining land not intersected by the railroad."

The court refused the request, holding that benefits, although special, could not be set off against the value of the strip taken for the right of way, or against the damages to the remainder of the land.

Co. 53 Barb. 457; Sunbury & E. R. Co. v. Hummell, 27 Pa. 99; Lehigh Valley R. Co. v. Lazarus, 28 Pa. 203; Patten v. Northern Cent. R. Co. 33 Pa. 426; Lafayette Pl. Road Co. v. New Albany & S. R. Co. 13 Ind. 90; although there are decisions to the contrary. Phila. & R. R. Co. v. Yeiser, 8 Pa. 366; *Re* Utica etc. R. Co. 53 Barb. 456; Somerville & E. R. Co. v. Doughty, 22 N. J. L. 495; Proprietors of Locks & Canals v. Nashua & L. R. Corp. 10 Cush. 392; Colvill v. St. Paul & C. R. Co. 19 Minn. 233; Hatch v. Cincinnati & I. R. Co. 18 Ohio St. 124; Adden v. White Mts. N. H. R. Co. 55 N. H. 413. Under the Statutes of Indiana danger from fire should be considered in the assessment of damages. Swinney v. Ft. Wayne etc. R. Co. 59 Ind. 235; Lafayette etc. R. Co. v. Murdock, 68 Ind. 137.

**Measure of damages.** The true measure of damages is the difference between the market value of the whole tract before the taking, and that of the remainder after the taking, excluding any enhancement of value by the building of the road. St. Louis, A. & T. R. Co. v. Anderson, 39 Ark. 167; Danville etc. R. Co. v. Gearhart, 81 Pa. 230; East Brandywine & W. R. Co. v. Bank, 73 Pa. 454; Jacksonville & S. E. R. Co. v. Walsh, 105 Ill. 253. The marketable value of property is the amount for which the property would sell if put upon the open market and sold in the manner in which property is ordinarily sold in the community in which it is situated. Everett v. Union Pac. R. Co. 59 Iowa, 243. The damages must be for an actual diminution of the market value of the land, and not speculative. Page v. Chicago etc. R. Co. 70 Ill. 324; Eberhart v. Chicago etc. R. Co. 1d. 347; Turner v. R. Co. 8 Phila. 483. The question for the jury to determine is, What was the value of the property in question on the day when the report of the commissioners was filed? Robbins v. St. Paul etc. R. Co. 22 Minn. 236. The jury should value the property without reference to the person of the owner or the actual state of his business. Pittsburgh & L. E. R. Co. v. Robinson, 96 Pa. 423. The question is, How much less in value was the farm immediately after taking the land for right of way, and in consequence thereof, than it was immediately before, not taking into account any supposed benefits to result from the building of the railroad? Harrison v. Iowa Midland R. Co. 36 Iowa, 323; Brooks v. Davenport & St. P. R. Co. 37 Iowa, 92. The inquiry as to damages should be confined to the tract of land described in the petition, in the absence of a cross bill by the defendant showing that he owns contiguous lands which will be damaged. Jones v. Chicago & I. R. Co. 68 Ill. 380. The cost of improvements upon the land should not be considered, unless they in fact increase its value to the extent of their cost. Jacksonville & S. E. R. Co. v. Walsh, 105 Ill. 253. Where the award provides that if the owners shall retain possession

three months they will sustain no damages to their business, if the railway company waits three months before taking possession, it avoids payment of that class of damages. Glennon v. Chicago etc. R. Co. 79 Ill. 501. Interest from the date of the award of the commissioners should, as a general rule, be allowed, not strictly as damages but as an equitable mode of compensating the owner for the necessary delay in ultimately ascertaining the amount he is entitled to be paid. Metier v. Easton & A. R. Co. 37 N. J. L. 222; Drury v. Midland R. Co. 127 Mass. 571; *Re* Pigott & The Great Western R. Co. L. R. 18 Ch. Div. 146.

**Value of land for its uses and purposes.** The value of land for farm use is a proper subject of inquiry. Michigan A. L. R. Co. v. Barnes, 44 Mich. 222. The jury are to take into consideration, not only the purposes to which the land is or has been applied, but any other beneficial purposes to which it may be applied, which would affect the amount of compensation or damages. Cincinnati & S. R. Co. v. Longworth, 80 Ohio St. 108; Colvill v. St. Paul & C. R. Co. 19 Minn. 233. In condemning land its value is to be assessed with reference to what it is worth for sale in view of the use to which it may be put, and not simply with reference to its productiveness to the owner in the condition in which he has seen fit to leave it. Mississippi River Bridge Co. v. Ring, 53 Mo. 421. Any purpose for which the same is adapted, and which enters into and affects its market value may be properly considered. Sherman v. St. Paul etc. R. Co. 30 Minn. 227.

**Value of tract cut off.** The fact that a part of the land is cut off should be taken into consideration in assessment of the damages. Peoria, A. & D. R. Co. v. Sawyer, 71 Ill. 381. Where a tract of five acres was by the right of way cut off from the body of plaintiff's farm, it was held that the value of the five acres might be proved. The jury might well consider the value of the component parts. Harrison v. Iowa Midland R. Co. 36 Iowa, 323. Where a highway ran through the property, and the railroad ran through a part thereof which lay between the highway and the Mississippi River, evidence was held admissible to show what such portion, taken by itself, was worth, without the railroad, at the time of the taking aforesaid, and what the balance would be worth after taking out the piece appropriated by the railroad. Colvill v. St. Paul & C. R. Co. 19 Minn. 233. Plaintiff was owner of one hundred and twenty acres of land, consisting of three forties in line from east to west. In assessing the compensation to be paid to the plaintiff, he is entitled to have the effect of the appropriation of the right of way across the two westerly forties upon the easterly forty considered and taken into account. Wilmes v. Minneapolis & N. W. R. Co. 29 Minn. 242.

2 L. R. A.



It is conceded by all the parties that neither general nor special benefits can be set off against the value of the strip or part taken for the right of way. The question is therefore presented whether special benefits from the construction of the railroad or any improvement thereby may be set off against the damages to the remainder of the land.

If it were not for the provisions of the Constitution of the State, as a matter of justice, the benefits, direct and special, to the land owner should be charged in making the estimate of the amount to which he is justly entitled for the appropriation of the right of way. *Wichita & W. R. Co. v. Kuhn*, 88 Kan. 675-678.

Under the Constitution, are such benefits to be deducted or allowed from the compensation required to be paid?

Section 4, art. 12, of the Constitution ordains:

"No right of way shall be appropriated to any corporation until full compensation therefor be first made in money, irrespective of any benefit from any improvement."

This section of the Constitution was referred to and construed seventeen years ago in *St. Joseph Railroad Company v. Orr*, 8 Kan. 419. It was said in that case:

"The plaintiff in error offered evidence to show that benefits accrued to the land of appellant by reason of building the road. The court refused to permit any evidence on that point to go to the jury, and correctly. Section 4 of article 12 of the Constitution is conclusive on this point."

The writer of that opinion was Kingman, late Chief Justice. As he was a member of the Constitutional Convention of 1859, and the chairman of the committee upon judiciary in the convention, this decision is entitled to great consideration.

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"Under the provisions of section 4, art. 12, of the Constitution of the State a railway company must pay for the right of way, irrespective of any benefit from the proposed improvement of the company; and the compensation for such right of way appropriated to the use of the company includes, not only the value of the property taken, but also the loss the land owner sustains in the value of his property by being deprived of a portion of it."

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In *Frederick v. Shane*, 82 Iowa, 254, it was held that "In the assessment of damages an individual sustains in the location of a road over his lands, the jury cannot, under article 1, section 18, of the State Constitution, take into consideration any advantage or benefit that may result to the owner by reason of the establishment of the road—as that it would tend to drain and improve the land." See also, to the like effect, *Brooks v. Davenport & St. P. R. Co.* 37 Iowa, 99.

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In Indiana in 1853, and also in 1873, the statute declared that, "In estimating any damages [for the appropriation of land for the right of way of a railroad] no deduction shall be made for any benefit that may be supposed to result to the owner from the contemplated work."

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In *Cleveland Railroad Company v. Ball*, 5 Ohio St. 568, it was said: "After the testimony

was closed, the court was requested by the counsel for the plaintiff in error to charge the jury, amongst other things, as follows:

"3. That it is proper for the jury to consider the benefits, by reason of the appropriation, to the residue of the tract through which the appropriation is made, for the purpose of determining whether such residue is injured by the appropriation.

"4. That if the jury are of opinion that the whole of the residue of the tract through which the appropriation is made, is not diminished in value by the appropriation, that no damages are to be assessed for any injury which it may be claimed is done by the appropriation to such residue.

"These instructions the court refused to give to the jury," and "as to the third point requested, the court charged the jury: 'That by the Constitution of the State, and their oaths, they were required to assess the defendant's damages or the amount of his compensation, irrespective of any benefit proposed by the plaintiff as a railroad company; and that they were to exclude all real or imaginary benefits from their consideration.'

"As to the fourth point requested, the court charged the jury: 'That the Constitution of the State provided that the compensation shall be assessed by the jury without deduction of benefits to any property of the owner. That to charge the jury as requested would be asking them to disregard this provision of the Constitution as well as art. 18, sec. 5, which provides that the compensation made to the owner of the property shall be irrespective of any benefits from any improvement proposed by said corporation.'

The supreme court, *Bartley, Ch. J.*, delivering the opinion, said there was no error in the instructions of the court to the jury. There was something said in the opinion, that where a local benefit or advantage was blended with a local incidental injury, the jury might consider the same; but it was not decided in that case that the owner, for local incidental injury to the residue of his land, could be allowed any deduction for the separate local benefit. Both of the Ohio decisions referred to were rendered only a few years prior to the adoption of our Constitution.

The case of *Kramer v. Cleveland Railroad Company*, 5 Ohio St. 140, cited as supporting the allowance of special benefits, was made under the Ohio Constitution of 1802, and not the Constitution in force at the time of the adoption of our own. The Ohio Constitution of 1802 permitted the railroad to set off against the value of the property taken for public use the increased benefits arising from the improvement; and it therefore differed widely from the Ohio Constitution in force in 1859.

It is contended, however, by the railroad company, that as this court, in *Atchison Railroad Company v. Blackshire*, 10 Kan. 477, recognized that the fair way of determining the injury for the appropriation of a right of way is to determine the market value of the premises before the right of way is set apart, and then again after, and that the difference will be the true measure of damages; and as this rule has also been followed by the court in 2 L. R. A.

many cases—that this permits benefits to be considered; and, therefore, that the construction given to the constitutional provisions already referred to cannot be sustained.

If this latter rule permitted separate benefits to be considered, so far as they affect the value of the premises injured, we suppose the rule must give way to the provisions of the Constitution, which all concede are paramount. But this rule does not conflict with our construction of the constitutional provision, excepting in a few cases only; and the conflict is more theoretical than substantial. The jury do not generally consider benefits, when they ascertain the market value of the land before the appropriation, and then the market value of the land after the appropriation or construction of the railroad, and determine the difference as the damages. But even if the rule in the *Blackshire Case* is not always accurately correct, the railroad company cannot complain of the adoption of the rule, because under its construction it is beneficial, not detrimental.

We have already held that farmers living in the neighborhood of the land in question, well acquainted with its situation and fertility, its advantages and disadvantages, are qualified to state their opinions in regard to its value before and after the road was constructed through it. Such witnesses are competent, not strictly as experts having peculiar skill and scientific attainments, but as persons having particular knowledge of the facts in issue. We are not inclined to extend the rule in regard to this character of evidence; therefore, the opinion of no farmer, not living in the neighborhood of the land, and not acquainted with its situation and fertility, its advantages, disadvantages, etc., ought to be received in regard to the value of the land. Farmers not employed in buying and selling real estate, and having no knowledge of the facts in issue, ought not to be permitted to give their opinions from an examination of a map of the route of the road, or upon hearsay evidence only. *Le Roy & W. R. Co. v. Hawk*, 89 Kan. 638.

Several of the witnesses, who were farmers, were permitted to testify the amount, in their judgment, per acre that the land would be depreciated by reason of the location of the road across it.

This class of evidence is not to be commended, and falls very nearly within the objections stated in *Wichita Railroad Company v. Kuhn*, 38 Kan. 675-677. The opinion filed upon a motion for a rehearing in that case corrected the second part of the syllabus reported in 38 Kan. 104. Witnesses, competent therefore, may give their opinions as to the value of the property appropriated for right of way, but not as to the amount of damages caused thereby. They may testify to the market value of the property before the right of way is set apart, and then again after; but any violation of this rule, prejudicial to the interests of the opposing party, perils a favorable verdict.

In *Leavenworth Railway Company v. Paul*, 28 Kan. 816, where two witnesses were allowed to state what per cent the property was damaged by the appropriation of the right of way, the judgment was not reversed; but there were many other things stated in the opinion, tending

It is conceded by all the parties that neither general nor special benefits can be set off against the value of the strip or part taken for the right of way. The question is therefore presented whether special benefits from the construction of the railroad or any improvement thereby may be set off against the damages to the remainder of the land.

If it were not for the provisions of the Constitution of the State, as a matter of justice, the benefits, direct and special, to the land owner should be charged in making the estimate of the amount to which he is justly entitled for the appropriation of the right of way. *Wichita & W. R. Co. v. Kuhn*, 88 Kan. 675-678.

Under the Constitution, are such benefits to be deducted or allowed from the compensation required to be paid?

Section 4, art. 12, of the Constitution ordains:

"No right of way shall be appropriated to any corporation until full compensation therefor be first made in money, irrespective of any benefit from any improvement."

This section of the Constitution was referred to and construed seventeen years ago in *St. Joseph Railroad Company v. Orr*, 8 Kan. 419. It was said in that case:

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to show that the evidence of these two witnesses alone was not sufficiently prejudicial, even if erroneous, to require a new trial. Neither the syllabus nor opinion, however, fully justifies the admission of such evidence. See *Kansas Cent. R. Co. v. Allen*, 24 Kan. 83; *Roberts v. Brown Co.* 21 Kan. 247; *Wichita & W. R. Co. v. Kuhn*, *supra*.

It is objected that the court instructed the jury that they might take into consideration the increased risk or exposure by fire on the plaintiff's premises, which might accidentally result from the operation of the road through the same; and also that they might consider the increased risk or probability of stock upon the premises being killed or injured as the result of accident for which the company would not be responsible. The design of the law is to fully compensate the land owner for all injury he may sustain by reason of the appropriation of his land to the use of the road, and which shall grow out of or be occasioned by its location and use at that place. This being true, it follows that it is proper for the jury to consider whether his stock would be liable to be accidentally killed, or his crops, fences and buildings destroyed by fire, without fault on the part of the railroad company. If there was a liability to such injuries, its tendency would be to depreciate the value of the farm in its use, as well as in the market. It must be borne in mind that these things are proper to be considered so far only as they tend to depreciate the value of the farm or tract of land. *Kansas City & E. R. Co. v. Kregelo*, 32 Kan. 610; *Weyer v. Chicago, W. & N. R. Co.* 68 Wis. 180; *St. Louis & S. E. R. Co. v. Teters*, 68 Ill. 144; *Lewis, Eminent Domain*, §§ 496, 497; *Mills, Eminent Domain*, 2d ed. §§ 162, 163.

But instructions concerning the danger to which the stock thereon will be exposed, so far as the same affects the value of the farm, or instructions concerning danger from fire to buildings, fences, timber or crops upon the remainder of the land, in so far as it depreciates the value of the property, ought not to be given, unless there is evidence introduced in the case upon which to found such instructions. In this case there is scarcely any, and perhaps we may say no, evidence, tending to show any special facts of depreciation in the value of the property from danger from fire or from danger to stock.

*Chief Justice Shaw, in Proprietors of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 885, expressed the opinion that danger from fire may enter into the estimate of damages, if the danger be "imminent and appreciable." Where, however, the house and other buildings on the premises are distant from the right of way, and beyond real danger from the operation of the road, no compensation for danger from fire to those buildings should be allowed. If crops or any improvements are in such close proximity to the railroad as to render danger from fire "imminent and appreciable," then, of course, this matter should be considered. *Webber v. Eastern R. Co.* 2 Met. 147; *Hatch v. Cincinnati & I. R. Co.* 18 Ohio St. 92.

The danger or exposure of buildings, fences, timber or crops from fire is an entirely different question from that involved in its destruction

by fire without fault of the company. In the one case, while the risk or exposure may somewhat decrease the value of the property, and is a legitimate consideration for what it may be worth in fixing the compensation to the owner, in the other case, the destruction of buildings, fences, timber or crops by fire is a field of inquiry so remote and contingent as to be without and beyond any range of damages known to the law. *Lance v. Chicago, M. & St. P. R. Co.* 57 Iowa, 686.

In this case it appears from the evidence that there was a house and barn somewhere upon the farm, but we cannot tell from the evidence how near they were to the railroad or right of way. Very little is testified to about any crops upon the farm along or in the vicinity of the right of way. No evidence was offered tending to show a decrease in the rental value or increase of the cost of insurance of the property, whereby it was depreciated by reason of danger from fire from passing trains. If instructions regarding danger from fire to buildings, crops, etc., were deemed necessary, evidence should have been offered showing all the facts in regard to the situation of the property and improvements relatively to the railroad. The distance from the road to which the danger from fire extends might also have been shown.

Again, if special instructions were deemed important concerning the increased risk or probability of stock upon the premises being accidentally killed or injured, then evidence should have been offered that the farm or land was used for stock purposes, or that it was specially adapted for those purposes. If a railroad runs through a farm used for agricultural purposes only, or runs through a lot in a city or village where stock are not kept, an instruction concerning the danger to which the stock upon the property will be exposed would be misleading and erroneous. In the absence of evidence tending to show danger from fire or danger to stock, special instructions asking the jury to consider these things should not be given.

In this State the necessity of showing special facts upon which to base instructions concerning exposure to fire and danger to stock by the operation of a railroad are more important than in many States, because, in this State, a railroad company is not only responsible for all fires which occur through the negligence of the company, its servants or employees, but the statute makes the setting out of such fires, in the operation of a railroad, *prima facie* evidence of negligence on the part of the company. Compiled Laws 1885, chap. 84, § 101; *Kansas City & E. R. Co. v. Kregelo*, *supra*.

In this State, railroad companies are responsible to the land owner or occupant for all injuries negligently done to stock by the company, its servants or employees; and are also liable for all injuries to stock, caused by the road not being fenced through the land. Compiled Laws 1885, chap. 84, §§ 28, 30, 34.

There is therefore only the risk or exposure by fire, and the risk or exposure of stock, to be considered, when such risk or exposure occurs without fault or negligence on the part of the railroad company. As to what particular

questions of fact should have been submitted to the jury, see *Wichita & W. R. Co. v. Feh-heimer*, 36 Kan. 45; *Le Roy & W. R. Co. v. Hawk*, 39 Kan. 688.

*For the errors referred to, the judgment of the District Court will be reversed, and the cause re-manded for a new trial.*

All the Justices concurring.

## PENNSYLVANIA SUPREME COURT.

COMMONWEALTH, *ex rel.* John W.  
KEELY,

v.

Howard PERKINS, Superintendent of Phil-  
adelphia County Prison.

(.... Pa. ....)

**An order requiring a defendant to oper-  
ate a machine invented by him** (the so-  
called "Keely Motor"), made in a suit for a dis-  
covery as to such invention, before issue joined  
and before legal testimony could have been taken,  
and which would in effect compel him to disclose  
his defense,—held, to be an improvident exercise  
of chancery powers, and hence not sufficient to  
support a commitment as for a contempt in not  
obeying such order.

(January 23, 1889.)

**HABEAS CORPUS.** *Relator discharged.*

The relator was confined in the Philadel-  
phia County Prison, under a commitment  
issued by the Common Pleas No. 3 of that  
county, upon an attachment for contempt of  
court in disobeying an order made in the  
equity suit of Bennett C. Wilson against John  
W. Keely, the relator.

The commitment and the proceedings on  
which it was based are set forth in the opinion.

*Messrs. J. Jos. Murphy, Charles B.  
Collier and Wayne MacVeagh* for rela-  
tor.

*Messrs. Strawbridge & Taylor, A. S.  
L. Shields and Rufus E. Shapley, contra.*

**Paxson, Ch. J.**, delivered the opinion of  
the court:

This was a writ of *habeas corpus*. The rela-  
tor complains that he is unlawfully restrained of  
his liberty by the keeper of the Philadelphia  
County prison. The respondent makes return  
that he holds the relator by virtue of the fol-  
lowing commitment:

*NOTE.—Essentials to bill for discovery. It is essen-  
tial to a valid bill of discovery that it set forth a title  
in the party which is sufficient to support or defend  
a suit, and that it pray a discovery pertinent to  
that title and nothing beyond. Young v. Colt, 2  
Blatchf. 377. See Story, Eq. Pl. §§ 317-320; 2 Story,  
Eq. Jur. § 1490; 1 Pom. Eq. Jur. 204; Van Kleeck v.  
Reformed Dutch Church, 6 Paige, 600; S. C. in err.  
20 Wend. 457; Phillips v. Prevost, 4 Johns. Ch. 206.  
A party has no right to a discovery except of facts  
and deeds and writings necessary to his own title,  
or under which he claims, for he is not at liberty  
to pry into the title of the adverse party. 2 Story,  
Eq. § 1490; Sackville v. Ayleworth, 1 Vern. 105; Dur-  
sley v. Fitzhardinge, 6 Ves. Jr. 200; Allan v. Allan,  
15 Ves. Jr. 131; Breyvoort v. Warner, 8 How. Pr. 324.  
See Dias v. Merle, 2 Paige, 494; Van Kleeck v. Re-  
formed Dutch Church, 6 Paige, 600. This court will  
not interfere to enable applicants to ferret out evi-  
dence or witnesses. Woods v. DeFigniere, 25 How.  
Pr. 527.*

Examination before trial, which may well be  
characterized as a mere fishing examination, should  
3 L. R. A.

"Be it remembered, that on 17th day of No-  
vember, 1888, on motion of \_\_\_\_\_,  
Esquire, the court ordered: And now the  
said John W. Keely having been brought into  
court by the attachment issued in these pro-  
ceedings, and having been required by the  
court to purge himself of the contempt of which  
he is convict, or show cause why he should not  
be further dealt with as to the court may ap-  
pear proper; and the said John W. Keely not  
having purged himself of said contempt, and  
not having shown cause why he should not be  
further dealt with—after hearing the said John  
W. Keely, and after full consideration, it is  
decreed and adjudged that for said contempt  
the said John W. Keely shall be committed to  
the county prison, to be there kept and con-  
fined in custody until he shall have purged him-  
self of said contempt, and until he shall have  
been legally discharged from said custody."

Upon the presentation of the petition, with  
a copy of said commitment, to *Justice Sterrett*  
in vacation, he allowed the writ returnable  
before him at chambers. Upon the return of  
the writ the hearing was continued to the 12th  
of January before the court in banc, and the re-  
lator was admitted to bail in the mean time.  
This was the course pursued in *Commonwealth,  
ex rel. Torrey, v. Ketner*, 92 Pa. 372. See also  
*Hummel & Bishop's Case*, 9 Watts, 416; *Com.  
v. Newton*, 1 Grant, 453.

We might well discharge the relator, upon  
the insufficiency of the commitment. It is no  
only vague but it wholly fails to show the  
nature of the contempt for which he was com-  
mitted. As we do not review such cases upon  
the merits, and only inquire into them so far as  
to ascertain whether the court had the jurisdic-  
tion or power to make the order, it is manifest  
that in many instances the parties would be  
remediless unless the commitment sets forth  
such facts as show jurisdiction. We are not  
asked, however, to decide this case upon tech-  
nical grounds.

neither be allowed nor favored, and far less should  
the power be exercised for inequitable purposes, or  
to create or promote litigation. *Elmore v. Hyde*,  
2 Abb. N. C. 136. See *Lansing v. Starr*, 2 Johns. Ch.  
150; *Lansing v. Pine*, 4 Paige, 639. The exercise of  
power to compel the production of writings was  
confined to those which were the foundation of the  
action; so that even those which were evidentiary  
only were excused from the benefit of it. It  
could not be exercised for inequitable purposes, or  
to create or promote litigation. *Woods v. DeFign-  
niere*, 1 Robt. 688, 25 How. Pr. 523. See *Willis v.  
Bailey*, 19 Johns. 289; *Bank of Utica v. Hillard*, 6  
Cow. 62; *Bailey v. Dean*, 5 Barb. 297; *Denslow v.  
Fowler*, 2 Cow. 502; *Kimberly v. Sells*, 3 Johns. Ch.  
467.

**Contempt.** It is a sufficient answer to a motion to  
commit for contempt, that the court has no jurisdic-  
tion of the matter pending, in which the con-  
tempt is alleged to have been committed; and on  
that fact appearing, the motion to commit should  
be denied. *People v. Brennan*, 45 Barb. 347; *Sulli-  
van v. Judah*, 4 Paige, 444.

A *certiorari* having been issued to the court below, we have before us the record of the case of *Wilson v. Keely*, and from it we learn that the alleged contempt consisted in a refusal to obey an interlocutory order. If the court had the power to make the order we have no doubt it possessed the power to enforce it by attachment, and if necessary by imprisonment.

It is true, under the Act of June 16, 1836, the punishment of imprisonment for contempt is limited to such contempt as shall be committed in open court. It is also true that obedience to the lawful process of the court may be enforced by attachment. Imprisonment for contempt committed in open court is imposed as a punishment, and is for a definite period. Imprisonment for disobedience to the process of the court is not so much for a punishment as to enforce such process, and ceases the moment the party purges himself of his contempt by obedience. The power in both instances is essential to the existence of the court. A court that has not the power to protect itself from public insult, or to compel obedience to its lawful process, would be beneath contempt. As to the authority of the court to enforce obedience to its process by attachment I refer to *Tomé's Appeal*, 50 Pa. 285; and *Com. v. Reed*, 59 Pa. 425, in which the subject is fully discussed.

If the court below had jurisdiction of the parties and the subject matter, and the order in question was lawfully made, it possessed the power to enforce it by attachment. It is almost needless to say that the converse of this proposition is equally true. This involves a brief examination of the nature of the proceedings.

Bennett C. Wilson filed his bill in the court below against John W. Keely, claiming to be the assignee of said Keely of a certain principle or machine known (by Keely) as a reacting vibrating machine, being an independent motor or self acting, having a revolving globe, and other appliances, the said globe being the center for the dispensation of said motion and power, and where all the actual power is produced dependent only on itself for this production and reaction unlimited.

The bill avers that since said assignment the defendant has received divers large sums of money from the exhibition of, and sale of interests in, and from the unlawful use of, said invention, and prays discovery relative thereto; that the defendant has neglected and refused to permit complainant "to have access to and examine the drawings, models and machines embodying the invention referred to in the assignment hereinbefore named in the possession and under the control of said defendant;" that complainant believes that the defendant, unless restrained by an order of this court, will sell and assign said invention to others, and dismantle and alter said motor. The prayers for relief, briefly stated, are, that the defendant be enjoined from removing the machines or models known as the "Keely Motor" from the shops where the same are now located; from selling, assigning or using the same—and particularly that the defendant be compelled to forthwith "exhibit to your orator, and permit him to inspect, all models, machines, drawings and descriptions in the possession of the de-

fendant, of the invention referred to in the above named assignment, and known as the Keely Motor."

Upon the filing of the bill the court below granted an *ex parte* injunction, which was afterwards continued until the further order of the court. A demurrer was filed by the defendant, which appears to have been overruled, with leave to answer over; a commission of experts was appointed to examine the machine, who reported to the court on October 20, 1888. A rule for an attachment against the defendant was granted on October 24, 1888, and upon the 25th of the same month the defendant took a rule to dissolve the injunction. I have referred to only a few of the docket entries; they are very numerous and indicate an especially active and hostile litigation, culminating November 17, 1888, in the commitment of the defendant to the county prison for contempt. The said commitment was based upon disobedience to the order of court of April 7, 1888. The order was as follows:

"And now, April 7, 1888, in accordance with the opinion heretofore filed in this case it is hereby ordered by the court that the defendant the said John W. Keely, shall within thirty days exhibit to the said plaintiff, his attorneys, and to Charles Cresson, Thomas Shaw, Prof. Wm. D. Marks and Jacob Naylor, Esq., who are hereby appointed by the court as experts, the inventions, machines or devices referred to in the plaintiff's bill and now known as the 'Keely Motor,' and shall then and there, in their presence, operate the same or cause them to be operated, and explain the modes of constructing and operating to them. And the said experts are hereby authorized and directed to make such an examination of said machines as will enable them to inform the court as to their identity in construction, principle or operation with the invention described in the complainant's bill as having been assigned him in 1869 by the respondent, the said complainant giving the said experts such a particular description of the last mentioned invention as may be necessary to enable the comparison to be made; and the said experts shall further make such drawings of the machine known as the 'Keely Motor' as they may consider necessary for the information of the court and report jointly or severally; and it is further ordered that the information obtained by this inspection by the complainant and his counsel, or by the said experts, shall not be used for any other purpose than for the proper hearing and adjudication of the present proceeding."

At the time this order was made the cause was not at issue. No answer had been filed, and of course there was no examiner or master. At this stage no legal testimony could have been taken. The plaintiff had obtained his special injunction, which was duly continued within the five days. There was then no further step which the plaintiff could properly take except to put the case at issue. After issue joined, an examiner could have been appointed, and the proofs taken in an orderly manner. Instead of so proceeding a commission of experts was appointed to examine the defendant's machine; and the order of April 7 was made by which the defendant, in advance of any issue, was not only required to



exhibit his machine, but also to operate it and explain the mode of its construction and operation, although it clearly appeared that it would require considerable expense to clean the machine, put it together and operate it. The defendant appears to have been willing to exhibit it, and in point of fact did so.

In view of this I have but considered it necessary to review the authorities upon the question of the power of the court to compel him to exhibit his machine before issue joined. That he might have been compelled to do so at a proper stage of the cause is conceded. But to make an order not only to exhibit, but to operate, it, the practical effect of which was to wring from him his defense in advance of any issue joined, was an excessive and improvident exercise of chancery powers. It is the more remarkable from the fact that the plaintiff's case, as shown by the exhibits and drawings, was sealed up in an envelope and retained by the court, access to the same being not only denied to the defendant, but even to the experts appointed by the court.

It is not necessary to discuss the question how far the motion to dissolve the injunction justified these proceedings. Upon that motion the defendant was the actor, and if his affidavits failed to satisfy the court that the injunction should be dissolved, his motion would necessarily fail. Aside from this the motion to dissolve was made more than three months after the order of April 7, as appears by the docket entries.

We are of opinion that the order referred to

was improvidently made. It follows that the learned court had no power to enforce it by attachment.

*The relator is discharged.*

**Mitchell, J., concurring:**

It was stated, without challenge, at the argument, that the relator had made a motion to dissolve the injunction, before the order of April 7, 1888, and the concluding sentence of the opinion of the learned President of the court below indicates that such was the fact, and that the order was made with special reference to a hearing on that motion.

If that fact were before us I should be of opinion that the inspection directed by the order was within the regular powers of a court of equity, especially where it was concurred in by the relator himself for several months, nominally complied with, and not objected to until he found that it was to be a real examination which was to bring his discovery to a genuine test before a competent mechanical tribunal.

But the record unfortunately does not show any application to dissolve the injunction until October 25, several months after the order for inspection; and as on a hearing of this kind we can review only the regularity of the proceedings upon their face, we are bound by the dates as they appear on the record.

Upon this ground I concur in the opinion of the court that the order for inspection was premature, and the commitment for contempt in not obeying it was therefore improvidently issued.

## UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MISSOURI.

Ernest A. RICH *et al.*,

v.

Thomas BRAY and Minnie G. Kinsey.

(....Fed. Rep....)

**1. The equity jurisdiction of the federal courts** may extend to a suit for the disclosure and distribution of assets held by an executor *de son tort*, although such suit could not be maintained in the state courts for the reason that the probate system of the State afforded a complete remedy.

**2. To give jurisdiction to a federal circuit court**, where two or more parties, whose interests are so separate that any number of them may proceed with the litigation without the others, join as a matter of convenience to prevent multiplicity of suits, in one action for the ascertainment and distribution of their respective interests in a common fund, the interests of each, independent of the others, must amount to \$2,000.

**3. A suit in the nature of partition** cannot be maintained where there has been an ouster of the complainants by the defendant tenant in common, by acts so overt and notorious as to imply notice to his cotenants.

**NOTE.**—*Equity jurisdiction of federal courts.* The rule adopting the equity jurisprudence of England applies only to the remedy. Meade v. Beale, Taney, 359. The jurisdiction in equity of the United States Courts, as to the remedies, is coextensive with the jurisdiction in chancery as exercised in England, and is not affected by state jurisprudence as to the practice and procedure. Pa. v. Wheeling & B. Bridge Co., 59 U. S. 18 How. 421 (15 L. ed. 435); Dodge v. Woolsey, 59 U. S. 18 How. 331 (15 L. ed. 401); Barber v. Barber, 62 U. S. 21 How. 582 (16 L. ed. 233); Payne v. Hook, 74 U. S. 7 Wall. 425 (19 L. ed. 260); Robinson v. Campbell, 16 U. S. 3 Wheat. 212 (4 L. ed. 673); Lorman v. Clarke, 2 McLean, 568; Gordon v. Hobart, 2 Sumn. 401. They may exercise this jurisdiction although the state law gives exclusive jurisdiction to a state court. Parsons v. Lyman, 5 Blatchf. 170. Jurisdiction cannot be conferred by consent of parties, but must be given by law, and should not be extended by doubtful construction. Elgin v. Marshall, 108 U. S. 579 (27 L. ed. 240); Bruce v. Manchester & K. R. Co., 117 U. S. 514 (29 L. ed. 900). Equity sometimes takes jurisdiction on account of the parties, and sometimes on account of the relief

to be administered. Partee v. Thomas, 11 Fed. Rep. 773. The citizenship of formal parties with no real interest in the controversy does not affect the jurisdiction. Removal Cases, 100 U. S. 457 (25 L. ed. 533); Barney v. Latham, 103 U. S. 208 (26 L. ed. 514); Harter v. Kernochan, 108 U. S. 523 (26 L. ed. 411); Wormley v. Wormley, 21 U. S. 8 Wheat. 421 (5 L. ed. 651); Taylor v. Holmes, 14 Fed. Rep. 499. If a right exists within a State which cannot be enforced by law, relief may be sought in equity although it originates under a state statute or a local usage. Clark v. Smith, 38 U. S. 13 Pet. 195 (10 L. ed. 123); Fitch v. Creighton, 65 U. S. 24 How. 159 (16 L. ed. 506); Lorman v. Clarke, 2 McLean, 568; Goshorn v. Alexander, 2 Bond, 158. Relief may be sought, even if no remedy exists in the state court. Fletcher v. Morey, 2 Story, 553. See Grand Rapids & I R. Co. v. Sparrow, 1 L. R. A. 480.

**Matter in dispute.** The pleadings should show that the matter in dispute exceeds the jurisdictional amount. U. S. v. Pratt Coal & Oil Co., 18 Fed. Rep. 708. Where a number of plaintiffs claiming under the same title and having a common interest in the relief sought unite in a suit, their united interests

4. Jurisdiction is not conferred by making a necessary party, whose interests are all in common with those of the complainants, a nominal defendant, in order to comply with the requirement that to give a federal court jurisdiction all the parties on one side must be nonresidents of the State in which the suit is brought.

(January 14, 1899.)

**ON** demurrer to a bill in equity. *Demurrer sustained.*

The case is stated in the opinion.

*Messrs. Henderson & Meredith* for complainants.

*Messrs. Silver & Brown* for respondent, Bray.

**Philips, J.**, delivered the following opinion:

This is a bill in equity. The petitioners are nonresidents of the State and the respondents are citizens of this district.

The bill alleges in substance that William Bray, the maternal grandfather of complainants, died intestate at Maries County, Missouri, on or about the 15th day of February, 1883; that he died seised and possessed of a large amount of real estate and personal property, undisposed of by will or otherwise; that he left no widow, and that no letters of administration have ever been granted on his estate. That complainants and respondents, and other unknown heirs, citizens of the Dominion of Canada, not made parties hereto, are his sole heirs at law.

That on his death the respondent, Thomas Bray, took possession of the entire estate of decedent, consisting of large tracts of land and personal property, mill machinery, stores and appliances, household furniture, horses, wagons and implements of husbandry, farm products, live stock and other chattels, as also the rents, products and profits of said mill and farm, moneys, notes, mortgages and bonds, and has ever since continued to hold, use and enjoy the same as his own property, to the exclusion of the other rightful heirs of the decedent. That he has made large profits out of said property, concealing from the complainants the fact of the existence of such property—whereby they have sustained great loss by the acts and misrepresentations of said Thomas Bray.

The prayer of the bill is that the said Thomas Bray be declared a trustee of said estate for the

said heirs, and that he be required to render a full and true account of all properties, real and personal, that so came into his hands, and account for the increase and profits thereof; that distribution be decreed to be made of the entire estate among the lawful heirs; and for all proper relief.

To this bill the respondent, Thomas Bray, demurs for various grounds of objection, which, so far as deemed essential, will be considered in their order:

1. It is objected that complainants have no standing in a court of equity, for the reason that they have an adequate and complete remedy at law.

It may be conceded that if this action had been instituted in the state court, it would fail, so far as the personal property is concerned, for the reason that the probate system under the state statute has in this respect largely superseded the ancient equity jurisdiction of the chancery courts, for discovering, marshaling and distributing the estates of decedents, at the suit of the heir or creditor. The administration law of the State affords adequate remedies and facilities to accomplish the object sought by this bill: to have an executor *de son tort* disclose the assets in his hands, and for their summary recovery, administration and distribution, by either a private or public administrator, rendering a resort to a court of equity unnecessary. *Titterton v. Hooker*, 58 Mo. 596; *Pearce v. Cuthoun*, 59 Mo. 274; *Johnson v. Beasley*, 65 Mo. 251; *Davis v. Smith*, 75 Mo. 228; *French v. Stratton*, 79 Mo. 562, 563. See also discussion in *Roe v. Harmon*, 29 Mo. App. 569.

It cannot be questioned, however, that such a bill would have come within the cognizance of the Court of Chancery in England, as that jurisdiction was exercised at the time of the adoption of our Federal Constitution.

In *Pratt v. Northam*, 5 Mason, 105, Judge Story observed: "It has been for a great length of time settled that in cases of the administration of assets, courts of equity have a concurrent jurisdiction with courts of law. The original ground seems to have been that a creditor, or other party in interest, had a right to come into chancery for a discovery of assets; and being once rightfully there he should not be turned over to a suit at law for final redress. And for the purpose of complete justice it became necessary to conduct the whole administration and distribution of the assets under the

constitute the matter in dispute. *Shields v. Thomas*, 58 U. S. 17 How. 3 (15 L. ed. 38); *Washington Market Co. v. Hoffman*, 101 U. S. 112 (25 L. ed. 732); *Davies v. Corbin*, 112 U. S. 36 (28 L. ed. 627); *Estes v. Gunter*, 121 U. S. 183 (30 L. ed. 884); but see *King v. Wilson*, 1 Dill. 555; *Woodman v. Latimer*, 2 Fed. Rep. 842. The amount due each of several suitors must be equal to the amount required to give jurisdiction. *Woodman v. Latimer*, 2 Fed. Rep. 842; *Adams v. Douglas Co. McCahan*, 235. The matter in dispute must exceed \$2,000. Act of Congress, March 3, 1887. The rule is an arbitrary one and excludes jurisdiction in cases which involve rights that, because they are priceless, have no measure in money. *Lee v. Lee*, 38 U. S. 3 Pet. 44 (3 L. ed. 890); *Barry v. Mercein*, 46 U. S. 5 How. 108 (12 L. ed. 70); *Pratt v. Fitzhugh*, 66 U. S. 1 Black, 271 (17 L. ed. 206); *Sparrow v. Strong*, 70 U. S. 3 Wall. 97 (18 L. ed. 49). The matter in dispute upon a bill filed solely for an accounting is the amount of the disputed items of the account. *McCormick v. Gray*, 64 U. S. 13 How. 26 (14 L. ed. 36). In a suit for an injunction the value of the object to be gained by the bill, not the amount of plaintiff's damages, is the test of jurisdiction. *Miss. & M. 3 L. R. A.*

*R. Co. v. Ward*, 67 U. S. 2 Black, 485 (17 L. ed. 311); *Washington Market Co. v. Hoffman*, 101 U. S. 112 (25 L. ed. 732); *Whitman v. Hubbell*, 30 Fed. Rep. 81. In a suit to enforce the use of a trademark and compel an account of profits the amount in dispute is not limited to the amount of profits; the value of the trademark may be considered. *Symonds v. Greene*, 28 Fed. Rep. 834. In an action of trespass or assault and battery, where the law prescribes no limitation as to the amount to be recovered, the plaintiff has a right to estimate his damages at any sum; and the damage stated in the complaint is the demand and presents the only criterion to which the court can resort in settling the question of jurisdiction. *Wilson v. Daniel*, 3 U. S. 3 Dall. 401 (1 L. ed. 655); *Barry v. Edmunds*, 116 U. S. 550 (29 L. ed. 729). Jurisdiction does not depend on the amount of any contingent loss which one of the parties may sustain by a decision against him, but upon the amount in dispute between them. *Ross v. Prentiss*, 44 U. S. 3 How. 771 (11 L. ed. 824).

In general, The survivability of a right of action is governed by the local law. *Warren v. Furstenheim*, 1 L. R. A. 40.

superintendence of the court of chancery, when it once interfered to grant relief in such cases." See *Thompson v. Brown*, 4 Johns. Ch. 619.

The United States Courts derive their equity, as well as common law, jurisdiction from the Federal Constitution and laws. Even in States where there are no chancery courts the equity jurisdiction of the federal courts none the less obtains. The State Legislature cannot, by the adoption of any system of administering justice, restrict the constitutional jurisdiction of the federal courts. *Lorman v. Clarke*, 2 McLean, 569; *Robinson v. Campbell*, 16 U. S. 8 Wheat. 212 [4 L. ed. 372].

As said by Mr. Justice Swayne in *Barber v. Barber*, 62 U. S. 21 How. 691 [16 L. ed. 229]: "It is no objection to the equity jurisdiction in the Courts of the United States that there is a remedy under the local law, for the equity jurisdiction of the federal courts is the same in all States, and is not affected by the existence or nonexistence of an equity jurisdiction in the state tribunal. It is the same in nature and extent as the jurisdiction in England, whence it is derived."

So it has been repeatedly held that the jurisdiction of the Courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. *Hyde v. Stone*, 61 U. S. 20 How. 175 [15 L. ed. 875]; *Suydam v. Broadnax*, 39 U. S. 14 Pet. 67 [10 L. ed. 857].

In *Payne v. Hook*, 74 U. S. 7 Wall. 480 [19 L. ed. 261] Mr. Justice Davis uses this language: "If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different States of the Union."

I do not wish to be understood as holding by anything here said or maintained that, where an estate is in process of administration, under the state statute, in the absence of any matters of fraud and the like, which would call into action the special powers of courts of equity for the attainment of entire justice, a party entitled to sue in this court on the grounds of citizenship could call upon it to arrest the jurisdiction of the state court, already acquired, and take upon itself the administration and distribution of the estate.

And where relief is sought on the equity side of the court, the bill, of course, should present some of the exceptional facts which evoke and call into exercise the extraordinary powers of a court of chancery. The bill in this case shows that there has been no administration after the lapse of five years; that Bray has wrongfully appropriated the whole estate to his use, traded and speculated upon it, changed the original form of some of the property, made profits thereon, and been guilty of concealment, rendering a discovery and accounting necessary. These are matters coming within the customary jurisdiction of courts of equity.

2. It is also objected that it does not sufficiently appear that the matter in dispute exceeds 2 L. R. A.

the sum or value of \$2,000. As the amount in dispute is a jurisdictional fact, it should be made to appear affirmatively on the face of the bill.

The only allegation from which any idea of the value of the property in controversy can be derived is contained in the following statement: "The amount of which is unknown to said complainants, but much more than \$2,000 over and above all just debts and funeral expenses."

How much more than \$2,000? This averment could be true if the amount were only \$2,100 or less. Is this sufficient to give this court jurisdiction? There are a large number of heirs or distributees to share in this property; and it is manifest on the face of the bill that the interest of no one of them, nor the interest of all the complainants combined, amounts to the sum in suit. Some of the heirs who are admitted to be distributees, and whose respective shares would have to be reserved for them, are not made parties to this suit. Therefore, the position necessarily assumed by complainants is that their respective interests and rights are so far separate that any number of them may proceed with the litigation without the others. I understand the rule in such case to be that where two or more parties may thus join, as a matter of convenience to prevent multiplicity of suits, in one action for the ascertainment and distribution of their respective interests in a common fund, the interest of each, independently of the others, must amount to the sum of \$2,000 to give jurisdiction to this court. *King v. Wilson*, 1 Dill. 556-568; *Massa v. Outting*, 80 Fed. Rep. 1; *Woodman v. Latimer*, 2 Fed. Rep. 842; *Seaver v. Bigelow*, 73 U. S. 5 Wall. 208-210 [18 L. ed. 595]; *Terry v. Hatch*, 93 U. S. 44 [23 L. ed. 796]; *Chatfield v. Boyle*, 105 U. S. 281-284 [26 L. ed. 944, 945].

The case presented by this bill is, in my opinion, quite distinguishable in principle from that involved in *Davies v. Corbin*, 112 U. S. 86 [28 L. ed. 627]. That was a proceeding by mandamus at the relation of several judgment creditors to compel the levy of taxes, by the proper county officer, to raise the fund necessary to satisfy such judgments. In such case the officer is to collect a tax, not for the benefit of any one creditor alone, but for all. As said by the court:

"A payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is not to raise the sums due the relators, but to raise the whole tax of ten mills on the dollar. As the matter stands each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors. It is apparent, therefore, that the dispute is between the tax collector on one side and all the creditors on the other, as to his duty to collect the tax as a whole for division among them after the collection is made, according to their several shares."

But it cannot be maintained here that the payment by the respondent, Bray, of the share of complainants would not abate this action, although there are other heirs. This bill, as already stated, is framed upon the theory that a portion of the heirs entitled to distribution may maintain the action for the recovery of their respective proportions, bringing the

case directly within the rule established by the authorities cited. In the *Tax Levy Case* the judgment creditors have no common fund existent until after levy and collection; whereas, in the case at bar the fund already existed before suit, of which each complainant is entitled to a definite portion.

The demurrer to the bill on this ground is well taken. *Maxwell v. Kennedy*, 49 U. S. 8 How. 210 [12 L. ed. 1051].

3. In respect of the real estate mentioned in the bill, there is serious difficulty. There is no question of the jurisdiction of a court of equity to make partition of lands; in which action all the equities between the coparceners may be considered and adjusted. But I understand the rule to be likewise inflexible that in a partition suit, either at law or in equity, the title to the land cannot be litigated. Where there is an adverse holding under claim of exclusive right, amounting to an ouster among tenants in common, it destroys the unity of possession and takes away the right of partition. Resort must first be had to the action of ejectment at law. "If one coparcener disseise another, during this disseisin a writ of partition doth not lie between them, for that *Non tenent inanimul, et pro indiviso*." Co. Litt. 167 a, 5 Com. Dig. 225; 16 Viner, 225.

So it is said in *Adam v. Ames Iron Co.* 24 Conn. 290: "The rule at common law is well established that where the writ of partition would be only between coparceners, the plaintiff must be in possession or seised of the land when the writ is brought; and since this right of partition has been extended to joint tenants and tenants in common, the same rule obtains, whether the remedy is sought by writ or bill in equity. And this rule has been applied to an adverse holding by one tenant in common adversely to his cotenant. *Law v. Patterson*, 1 Watts & S. 185; *Clapp v. Bromagham*, 9 Cow. 560; *Lambert v. Blumenthal*, 26 Mo. 471; *Ellis v. Davis*, 109 U. S. 493 [27 L. ed. 1008].

What will amount to such ouster by one tenant in common of his cotenants, has been a much debated question by the courts. It requires stronger evidence, or rather more affirmative acts, to constitute an ouster by one such tenant of his cotenants than against a stranger. As the possession and seisin of one tenant in common is the possession and seisin of the others, his possession is *prima facie* not adverse to his cotenants.

*Judge Story in Olymer v. Dawkins*, 44 U. S. 3 How. 689 [11 L. ed. 778], says: "This presumption will prevail in favor of all until some notorious act of ouster or adverse possession by the parties entering in possession is brought home to the knowledge and notice of the other. Such notorious ouster or adverse possession may be by any overt act *in pais*, of which the other tenants have due notice, or by the assertion of a several and distinct claim to an entirety of the whole land, which in contemplation of law is known to the other tenant."

This question was fully considered and with characteristic ability by *Judge Napton in Warfield v. Lindell*, 80 Mo. 272, from which we make the following quotation, as expressive of what we conceive to be a conservative and correct view: "To constitute an adverse posses-

sion of one tenant in common against his cotenants, there must be some notorious act asserting an entire ownership. It is further said in some cases that this act must be brought home to the knowledge of the cotenant. This, we suppose, depends upon the nature of the act. If it consists altogether of a mere verbal assertion of entire ownership, such an assertion could not with any propriety be regarded as an act of adverse possession of which the cotenant was bound to take notice, unless made to him or communicated to him. A declaration to a mere stranger amounts to nothing, unless that declaration is brought to the knowledge of the cotenant. But when the act is of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such an unequivocal character as not to be easily misunderstood, it is not believed to be necessary that any positive notice should be given to the cotenant, or that it devolves upon the possessor to prove a probable actual knowledge on the part of the cotenant. It is sufficient that the act itself is overt, notorious; and if the cotenant is ignorant of his rights or neglects them, he must bear the consequences."

The bill in the case at bar in substance avers that the respondent, Thomas Bray, possessed himself of this land on the death of William Bray, without authority of law, and has ever since held the same, except such part as he may have disposed of, or given to the correspondent, Minnie G. Kinsey, to their entire exclusion, denying that there was any such property belonging to William Bray, and refusing to give complainants their share; living on and cultivating such real estate as his own; using said property for his own private gain in every way possible; making great profits thereon, no part of which has he ever shared with complainants.

Construing the pleading most strongly against the pleader, the legitimate inference to be drawn from the concessions of the bill is that the ouster was complete. There was not only an adverse holding, but an open occupation of the property to the exclusive use and benefit of respondent, with the denial of complainants' right to any share therein; acts so overt and notorious as to imply notice to the cotenants. In fact his adversary character in the occupancy and exclusive claim of right is unduly made the basis of the relief sought by the complainants, and therefore this action cannot be maintained in respect of the real estate.

4. It is next insisted by the demurrer that complainants' right of action as to the personal property is barred by the statute limiting such causes of action to five years after the right of action accrued.

It may be conceded that where it affirmatively appears on the face of the bill that the statutory period has run, the objection may be raised by demurrer; but on examination of the demurrer no such ground is assigned therein; and as this is an objection personal to the respondent, if it does not raise it by demurrer or plea, it is deemed to be waived by him.

Under the Missouri Statute advantage cannot be taken of the Statute of Limitations otherwise than by plea, except in those instances where the statute creates an absolute bar by

lapse of time without any exception. *Belle-ville Sav. Bank v. Winslow*, 80 Fed. Rep. 488.

5. There is another fatal objection to the jurisdiction of this court. The defendant Minnie G. Kinsey is joined as a corespondent with Thomas Bray. She is a citizen of this State and district. She is an heir equally with complainants. No wrong is alleged against her. Her interests, as appears from the bill, are in harmony with those of the complainants. She is a necessary party to any partition proceeding. *Dameron v. Jameson*, 71 Mo. 97; *Barney v. Baltimore*, 73 U. S. 6 Wall. 280 [18 L. ed. 825].

Why is she joined as a corespondent? No reason whatever is assigned therefor, and I apprehend that none other can be assigned than the fact that she could not be joined as a co-complainant without ousting the jurisdiction of the court, for the reason that she is a citizen of the State of Missouri, and of this federal district.

The question, therefore, presents itself on the

face of this bill: Can the complainants by this manoeuvre bring this controversy into this jurisdiction? The law is that all the parties on one side, where the action is instituted in the United States Court, must be nonresidents of the State in which the suit is brought. It would, in my opinion, be a palpable fraud on our jurisdiction if such a subterfuge could be resorted to successfully, by making one of the necessary parties a defendant whose interests are all in common with those of the complainants, and against whom no antagonistic act is alleged.

This question has undergone thorough examination in the case of *Bland v. Fleeman*, 29 Fed. Rep. 669, in a case quite parallel in principle; and approving the principle therein announced as applied to the facts of this case, I hold that jurisdiction cannot thus be thrust upon this court.

6. There are other objections made to this bill, but they are not of sufficient importance to justify the prolongation of this already too long opinion.

*Demurrer sustained.*

## U. S. DIST. COURT, EASTERN DIV., SOUTHERN DISTRICT OF GEORGIA.

Marion ERWIN

v.

UNITED STATES.

(....Fed. Rep.....)

**1. The Act of 22d February, 1875 (18 Stat. at L. 333), which requires that the accounts of district attorneys, clerks, marshals, etc., shall be forwarded, "when approved," "to the proper accounting officers of the treasury," does not make presentation to such officers a condition precedent to a right of action; nor is rejection of a claim by the accounting officers of the Treasury such a determination of a "commission or department authorized to hear and determine," in the meaning of the Act of March 3, 1887 (24 Stat. at L. 505), as will bar an action in the proper courts.**

**2. While the general rule is otherwise, when a statute is silent as to compensation, if additional labor is imposed upon a clerk, not in the line of the duties ordinarily appertaining to such an office, and if contemporaneous construction of the statute by the Attorney-General, and analogous provisions of other statutes subsequently passed indicate an intention to pay for such services, the officer is entitled to compensation.**

**3. A clerk of a Circuit or District Court of the United States is entitled to compensation for revising the jury box, at the rate of \$5 per day for a period not exceeding three days for a term of the court. The clerk is entitled to charge fifteen cents per folio for recording the names, residences, etc., of jurors, on a record which he is required to make by a rule of court.**

**4. Where his deputy attends a session of the court, the clerk is entitled to a *per diem* compensation for such attendance, even though the clerk has received a *per diem* for his personal attendance the same day at a session of the court at another place.**

**5. The proviso, relative to compensation for attendance of court officers, in the Act**

of August 4, 1886 (24 Stat. at L. 258), was repealed by the proviso covering the same subject matter in the Act of March 3, 1887 (24 Stat. at L. 541). And since the passage of the latter Act, it is not necessary that business be transacted in court to entitle the clerk to his *per diem*; it is sufficient if the court be opened for business by the judge.

**6. The offices of clerk and commissioner are compatible. A person who holds two distinct compatible offices may receive the compensation of each. A clerk is given a *per diem* fee "for his attendance" at a session of the court. A commissioner is given a *per diem* fee "for hearing and deciding"—services clearly distinct.**

**7. An attachment against a defaulting witness or juror for contempt of court is an independent suit, and a "cause" for which a docket fee is chargeable under the Fee Bill. The clerk is required to make a final record of the proceedings in such a case.**

**8. The clerk is entitled to a docket fee for a hearing by the court on application for a warrant for the transportation of a defendant to another district under the provisions of section 1014, Revised Statutes.**

**9. The clerk is entitled to charge for filing each separate paper sent up by commissioners after hearing in criminal cases, and for filing each separate account of deputy marshals, being the vouchers to accounts current of the marshal.**

**10. The fees of the clerk for entering orders approving accounts of marshals, clerks, attorneys, commissioners, etc., as required by the Act of February 22, 1875 (18 Stat. at L. 333), and for certified copies of such orders for the department, are properly chargeable against the United States.**

**11. Where by order of the court the clerk enters upon the minutes, as memorial services in respect to the late Vice President, a proceeding in court of official character, the fee for entering is properly chargeable to the Government.**

**12. The statute requires that jurors and witnesses shall be paid upon the orders of the court. When the clerk states the accounts of jurors and witnesses, taking their aff-**

\*Head notes by the COURT.

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devits as to travel and attendance, and presents the accounts stated in a report to the court for its approval, he is entitled to the fee prescribed by the statute "for making any report." The original orders signed by the judge should be entered of record, and placed upon file by the clerk, and he is entitled to a fee of ten cents for filing each.

13. In a State where the use of local jails for United States prisoners is permitted, whenever a prisoner is committed to jail a copy of the writ of commitment showing grounds thereof should be left with the jailer. In case of a proceeding before a judge or commissioner in which it is necessary to commit the defendant to jail to await a hearing or pending examination, a writ to commit is necessary, setting forth the cause of detention and why examination is postponed. After hearing and order committing for trial, a final writ of commitment is necessary, reciting the hearing, finding of probable cause, and that prisoner is committed, in default of bail, to await trial. Where a defendant is arrested on bench warrant and brought before the court, and is committed, in default of bail, to await trial, the writ of commitment should state the cause of detention until a trial can be had. After conviction a final writ of commitment is necessary, setting forth the fact of trial and conviction and the term of imprisonment prescribed in the sentence. The copy commitment delivered to the jailer should, where practicable, be certified and bear the seal of the court.
  14. A state law passed since 1789 cannot affect criminal procedure in the federal courts. Unless there be an express statute to the contrary the federal courts are governed in criminal causes by the general common-law procedure. A final record was required to be made by the clerk at common law; and the general method of making the record prescribed by the common law should be followed now, subject to such changes as have been wrought by the character of our institutions, and the modifications made necessary by the enlarged Bill of Rights of the Federal Constitution.
  15. A criminal information must be founded on an affidavit charging a crime, and a preliminary hearing, finding probable cause, and fixing reasonable bail by the committing magistrate; otherwise, the proceeding is not in accordance with due process of law, and is contrary to the 4th, 5th and 8th Amendments to the Constitution. The proceedings before the committing magistrate showing a compliance with these constitutional provisions, being a necessary part of the proceeding, should be entered upon the final record.
  16. At common law the names of only four witnesses could be included in one subpoena. The witness was served by leaving with him a copy of the subpoena or a ticket which contained the substance of the writ. It was the duty of the party or his attorney to make the copy subpoenas or tickets and furnish them with the writ to the officer for service. Section 829, Revised Statutes, requires that the clerk shall insert in each writ of subpoena the names of as many witnesses in a cause as convenience in serving will permit. Where the clerk makes the copy subpoenas or subpoena tickets and furnishes them to the marshal for service at the request or by the acquiescence of the district attorney, the clerk is entitled to charge the Government for making such copies.
  17. In determining the number of folios in a final record, each separate and distinct order, notice or other paper is to be counted separately.
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ately, according to the rule prescribed in section 854, Revised Statutes; and the aggregate of the folios so found is the number of folios in the record.

(January 17, 1899.)

**ACTION** by a clerk of a United States District Court against the United States, under Act of Congress of March 8, 1887, entitled "An Act to Provide for the Bringing Suits against the Government of the United States."

*Judgment for plaintiff.*

Mr. Marion Erwin, plaintiff, *pro se.*

Mr. Du Pont Guerrey, U. S. Atty., for defendant.

**Speer, J.**, delivered the following opinion:  
*Finding of facts.* This suit was brought under the Act of Congress of March 8, 1887, which confers upon the District Court of the United States concurrent jurisdiction with the court of claims, of all demands against the Government, not sounding in tort, in amounts not exceeding \$1,000, and the same jurisdiction upon the circuit courts of demands exceeding \$1,000 and not exceeding \$10,000.

The issues formed in these novel but statutory proceedings are triable by the court without the intervention of a jury. In the suit before the court the Government was represented by the United States Attorney and the plaintiff appeared *in propria persona*.

The claimant was appointed Clerk of the District Court of the United States for the Southern District of Georgia on the 17th day of March, 1883, and had continued to hold that office until the present time. He rendered, at various times, his accounts for fees claimed to be due by the Government, which accounts were duly presented and approved by the court, as required by the Revised Statutes, § 846, and the Act of February 22, 1875 (18 Stat. at L. 338).

The accounting officers of the Treasury Department disallowed quite a large number of the items charged.

The claimant made up an account for the aggregate amount of these disallowances, running back to the date of his appointment, and included therein also similar items for services rendered which had not theretofore been included in the accounts rendered to the department because of the said adverse rulings on the legality of the charges. This account was presented and sworn to in open court in the presence of the district attorney, the claimant stating at the time that the account was for items disallowed in his accounts by the accounting officers of the Treasury, and that it was his purpose to bring suit for the same in this court. Upon objection made by the district attorney the court held that it was not necessary or proper for the court to make any order in the premises at that time; that the legality of the charges would be passed upon when the account was sued and should come up for trial regularly. The claimant was not, however, to be deprived of any advantage which might accrue to him by reason of his having presented the account with all its items, for the approval of the court as prescribed by the Act of February 22, 1875 (18 Stat. at L. 338).

It is upon this account that the claimant sues. The petition contains also a count for work and

labor, in the usual *indebitatus assumpsit* form. In the lengthy bill of particulars annexed to the petition all the items of disallowances of a similar character have been collected and ranged under appropriate heads, making twenty different items to be passed upon. It will be found convenient to set out the facts bearing upon each item, as each is taken up for consideration.

*Conclusions of law.* "The Act of the 22d of February, 1875 (18 Stat. at L. 388), which requires that the accounts of district attorneys, marshals, clerks, etc., shall be forwarded "when approved," "to the proper accounting officers of the Treasury," does not make presentation to the accounting officers a condition precedent to an action." *Raeessies v. U. S.* 21 Ct. Cl. 248.

It follows, therefore, that, the accounting officers of the Treasury having ruled against the legality of charges of a certain class for services performed, on the presentation of a former account, it is unnecessary for the clerk to include in subsequent accounts, charges for similar services as a prerequisite to his right to sue for the same. On the other hand, there are claims relative to which the department may be invested with such powers as will make a rejection by its officers final, even as against the courts. *Chorpenning v. U. S.* 8 Ct. Cl. 140; *Meads v. U. S.* 76 U. S. 9 Wall. 691 [19 L. ed. 687].

But the rejection of a claim by the comptroller or the accounting officers of the Treasury is not the determination of a "commission or department authorized to hear and determine," which will prevent the revision of such a finding by the proper courts. Sec. 191, Rev. Stat.; *Chorpenning v. U. S. supra*; *U. S. v. Saunders*, 120 U. S. 126 [30 L. ed. 594].

#### CONSIDERATION OF THE CLAIM BY ITEMS.

##### Item 1.

Charge for necessary time required (not exceeding three days for any one term of the court charged) and services rendered in procuring and selecting the names of competent jurors from the body of the district, and revising the jury list and box, under the orders of the court, at \$5 per day—\$75.

*Finding of facts.* The services were performed as charged. The nature of the services—the selection of competent jurors, from the body of a district containing seventy-nine counties and covering two thirds of the State of Georgia—was such that it could not be conveniently performed during the sessions of the court, when the time of the clerk is occupied with court work, and the jury boxes for obvious reasons cannot be revised. The selection of competent jurors requires much correspondence, the exercise of great care and sound judgment. It has been the practice in this district, whenever, in the judgment of the court, the jury box needed revision, to make an order before the close of one term of the court, requiring the revision to be made during vacation for the next term of the court. The *per diem* charges here made are not for days when there were charges by the clerk for attendance in court. The several charges aggregated by this item were disallowed by the comptroller as not warranted by law.

*Conclusions of law.* Jurors to serve in the

courts of the United States were formerly selected in accordance with the laws of the several States. Sec. 800, Rev. Stat.

By the Act of June 30, 1879, a new and uniform method was established for all the federal courts. Jurors possessing the proper qualifications were thereafter required to be selected by the clerk and a jury commissioner, to be appointed by the judge, and the names so selected to be placed in a box, from which the juries were to be drawn as occasion required. 21 Stat. at L. 43; 1 Sup. Rev. Stat. 497.

Here was a new, important and arduous duty placed upon the clerk, not contemplated at the time of the enactment of the clerk's fee-bill in 1853 (§ 828, Rev. Stat.), and yet the Act is silent as to compensation to the clerk or to the jury commissioner. If the silence of the Act in this particular be indicative of an intention to throw this additional labor upon the clerk without any compensation therefor, as Congress had an undoubted right to do, it would be indicative also of an intention not to compensate the jury commissioner whose appointment is provided for also, and to make that office purely honorary. But the Attorney-General appears to have held otherwise. He allowed what he considered reasonable compensation to jury commissioners out of the fund appropriated for the miscellaneous expenses of the courts. Annual Report of Atty-Gen. for 1883, p. 19. For weight to be given to such opinion, see *U. S. v. Hill*, 120 U. S. 180 [30 L. ed. 632] and cases cited. Besides the appropriation bill of March 8, 1885 (23 Stat. at L. 511), had a provision for "compensation for jury commissioners—\$5 per day, not exceeding three days for any one term of the court." This is a legislative interpretation of the statute, coinciding with the contention of the claimant.

A similar provision is contained in each subsequent appropriation. The duties of the clerk in revising the jury box are not those usually coming within the functions of the office of a clerk of court. In effect the Act creates two new offices—the jury commissioners of the court—one of these commissioners to be appointed by the court, and the clerk of the court *ex officio* to be the other. In point of fact the clerk is *ex officio* a jury commissioner, and it seems clear that he is entitled to compensation as such out of the appropriation for pay of jury commissioners, at the rate of \$5 per day, as provided for by the several appropriation Acts, or at least the intention to pay at that rate may be inferred from those Acts, and whether the clerk be entitled to pay out of those appropriations or out of the regular appropriations for fees of clerks is immaterial. See *U. S. v. Brindle*, 110 U. S. 688 [28 L. ed. 286].

##### Item 2.

Charge for making record of names, residence, etc., of jurors on jury list record—\$3; and making copy of the names, etc., for the jury box—\$2.

*Finding of facts.* It is not denied that the services were rendered, but the disallowance by the comptroller is stated in his report to be, "Because not authorized to a clerk; this is the work of the jury commissioner."



*Conclusions of law.* The statute does not make it the duty of the jury commissioner to make such a record, but the duty is imposed upon the clerk by Rule 60 of this court—a rule prescribed by the late, the Honorable W. B. Woods, when Circuit Judge. The importance of the record cannot be denied, and the clerk is entitled to charge for making any record, at fifteen cents per folio, which is the amount charged.

It is conceded that if the clerk is entitled to pay for revising the jury box, that the charge of \$2 for making copy of names, etc., for the jury box is erroneous, as being properly within the services for which the *per diem* is provided.

#### Item 3.

Charge for necessary attendance under section 584, Revised Statutes, by deputy at Savannah on the opening day of the May Term, 1884, and on the opening day of the November Term, 1887—\$10.

*Finding of facts.* These *per diem* charges were disallowed by the comptroller, because the clerk charged for and received a *per diem* fee for his personal attendance at a session of the court at Macon on the same days—the comptroller holding that only one *per diem* can be charged by a clerk, even though the court is in session at two different places in the district at the same time, and even though the clerk is compelled to be at one place himself, and have a deputy in attendance at the other. It is not denied that the services were rendered as stated.

*Conclusions of law.* The first question that arises is: How far can a clerk be represented in the performance of his duties by deputy?—and, second, whether he is entitled to receive the usual fees for work done when the service is performed by deputy.

The powers and duties of deputy clerks are not fixed by section 558, Revised Statutes, which provided for their appointment. But it is provided that their salaries must be paid by the clerks from the earnings of the clerk's office, under the Fee Bill. Secs. 561, 589, Rev. Stat. And the clerk is responsible for the acts of his deputy. Sec. 796, Rev. Stat.

For these reasons the right of the clerk to receive the fees earned by his deputy stands on the same footing as that of the marshal to receive the fees earned by his deputy; and the relations between the two cannot be satisfactorily illustrated by the relations between a district attorney and an assistant district attorney—the latter being paid a salary by the Government, and the district attorney not being responsible for his acts. *Townsend v. U. S.* 22 Ct. Cl. 214.

"A deputy is said to be one who occupieth in right of another, and for whom regularly his superior shall answer." "A deputy has not any estate or interest in the office, but is as servant to the officer." "A deputy cannot regularly have less power than his principal." Bacon, Abr. Vol. 7, p. 316 (L).

"Where the office of registrar to the Bishop of Rochester was granted to J. S., who was an infant of twelve years of age, this was held a good grant, the office being to be exercised by him or his deputy." Idem, p. 312 (I).

As a matter of practice, it is as often the

case as otherwise that the duties of a clerk or marshal in the court room are attended to by deputy, while the principal officer is engaged in the performance of other duties appertaining to his office elsewhere. This is particularly true in districts in which there are several places of holding court.

Honorable William Lawrence, late First Comptroller, in passing upon a similar question before the department, said: "A usage so long continued as to make it law, if there ever could have been any doubt about it, permits a deputy marshal to attend the sittings of courts, and gives the marshal a right to the *per diem* fee of \$5 for this service." First Comptroller's Decisions; *Double per Diem Case*, 5 Lawrence, 279.

The next question to be considered is whether the clerk is entitled to two *per diem* fees on the same day—one for his personal attendance at a session of the District Court for the Western Division of the District, at Macon, and the other for the attendance of his deputy at a session of the District Court for the Eastern Division of the District, at Savannah.

The Act of Congress providing for the holding of courts in two places in the Southern District of Georgia, is entitled "An Act to Provide for Circuit and District Courts of the United States at Macon, Georgia." The Act provides that "Said Southern District shall be and hereby is divided into two divisions, to be known as the Eastern and Western Divisions of the Southern District of Georgia." Act of January 20, 1890, 21 Stat. at L. 62.

Careful consideration of the provisions of this Act leads to the conclusion that separate, independent and distinct courts were created in each division. In fact, the "District Court of the United States for the Eastern Division of the Southern District of Georgia" is a tribunal as distinct from the "District Court of the United States for the Western Division of the Southern District of Georgia," as was the "Fifth Circuit Court of the United States for the Northern District of Georgia" from the "Fifth Circuit Court of the United States for the Southern District of Georgia" before the passage of the Act referred to. The terms of the courts in the two divisions were so fixed by the Act that the sessions at Macon and Savannah frequently conflict.

It often happens that while the judge and clerk are in attendance upon the district court in one division, the court in the other division must be opened and adjourned under the provisions of sections 583, 584, etc., of the Revised Statutes, and the clerk must have a deputy in attendance there.

Section 828, Revised Statutes, contains the following provision in reference to the clerk's fee for attendance:

"For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held, five cents a mile for going, and five cents for returning, and \$5 a day for his attendance on the court while actually in session."

"Court" is here used clearly, in the sense of "term" or "session" of the court, corresponding to the second definition of the word given by Mr. Bouvier in his Law Dictionary; because it is the term or session of the court

which is "required by law to be held" at a particular time and place.

And "the court," referring back to "any court," makes it the fair intendment of the clause that the clerk shall be entitled to \$5 a day for his attendance on any term of any court required by law to be held at any particular place, while the court is actually in session.

The fee is "for his attendance" at that particular place and on that particular court, and "\$5 a day" is the measure of his compensation for that particular service. *Goodrich v. U. S.* 35 Fed. Rep. 193.

Therefore, pay for his attendance on one court at a particular place cannot be pay for his attendance by deputy on a different court in a different place. And this is in accordance with the substantial justice of the case. The *per diem* of the clerk for his attendance in the one division is, under the law, justly and fully earned by his personal attendance on that court; and since he must, under the law, pay the expenses of maintaining and keeping a deputy in attendance at the court in the other division, and be responsible for his acts, it is but just that he should receive the fee for such attendance, so that he may pay the deputy from his earnings and have a margin of compensation for his own supervisory care and responsibility.

The Honorable William Lawrence, late First Comptroller, passed upon a similar question in case of a marshal's account pending before the Treasury Department, and reached the same conclusion *Double per Diem Case*. 5 Lawrence, 278.

#### Item 4.

Charge for necessary attendance at May Term, 1887, at Savannah, two days, May 25 and 28, on which the court was opened for business by the judge in person—\$10.

*Finding of facts.* The court was opened for business by the judge, but it is admitted that no business was transacted in court on those days, other than the reading and approval of the minutes, the entry by the clerk of the names of the officers of court in attendance, and the making of the entries, opening and adjourning court. The disallowance by the comptroller was "because no business was actually transacted on those days."

*Conclusions of law.* This disallowance is probably based upon the provision in the appropriation bill of August 4, 1886, providing as follows: "Nor shall any part of the money appropriated by this Act be used in the payment of a *per diem* compensation to any clerk or marshal for attendance in court except for days when business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2018 of the Revised Statutes." 24 Stat. at L. 253.

But the Appropriation Bill of March 3, 1887, contained a clause covering the same subject matter, and was not limited to that appropriation in its application. It provides that "hereafter" the clerk shall not charge a *per diem* fee, "except for days when the court is open by the judge for business, or business is actually transacted in court," and when the attendance is "under sections 583, 584, 671, 672 and 2018 of the Revised Statutes." 24 Stat. at L. 541.

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"Where two Acts are not in all respects repugnant, if the later covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal." *King v. Cornell*, 106 U. S. 896 [27 L. ed. 60]; *Speer, Removal of Causes*, p. 73. Therefore, when the court was opened for business by the judge on May 25 and 28, 1887, and the clerk was in attendance, he is entitled to his *per diem* whether business was transacted or not.

But independently of the above considerations, the clerk is entitled to his judgment here for these charges. Under the provisions of the Fee Bill, section 828, Revised Statutes, the clerk was entitled to a *per diem* for his attendance on the court when actually in session, even though "no suitors appeared, or for other reasons the court, in its discretion, adjourn to a future day." *Jones v. U. S.* 21 Ct. Cl. 1; *Bill v. U. S.* Ct. Cl. No. 15,570, not yet published; *Goodrich v. U. S.* 35 Fed. Rep. 193.

The limitation in the Act of August 4, 1886, was expressly confined to the money appropriated by that Act, and did not therefore repeal the general statute giving the clerk the right to his *per diem* for his attendance for each day when the court was actually in session. "A statute which fixes the annual salary of a public officer at a designated sum, without limitation as to time, is not abrogated or suspended by subsequent enactments appropriating a less amount for his services for a particular fiscal year, but containing no words which expressly or impliedly modify or repeal it." *U. S. v. Langston*, 118 U. S. 389 [30 L. ed. 164].

#### Item 5.

Charge for necessary attendance in the District Court at Macón at the October Term, 1887—October 10, 17, November 9, 19, 22 and 26—six days—\$30.

*Finding of facts.* It is not denied that the service was performed as charged, but the disallowance by the comptroller is "because the same days were charged and allowed him as commissioner."

*Conclusions of law.* It is not questioned that the offices of clerk and United States Commissioner are compatible offices.

From the organization of the judicial machinery of the Government it was found convenient to confer upon the clerk of the court the powers of Circuit Court Commissioner; and most of the clerks have had those powers conferred upon them. The appointments have been made and recognized as valid by many of the most eminent of our federal judges, notably by the late Justice Woods in this circuit. It is provided that "No marshal or deputy marshal of any of the courts of the United States shall hold or exercise the duties of commissioner of any of the said courts." Sec. 628, Rev. Stat. But notwithstanding the well known practice of appointing clerks as commissioners, there has never been any legislation prohibiting such appointments. The late Comptroller Wm. Lawrence held that such offices were not incompatible, nor were those of collector of internal revenue and commissioner. *Wade's Case*, 27 Int. Rev. Record, p. 16 (Jan. 17, 1881).

The regulations of the postoffice department,

in prohibiting certain employments to postmasters, makes an exception in the case of appointment as commissioners.

It is safe to say that clerks holding that position have performed its duties with as much skill, honesty and fairness as any other class of men who have been appointed to the position.

A person who holds two distinct compatible offices may lawfully receive the salary or compensation of each. *U. S. v. Saunders*, 120 U. S. 127 [30 L. ed. 594]; *U. S. v. Brindle*, 110 U. S. 688 [28 L. ed. 286]; *Concess v. U. S.* 62 U. S. 21 How. 468 [16 L. ed. 192].

The idea of the accounting officers seems to be, that the claimant having been paid a *per diem* for hearing and deciding as commissioner on a day certain, that even though he was not occupied in that service but a portion of the day, that his time was purchased by the Government for all purposed during that twenty-four hours.

The same reasoning would have prevented Saunders from receiving two salaries for the same month; but the supreme court held that, as the offices were not incompatible, and as he had performed the work of each office, he was entitled to both salaries.

The statute gives the clerk \$5 per day "for his attendance" on the court while actually in session. The court day may not last but ten minutes and yet the *per diem* for that court day will be fully earned at the expiration of that ten minutes. *Bill v. U. S.* and *Goodrich v. U. S.* *supra*.

On the other hand the statute gives the commissioner \$5 per day "for hearing and deciding" on criminal charges "for the time necessarily employed." As to what constitutes a "hearing and deciding"—see *Harper v. U. S.* 21 Ct. Cl. 56.

The respective services, therefore, are entirely distinct and for the performance of each the statute prescribes a fee.

#### Item 6.

This item has been reconsidered and allowed by the comptroller since the institution of the suit, and has consequently been stricken by amendment.

#### Item 7.

Charge for making dockets and indexes in cases of attachment for contempt, for defaulting witnesses and jurors—\$7; and for making final record in such cases—\$3.75.

*Finding of facts.* This item was disallowed by the comptroller "because these proceedings are not 'causes,' within the meaning of the Fee Bill" and "complete records are not necessary as to such proceedings."

*Conclusions of law.* It is unnecessary to go into the distinctions drawn by the courts as to when proceedings to punish for contempt are to be regarded as on the civil or criminal side of the court. These particular proceedings were instituted by the Government. The question raised is whether such proceedings are "causes," within the meaning of the Fee Bill, for which a docket fee can be taxed.

Mr. Bouvier defines a "cause" to be "Any question, civil or criminal, contested before a court of justice." "Case" and "cause" are 2 L. R. A.

synonyms. *Blyew v. U. S.* 80 U. S. 18 Wall. 581 [20 L. ed. 688].

In proceedings for contempts for failure to obey the orders or writs of a court, the parties have the right to be heard and to purge themselves of the contempt if they can. Such a proceeding is commenced by a regular process of the court; and there is a question to be contested and decided.

"When a court commits a party for contempt their adjudication is a conviction, and their commitment in consequence is execution." *Ex parte Kearney*, 20 U. S. 7 Wheat. 38 [5 L. ed. 891].

In that case, where a person imprisoned for contempt by the circuit court, applied to the Supreme Court of the United States for a writ of habeas corpus, it was denied because "This court has no appellate jurisdiction in criminal cases." There is in such cases process, judgment and execution under which the defendant may be imprisoned and his property sold and title pass. The necessity, therefore, for a record is absolute.

A proceeding for contempt is a distinct and independent suit. *Hayes v. Fischer*, 102 U. S. 121 [26 L. ed. 95].

Comptroller Lawrence held that district attorneys were entitled to docket fees in such cases. *Contempt Case*, 5 Lawrence, 255.

#### Item 8.

Charge for making dockets and indexes, in case of a hearing before the judge on application for a warrant for the transportation of a defendant from the Southern District of Georgia to the District of South Carolina, under the provisions of section 1014, Revised Statutes—\$3.

*Finding of facts.* This item was disallowed by the comptroller, "because there was no case in the district court, within the meaning of the Fee Bill."

*Conclusions of law.* The use of a docket, containing an abstract of the proceedings in a case for convenient reference, as well during the trial of the case as afterward, is well recognized. While the proceedings under consideration are before the district judge, there are questions to be decided which are frequently stubbornly litigated. Even cases tried by a commissioner are properly entered upon a docket. The docket fee is not prescribed by the Fee Bill simply for cases tried in court. The language is broad enough to apply as well to cases tried before the judge; and where the orderly conduct of the public business requires such a docket to be kept, the clerk is the proper person to keep it, and is entitled to a charge therefor.

#### Item 9.

Charge for filing each separate paper sent up by commissioners after hearing in criminal cases—\$105.50.

*Finding of facts.* This item was disallowed by the comptroller because he alleges that it is the duty of the clerk or the commissioner to fasten all the papers sent up by the commissioner together, and file them as one.

*Conclusions of law.* The rule of this court adopted on January 1, 1877, provides that after examination, "All the papers in the case,

including the affidavit and warrant to apprehend, and the recognizance, shall be forwarded at once by the commissioner to the clerk's office." Rules of Court, p. 36.

There is no law or rule of court requiring the papers to be fastened together; and considering the use to which they are to be put, in the further progress of the case or in the examination of accounts of commissioners, such a practice would be exceedingly inconvenient. They must be separated necessarily, as, for instance, where the affidavit is used as a basis for an information, or the bond is forfeited, etc.

Each paper should be filed for its permanent identification. The charge for filing each separate paper is authorized by the Fee Bill. Sec. 828, Rev. Stat.; *Reed v. U. S. Ct. Cl. No. 14,980*, decided 1888; *Goodrich v. U. S. 85 Fed. Rep. 193*.

#### Item 10.

Charge for entering orders approving accounts of commissioners, marshals, clerks, attorneys, etc., and for certified copies of orders, as provided for by 18 Stat. at L. 338—\$79.80.

*Finding of facts.* It is not denied that the services were rendered, and the charges in accordance with the Fee Bill; but the disallowances were made by the comptroller for the following reason: "All charges connected with the verification and approval of accounts of attorneys, marshals, clerks and commissioners, are disallowed as not properly chargeable to the United States," and because the charge "is payable by the officer individually."

*Conclusions of law.* By the terms of the Act it is expressly provided that the accounts of clerks, marshals, and district attorneys shall be "rendered" to the court, and the officer shall prove the account in open court to the satisfaction of the court, by his own oath or that of other persons having knowledge of the fact. If the officer has done that, he has performed all that is required of him by the statute, and his account is fully rendered. There is something, however, for the court to do. It must cause to be entered of record an order approving or disapproving the account as may be "according to law and just." (See Statute.) The clerk is then required to file the duplicate accounts, and forward the originals to the proper accounting officers of the Treasury.

The officers having performed the services, the Government is justly indebted to them to the full amount of the fees prescribed for the same without any deduction; and when they have presented their account in the manner prescribed by law, they are not properly chargeable with the after expenses incident to methods adopted by the Government for its own convenience or protection.

The injustice of adopting such a rule is particularly apparent in the case of the marshal, most of whose accounts rendered are not for fees, but for disbursements of funds, intrusted to him for pay of witnesses and jurors, support of prisoners and miscellaneous expenses of the courts; and in case of accounts rendered for actual expenses in the transportation of prisoners to the penitentiary under section 554*g*, Revised Statutes, for which he gets no compensation whatever, and of which a separate account is required by the Attorney-General for

each case, the performance of the duty would be an expense to the officer, which is clearly not contemplated by the statute.

In the case of commissioners the force of this reasoning is still more apparent, because the Act provides that all they have to do is to forward their accounts, duly verified by oath, to the district attorney, and he must see to the other proceedings.

The clerk being entitled to the charges, they are therefore properly payable by the United States. *Reed v. U. S. supra*.

Similar charges were considered by Comptroller Lawrence as properly chargeable to the Government. *Commissioners' Oath Fee Case*, 5 Lawrence, 850.

#### Item 11.

Charge for filing each separate account of deputy marshals, being the vouchers to accounts current of the marshal—\$8.90.

*Finding of facts.* This item was disallowed by the comptroller as unnecessary and unauthorized.

*Conclusions of law.* The purpose of filing the duplicate accounts of officers of the court in the clerk's office is for ready reference. It is not practicable to fasten these vouchers together, and would make reference to them inconvenient. Besides, each separate voucher should be identified. The charge is authorized by the Fee Bill. *Goodrich v. U. S. 85 Fed. Rep. 198*.

#### Item 12.

Charge for entering upon the minutes by order of the court, proceedings in the court, *in memoriam*, on the death of the Honorable Thomas A. Hendricks, late Vice President of the United States, and for similar proceedings on the death of Justice W. B. Woods of the Supreme Court of the United States—\$4.50.

*Finding of facts.* These charges were disallowed by the comptroller "as not payable by the United States."

*Conclusions of law.* It has been the custom of this Government, and of all civilized Governments from time immemorial, to pay suitable respect to the memory of its distinguished citizens who die while in the public service. The halls of the legislative and judicial departments are draped in mourning, public buildings are clothed in black, and ships of war carry their flags at half mast. Such acts are regarded as the acts of the Government performed through its public servants, and such trivial expenses as the purchase of bunting, etc., for such occasions have been universally recognized as an expense properly chargeable to the Government. Proceedings in court in memory of a distinguished associate justice, or of a vice president, stand upon the same footing; and the Government could as well refuse to pay the printer, who sets up the type for some eulogistic speech delivered in Congress on similar occasions, as to refuse to pay the clerk for recording a memorial resolution entered upon the permanent records by the orders of the court.

#### Item 13.

Charge for making reports of the amount of fees due by the United States to jurors and witnesses for travel and attendance, for the ap-

proval of the court, as required by sections 855, 846, Revised Statutes, and for filing the orders to pay the same—\$98.30.

*Finding of facts.* The charges aggregated by this item cover a period of three years, and may be consolidated thus:

Drawing 223 reports, 27 each at 15c	\$66.90
Filing 264 orders to pay at 10c	26.40

The reason assigned by the comptroller for the disallowance in his report No. 92,163 is as follows: "All charges for filing orders to pay jurors and witnesses disallowed; after such orders are entered on record they should be given to the marshal to accompany his account as authority to pay." This position was apparently abandoned in subsequent reports, and a new position taken, as stated in the letter of the first comptroller to the clerk, of August 8, 1886, which is in evidence, as follows: "In accounts hereafter rendered you will not be allowed for drawing reports of attendance of witnesses and filing orders to pay witnesses in addition to entering order on minutes. It seems sufficient that the orders should be entered on the minutes and a copy of each order furnished to the marshal."

The practice in this district in regard to the payment of the fees due by the United States to witnesses and jurors is as follows: When a case has been disposed of and the witnesses discharged by the district attorney from further attendance, they repair to the clerk's office. The clerk then ascertains the exact amount due them for attendance and mileage, by examination of their subpoenas, questioning them as to the place from which they have traveled, and comparing their statements with a table of distances kept in his office for that purpose, and the witness is sworn, on a jurat drawn on his subpoena ticket, to the correctness of his claim. If any doubtful question arises it is referred to the presiding judge for his decision. The days attended, mileage and amounts due the respective witnesses are then entered on a report which is signed by the clerk and submitted to the court for its approval. This report is in the following form:

To the honorable, the presiding Judge of the District Court of the United States for the Eastern Division of the Southern District of Georgia: I have to report that the following named witnesses are entitled to the amount set opposite their names, for their *per diems* and mileage for attendance upon the said court at and during the ——— Term, 188–, to the truth of which account they have been duly sworn.

Clerk.

Then follow the title of the case, and a list of the names of the witnesses with the number of days attended and miles traveled, and the amounts due them respectively.

This report is then submitted to the court, and, if adjudged correct, the following order is indorsed upon it:

*It is ordered,* That the marshal for this district pay to the above named witnesses the amount set opposite their names for their *per diem* and mileage for attendance upon the court,  
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as above stated. In open court, this ——— day of ———, 188–.

U. S. Judge.

A similar report and order is made where jurors are to be paid, except, of course, they do not attend in any particular case, while the fees of witnesses are properly taxed as costs, in the case in which they attend. The only question involved is whether these reports by the clerk are necessary for the convenient despatch of the public business as incident to the method of payment of witnesses and jurors provided by the statutes.

*Conclusions of law.* "In cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts." Sec. 855, Rev. Stat.

"No accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs." Sec. 846, Rev. Stat.

The clerical work involved in the making up and stating the accounts of witnesses and jurors is very properly done by the clerk. The institution of the office is for the purpose of relieving the judge from clerical services. The judges could not perform these duties without serious interference with the despatch of judicial business. That such accounts should be carefully made up and stated by some responsible ministerial officer of the court is plain. The clerk cannot, under the statute, enter the order on the minutes until the order is made; and no order fixing the exact amount to be paid, as is contemplated by the statute, can be made until the statement of the items of the account is presented to the court in proper form. The convenient despatch of the business of the court makes it necessary that it should be presented to the court in such shape as to prevent the consumption of the time of the court unnecessarily in the consideration of details; and that is best accomplished by the report of the clerk to the court in proper form.

It is true that in general the court may direct a clerk to enter upon the minutes an order not previously reduced to writing; but it is the universal practice where an order contains a number of details to write it out upon paper and, after the signature of the judge is appended, it is handed to the clerk for entry on the minutes, the original being filed away in the clerk's office as a part of the files of the court. If the order is to be made by the court, the court must be first put in possession of its details.

The reports being necessary, the clerk is entitled to fifteen cents per folio for making the same. Sec. 828, Rev. Stat.; *Commissioners Oath Fee Case*, 5 Lawrence, 350, note; *Singleton v. U. S.* 22 Ct. Cl. 118.

The fact that he is entitled to an additional fee for entering the order on the minutes, and for making a copy for the accounting officers of the Treasury if they require it in the adjustment of the marshal's accounts, cannot affect the question.

In regard to filing the orders to pay, to which the signature of the judge is attached, such papers belong to the files of the court, and should be marked "filed" by the clerk, for identification. The charge of ten cents for filing any paper is authorized by the Fee Bill.

#### Item 14.

Charge for issuing writs of commitments of defendants to jail to await trial, and for making certified copies for jailor, and entering marshal's returns—\$8.

*Finding of facts.* In two of the cases in question the defendants had been committed to Richmond County jail, after a preliminary examination before a commissioner there. At the ensuing term of the court, the defendants were brought to Savannah for trial, and as the trial could not be had on the day on which they were brought to court, the court directed that the defendants be committed to the Chatham County jail to await trial; that jail being in the vicinage of the court, and the clerk issued the commitments accordingly.

In another one of the cases, the defendant was charged with murder on the high seas; and pending a hearing postponed to another day, the district judge directed the clerk to issue a writ of commitment to Chatham County jail.

In the other cases the defendants were brought into court on bench warrants, and, in default of bail, were by the direction of the court committed to jail to await trial. Writs of commitment were issued by the clerk accordingly.

These charges were disallowed by the Comptroller "because the defendants were in the custody of the marshal under process."

*Conclusions of law.* The point at issue turns upon the proper practice in such cases.

"In a State where the use of jails, penitentiaries or other houses is not allowed for the imprisonment of persons arrested or committed under the authority of the United States, any marshal in such State, under the direction of the judge of the district, may hire or otherwise procure, within the limits of such State, a convenient place to serve as a temporary jail." Sec. 5538, Rev. Stat.

And in such cases no special process of commitment is necessary, the prisoners being already in the custody of the marshal, and their detention being still continued in his custody. *Turner v. U. S.* 19 Ct. Cl. (No. 12,774) 629; *Ex Osterhaus* (6 Circ. Mich.) 6 Am. L. T. 519.

But in a State, as in Georgia (see § 859, Code of 1882), where the use of jails is allowed for United States prisoners, the statutes authorize their imprisonment there. *Ex parte Geary*, 2 Biss. 489. "And while so confined therein, shall be exclusively under the control of the officers having charge of the same, under the laws of such State or territory." Sec. 5539, Rev. Stat.

The state jails are not under the control of the marshal, nor is the custody of the jailer the custody of the marshal in such cases; *Randolph v. Donaldson*, 18 U. S. 9 Cranch, 76 [3 L. ed. 662]; and the statutes provide that "Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant or *mittimus*, a copy thereof shall be delivered to such sheriff or jailer as his authority to hold the prisoner, and the original writ, warrant or *mittimus* shall be returned to the proper court or officer, with the officer's return thereon." Sec. 1028, Rev. Stat.

In regard to commitments to await trial, it has been held that it is proper for a commissioner to issue a writ of commitment on sending a prisoner to jail pending an examination—what is commonly called a temporary commitment—provided the examination cannot be had at once; but examination should be held within twenty-four hours thereafter unless special cause be shown (*U. S. v. Worms*, 4 Blatchf. 332); and it has been held that every writ of commitment must show sufficient cause on its face to justify the jailer in holding the prisoner. The copy of the commitment is the authority of the jailer to hold. *Ex parte Burford*, 7 U. S. 8 Cranch, 448 [3 L. ed. 495]; *Ex parte Bennett*, 2 Cranch, C. C. 612; *U. S. v. Brown*, 4 Cranch, C. C. 353; *Ex parte Williams*, 4 Cranch, C. C. 348; *U. S. v. Harden*, 10 Fed. Rep. 803.

It follows, therefore, that in case of an examination before a judge or commissioner, in which it is necessary to commit the defendant to jail to await a hearing or pending the examination, that a writ of commitment is necessary, setting forth the cause of his detention and why the examination is postponed.

After the hearing and finding of probable cause of defendant's guilt a new writ of commitment is necessary, because in order to justify the detention of the prisoner for months, as it sometimes happens, before he has been convicted of a crime, it should appear that he has had an examination before the committing magistrate; that probable cause of his guilt has been found; and that he is committed in default of bail. The same rule applies to proceedings before the court. If a prisoner is brought before the court, in the custody of the marshal, on bench warrant or otherwise, before trial, and it becomes necessary to commit him to the custody of any particular jailer for the first time, a writ of commitment is necessary setting forth the cause of the detention.

Again: after trial and conviction, when the court sentences a defendant to imprisonment for a term in any particular jail, a writ of commitment—commonly called the final commitment—is necessary, for the reason that the time and purpose of the imprisonment are entirely different. Nor is there anything in section 1080 of the Revised Statutes opposed to this procedure. That section must be construed with section 1028, because both sections are parts of the same Act.

Section 1080 provides that "No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal."

The meaning of this section is obvious; where a prisoner has once been committed to jail to await trial, or pending a trial, he may be brought out to court or carried back to jail a dozen or more times and for day after day during the progress of the trial; and for this purpose no writ is necessary, because, after the

jailer in the first instance has taken custody of the prisoner, the copy of the writ on which the commitment was made remains with him as his authority to hold.

The statute is expressly limited to prisoners or persons already in custody; and the further use of the expression "remanding" shows clearly that it applies only to cases where the person has already been committed properly under the provisions of section 1028, because "to remand" implies a previous custody.

The district attorney is given no power under the statutes to imprison, and his powers here are clearly limited to the bringing in and remanding persons already imprisoned by competent authority.

"Where special reasons exist why a warrant of commitment should be issued to the marshal and the jailer for the purpose of having the prisoner actually committed to jail, as was the case in the trial of Aaron Burr, cited by the claimant (1 Burr's Trial, 351, 353, 359), and as is frequently the case where the marshal has no sufficient conveniences for the safe keeping of the prisoner outside of a jail, and a commitment to prison is actually made, it would seem not to be a simple case of remanding; and for the service of such a warrant by actual commitment the marshal might charge his fee." *Turner v. U. S. supra.*

#### Item 15.

Charge for attaching seals to certified copies of commitments furnished for service on jailer when defendants are committed to jail—\$1.60.

*Finding of facts.* These charges were disallowed by the comptroller "because the marshal and the jailer must take official cognizance of the signature of the clerk."

*Conclusions of law.* Even if that be true, the copy of the commitment is the authority of the jailer to hold the prisoner. Other courts and other persons have the right to inquire into the cause of the detention of a citizen; and there is certainly no rule by which they are required to take official cognizance of the signature of the clerk, unless the seal of the court is attached. But judicial notice is taken of the seals of a superior court. Bouvier, Law Dict. Seal.

It is true that under the comity of courts such a copy not under seal might very properly be taken as sufficient notice of the character of the custody, as to require that the proper officer of the Government be notified of any proceeding looking to the release of a prisoner; but that comity has not always been respected by the state courts exercising *habeas corpus* jurisdiction, even in this district. The proper practice is to attach the seal of the court to such copies.

#### Item 16.

This item has been stricken by amendment, because allowed by the comptroller since the bringing of the suit.

#### Item 17.

Charge, in criminal cases brought by information, for entering on the final record the following proceedings: Affidavit, warrant of arrest, marshal's return and finding of commissioner of probable cause of defendant's 2 L. R. A.

guilt, upon which the information is founded. Commitment to jail in default of bond. Recognizance in cases were given, and justification of surety and waiver of homestead exemption where it is waived. Petition and order for subpoenas on part of defendant at expense of the United States. Commitment under sentence and marshal's return—\$60.75.

*Finding of facts.* These charges were disallowed by the comptroller, "because it was not necessary to copy the same to make proper final record."

*Conclusions of law.* The clerk must record all the orders, decrees, judgments and proceedings of the court. Sec. 794, Rev. Stat.

"In its general acceptance 'proceeding' means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing." "Ordinary proceedings intends the regular and usual mode of carrying on a suit by due course of common law." Bouvier, Law Dict.

There are no statutes prescribing what records the clerk shall keep, or how they shall be kept in criminal cases. "Congress has never enacted a Code of Criminal Procedure, and the States have no power to prescribe either modes of proceeding or rules of evidence in prosecutions for federal offenses. In a general way the federal courts must be governed in these respects by the common law." *U. S. v. Maxwell*, 3 Dill. 278.

"In the administration of criminal law, unless there be an express statute to the contrary, we are governed by the general common-law procedure. In the administration of criminal law and in criminal jurisprudence, we go to the common law for the purpose of ascertaining the modes of practice, the modes of procedure, the rights of the defendant, and the rights of the Government, the duty of the court and the duty of the jury, and we administer it according to that." *U. S. v. Nye*, 4 Fed. Rep. 890.

"No law of a State since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases." *U. S. v. Reid*, 53 U. S. 12 How. 361 [18 L. ed. 1023].

Passing now to the common-law authorities: "A court of record is that where the proceedings are enrolled in parchment for a perpetual memorial and testimony." "The very creation of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man whom the law will not intrust with any discretionary power over the fortunes or liberty of his fellow subjects." 3 Bl. Com. 24.

Proceedings for contempt are therefore especially the proper subjects of record.

"Records are not complete until delivered into court on parchment; therefore a minute book from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record." Archbold, Cr. Pl. p. 127.

"The record of judicial proceedings is always, in the first instance, taken down by the clerk of the court, in the way of short entries



made upon his dockets, or of the indorsements upon papers filed, and the like. It is not until after the term of the court closes that the extended record, or record proper, is made; and for the making up of this record resort is had to the docket entries, to the accompanying files of papers and to the several indorsements upon them; these serve as memoranda to the clerk. In England the extended entry or record proper is written upon parchment; in the United States, books made of stout paper are used." 1 Bishop, Cr. Proc. § 905.

Mr. Bishop, in his work on Criminal Procedure, treats very fully the subject of making up the final record in criminal causes brought up by indictment. See 1 Bishop, Cr. Proc. § 918.

The principles laid down there may be applied to proceedings by information, bearing in mind that the validity of the two proceedings rests upon very different foundations. And it must be borne in mind that the Constitution of the United States has placed certain restrictions upon the criminal procedure at common law, which makes it necessary that a record which is liable to be reviewed in a court above should speak as to a compliance with these provisions. Thus:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." 4th Amend. Const.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty or property, without due process of law." 5th Amend. Const.

"Excessive bail shall not be required." 8th Amend. Const.

A criminal information must be founded on an affidavit charging a crime and a preliminary hearing fixing bail and finding of probable cause, by the committing magistrate; otherwise the proceeding is not due process of law, and is contrary to the 4th, 5th and 8th Amendments. *U. S. v. Shepard*, 1 Abb. U. S. 431; *U. S. v. Tureaud*, 20 Fed. Rep. 621; *Hurtado v. Cal.* 110 U. S. 516 [28 L. ed. 232].

It is very essential, therefore, that the commitment proceedings should be regular and that the record should show it.

It is only necessary to add that the definition of a recognizance is "an obligation of record." The justification is a part of the recognizance. The statute provides that writs of commitment shall be returned to the proper court or officer, with the officer's return thereon." Sec. 1028, Rev. Stat.

A fee is provided for entering the return, and it is clearly contemplated as a part of the record; "it is the mode of executing judgment," as described under the definition of "proceedings."

The petition and order for subpoenas on part of the defendant at the expense of the United States is part of the proceedings of the case, and in some cases may form an essential part of the record to be reviewed.

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### Item 18.

Charge for making copy subpoenas (subpena tickets, one for each witness in a case) for service by the marshal on witnesses for the United States, 1 folio each at ten cents—\$189.40.

*Finding of facts.* The charges aggregated by this item extend over a period of five years. They were disallowed by the comptroller "because these copies should be made by the marshal, and the charge therefor is covered by his fee for service."

It is in evidence that because of this position taken by the comptroller, the clerk refused to continue furnishing the marshal subpoena tickets, as requested by the then district attorney; and the marshal refused to make them, and that the district attorney brought this disagreement between the officers informally before the court, His Honor the late Judge McCoy presiding. Upon consideration, the court directed the clerk to continue to make the tickets according to the practice which had always prevailed in the court. This was in 1882. The clerk has continued to make the tickets from that time, and his making them has been acquiesced in by the district attorneys; and even now the district attorney concedes that if it is not the marshal's duty to make them, they are very properly made by the clerk.

*Conclusions of law.* Unless the sheriff's fee for service at common law made it his duty to make the copies and included that in the fee for service, it is clear that it is not included in the marshal's fee for service.

"In ordinary cases the common subpoena is sufficient process to compel the attendance of your witnesses. You may include the names of four witnesses in one writ. Take it, together with a præcipe, to the signer of the writs: pay 1 s. 8 d. signing, 7 d. sealing. Then make out a copy of the subpoena for each witness; and serve it upon him personally, at the same time showing him the writ." 1 Archbold, Pr. 170; 2 Russell, Crimes, 945; Archbold, Cr. Pl. 157. "The witness must be personally served by leaving with him a copy of the subpoena, or a ticket which contains the substance of the writ." Roscoe, Cr. Ev. 106; 3 Chitty, Gen. Pr. 830. For form of subpoena ticket, see 1 Sellon, Pr. 451.

In like manner it is provided by the United States Statutes fixing marshal's fees that, "When more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit." Sec. 829, Rev. Stat.

It was not necessary, except in particular jurisdiction, for process in nonbailable actions at common law, to be served by a sheriff's officer; if by the attorney or his clerk it is sufficient. 1 Sellon, Pr. 88. But in bailable actions, the *capias* must be executed by the sheriff, undersheriff or by some bailiff or officer deputised by the warrant of the sheriff for that purpose. *Id.* 120, 122.

Mr. Chitty states "the practical proceedings upon issuing process in general" as follows: In case of an ordinary summons, after the sealing of the principal writ, "The attorney then fills up at least as many blank writs of summons, printed on paper, as there are defendants, and which must be exact copies of the principal sealed writ, and one very exact copy of which must be delivered to each defendant, immediately after the service of the service of the writ of summons, or arrest on a *capias*."

In service of *capias* in bailable action, after the sealing of the principal writ "The attorney, having made perfect copies, then proceeds to the proper office of the under-sheriff." 8 Chitty, Gen. Pr. 226; 1 Archbold, Pr. 829, 832.

It is very clear, therefore, that at common law it was the duty of the party or his attorney to furnish the officer with the necessary copies of writs for service, and that, too, whether it be a writ which might be served by a private person or whether it be one which could be served only by an officer. It remains to be shown that the clerk has the right to charge for making the copies when made by him at the request of the Government, either express or implied.

It cannot be doubted that the party or his attorney has still the right to make these copies, and that when so made the clerk is entitled to no fee for such copies. But it is well known that these officers keep a supply of carefully prepared blanks in their offices for use, which they prepare at their own expense, and this appears to have been the case from a very early time (1 Sellon, Pr. 69, 115); and because of that fact, and their recognized skill in preparing such papers, it is almost the universal practice in civil cases for the parties or their attorneys to have the clerk make these copy writs or subpoena tickets. It relieves the attorney from the necessity of performing clerical details which would otherwise frequently take his attention away from the more important duties devolving upon him in the conduct of his case.

The district attorney would have the same right to call upon the clerk to perform these services in a case that the attorney of a private party would have, and the clerk's Fee Bill provides a fee of ten cents per folio for making copies (§ 828, Rev. Stat.); and the same may be taxed in the costs of the case. See § 983, Rev. Stat.

It is not questioned that the clerk is entitled to charge for copies of injunctions, commitments and other processes for service when made by him; but it is claimed that the following provision in the marshal's Fee Bill changes the rule in regard to subpoenas. "For serving a writ of subpoena on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons or notice for a witness." Sec. 829, Rev. Stat.

This limitation is not in the clerk's Fee Bill, and applies only to the marshal. If it be contended that the statute reads by intentment, "And no further compensation shall be allowed to either the clerk or marshal for any copy, summons or notice for a witness," the answer is that under that construction it could not by any means be held that that statute made it the

duty of either the one officer or the other to make the copies; and since, as the law then stood it was not the business of either, the duty would rest where it always did, upon the party or his attorney; and the contention that it was included in the marshal's fee for service could not stand. But this interpolation is not justified. The marshal is the executive officer of the court, and the affirmative right given by the clause is to charge for service of a writ of subpoena; and the limitation that "No further compensation shall be allowed for any copy, summons or notice for a witness" means, clearly, that no additional charge shall be made for service of any notice, or the service of any summons, and *quodam generis* for the service of any copy for a witness. It was intended to prevent the marshal from making any additional charge for serving the subpoena ticket or for serving any notice or summons upon the witness when he is already under subpoena, it being provided in another clause that the marshal's *per diem* for attendance on court shall cover also the "bringing in and committing prisoners and witnesses during the term."

But even if an interpolation be made so as to make the clause read, "And no further compensation shall be allowed for making any copy, summons or notice for a witness," the effect would be simply a reassertion of the right of the parties to make such copies for themselves without fee to anyone, as the statute would not even then make it the duty of the marshal to make such copies, the language is purely negative in its character—a prohibition as to a charge; and, as we have seen, the making of such copies did not otherwise fall within the prescribed duties of the marshal. The purpose of the limitation would be construed to be similar to that of Rule No. 28 of the Circuit Court for this District, which is as follows: "The waiver of process and of service by the defendant shall not deprive the clerk or marshal of their respective costs for process and service; but no fees for copies and mileage shall be taxed. This rule, adopted by the late Justice Woods, recognizes the right of the marshal to charge for a service not actually performed if there has been an evasion of the service, and the service is one which the fee bill contemplates is necessarily to be performed by him in the conduct of the case; but it is also a reassertion of the right of the parties to make copies for themselves. But whether it was the marshal's duty to make these copies or not, the validity of the copy did not depend upon who made it. The marshal refused to make them; and on motion and by the acquiescence of the district attorney they were made by the clerk. If it became the clerk's duty for any reason to perform that service for the Government, he was entitled to the fee provided for such work. See *U. S. v. Macdonald*, 83 U. S. 7 Pet. 14 [8 L. ed. 587], cited and applied in *Hartson v. U. S.* 21 Ct. Cl. 455, 456.

#### Item 19.

Charge for making final record in certain criminal cases, being for the number of folios recharged against the clerk by the comptroller on the report of an examiner of the department of justice as in excess of the actual count—\$34.60.

**Finding of facts.** The difference in the count arises thus: The examiner claims that the number of folios in any case is ascertained by taking the aggregate number of words in the entire record, and dividing by one hundred. The clerk claims that each separate and distinct order or other paper is counted separately, and the number of folios is ascertained by the rule prescribed by section 854, Revised Statutes, and the aggregate of the folios so found is the number of folios in the record.

**Conclusions of law.** "The term 'folio,' in this chapter, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted except when the whole statute, notice or order contains less than fifty words." Sec. 854, Rev. Stat.

Here is express authority in the statute for the counting of each separate and distinct order or other separate proceeding in the record separately. If an order contained less than fifty words, how could it be counted a folio unless it be counted separately? If an order contained four hundred and twenty-five words, how can it be counted as only four folios, unless it be counted separately? And the counting of each separate and distinct order, notice or statute separately implies that the other independent proceedings should be counted separately also; this would follow from the sequence of the proceedings on the record; and this has been expressly decided. *Cavender v. Cavender*, 10 Fed. Rep. 828. To illustrate: Suppose a record was made up of the following proceedings:

Indictment.....	1280 words.....	13 folios.
Order for capias.....	25 ".....	1 "
Capias.....	438 ".....	5 "
Order fixing bail.....	30 ".....	1 "
Recognition.....	443 ".....	4 "
Plea.....	18 ".....	1 "
Order for jury.....	15 ".....	1 "
Jury panel.....	86 ".....	1 "
Verdict.....	10 ".....	1 "
Sentence.....	110 ".....	1 "
	2449 "	20 "

In such a case there would be twenty-nine folios in the record, not twenty-four; and this appears to be the general rule for measuring work done by printers, clerks and stenographers.

The reason of the rule is found in the fact that the chirographist can copy one uniform and continuous piece of manuscript with much greater facility and in less time than he can copy any number of separate and distinct papers aggregating the same number of words but which he has to handle, select, arrange and appropriately head, as he concludes one and passes to another.

#### Item 20.

Charge for making final record in certain criminal cases, recharged against the clerk by the comptroller on the report of an examiner of the department of justice—\$42.30.

**Finding of facts.** The recharge was because the records were not completed at the time of the rendition of the account. It is in proof that the records were completed very shortly afterward, and evidence of that fact submitted

to the comptroller, but no action was taken thereon by him.

**Conclusions of law.** The final record is not ordinarily made up or at least not completed, until after judgment or decree. Archbold, Cr. Pl. 127; 1 Bishop, Cr. Proc. § 905.

The cost of the final record is part of the costs of the case, and it therefore frequently becomes necessary, by reason of the fact that the court sentences a defendant to pay costs, that the costs of the case, including the cost of the record yet to be made, should be taxed as soon as judgment is rendered. The taxation of the costs of the record in such cases stands upon the same principle of necessity as the taxation and allowance of the fees of a witness for his mileage home before he has actually returned. For similar reasons it is usual to tax the cost of the final record in civil cases at the time of the rendition of the judgment, the plaintiff paying costs being entitled to have the amount paid included in his *fi. fa.* against the defendant. Under the Laws of Georgia the costs of a case are payable to the officers on the rendition of the judgment. Code, §§ 3684, 3685.

It frequently happens that the costs must be collected at that time, or the opportunity will be lost.

Under the federal statutes it is provided that "The fees and compensations of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the Treasury, shall be recovered in like manner as the fees of the officers of the States respectively for like services are recovered." Sec. 857, Rev. Stat.

Whether this section provides a different rule for costs collected from the Government it is not necessary to consider; the proof is that the records were completed before the bringing of this suit, and therefore the clerk is certainly entitled to his judgment for the service now. *Ravenes v. U. S.* 21 Ct. Cl. 243.

**Final conclusions.** The lengthy bill of particulars of the plaintiff which we have just reviewed has entailed upon the court an unusual amount of investigation into the details of the technical duties performed by the clerks and the commissioners of the United States Courts, and not infrequently analogies have been drawn from the laws and decisions relating to the kindred duties of the marshal. While the labor has been very great the court will be gratified if by the conclusions reached it has aided to make plain the procedure which should be followed by the clerks of our courts of record in the performance of the many and important duties which devolve upon them. These require for their faithful and efficient performance much technical knowledge and legal training. These officials are most inadequately compensated at best, and besides, the emolument provided by law, small as it is, is often frittered away by careless and irresponsible dicta, which nevertheless close effectually the avenues upon which these officials might lawfully proceed for the collection of the wages of their labor. It is wise and beneficial that the circuit and district courts have been given jurisdiction in such cases.

It is true in every instance of disputed account in every item of the bill of particulars

that the plaintiff is fully and incontrovertibly sustained by the undisputed evidence; always by the obvious construction of the statute, and generally by ample array of precedents from the decisions of the courts or of the comptrollers, and frequently by both. It is impossible to doubt the merit of his demands; and the

court finds that the facts hereinbefore set forth are true, and that *the plaintiff have judgment against the United States of America* for the sum of \$180.80 and costs accrued since the time when the United States put in issue his right to recover.

## SOUTH CAROLINA SUPREME COURT.

Jefferson FLOYD *et al.*, *Respts.*,

v.

J. Wardlaw PERRIN, County Treasurer,  
*Appt.*

(....S. C....)

1. **The titles of statutes**, as "An Act to Charter" a railroad company, and "An Act to Amend an Act Entitled 'An Act to Charter'" such company, are sufficient, under a constitutional provision that statutes shall relate to but one subject, which must be expressed in the title, to sustain a provision in the body of the Act giving authority to counties, townships, etc., to subscribe to the stock of such company, and declaring that such townships, etc., shall be bodies politic and corporate, invested with the necessary powers to carry out the statutory provisions. (*McIver, J., queries.*)

2. **Under South Carolina Constitution, art. 9, sec. 8, giving counties, townships, etc., power to assess and collect taxes for corporate purposes**, which thereby impliedly inhibits taxation for other purposes, a statute declaring that townships may subscribe to the stock of a railroad company, and that they shall be bodies politic and corporate, invested with the necessary powers to carry out that purpose, is unconstitutional, for the reason that townships in South Carolina since the Act of 1870 repealing most of the provisions of the Act of 1868, organizing townships, etc., are mere territorial divisions, with no officials, no perpetual succession, no corporate powers, privileges or purposes, and therefore power to take stock in a railroad and to levy taxes in payment thereof cannot be exercised for any corporate purpose within the meaning of the Constitution. (*McGowan, J., dissents.*)

(November 30, 1888.)

**APPEAL** by defendant from a judgment of the Common Pleas Circuit Court of Abbeville County (Norton, J.), in favor of the plaintiffs, in an action by taxpayers of Ninety Six Township, to recover the amount of a certain tax paid by them under protest. *Affirmed.*

(The plaintiffs also appealed from a holding of the trial court, that they were estopped from showing that the conditions precedent to the issue of the bonds for which the tax was levied had not been complied with.)

The facts, and questions presented, are stated in the opinions.

*Messrs. Wells & Orr*, with *Mr. Benet*, for appellant:

**NOTE.**—*Constitutional law.* For title of Act, see note to *Titusville Iron Works v. Keystone Oil Co.* 1 L. R. A. 161.  
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The recitation in the bonds, that all the conditions precedent have been complied with, is binding on the taxpayers, when the bonds are in the hands of innocent holders.

*Moran v. Miami Co.* 67 U. S. 2 Black. 723 (17 L. ed. 312); *Lexington v. Butler*, 81 U. S. 14 Wall. 282 (20 L. ed. 809); *Walnut v. Wade*, 103 U. S. 688 (26 L. ed. 526); *Northern Nat. Bank v. Porter Twp.* 110 U. S. 608 (28 L. ed. 258); *Rock Creek v. Strong*, 96 U. S. 271 (24 L. ed. 815); *Van Hostrop v. Madison*, 68 U. S. 1 Wall. 291 (17 L. ed. 538); *Knox Co. v. Aspinwall*, 62 U. S. 21 How. 559 (16 L. ed. 208); *Coloma v. Eaves*, 92 U. S. 484 (23 L. ed. 579); *Bissell v. Jeffersonville*, 65 U. S. 24 How. 287 (16 L. ed. 664); *Connor v. Green Pond etc. R. Co.* 23 S. C. 427.

Townships in this State are in reality quasi corporations, and as such capable, without any Act of incorporation, of incurring indebtedness for corporate purposes, by Act of the Legislature.

See *Driveston v. Dodge Co.* 105 U. S. 237 (26 L. ed. 1018).

The Constitution gives authority to "political divisions," at least by necessary implication, to create bonded debts without being incorporated, whenever the Legislature might sanction the same.

See *State v. Chester & L. N. G. R. Co.* 13 S. C. 290.

That this tax is for a corporate purpose has been practically decided in this State, so far as counties are concerned.

*Id.*; *Carolina etc. R. Co. v. Tribble*, 25 S. C. 266.

*Messrs. S. McG. Simkins and W. W. Butler*, for respondents:

When officers who are authorized to issue bonds of a municipality have the power to determine that the conditions precedent have been complied with, and do so determine, such decision as to a *bona fide* holder for value before maturity is conclusive and binds the municipality. The municipality is estopped to deny that the conditions have not been complied with.

*Burroughs, Pub. Secur.* 320, 322; 1 Dillon, *Mun. Corp.* 515; *Coloma v. Eaves*, 92 U. S. 484 (23 L. ed. 579); *Douglas Co. v. Bolles*, 94 U. S. 104 (24 L. ed. 46); *Johnson Co. v. January*, 94 U. S. 202 (21 L. ed. 110).

But where the validity of the bonds is in question as between the municipality and the railroad company or original payee, the former is not estopped from inquiring into the performance of the conditions precedent.

*Burroughs, Pub. Secur.* pp. 297, 298, 322; 1 Dillon *Mun. Corp.* pp. 298, 505, 544; *Pierce*,

Railroads, 92; *McClure v. Oxford Twp.* 94 U. S. 429 (24 L. ed. 129); Jones, Railroad Securities, p. 247, §§ 298, 300; *Chambers Co. v. Cleave*, 88 U. S. 21 Wall. 817-821 (22 L. ed. 517-519); *Union Pac. R. Co. v. Lincoln Co.* 3 Dill. 800; 1 Wood, Railway Law, 332; *Vanover v. Davis*, 27 Ga. 854.

An actual and strict compliance with all the conditions precedent prescribed by the Act must be had, or else the bonds or the tax, as in this case, are invalid.

1 Dillon, Mun. Corp. § 68; Burroughs, Public Securities, 259; *McClure v. Oxford Twp.* 94 U. S. 429 (24 L. ed. 129); *Trimmer v. Bomar*, 20 S. C. 854.

Townships have no corporate existence in this State.

*Glenn v. York Co.* 6 S. C. 420.

Each county is a body politic and corporate, vested by the Constitution and Acts with certain corporate powers and purposes—*Carolina etc. R. Co. v. Tribble*, 25 S. C. 264—such as highways, ferries, bridges, and all matters relating to taxes; but a township has no corporate purposes in any of these matters.

Even without corporate existence a county may have power to contract legal obligations, and have interests peculiar to themselves and not common with all other citizens of the State.

*State v. Chester & L. N. G. R. Co.* 18 S. C. 316.

But this power given to counties is derived from the Constitution, § 10, art. 4, and has no application to townships, in so far as they exist within themselves. If a township has no general corporate existence, and only exists geographically, as school districts, etc., then this railroad tax is not for a corporate purpose within the meaning of the Constitution.

*Weightman v. Clark*, 108 U. S. 256 (26 L. ed. 392).

Even if a township has corporate existence and corporate purposes a railroad tax is not such purpose.

See *Chambers v. Tribble*, 28 S. C. 75; Cooley, Taxn. 42; *Allen v. Jay*, 60 Maine, 124, 11 Am. Rep. 187.

The question as to whether a railroad tax is for a public or township corporate purpose is an open one in this State.

See *Feldman v. Charleston*, 28 S. C. 64; *State v. Charleston*, 10 Rich. L. 491.

*Glenn v. York Co.* 6 S. C. 412, seems to be to the effect that a county may subscribe to a railroad (but not without a vote of the people).

*State v. Chester & L. N. G. R. Co.* 18 S. C. 813.

In all the subsequent cases the question as to whether a railroad tax subscribed by a township is constitutional, does not seem to have been made, presumably because it was thought to be settled. It seems to be settled that it is a tax; but neither a state, county nor municipal tax.

*Carolina etc. R. Co. v. Tribble*, 25 S. C. 260. The following decisions sustain the position that the tax is unconstitutional:

*Hanson v. Vernon*, 27 Iowa, 29, 1 Am. Rep. 215; Cooley, Taxation, pp. 60, 96, § 7 and note; *Phila. Relief Assn. v. W. & O. R. Co.* 39 Pa. 73; *Sauvion v. Racine*, 18 Wis. 404; *Thomas v. Port Huron*, 3 L. R. A.

27 Mich. 320; *People v. Salem*, 20 Mich. 452; *People v. State Treasurer*, 23 Mich. 499.

The power of towns, as political subdivisions, to levy taxes is limited to purely local corporate purposes, and is not extended to state purposes; for a town in its corporate capacity will not be bound, even by the express vote of a majority, to the performance of contracts and other legal duties not coming within the scope of the objects and purposes for which it is incorporated.

*Stetson v. Kempton*, 18 Mass. 272; *Hooper v. Emery*, 14 Maine, 375; *Adams v. Wiscasset*, 5 Mass. 328; *Gove v. Epping*, 41 N. H. 544.

*Simpson, Ch. J.*, delivered the opinion of the court:

This case primarily involves the constitutionality of an Act entitled "An Act to Charter the Greenville & Port Royal Railroad Company," passed December 23, 1882, and of an Act entitled "An Act to Amend an Act Entitled 'An Act to Charter the Greenville & Port Royal Railroad Company,'" passed December 24, 1885.

In the body of this Act power is given to counties and townships, etc., to subscribe to the stock of the company thereby chartered; and it enacts that for the purpose of the Act "townships shall be, and they are hereby declared to be, bodies politic and corporate, and vested with the necessary powers to carry out the provisions of this Act." Under the provisions of this Act, a township known as "Ninety-Six Township," in Abbeville County, subscribed to the stock of said company, the county commissioners, as the corporate agents of said township, issuing the necessary bonds in payment of said subscription, to meet the interest of which bonds a tax was assessed and collected by defendant, treasurer of the county.

The action below was brought by the plaintiffs, taxpayers of said township, under section 268, General Statutes, to recover the amount paid by them under protest, to wit, \$305.05. Their claim to recover is based mainly upon two propositions, involving, as we have said, the constitutionality of the enactments above referred to, to wit: it is claimed:

*First*, that the Act in question, with the amendment, in so far as it purports to incorporate any township or townships in the body of said Act and not mentioned in the title, is in violation of that section of the Constitution which declares that "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." Article 2, § 20.

*Second*, it is claimed that the Act violates section 8 of article 9 of the Constitution, which impliedly inhibits the Legislature from vesting the corporate authorities of counties, townships, etc., with the power to assess and collect taxes for any other purpose except a corporate purpose, and it is denied that the subscription in question by Ninety-Six Township, and the tax collected thereunder, was for a corporate purpose.

Now, assuming in the first instance that the subscription by Ninety-Six Township to the Greenville & Port Royal Railroad Company was within its corporate purpose, and therefore

if said township had been incorporated and vested with power to assess and collect a tax to meet such subscription by a separate Act expressed in its title, such Act would not be obnoxious to article 9, § 8, of the Constitution yet the question still is presented whether the incorporation of this township with the power mentioned in the body of an Act which in its title refers only to the chartering of the railroad company, is not obnoxious to section 20, art. 2, *supra*, because, as alleged, it refers to a subject distinct and foreign to that expressed in the title. His Honor, the Circuit Judge, held and ruled that the article was unconstitutional in both particulars.

This court has several times considered and discussed section 20, art. 2, *supra*; notably in the cases, *Charleston v. Oliver*, 16 S. C. 47; *State v. Chester*, 18 S. C. 464; *State v. McDaniel*, 19 S. C. 116, and *Connor v. Green Pond Railway Company*, 23 S. C. 427. In some of these cases the principle under which the section should be construed and applied was announced.

In *Charleston v. Oliver*, while holding the Act under review unconstitutional because in the judgment of the court it was in violation of the section, the court said: "We think there has been, and ought to be, a general disposition to give a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction (Cooley, Const. Lim. 146); and we fully agree with the Supreme Court of the United States where — *San Antonio v. Mehafty*, 96 U. S. 315 [24 L. ed. 817]—adopting the language of the Texas Court in *San Antonio v. Lane*, 82 Tex. 405, it holds that 'When an Act of the Legislature expresses in its title the object of the Act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction that every law shall embrace but one subject, and that shall be expressed in its title.'"

In *State v. Chester*, *supra*, the court said: "This section no doubt contains a wise provision, and if properly observed would tend greatly to prevent confusion and doubt as to the exact meaning and intent of legislative enactments; and to this end it should be enforced by the courts in all proper cases, due care being exercised lest a too strict construction might defeat its very object and purpose by clogging legislation and loading down our statute books with numberless separate Acts wholly unnecessary to the end," etc.

These two cases and others show the spirit in which this court has been disposed to consider this section. And under the influence of this spirit, in *Connor v. Green Pond Railway Company*, *supra*, where, in an "Act to Incorporate the Green Pond, Walterboro & Branchville Railroad Company," power was conferred upon the county commissioners to issue bonds in subscription to the capital stock of this railway, the court said: "As we have said in *Charleston v. Oliver*, 16 S. C. 56, upon the authority of *Mr. Justice Cooley*, 'there has been, and ought to be, a general disposition to give a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction.' Hence, when a question

under this clause of the Constitution is presented for adjudication, we are bound to take a liberal and enlarged view, and if practicable bring the legislation which is assailed as unconstitutional within the limits prescribed by the supreme law of the land." And in this case the section assailed was held constitutional on the ground that it contributed to the object expressed in the title, and could be properly regarded as lawful means to achieve that object, to wit: the corporation and construction of the Green Pond Railroad Company.

Now, applying these principles announced from our own court, and especially the decision in the last case, we think the Circuit Judge was in error in holding the Acts here unconstitutional because of section 20, art. 2, of the Constitution. The only difference between *Connor v. Green Pond Railway Company*, *supra*, and the case before the court (assuming for the present that Ninety-Six Township had a corporate purpose, and was therefore capable of being invested with the power to subscribe and tax to the end of carrying out said corporate purpose), was the fact that Colleton County was already a corporate body with a corporate purpose at the time the Green Pond Railroad Company was chartered, while in the latter case Ninety-Six Township was incorporated by the Acts chartering the railroad.

We cannot see that this difference affects the question. The principle upon which it was held in the first case that the Act was constitutional was that the authority granted to the county to subscribe to the railway was a means to achieve the object expressed in the title of the Act, and therefore was germane to that object. So it appears to us that declaring the township a corporate body with power to tax in aid of the Greenville & Port Royal Railroad was contributory to, and furnished means to achieve the object of, the Act as expressed in the title, assuming all the time that Ninety-Six Township was really incorporated with a corporate purpose, and that the power conferred was intended to promote that corporate purpose.

This brings us to this latter question, which, as it appears to us, is the main and vital question in the case, to wit: Was Ninety-Six Township incorporated with a distinct corporate purpose, and was the power to subscribe to the railroad in question and to assess and collect a tax to meet such subscription, granted with the view to enable it to carry out said corporate purpose, and thus conform to section 8, art. 9, of the Constitution, in which it is provided "That the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes?" etc.

It will be conceded that, at the time of the passage of the Act chartering the Greenville & Port Royal Railroad Company, Ninety-Six Township was not a corporate body, nor was there any other corporate township. It is true that in 1868, under an Act of the Legislature passed in 1868, the counties of the State were divided into townships, which were declared to be corporate bodies, with corporate purposes, and with powers and privileges conferred, and to be organized with various officials, moderators, town clerks, selectmen, constables,

etc., and with all the machinery of a regular corporation. But this Act was repealed in 1870 by "An Act to Repeal an Act Entitled 'An Act to Organize Townships, and to Define Their Powers and Privileges,'" excepting, however, that portion of said Act fixing the number, names and boundaries of the respective townships in the respective counties, which were left as territorial divisions, but with no corporate powers, privileges or purposes. Has Ninety-Six Township been incorporated with a corporate purpose sufficiently to authorize its being invested with the power to assess and collect taxes in aid thereof?

Section 9 of the charter of the railroad provides that "For the purpose of this Act, all the counties and townships in said county along the line of said railroad, or which are interested in its construction as herein provided for, shall be, and they are hereby declared to be, bodies politic and corporate, and vested with the necessary powers to carry out the provisions of this Act," etc. Ninety-Six Township is along the line of said railroad, and in so far as section 9, above, has incorporated any township, Ninety-Six is included. But these incorporations are rather singular bodies. No machinery is provided for their organization; they have no officials, no perpetual succession, nothing, in fact, originally belonging and appertaining to corporate bodies, either public or private, municipal or otherwise. Inasmuch, however, as the General Assembly has declared them in express words to be bodies politic and corporate, they must be so held here. But where is the corporate purpose upon which, and for the promotion of which, the Legislature is authorized by section 9, art. 8, of the Constitution, to grant power to tax the property in said townships by a majority vote of the inhabitants?

To understand what is meant by a corporate purpose, a distinction must be drawn between the powers of a corporation and the end and the purpose intended to be accomplished by it. The two must not be confounded. To illustrate: the counties of the State are corporations, with well defined and distinct purposes, to wit: supervision of roads, bridges and ferries, and other internal and county matters; and to carry out these ends certain powers are granted which are distinct and separate from the ends. So, too, municipal governments are provided for cities, towns and villages, for the purpose of enabling them to preserve peace and order, to construct and repair streets, and for various other corporate objects; and to enable these governments to meet the ends designed certain powers are granted, but these powers and the corporate purpose are widely different. True, the one follows the other, and is necessary thereto; but the corporate purpose must exist before a power can be granted to carry it out.

Now, these townships, after being declared bodies politic and corporate, were authorized to subscribe to the railroad upon a vote of the inhabitants, said subscription to be paid by taxation. But, we again ask: For what corporate end and purpose was this power granted? Of what matter did the township after its incorporation have charge, the promotion of which was intended by this subscription? What

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corporate interest did it control, demanding the taxing power for its advancement? We can see nothing. It was given power to take stock in the railroad, but for what end, in so far as the township is concerned? Suppose this stock should become largely repunerative in the way of dividends, in what manner and for what purposes could it be used? These are questions to which the Act incorporating the township affords no reply.

The case referred to by His Honor, the Circuit Judge, and also by the counsel—*Weightman v. Clark*, 108 U. S. 256, 261 [20 L. ed. 392, 394]—presents a striking example of the difference between the powers granted and a corporate purpose, where a school district in Illinois was authorized to subscribe to the capital stock of a railway company, and the case reached the Supreme Court of the United States. *Chief Justice Waite*, in delivering the opinion of the court, said:

"Taxation by municipal or public corporations must be for a corporate purpose. It is not always easy to decide whether a certain kind of tax is within or without this limitation; but we think it may be safely said that, as a general rule, a corporate purpose must be some purpose which is germane to the general scope of the object for which the corporation was created. . . . Taxation for school purposes only would be germane to such corporations, to wit, school districts."

The Illinois Act was declared unconstitutional.

So, in the case before the court, while we see a distinct power granted to these incorporated townships, we are at a loss to find a corporate purpose to which this power can be said to be germane, and which it is intended to advance and promote by the exercise of said power. It is conceded that in this State and in the other States having a constitutional provision similar to ours, by which counties, etc., may be invested with power to subscribe to railroads, etc., and to tax the inhabitants to meet such subscription, it is constitutional for the Legislature to grant such power to the counties; but this is based upon the position that railroads, being highways, are embraced within the corporate purposes of the counties, which have jurisdiction over highways, bridges and ferries, with other matters appertaining to the counties. The townships, however, have no such jurisdiction; and therefore the cases relied on in the argument, in which county subscriptions to railroads have been held legal, have no application, because in all such cases the subscription and taxation were intended to promote and advance a strictly corporate purpose of the county, which is not the fact as to townships.

We would very gladly have come to a different conclusion from that which has been reached, in this case, because of the serious effect which this judgment may have; but after patient and mature consideration we feel compelled to hold with the Circuit Judge that, in so far as the Acts in question attempted to confer power upon townships along the line of the railroad embracing Ninety-Six Township, they were in violation of the eighth section, ninth article, of the Constitution, and therefore void.

From the view which we have taken of this



case it is not necessary to consider the plaintiffs' (respondents') grounds of appeal, which impute error to the Circuit Judge in holding, as matter of law, that plaintiffs were estopped from showing that the conditions precedent to the issue of the bonds, etc., had not been complied with, etc.

We do not think there is anything in the defendant's appeal as to the jurisdiction of the court, in so far at least as the right of plaintiffs' recovery has been based upon the illegality of the tax, because of the unconstitutionality of the Act under which it has been imposed. The duty performed by the county commissioners was not one of those duties which appertained to the county commissioners as a constitutional body, having jurisdiction over roads, highways, ferries and bridges, and in all other matters relating to taxes, disbursements of money for county purposes, with the right of appeal in all cases to the state courts. Nor was said duty imposed of necessity upon said commissioners on account of said jurisdiction.

On the contrary, the county commissioners were simply declared the corporate agents of the townships, and as said agents invested with authority to order the election, and issue the bonds upon certain conditions; and, as we suppose, anyone else might have been declared the agents as well. Under these circumstances we do not think the county commissioners constituted a court in this matter as in matters belonging to their legal jurisdiction, before which it was incumbent upon the plaintiffs, as taxpayers, to raise the question of the constitutionality of the Acts mentioned, at the peril of being estopped from bringing the action below to test the legality of the tax, under the Act, in such case especially made and provided, as they have done.

*It is the judgment of this Court that the judgment of the Circuit Court, holding the Acts in question unconstitutional on account of the absence of a corporate purpose in the townships incorporated, and that therefore the tax assessed and collected by the defendant was illegal, and should be refunded, should be affirmed, and the same is hereby affirmed.*

**McIver, J., concurring:**

I concur fully with the Chief Justice that the Act in question is unconstitutional, for the very satisfactory reasons presented in his opinion, and, although conscious that I can add nothing to the strength of his reasoning, yet, in view of the grave issues and important consequences involved in the case, it has been deemed proper that each member of the court should express his views.

The people, in their sovereign capacity, have, by their Constitution, intrusted the taxing power to the General Assembly, and, upon a familiar principle, this power thus delegated to that body cannot be delegated by it to any subordinate agency, except by express permission of the sovereign authority. The framers of the Constitution, recognizing this doctrine, provided that this high power of taxation might be delegated to certain subordinate agencies for certain purposes, for we find it declared in section 8, art. 9:

"The corporate authorities of counties, townships, school districts, cities, towns and villages  
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may be vested with power to assess and collect taxes for corporate purposes," etc.

It is clear, therefore, that this provision is, as is said by Waite, *Ch. J.*, in *Weightman v. Clark*, 103 U. S. 259 [26 L. ed. 398], in speaking of a similar provision in the Constitution of Illinois, "a limitation on the power of the Legislature to authorize taxation by public corporations."

When, therefore, a question arises as to the constitutionality of an Act purporting to delegate the taxing power to some subordinate agency of the government, two inquiries are presented: *first*, whether such agency is one of those to which the Constitution permits the taxing power to be delegated; *second*, whether the taxation purporting to be authorized is for a corporate purpose—for, as we have seen, this power can only be delegated to the corporate authorities of counties, townships, etc., and only for a corporate purpose. This necessarily implies that there must be a corporation, with corporate authorities, created for certain corporate purposes, so that the practical inquiries in this case are: *first*, whether Ninety-Six Township is a corporation, furnished with corporate authorities; and if so, *second*, whether the power to tax, which the Act purports to confer upon such corporate authorities, is for a corporate purpose.

As to the first question there can be no doubt of the power of the General Assembly to erect the inhabitants of Ninety-Six Township into a corporation for any legitimate purpose; and assuming, for the purposes of this case, that this has been done by the Act in question, though the indefinite terms of the Act—"that, for the purpose of this Act, all the counties and townships in said counties, along the line of said railroad, or which are interested in the construction as herein provided for," shall be bodies politic and corporate—might leave that matter in some doubt; and assuming, further, that the provision of the Act declaring the county commissioners of the respective counties to be the corporate agents of the counties or townships so incorporated would be sufficient to constitute the county commissioners of Abbeville County "the corporate authorities" of Ninety-Six Township, within the meaning of the Constitution, the important inquiry remains whether the taxing power which the Act purports to confer upon Ninety-Six Township is for a corporate purpose.

It is very clear to my mind that under a proper construction of section 8, art. 9, of the Constitution above quoted, the taxing power cannot be delegated to any of the subordinate agencies therein named, except for a corporate purpose. The manifest meaning of this section of the Constitution is that this high power can only be delegated to these subordinate agencies for the purpose of aiding or promoting the objects for which they have been erected into corporations. This necessarily implies that there must first be a corporation, with certain corporate purposes, and when the taxing power is claimed it must be shown that it was conferred for the purpose of aiding or promoting some one or more of such corporate purposes.

I do not mean to say that the corporation must be created by some previous Act defining its powers and purposes before any Act can be

constitutionally passed investing such corporation with the taxing power; but I do mean to say that the power to tax is dependent upon the existence of some corporate purpose to which the proceeds of the tax may be applied; though all this may be done in one and the same Act, the corporation may be created, endowed with specified powers to effect certain corporate purposes, and in the same Act the corporation may properly be invested with the power to levy taxes to promote such corporate purposes.

For example, I see no reason why the General Assembly may not have created the Township of Ninety-Six a corporation for school purposes, and in the same Act conferred the power to levy taxes for such purposes. So, too, perhaps, the General Assembly, but for the fact that the Constitution (section 19, art. 4) has clothed the county commissioners with jurisdiction over roads, highways, etc., might have passed an Act creating the Township of Ninety-Six a corporation, and invested it with the control and management of highways, and, as promotive of that corporate purpose, might have invested it with power to levy taxes to aid in the construction of a railroad, upon the doctrine which, after much conflict of opinion, seems to be settled, that a railroad is a highway, and therefore a municipal corporation, charged with the supervision and control of highways, may be invested with power to aid in its construction. But the Act in question does not purport to have either of these objects in view. It simply erects the several townships along the line of the proposed railroad into corporations, without any corporate purposes whatever, and only purports to confer upon them the single power of subscribing to the stock of this particular railroad.

Now, it cannot be denied that the power to subscribe to the capital stock of this railway company necessarily involves the power to levy taxes to pay such subscription, as it is not pretended that the townships have any other means of raising the money necessary for that purpose. *Citizens Sav. & Loan Assn. v. Topeka*, 87 U. S. 20 Wall. 655 [22 L. ed. 455]; *Feldman v. Charleston*, 23 S. C. 59.

If this be so, then to say that the subscription to the capital stock of the company is the corporate purpose for which the taxing power is conferred would be to assume the very point in issue, for that would be simply asserting, in another form, the affirmative of the proposition to be proved. The same mode of reasoning would necessarily lead to the conclusion that the General Assembly has the power to invest the corporate authorities of any of the subordinate governmental agencies mentioned in section 8, art. 9, of the Constitution, with the power to subscribe to railroads, together with its necessary incident, to levy taxes to pay such subscriptions; but it has been decided by the highest judicial authority in this country, in the case of *Weightman v. Clark*, *supra*, that a township erected into a corporation for school purposes cannot, under the Constitution of Illinois, which, in this respect, is practically identical with ours, be invested with power to subscribe to a railroad.

The reasoning of *Chief Justice Waite* in that case applies with equal force to the question now under consideration. The object of the

constitutional provision is to limit the power of the Legislature to authorize taxation by public corporations, by restricting it to taxation for a corporate purpose, which must be some purpose germane to the objects of the corporation; and it is very manifest that if the Legislature can, by simply authorizing a corporation to subscribe to a railroad, acquire the right to invest such corporation with the taxing power, then the constitutional provision would lose its limiting force, for in every instance it could be evaded.

The cases which seem to be mainly relied upon by appellant are *Brown v. Hertford County*, decided recently by the Supreme Court of North Carolina, and reported in 100 N. C. 92, 5 S. E. Rep. 178, and *Harter v. Kernochan*, 108 U. S. 563 [26 L. ed. 411]. It does not appear from the former case that there is, in the North Carolina Constitution, any such provision as that found in section 8, art. 9, of our Constitution, upon which the view herein presented rests; and hence it is difficult to perceive how that case can be any authority upon the question here involved. A careful examination of the other case, which went up to the Supreme Court of the United States from the State of Illinois, will show that the question now under consideration was not one of the points decided in that case; the main controversy there being whether, after the people of the township had voted a donation to the railroad company, to be raised by a special tax, the township could be afterwards authorized to issue bonds for the amount so donated without submitting the proposition again to be voted upon. It is true that in discussing that question, *Mr. Justice Harlan* does use the following language, quoted in the argument in this case: "That [the donation to the railroad], it must be conceded, was a corporate purpose, within the meaning of the Constitution, as interpreted by the state court;" \*but from the language used by the same justice, in the case of *Livingston County v. Darlington*, 101 U. S. 417 [25 L. ed. 1019], it is very doubtful whether the Supreme Court of the United States would place the same interpretation upon the Constitution of that State. After considering the question whether an Act authorizing a county to subscribe money for the purpose of establishing a state reform school within its limits was constitutional, and, after reviewing the Illinois decisions upon the construction of that clause in the Constitution of that State, similar to ours, limiting the power of the Legislature to vest subordinate agencies of the government with the taxing power, and showing that those decisions had been far from uniform, he says: "We express no opinion as to what, in our judgment, is the true exposition of those parts of the Illinois Constitution to which reference has been made." But the court simply followed, as it usually does, what seems to have been the construction placed upon a State Constitution by the courts of that State. Indeed, it does not appear from anything that is said in the case of *Harter v. Kernochan* what was the nature or purpose of township corporations in the State of Illinois; and hence the case furnishes no data upon which the question whether a subscription to a railroad was "a corporate purpose" could be determined or even discussed.

Our case of *State v. Chester Railroad Company*, 18 S. C. 290, has also been cited by appellant; but that case simply decides, what is conceded under the authorities, that a county may be invested with power to subscribe to a railroad; and it furnishes no authority whatever for the proposition that a township may be clothed with such a power. A county differs widely from a township, and therefore to apply the same principles to one which have been applied to the other would necessarily lead to error and confusion. A county is a political division, expressly provided for by the Constitution, endowed with specific powers, and provided with appropriate officers, to manage its affairs, while a township has none of these features. It is a mere territorial division which, for convenience, is used by officers and agencies of the government, but without any rights or powers, corporate or otherwise, until the Legislature sees fit to erect it into a corporation—for such purposes as may be specified in its charter.

A township cannot with any propriety be considered as one of the political divisions of the State, for there is nothing in the Constitution constituting or recognizing it as such, and there is no Act of the Legislature investing it with any such character, or with any of the attributes incident to such a condition; hence, the argument drawn from the amendment to article 9 of the Constitution (18 Stat. 689), which declares that "Any bonded debt hereafter incurred by any county, municipal corporation, or political division of this State shall never exceed 8 per centum of the assessed value of all the taxable property therein," loses all its force.

It is said, however, that this court has, in at least two cases, impliedly, though not expressly, recognized the power of the General Assembly to invest townships with the taxing power. *Chamblee v. Tribble*, 23 S. C. 70; *Carolina etc. R. Co. v. Tribble*, 25 S. C. 290.

It is not, and cannot be, pretended that the question now presented was either raised, considered or decided in either of these cases, but the claim is that the power now brought in question was, by implication, recognized. This, of itself, would be quite sufficient to show that those cases present no obstacle whatever to the conclusion reached in this case. Courts of final resort do not usually volunteer to raise questions, especially such as impugn the constitutionality of an Act of the Legislature, but are content to confine themselves to the questions for review presented by the record. But when parties claim their constitutional rights, and demand a decision from the tribunal charged with that duty of a question involving such rights, the court has no other alternative but to consider and decide such question according to its best judgment, even though the same question may have been passed by in previous cases.

But this is not all. In the case first cited it is quite certain that the question now presented could not authoritatively, and therefore could not properly, have been decided, for the question which lay at the foundation of that case was whether the court had jurisdiction; and, after the court had reached the conclusion which it did, that the court had no jurisdiction, it would have been, not only nugatory, but also im-

proper, to consider or determine any other question which had been raised or might have been raised in the case, for the simple reason that the decision of a court, in a case of which it has no jurisdiction, is without authority and binds no one. In the other case the question as to the legality of the tax was not, and could not have been, raised, as it does not appear that the tax was paid under protest. On the contrary, so far as appeared in the case, the tax was paid voluntarily, and might be regarded as a voluntary contribution by the taxpayers residing in Williamston Township towards the construction of the railroad. The only question in the case was as to the disposition which should be made of a certain portion of the tax paid by a manufacturing company—whether it should be paid over to the railway company, or returned to the manufacturing company, under the provisions of the Act of 1873, passed to promote the establishment of manufacturing enterprises; so that it would have been wholly out of place in that case to consider the question whether the tax was legally imposed, even if such question could have been raised. But inasmuch as it had been settled that the legality of the tax could not be tested by an application for an injunction or writ of prohibition restraining the collection of the tax, and inasmuch as the tax there in question did not appear to have been paid under protest (which would be necessary by the express terms of section 268 of the General Statutes to enable one to test the question in the mode provided by that section, which is the only mode provided by law for that purpose), it is not easy to perceive how the question could have been raised. It seems, therefore, that the question now presented was not only not raised, but could not have been properly raised in either of those cases; and hence they lend no strength whatever to the position contended for by the appellant.

I am also inclined to think that the Act is also in violation of section 20, art. 2, of the Constitution. There is to my mind great force in the view presented by the Circuit Judge that, inasmuch as this Act, which, by its title, purports to create one corporation—the railroad company—and in the body of the Act undertakes to create other corporations—townships—of a wholly different character, it relates to more than one subject, some of which are not expressed in the title. The title was an advertisement to the public that the purpose was to create a railroad corporation, and, as has been held, the means necessary and usual to accomplish that purpose might properly be provided for in the Act. Hence, to provide in such an Act that a corporation already existing might subscribe for the stock of a railroad company would be no violation of the constitutional provision. But when it is proposed, to go further, and to create new corporations by an Act, the title of which gives no intimation whatever of such a purpose, the question assumes a very different aspect. But, concurring, as I do, with the Chief Justice on the other point, it is unnecessary to discuss this question.

**McGowan, J.**, dissenting:

I cannot concur in this judgment. Are the Acts to charter the "Greenville & Port Royal Railroad Company," and an Act to amend the

same, passed in 1885, so far as they purport to authorize townships to subscribe to the capital stock of said railway company, unconstitutional and void, and the tax illegal, which was assessed and collected to pay the interest on the bonds issued in behalf of the Township of Ninety-Six?

This court has repeatedly held that "It is no small matter to declare an Act of the Legislature unconstitutional. The Legislature is the law-making power of the State upon all subjects not prohibited by the Constitution, every part of which should be so construed, if possible, as to allow full force to section 1, art. 3, which vests the full legislative power of the State in the General Assembly." *Pelzer v. Campbell*, 15 S. C. 592. The English Parliament, in a political sense, is omnipotent; but with us it is the people, and the people speak and act through the Legislature, except when restricted by the Constitution of the United States or of the State. No statute can be disregarded unless a constitutional violation can be pointed out. *Cooley, Const. Lim.* §§ 87-173. The constitutionality of a law must be presumed until the violation of the Constitution is proved beyond all reasonable doubt; and a reasonable doubt must be solved in favor of legislative action, and the Act be sustained. Id.

"It is an axiom in American jurisprudence that a statute is not to be presumed void on this ground unless the repugnancy to the Constitution be clear and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment. The particular clause of the Constitution must be specified, and the Act admit of no reasonable construction in harmony with its meaning. The judicial function involving such result is one of delicacy and to be exercised always with caution." *Pine Grove Twp. v. Talcott*, 86 U. S. 19 Wall. 673 [23 L. ed. 232].

This wise and conservative principle, thus reiterated in every possible form by elementary writers and judges of the highest character, is certainly not weakened in this case by its great importance and the fact stated at the bar that very large sums of money have been invested in these bonds, those investing relying with implicit faith and confidence upon an Act placed upon the statute book by the Legislature, the only law-making body of the State. The question, then, is whether the Act of the Legislature in contention is so clearly and beyond doubt unconstitutional as to require the court, at this late day, and after so much has been done and investments made under it, to declare it unconstitutional and void.

I. As to the title of the Act. Section 20, art. 2, of the Constitution declares that "Every Act or Resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." Upon this subject I concur with the Chief Justice, and think it is unnecessary to attempt to add anything to what he has said. It seems to me that the case of *Connor v. Green Pond Railway Company*, 23 S. C. 428, is precisely in point, in which *Mr. Justice McIver* well said: "As we have said in *Charleston v. Oliver*, 16 S. C. 56, upon the authority of *Mr. Justice Cooley*, 'There has been and ought to be, a general disposition to give a liberal construction to constitutional provisions 3 L. R. A.

like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of construction.' Hence, when a question under this clause of the Constitution is presented for adjudication, we are bound to take a liberal and enlarged view, and, if practicable, bring the legislation which is assailed as unconstitutional within the limits prescribed by the supreme law of the land. Now, looking at the Act in question in this spirit, we do not see how it conflicts with the provision of the Constitution which has been quoted. The subject to which the Act relates is the Green Pond, etc., Railway Company, and that subject is undoubtedly expressed in the title. Nor do we find that the Act relates to any other subject . . . No new subject is introduced into the Act, but the subject which all the while engages the attention of the Legislature is the railway, which necessarily includes any appropriate means for its construction." *San Antonio v. Mehaffy*, 96 U. S. 315 [24 L. ed. 817].

II. But I cannot concur that the Act assailed, giving the power to Ninety-Six Township to vote a subscription to the railroad company, was unconstitutional for the reason that it was not within section 8 of article 9 of the State Constitution, which declares "that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes." It will be observed that the Constitution places counties and townships in regard to taxation on the same footing, and manifestly contemplates both as incorporated with certain local interests of their own; one smaller than the other, but both being territorial divisions, with inhabitants, and both alike capable of internal improvement beneficial to the inhabitants. What *Judge Willard*, in *State v. Chester Railroad Company*, 18 S. C. 816, said as to counties is quite as applicable as to townships. Section 8, art. 9, of the Constitution, speaks of the "corporate purposes" of counties as objects for raising and expending county taxes, thus strengthening the view already presented: that these communities are capable of acquiring interests distinct and apart from such as concern the State at large. The limit is put by the Constitution to the extent or character of such corporate purposes. That the community may have local interests calling for the expenditure of money is clearly recognized and provided for, and that implies the power of incurring obligations, etc. The question is not as to the power of the Legislature, but whether the law makers exercised their conceded right, so as to effectuate their manifest intention to make Ninety-Six Township a body corporate with the power to subscribe by vote to the capital stock of the railroad company. Upon this subject all the presumptions are in favor of the Act, and those who assail it must fail unless they show its unconstitutionality clearly and beyond doubt.

1. The Circuit Judge held that Ninety Six was not a township within the meaning of the Constitution. With all due respect, I think that was error. It was certainly a corporation from the adoption of the Constitution (1868) until 1870, when its corporate powers were withdrawn by the Legislature, leaving the ter-

rior division with its lines, boundaries and name already fixed, like a lifeless body—ready, however, to have the new life of a corporation breathed into it. No other power but the Legislature could give it that new life; and in 1885 it passed the Act chartering the aforesaid railroad, in which, among other things, the Legislature declared "That, for the purposes of this Act, all the counties, and townships in said counties, along the line of said railroad, or which are interested in the construction as herein provided for, shall be, and they are hereby declared to be, bodies politic and corporate, and vested with the necessary powers to carry out the provisions of this Act; and shall have all the rights, and be subject to all the liabilities in respect to any rights or causes of action growing out of the provisions of this Act," etc.

The railroad runs through the old Township of "Ninety-Six;" and can there be any doubt that this Act made it a corporate body? The Act itself expressly so declares. It may be thought by some that it was rather a meager corporation—scant in powers, authorities and officials as such. But it must not be overlooked that the Legislature which created it had the undoubted right to give it such shape and form as it thought proper, with a single power or a dozen. The only authority in the State which can make or unmake corporations has expressly declared that it is a corporation, and it seems to me that the court cannot assume legislative functions, and undertake to supervise and correct an Act of the Legislature as to the manner of creating a corporation, and the number or character of the powers which should be conferred. It was a clear case of "clay in the potter's hands."

2. As well as I can comprehend, it is further urged against the Act that in fact it gave no corporate power, but only the right to subscribe by a vote of the inhabitants to the capital stock of the railroad company, which was no corporate power at all—but surely the exercise of a power presupposes it to be already in existence, to have been previously granted. There is nothing whatever in this, for the right expressly given to exercise the power involved and necessarily implied the grant of the power itself.

This is clearly shown to be the settled law in the very latest work on the subject of the "Interpretation of Statutes" (1888). Mr. Endlich says: "An Act which simply creates a corporation impliedly gives it the legal attributes of one, among which is a general power to make contracts. Even where a corporation is created with certain specifically enumerated powers, it possesses, in addition, by implication, all such as are either necessarily incident to those specified, or essential to the expressed purposes and objects of the corporate existence. In this country all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given or may not be reasonably inferred; but if we were to say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them, in some cases, the power of self preservation, as well as many of the means necessary to effect the essential

objects of their incorporation," etc. See End. Interp. Stat. § 418, and 1 Dillon, Mun. Corp. § 23.

8. It is, however, still further urged that the Act is unconstitutional, and must be declared void, for the reason that the power it purports to give the townships (to aid in the construction of a railway) is not a corporate purpose within the meaning of the Constitution.

Mr. Dillon, recalling some views previously expressed, says: "The Supreme Court of the United States, following repeated intimations of its judges in previous cases, have directly sustained the validity of legislative Acts authorizing municipal aid to railways. In view of the prior adjudications of that tribunal in the municipal bond cases . . . and of the almost uniform holding of the state courts, no other result could have been anticipated. This ends judicial discussion, if it does not terminate doubts." 1 Dillon, Mun. Corp. 3d ed. § 158, and notes.

It is now, then, conceded on all hands that the power to aid in the building of a railroad, given to a county or a city already incorporated with defined powers, is "a corporate purpose." See *State v. Chester & L. N. G. R. Co.* 18 S. C. 200; *Johnson v. Stark County*, 24 Ill. 75; *Davidson v. Ramsey Co.* 18 Minn. 482; *Nichol v. Nashville*, 9 Humph. 262; *State v. Charleston*, 10 Rich. L. 491.

But that such power to aid in building a railroad is a corporate purpose, when given to a township corporation, is denied, on grounds which to my mind are far from clear, but, on the contrary, are at least very doubtful.

In the first place it is said that "The corporate purpose must exist before a power can be granted to carry it out." I am not sure that I understand the precise point of this objection, unless it be that the power can only be called "corporate" when given to a body which had been previously made a corporation, with powers defined, and indicating its character. If this be the meaning, then according to this view suggested, the charter of a corporation could never be amended so as to enlarge its powers. The words of the Constitution are, "may be invested with the power," etc. Nothing is said of the time when, or the manner how, only on condition that it must be for a corporate purpose. The purpose can only appear from the powers given. I can see that a power cannot be exercised before it comes into existence; but I confess I am unable to perceive why the grant of a power, and the right to exercise it in the future, may not be given simultaneously in the same Act, *uno flatu*.

What is a corporate purpose? It is very obvious that it might be regarded as an improvement benefiting all the inhabitants of a township to have a railroad built through it, and, therefore, to secure that object, might in one sense be regarded as a "corporate purpose;" that is to say, a purpose benefiting the corporation. But we suppose that the expression in the Constitution, "corporate purpose," embraces more than that, and means something not only appertaining to the corporation, but within the scope of its powers as a corporation. For instance, we can well understand that a "public school" corporation, laid out by the United States for school purposes, and without any

state township organization, could not long levy a tax to build a railroad; for the very good reason that it was not a corporate purpose *quoad* that particular corporation. *Weightman v. Clark*, 103 U. S. 256 [26 L. ed. 392].

As *Chief Justice* Waite well expressed it: "Taxation by municipal or public corporations must be for a corporate purpose. It is not always easy to decide whether a certain kind of tax is within or without this limitation; but we think it may safely be said, as a general rule, a corporate purpose must be some purpose which is germane to the general scope of the object for which the corporation was created." This is the principle clearly stated. Now, tested by it, can it be said that the power to aid in the building of a railroad was not a corporate purpose as to *Ninety Six* corporation? Was that not "a purpose germane to the general scope of the object for which the corporation was created?" It was not created for "school purposes," but for the very purpose of allowing the inhabitants, if they saw fit, to aid in building the road. So far as concerned the corporation of *Ninety Six*, it was not only a corporate purpose, but the corporate purpose for which the corporation was created. The Act which created it expressly declared that it "was for the purposes of this Act," viz., the building of the railroad.

That this was the view of the supreme court clearly appears from another case, decided soon after that of *Weightman*, as to the "School District."

The case of *Horter v. Kernochan*, 108 U. S. 562 [26 L. ed. 411], also from the State of Illinois, arose in reference to the liability of the township on certain bonds voted by the inhabitants to assist in building "the Illinois South-eastern Railway." The court held the township liable, and in delivering the opinion *Judge* Harlan said: "But neither that nor any other decision by the state court distinctly meets the precise point now before us, or would justify us in holding (as we ought not to do, except in a clear case) that the General Assembly of the State had transcended its constitutional powers. The Act did not assume to impose a debt upon the township without the consent of the electors. It expressly required an election to be held at which the legal voters could determine the question of donation ['subscriptions,' as we call it] for themselves. The election was held, and a donation voted to aid in the construction of a railroad. That, it must be conceded, was a corporate purpose within the meaning of the Constitution [the same as ours, precisely], as interpreted by the state court," etc. See also *St. Joseph Twp. v. Rogers*, 83 U. S. 16 Wall. 662 [21 L. ed. 337].

But, without incumbering this opinion with reference to other cases, it surely cannot be necessary to do more than refer to the latest case that has been brought to our attention (1888), which, it seems to me, is absolutely conclusive of this upon every point made. The case is *Brown v. Hertford County*, 100 N. C. 92, reported in 5 S. E. Rep. 178. In an Act of the General Assembly of the State chartering the "Murfreesboro Railroad Company" the 14th section provided as follows: "That Murfreesboro Township, in Hertford County, and the Town of Murfreesboro, in said county, may

subscribe to the capital stock of the Murfreesboro Railroad Company, or make donations to said company, to be secured by the bonds of said township or town, as the case may be, bearing interest, etc., subject to the approval of the qualified voters of said township or town," etc. As stated in the opinion of the court, the main question in the case was whether the General Assembly had the constitutional power to authorize a township to vote its bonds to aid in building a railroad running partly through the township. The court held that the General Assembly had such power and, in delivering the opinion of the supreme court, *Judge* Merrimon said:

"Townships, therefore, are within the power and control of the General Assembly, just as are counties, cities, towns and other municipal corporations. It may confer on them, or any one of them, corporate powers, with the view to accomplish any lawful purpose to promote the prosperity, safety, convenience, health and common good of the people residing within them, and resorting thither from time to time; and we can see no good reason why it may not confer such power for a single purpose as well as many. There may be enterprises important to the people of localities, such as townships, school districts, and the like, that may be promoted by the exercise of corporate powers to a limited extent by such communities. . . . We are unable to see any just reason why the people of a township through which a railroad is located shall not, if they see fit, aid in the construction by taxing themselves and creating a debt for the purpose, when the Legislature provides that it may, just as the people of a county, city or town may do, and for the like considerations. It may be unwise or inexpedient as a measure of economy, but the taxpayers (electors) must judge as to that. In many important respects the citizens of a township are an organized community, separate from their neighbors, and they may derive great and special advantages from a railroad to be located and constructed in their midst," etc.

As it seems to me, this is conclusive of every point made in the case. It is said, however, that the Constitution of North Carolina has in it no such provision as that in ours, which by implication, limits the power of the Legislature to allow corporate assessments only for "corporate purposes." Assuming this to be so, I do not see how it can affect the case, in the view expressed by *Judge* Merrimon, that the building of a railroad is as much a corporate purpose for a township as "of a county, city or town." It is true that, as the judgment of a sister State, the case of *Brown v. Hertford County*, *supra*, is not absolutely binding as authority upon us; but it is certainly valuable in the consideration of a similar question, on account of the high source from which it comes, and the soundness of its reasoning. It is also true that the precise point now made has never been formally decided in this State; but the supreme court, in at least two cases, has enforced, as legal, assessments levied by township authority under Acts of the Legislature similar to the one under consideration. This at least furnished some ground for the belief of the country that such assessments were not il-



legal, and void. See *Chambliss v. Triddle*, 28 S. C. 70, and *Carolina Railway Company v. Triddle*, 25 S. C. 264.

I do not think it has been clearly shown that

the Act of the Legislature in question is unconstitutional, and therefore the judgment below should be reversed.

## NEW YORK COURT OF APPEALS.

Joseph W. PALMER, *Resp't.*,  
v.  
PENNSYLVANIA CO., *Appt.*

(111 N. Y. 488)

1. The failure of a railroad company to remove from the platform of a passenger car on a through train, before 5 o'clock, A. M., while yet on the route, a thin covering of ice and snow which had accumulated during the night, will not constitute negligence such as will make it liable for an injury which a passenger sustained by slipping thereon, especially when he had several times crossed over the platform during the night and knew of its slippery condition.
2. Railroad corporations are not insurers of the lives or safety of passengers upon their cars; and in order to render them so, it is essential to show that they have neglected the performance of some duty which, in the exercise of reasonable care, prudence and diligence, they owe to such passengers.
3. Railroad corporations are not obliged to

immediately and effectually remove from the exposed platform of a car while en route the effects of a continuous storm of snow, sleet, rain or hail; their obligation in this respect is analogous to that imposed upon municipal corporations in respect to the removal of snow and ice from streets.

4. The degree of care required of railroad corporations in the removal of ice or snow from car platforms must be generally determined by the circumstances of each case; but they should not be held responsible for dangers produced by the elements, until they have assumed a dangerous form and there has been a reasonable opportunity to remove their effects.

(November 27, 1886.)

**A**PPEAL by defendant, from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Dutchess Circuit, rendered upon a verdict for \$1,215 in favor of the plaintiff in an action for damages for personal injuries received

**NOTE.**—*Railroad as carrier not liable as insurer of life or safety of passenger.* A railroad company is not an insurer, but is only liable for negligence in respect to the condition of its railroad, cars and other appliances. *McPadden v. New York Cent. R. Co.* 44 N. Y. 478; *Keith v. Pinkham*, 43 Maine, 501; *Sawyer v. Hannibal & St. J. R. Co.* 37 Mo. 240; *Maury v. Talmadge*, 2 McLean, 157; *Sullivan v. Philadelphia & R. R. Co.* 30 Pa. 234; *Meier v. Pennsylvania R. Co.* 64 Pa. 225; *McClary v. Sioux City & P. R. Co.* 3 Neb. 45; *Fairchild v. California Stage Co.* 13 Cal. 500; *Burnes v. Cork etc. R. Co.* 13 Ir. C. L. 543; *Ford v. London & S. W. R. Co.* 2 Fost. & F. 730; *Pym v. Great Northern R. Co.* 2 Fost. & F. 619; *Readhead v. Midland R. Co.* L. R. 2 Q. B. 412; *Simmons v. New Bedford, V. & N. Steamboat Co.* 97 Mass. 361; *Ingalls v. Bills*, 9 Met. 1.

They are not insurers of the lives or persons of their passengers, but are merely bound to the exercise of the highest degree of care and diligence in the conduct of their business, and are accountable for the slightest negligence, notwithstanding their exemptions from the rules pertaining to common carriers of property. *Cornwall v. Sullivan R. Co.* 28 N. H. 161; *Taylor v. Grand Trunk R. Co.* 48 N. H. 304; *Hall v. Connecticut River Steamboat Co.* 13 Conn. 319; *Fuller v. Naugatuck R. Co.* 21 Conn. 557; *Maverick v. Eighth Ave. R. Co.* 36 N. Y. 378; *Carroll v. Staten Island R. Co.* 58 N. Y. 120; *Sullivan v. Philadelphia & R. R. Co.* 30 Pa. 234; *Toledo, W. & W. R. Co. v. Apperson*, 49 Ill. 480; *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138; *Wheaton v. North Beach & M. R. Co.* 36 Cal. 500; *Union Pac. R. Co. v. Hand*, 7 Kan. 380, 382; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Johnson v. Winona & St. P. R. Co.* 11 Minn. 236; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 230; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431; *Baltimore & O. R. Co. v. State*, 29 Md. 222; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; *George v. St. Louis, I. M. & S. R. Co.* 34 Ark. 613.

**Not liable for injuries arising from inevitable accident.** A railroad corporation is not an insurer against every possible casualty, but only against such as result in spite of the highest degree of reasonable vigilance. *Chicago etc. R. Co. v. Stumps*, 69 Ill. 400; *Gonzales v. N. Y. & H. R. Co.* 39 How. Pr. 407; *Reed v. New York Cent. R. Co.* 56 Barb. 463; *Toledo, W. & W. R. Co. v. Apperson*, 49 Ill. 480; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; 2 Wood, *Railway Law*, 1049. They are not liable for injuries to passengers, occasioned to them by inevitable

accident. The principles governing common carriers of goods do not apply to the carriage of passengers. The matter of mere accident is a risk that the traveler himself necessarily assumes. 2 Rorer, *Railroads*, 957; *Cumden & A. R. & Transp. Co. v. Burke*, 13 Wend. 611; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *Angell, Carriers*, § 521; *Laing v. Colder*, 8 Pa. 479; *Knight v. Portland, S. & P. R. Co.* 56 Maine, 234; *Sawyer v. Hannibal & St. J. R. Co.* 37 Mo. 240; *Huelsenkamp v. Citizens R. Co.* 37 Mo. 537; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; *Atchison & N. R. Co. v. Flinn*, 24 Kan. 627; *Alden v. New York Cent. R. Co.* 26 N. Y. 102. By the term *accident* we necessarily mean an inevitable occurrence, not to be foreseen and prevented by vigilance, care and attention, and not occasioned or contributed to, in any manner, by the act or omission of the company, its agents, employees or servants. *Carroll v. Staten Island R. Co.* 58 N. Y. 120.

**Negligence, in such cases a question of fact.** What is or is not negligence in a particular case is generally a question of fact for the jury. *Fritsch v. Allegheny*, 91 Pa. 226; *Neslie v. Second & Third Streets Pas. R. Co.* 4 Cent. Rep. 700, 113 Pa. 300. If there was no doubt of the existence of the facts complained of, yet if there be substantial doubts as to the reasonable and natural inferences to be drawn from those facts, they should be submitted to the jury. *McKee v. Bidwell*, 74 Pa. 218; *Crissey v. Hestonville, M. & F. Pas. R. Co.* 75 Pa. 83.

**Distinction in liability between carriers of goods and passenger carriers.** There is a plain distinction between the liabilities of carriers of goods and of passengers. *Aston v. Heaven*, 2 Esp. 533; *Christy v. Griggs*, 2 Camp. 79; *Dodge v. Boston & B. S. Co. ante*, 83. The liability of a carrier of passengers, like that of a common carrier of goods, arises out of his duty, implied by law; but, unlike that of the latter, it is not that of an insurer. He does not warrant the safety of the passengers at all events, but only that, so far as human care and foresight can reasonably be required to go, their safe conveyance will be provided for. *Smith, Mercantile Law*, 7th ed. 282; *Ansell v. Waterhouse*, 8 Maule & S. 336; *Crofts v. Waterhouse*, 3 Bing. 319. In the case of the common carrier of goods, the responsibility of an insurer is superadded to the responsibility which arises out of his contract to carry for reward. *Riley v. Horne*, 5 Bing. 230; 1 Story, *Balm.* § 491. See *Fox v. Boston & M. R. Co.* 1 L. R. A. 702, note.



while alighting from defendant's train. *Reversed.*

The facts, and questions presented, are sufficiently stated in the opinion.

**Mr. Homer A. Nelson, with Mr. R. F. Wilkinson, for appellant:**

Defendant did everything which a prudent and sensible person, in a similar situation, would have deemed adequate, in view of the circumstances and the danger to be anticipated, to prevent any injury which might reasonably be expected to occur. This is the full measure of its liability to the plaintiff.

*Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Crocheron v. North Shore S. I. Ferry Co.* 56 N. Y. 656; *Cleveland v. N. J. Steamboat Co.* 63 N. Y. 806; *Carpenter v. Boston & A. R. Co.* 24 Hun, 104-108; *Loftus v. Union Ferry Co.* 84 N. Y. 455-460; *Putnam v. Broadway & 7th Ave. R. Co.* 55 N. Y. 108-119; *Crafter v. Metropolitan R. Co.* L. R. 1 C. P. 300; 2 Redfield, Railways, 201; *Moreland v. Boston & P. R. Corp.* 1 New Eng. Rep. 909, 141 Mass. 81.

It is not the duty of the railroad company to furnish someone to aid passengers in alighting from its cars.

*Laffin v. Buffalo & S. W. R. Co.* 7 Cent. Rep. 798, 106 N. Y. 187.

**Mr. Grant B. Taylor, for respondent:**

The condition of the platform was at all times within the notice of defendant and its servants, and there was no difficulty in making it safe. The degree of care was quite different from that imposed upon one who simply permits the public, by a bare license, to go upon his premises.

*Poster v. N. Y. Cent. & H. R. R. Co.* 11 Cent. Rep. 925, 108 N. Y. 686; *Prassell v. N. Y. Cent. & H. R. Co.* 84 N. Y. 246; Angell, Carriers, §§ 521-524, 568; *Hulbert v. N. Y. Cent. R. Co.* 40 N. Y. 145; *Weston v. N. Y. Elevated R. Co.* 73 N. Y. 595.

In Ohio common carriers are held liable for slight negligence.

*Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201.

Degree of care as carriers of passengers is the highest possible degree of care and skill of which human prudence is capable of making use.

*Manville v. Cleveland & T. R. Co.* 11 Ohio St. 417.

Where carriers undertake to convey passengers by steam, public policy and safety require that they should be held to the greatest possible care and diligence. Any negligence in such case may deserve the epithet of gross.

*Phila. & R. R. Co. v. Derby*, 55 U. S. 14 How. 468 (14 L. ed. 509); *The New World v. King*, 57 U. S. 16 How. 469 (14 L. ed. 1019); *Pa. Co. v. Roy*, 102 U. S. 451 (26 L. ed. 141); *Eagle Packet Co. v. Defries*, 94 Ill. 598, 84 Am. Rep. 245.

The plaintiff was entitled to a safe passage out of the car so that he could continue his journey to the place of destination; and he had a right to act upon the assumption that every necessary and reasonable precaution would be taken by its proprietors to make it so.

*Archer v. N. Y. etc. R. Co.* 9 Cent. Rep. 238, 106 N. Y. 595; *Dobiecki v. Sharp*, 88 N. Y. 208; *Poster v. N. Y. Cent. & H. R. R. Co.* 11 Cent. Rep. 925, 108 N. Y. 686.  
2 L. R. A.

**Ruger, Ch. J.**, delivered the opinion of the court:

The evidence was quite conflicting as to the presence of any ice on the platform of the car from which the plaintiff fell and broke his leg, and as to the quantity of snow lying thereon—some of the witnesses stating that there was no ice, and only so much snow as had apparently been blown in and gathered around the corners and crevices of the platform; and others saying there was some ice formed on the edges of the platform from sleet, hail or rain freezing there, and being thinly covered with a coating of snow.

It had stormed at various times during the night and morning, and the weather was cold and freezing. Whatever may have been the testimony, it is quite certain that the quantity of either ice or snow was quite inconsiderable, and perceptible only after some inspection. It also appeared that, such as it was, it had been formed upon the platform of a passenger car attached to a through train, running from Chicago to Fort Wayne, in the course of its transit between those places. The plaintiff had taken his passage at Chicago for a place beyond Fort Wayne, and had been upon the cars about two hours, when, about 5 o'clock A. M., they arrived at Mansfield, in the State of Ohio, where the accident occurred. The jury were undoubtedly authorized to find from the evidence that there was some snow upon the car platform, and some slight spots of ice around its edges, and that the accident was occasioned by the slipping of the defendant on the platform by reason of such ice or snow. There is no claim that there were hummocks or bunches of either substance, or that it lay in any other form than as a thin covering upon the platform. It was also established by the evidence of the plaintiff that he was aware of the condition of the platform at the time of the accident, as he had two or three times during the night crossed over it, and observed that it was slippery.

The amount of the verdict rendered in the case is quite reasonable, and as the plaintiff was undoubtedly seriously injured, and was subjected to damage by reason thereof, we should be quite willing to affirm the judgment if it could be done without violating legal principles.

Railroad corporations, however, are not the insurers of the lives or safety of passengers upon their cars, and, in order to render them so, it is essential to show that they have neglected the performance of some duty which in the exercise of reasonable care, prudence and diligence they owe to such passengers. We think the trial court was not justified in applying to this case the rule pertaining to the construction and maintenance of tracks and running machinery by railroad corporations, which holds them to the use of the utmost possible care in discovering and remedying defects therein. That rule is applicable to such appliances of a railroad as would be likely to occasion great danger and loss of life to the traveling public, if defects existed therein, on account of the velocity with which cars are moved, and the destructive and irresistible force which accompanies such motion.

No claim is made here but that the roadbed

was in good order, the cars constructed upon the usual and customary plan, and provided with all the conveniences and appliances ordinarily used to afford safety and comfort to their occupants. It had a safe and well constructed platform, with proper and convenient steps, to enable passengers to safely enter or alight therefrom, and hand rails on either side to afford assistance in case of any insecurity in the footing of the passageway. The accident occurred from a cause which is as common to all other exposed places as to that of a car platform, and which is inseparable from the nature of a northern climate. Persons who suppose that they are freed from the exercise of reasonable care and prudence in passing over places exposed to ice and snow in such a climate as ours, upon the assumption that a duty belongs to some other person to keep such place under all circumstances absolutely free therefrom, greatly mistake the legal obligations resting upon the parties respectively interested.

The rule laid down by the trial court in *Weston v. New York Elevated Railroad Company*, as approved in 78 N. Y. 595, in reference to a permanent platform at an elevated railroad station in the City of New York, was that "The defendant was not bound to keep its platform in such a condition that it would have been impossible for any passenger to slip, but in such a condition that a person using ordinary care, which people use when not apprised of danger, would not slip." This was applied in a case where the snow had fallen long before the accident and an effort had been made by the railroad company to remove it, but it had imperfectly performed that duty.

We think even such a rule is not applicable to the removal of snow and ice on cars attached to a running railroad train traveling in the night during a continuous storm. The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travelers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations or the termini of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so.

We are not referred to any case laying down the precise degree of care and diligence required of such corporations, under such circumstances; but we think it must be somewhat analogous to that imposed upon municipal corporations in respect to the removal of snow and ice from public streets. Those corporations are required to remove dangerous accu-

mulations of snow or ice in a street or public place within a reasonable time after they have occurred, but they are not to be deemed negligent if they do not remove all traces of such obstructions when they do not constitute something more than the presence of a danger arising alone from their inherent quality of being slippery. *Taylor v. Yonkers*, 105 N. Y. 202, 7 Cent. Rep. 280; *Kinney v. Troy*, 103 N. Y. 570, 11 Cent. Rep. 454; *Kaveny v. Troy*, 108 N. Y. 572, 11 Cent. Rep. 342.

The theory upon which the learned trial judge denied the motion for a nonsuit in this case is undoubtedly expressed in his charge to the jury, in which he says: "If you will pay attention you will understand the enormous responsibility which such a company assumes. The duty it owes the public is the utmost possible care to anticipate future accident or disaster, and the utmost possible prudence in guarding against it." Although this portion of the charge was unexpected to by the defendant, and is therefore unavailable to it as an error of law upon this appeal, it may yet be taken as an expression of the views entertained by the court in respect to the law, in refusing to grant the motion to nonsuit presented by the defendant. It is quite impossible to lay down any general rule applicable to all circumstances, in respect to the degree of care to be observed by a railroad corporation in the removal of ice or snow from its cars; and each case must therefore be generally determined by its own peculiar circumstances; but it is safe to say that such corporations should not be held responsible for the dangers produced by the elements until they have assumed a dangerous form, and they have had a reasonable opportunity to remove their effects.

Having arrived at the conclusion that the case presented no facts as to the negligence of the defendant which a jury were justified in regarding as proof of negligence, we deem it unnecessary to discuss at length the question of the alleged contributory negligence of the plaintiff. A problem not free from doubt is presented by a verdict adjudging the defendant guilty of negligence in not observing the danger arising from the presence of snow and ice upon a platform, and yet exonerating the plaintiff from the imputation of contributory negligence, in view of the fact that he knew that ice and snow had accumulated on the platform; that he had twice slipped there the same night, and thereafter walked fearlessly over it, without availing himself of the protection of hand rails within his reach on both sides of the platform. The same duty which rested upon the defendant to see and remove this obstruction rested upon the plaintiff, with still greater force, to guard himself from injury while passing over it, because he had been informed by experience of its presence and danger; and, as the storm continued until the train reached Mansfield, he should have known that no reasonable opportunity had been afforded the railroad company to effectually remove it.

*The judgments of the courts below should therefore be reversed, and a new trial ordered, with costs to abide the event.*

All concur

## PEOPLE of the State OF NEW YORK

v.

John O'BRIEN, as Receiver of the Broadway Surface R. R. Co., et al.

(.....N. Y. ....)

1. Whether the Attorney-General, who has brought an action to wind up the affairs of a corporation in which a receiver has been appointed, and which is still pending undetermined, can, to avoid multiplicity of suits and to carry out the provisions of New York Laws 1886, chap. 810, maintain another action in the name of the People, in aid of the former, to obtain a judgment declaratory of the rights and liabilities of the several parties as affected by the dissolution of the corporation, and to determine the fact as to what were the assets of the company and the extent of the interests of the several parties therein, and to restrain mortgagees and contractors and others from enforcing their rights in and liens upon the property, by legal proceedings, doubted, but not decided.
2. A corporation, although created for a limited period, may, by a grant of a franchise to maintain a street railroad, take from a city in which the title to streets is vested, an interest in perpetuity which is irrevocable.
3. The resolution of the Common Council of the City of New York granting a street railroad franchise to the Broadway Surface Railroad, which expressly provided for traffic contracts by which another company should obtain a right to run cars over its tracks, with no condition with respect to the duration of such contract rights or otherwise, gave an estate in perpetuity in Broadway to the Broadway Surface Railroad Company, under the authority of the Constitution and Laws of the State of New York.
4. An express reservation of power to repeal a charter can give no authority to take away or destroy property lawfully acquired

or created under authority conferred by the charter.

5. The provisions of New York Laws 1850, chap. 140, § 48, that the repealing of a charter shall not impair any remedy existing against the corporation, its directors or officers upon a liability previously incurred, is a contract protected by the provisions of the Federal Constitution.
6. The franchise of a street railroad company, under which it is authorized to construct and maintain a street railroad and run cars thereon for the transportation of freight and passengers, survives the dissolution of the corporation.
7. New York Laws 1886, chap. 271, attempting to take away from a street railroad company, which is dissolved by legislative action, the franchise which had been granted to it in perpetuity to construct and maintain a street railroad in a certain street, and to direct the sale and transfer of such franchise and the payment of the purchase price to the city, is unconstitutional as an effort to change the ownership of the franchise without due process of law.
8. New York Laws 1886, chap. 310, making it the duty of the Attorney-General to bring a suit to wind up the affairs of any corporation dissolved by Act of Legislature, which does not purport in terms to have a retroactive operation, and in which there is nothing to show that the Legislature intended it to apply to a dissolution already accomplished, does not apply to a corporation dissolved by legislative Act one week prior thereto.
9. New York Laws 1886, chap. 310, is obnoxious to the objection that it assumes to take property without due process of law and impairs the obligation of contracts, and is therefore unconstitutional, because:

(a) By making the receiver of a corporation a referee to take proof of claims against the corporation, and a judge to determine the materiality of evidence offered in their support, it violates the rule that no man should be a judge in his own case;

*NOTE.*—City ordinance, authorizing construction of railway. Where an ordinance of a city authorizes a railway company to construct and operate a line of road within the limits of the city, and prescribes the conditions imposed upon the company, and no right to alter the terms upon which the company accepted was reserved, the city has no power, by a subsequent ordinance, without the consent of the company, to impose upon it other and additional obligations. *People v. Chicago West Division R. Co.* 5 West. Rep. 517, 118 Ill. 113.

*Right to construct street railroad a franchise.* The right to construct and operate a street railway is a franchise which must have its source in the sovereign power. The legislative power over the subject is also subject to the limitation that the franchise must be granted for public and not private purposes; or at least public considerations must enter into every valid grant of a right to appropriate a public street for railway uses. *Fanning v. Osborne*, 8 Cent. Rep. 455, 102 N. Y. 441. The corporate entity and its corporate franchisees are different things; the one is the being, the others are attributes and possessions of the body. *State v. Boston, C. & M. R. Co.* 25 Vt. 433; 1 Kyd, Corp. 15. As to creditors, although a corporation may abandon its charter, it is still to be regarded and treated in law as existing, and its last elected or acting officers and agents will be regarded as such for the purposes of service of process. *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42. But so far as its duty to the public is concerned, the Legislature may by law release it therefrom and allow a transfer of its powers, effects and duties to other hands. *State v. Bailey*, 16 Ind. 46. The corporation cannot despoil its creditors by a voluntary surrender of its charter right, or franchise. *Oakland R. Co. v. Oakland R. & F. V. R. Co.* 45 Cal. 365; *Powell v. North Mo. R. Co.* 42 Mo. 63; *Goodwin v. McGeehee*, 15 Ala. 232; 2 L. R. A.

*Bedford R. Co. v. Bowser*, 48 Pa. 22. Compare, however, *Stillman v. Fredericksburg, O. & C. R. Co.* 27 Gratt. 119; 1 Rorer, Railroads, 40.

*Authority to take lands for its corporate use.* The authority to a railroad company to take lands only for its own use for the purposes contemplated by its charter does not authorize the taking of a fee, but only of an easement. *Strong v. Brooklyn*, 68 N. Y. 1; *Mills, Em. Dom.* § 81; *Oregon R. & Nav. Co. v. Oregon Real Estate Co.* 10 Or. 444. If a railroad corporation is authorized to acquire only the use of lands for the purposes of its road, the fee remains in the former owner; and when the public use has ceased, the property originally condemned or dedicated reverts to him. *Heard v. Brooklyn*, 60 N. Y. 242. The New York Statutes provide that a railway company acquires in land condemned only the right of use for the purposes of its incorporation, during the continuance of its corporate existence. *Re Hartford & C. W. R. Co.* 85 How. Pr. 153. A change in the public use from one kind of public use to another, which is not a material change, will not operate as an abandonment of the prior use so that a reversion to the owner would supervene. *Brainard v. Missisquoi R. Co.* 48 Vt. 107; *Malone v. Toledo*, 28 Ohio St. 643. But see *People v. Lawrence*, 54 Barb. 589; *Mills, Em. Dom.* § 57.

*Forfeiture of franchise.* Corporate franchisees cannot be forfeited, except in clear cases of violation of the statute. *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 1 West. Rep. 247, 104 Ind. 97. In the creation of every corporation there is a tacit condition that the franchise may be forfeited for willful misuser or nonuser in regard to matters which go to the essence of the contract between it and the State. *Darnell v. State*, 48 Ark. 321. The remedy against a corporation for misuser or nonuser of its corporate franchise is an action at law by *actio facias*, prosecuted at the instance and on behalf of

(b) It makes proof of the cost of an obligation the measure of the creditor's recovery, instead of the liability of the debtor as shown by the terms of his contract;

(c) It requires creditors to accept payment of obligations before maturity;

(d) It provides for the appointment of a receiver of property of a dissolved corporation and the transfer of its assets to him by force of the statute, after the title to the property had become vested, by dissolution of the corporation, in its directors as trustees for stockholders and creditors—by an action to which such directors are not parties.

10. The provision of New York Laws 1884, chap. 252, § 15, prohibiting leases of parallel roads by street railroad companies, does not prohibit traffic contracts between roads which are parallel for a certain portion of their length for the partial use of their respective roads beyond the line of parallelism, where such contracts are not in terms or in effect leases and do not surrender possession or control of the road by its original owner.

(November 23, 1884.)

**A** PPEAL from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Albany Special Term, in an action by the Attorney-General, in the name of the People of the State, for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties as affected by the dissolution of the Broadway Surface Railroad Company, a corporation. *Reversed.*

The action was brought against John O'Brien, as Receiver of the Broadway Surface Railroad Company, the City of New York, the Broadway and Seventh Avenue Railroad Company, the Twenty-third Street Railroad Company, and others. The plaintiff and all the defendants, except said two Railroad Companies, have appealed to this court.

The material facts, and the questions presented, are stated in the opinion.

*Messrs. Charles F. Taber, Denis O'Brien and William A. Poste for the People.*

*Mr. Denis O'Brien for the receiver.*

*Mr. William C. Gulliver, with Messrs. Alexander & Green, for defendants Mo-  
Lean, Bird, Selmes, Pentz, and Richmond.*

*Messrs. James C. Carter and Elihu Root for the Broadway & Seventh Avenue Railroad Company.*

*Mr. Edward Winslow Paige for defendant Palmer.*

*Mr. S. P. Nash, with Messrs. Nash & Kingsford and Chas. L. Jones for bondholders and mortgagees.*

**Ruger, Ch. J.**, delivered the opinion of the court:

It will not be unprofitable at the outset to recall some of the prominent incidents attending the origin and operation of the Broadway Surface Railroad Company, for the purpose of obtaining a clearer view of the situation of the parties, and their relation to the subject of the action. On May 13, 1884, that company filed articles of association, and became incorporated as a street railroad company, under the provisions of chapter 252 of the Laws of 1884, a general Act passed to authorize the formation of street railroad corporations, pursuant to the mode introduced by the amendment to the Constitution of 1875. By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the Con-

the government. *Atty-Gen. v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 529; *Merrick v. Brainard*, 38 Barb. 595; *Patrick v. Ruffners*, 2 Rob. (Va.) 203, 40 Am. Dec. 745; *State v. Fourth N. H. Turnp.* 15 N. H. 162, 41 Am. Dec. 632. The charter of a corporation will not be declared to be forfeited, except in a proceeding instituted directly for that purpose by the government granting the charter. *Jersey City Gaslight Co. v. Consumers Gas Co.* 4 Cent. Rep. 331, 40 N. J. Eq. 427; *Broadwell v. Merrett*, 2 West. Rep. 185, 87 Mo. 95. At common law an information in the nature of a *quo warranto* is the proper proceeding against a corporation to forfeit its franchise. *Darnell v. State*, 48 Ark. 321; *State v. Southern Pac. R. Co.* 24 Tex. 80. The corporation is liable to have its franchise forfeited at suit of the State for misuser or nonuser of its franchise. *Darnell v. State*, 48 Ark. 321.

*Forfeiture; how declared.* When a charter or franchise is granted by Act of the Legislature with a clause declaring it subject to forfeiture upon certain conditions of nonperformance no adjudication of a forfeiture by the courts is required, but the Legislature may treat the same as forfeited and may by statute grant the same to another. *Re Brooklyn, W. & N. R. Co.* 72 N. Y. 245, 75 N. Y. 335, 19 Hun, 314, 55 How. Pr. 14; *Oakland R. Co. v. Oakland, B. & F. V. R. Co.* 45 Cal. 365; *LaGrange & M. R. Co. v. Rainey*, 7 Cold. 429; *Kennedy v. Strong*, 14 Johns. 129; *U. S. v. Grundy*, 7 U. S. 3; *Cranch*, 351 (2 L. ed. 459); *State v. Clinton & P. H. R. Co.* 4 Rob. (La.) 459; *Sturges v. Vanderbilt*, 73 N. Y. 384; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524. But ordinarily a forfeiture can be declared and established only by judicial proceedings directly instituted for that purpose, and the method in such cases is by *quo warranto*. *Bruffett v. Great Western R. Co.* 25 Ill. 333; *Lanbury & N. R. Co. v. Wilson*, 27 Conn. 435; *Sturges v. Vanderbilt*, 73 N.

Y. 384; *Re N. Y. Elevated R. Co.* 70 N. Y. 327; 2 Kent. Com. 305; *Cleveland, P. & A. R. Co. v. Erie*, 27 Pa. 380; *Aurora & C. R. Co. v. Laurenceburgh*, 56 Ind. 80; *N. J. Southern R. Co. v. Long Branch Comrs.* 39 N. J. L. 28. The government creating the corporation can alone institute proceedings for the forfeiture of its franchise. *People v. Kingston & M. Turnp. Co.* 23 Wend. 221; *Perse & B. Paper Works v. Willett*, 19 Abb. Pr. 433; *Ahrens v. State Bank*, 3 S. C. 407. The State may exact the forfeiture or waive it, as may seem best to it for the public interests. *Jersey City Gaslight Co. v. Consumers Gas Co.* 4 Cent. Rep. 332, 40 N. J. Eq. 432.

*Mere insolvency will not work a dissolution.* Neither the mere insolvency of a corporation, nor proceedings in insolvency, nor the appointment of a receiver of the corporate property, will work a dissolution of the corporate existence. *Coburn v. Boston Paper Mache Mfg. Co.* 10 Gray, 245; *Boston Glass Manufactory v. Langdon*, 24 Pick. 53; 2 *Waterman, Corp.* 867. The doctrine in New York is, that although if a corporation does or suffers to be done acts that destroy the end and object of its creating, it is equivalent to a surrender of its corporate rights; yet mere insolvency, though total, is not sufficient evidence of such surrender. *Bradt v. Benedict*, 17 N. Y. 93. The fact that the property and most of the franchises of a railroad company are held in custody by a court of equity for the purpose of enforcing satisfaction of specific claims, does not work a dissolution of the corporation. The corporate existence continues, although dominion over the road and property may be suspended. *Heath v. Mo. K. & T. R. Co.* 83 Mo. 617; 2 *Waterman, Corp.* 867. It is not enough to work a dissolution that causes therefore exist; their existence must be judicially ascertained and then enforced by judgments of forfeiture, except where

stitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The Constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase.

The framers of the Constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who would pay the highest price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the Legislature alone, and authorized its acquisition by contract from such municipality. *Re New York Cable R. Co.* 11 Cent. Rep. 485, 109 N. Y. 32; *Troy v. Troy & L. R. Co.* 49 N. Y. 657.

The subsequent legislation of the State confirms this view, for at times it has provided that such right might be sold at auction, and by chapters 65 and 642 of the Laws of 1886 makes it obligatory upon the municipalities to dispose of such right by public auction to the highest bidder.

Previous to December 5, 1884, this company applied to the Municipality of New York for authority to lay tracks and run cars over Broadway from the Battery to Fifteenth Street; and on that day, by resolution of the common council, the consent of the city was given, upon the terms and conditions prescribed in the resolution granting it, among which was the annual payment of a considerable sum of money to the municipality. It is conceded that the Broadway Surface Company duly accepted the grant, and fully complied with and performed all of the terms and conditions provided therein to entitle it to acquire, construct and operate its road.

We know, not only from contemporary history, but from cases which have already reached this court, that serious questions have arisen with reference to the propriety of the means by which the corporators of the company obtained this consent from the municipal authorities; but they are not involved in this case, and have no bearing upon the questions presented for discussion by the record. The company subsequently obtained the favorable report of a commission, duly appointed by the supreme court, in lieu of the consent of abutting property owners, and the order of the court confirming the action of the commissioners.

After its incorporation, the Broadway Surface Company mortgaged its property and franchises as security for contemplated loans, and authorized its bonds to be put upon the market, for sale to the public generally, and they were largely purchased by investors, without notice of any defect in their origin or execution. It also made contracts with other street railroad companies owning, respectively, lines of road connecting with the contemplated line of the Broadway Surface Company, and diverging therefrom to distant parts of the city, for the use of their several tracks by each other, for which it received a large present pecuniary consideration from each of said companies, besides the exchange of mutual benefits and accommodations. It is not disputed by the plaintiff but that, upon the entry of the order of confirmation referred to, the Broadway Surface Railroad Company became vested with the right of constructing a railroad on Broadway, and running cars thereon, to as full an extent as it had power to acquire, or the state and city authorities had authority to grant. In the spring of 1885 the company caused its track to be constructed over the route authorized, and, from that time to the 4th day of May, 1886, when it was dissolved by an Act of the

they are within the power of the Legislature. *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.* 38 Barb. 358; *Sturges v. Vanderbilt*, 73 N. Y. 384; *State v. Noyes*, 47 Maine, 189; *Grand Gulf R. & Bkg. Co. v. State*, 10 Smedes & M. 434. A corporation is not dissolved by an omission to elect trustees under its charter for more than two years; in such case the old trustees hold over. *Reformed Dutch Church v. Brantford*, 32 Barb. 236; *Deming v. Puleston*, 8 Jones & S. 312; *Hardon v. Newton*, 14 Blatchf. 379; *Cahill v. Kalamazoo Mut. Ins. Co.* 2 Doug. (Mich.) 124, 43 Am. Dec. 464; *Morley v. Thayer*, 3 Fed. Rep. 748; *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.* 4 Rawle, 9, 26 Am. Dec. 112. A corporation aggregate may be dissolved within the period prescribed by its charter, by the death of all its members, or the destruction of an integral part of it. *State v. Real Estate Bank*, 5 Ark. 595, 41 Am. Dec. 109; *Chicago L. Ins. Co. v. Needles*, 115 U. S. 585 (28 L. ed. 1088).

*Corporate charters are contracts.* Charters of private corporations are contracts protected from invasion by the Constitution of the United States. *Chenango Bridge Co. v. Binghamton Bridge Co.* 70 U. S. 3 Wall. 51 (15 L. ed. 137); *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 513 (4 L. ed. 629); *Davis v. Gray*, 33 U. S. 16 Wall. 233 (21 L. ed. 417). So the charter granted to a railroad is a contract. *Wilmington & W. R. Co. v. Reid*, 80 U. S. 13 Wall. 264 (20 L. ed. 558); *Koenig v. Omaha & N. W. R. Co.* 3 Neb. 383. The charter of a private corporation is an executed contract between the government and the corporations which the Legislature has no power to repeal, impair or alter, against its consent. *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 513 (4 L. ed. 629); *Bush v. Shipman*, 5 Ill. 190; *Bruffett v. Great Western R. Co.* 25 Ill. 353; *Chenango Bridge Co. v. Binghamton Bridge Co.* 70 U. S. 3 Wall. 51 (15 L. ed. 137); *Wilmington & W. R. Co. v. Reid*, 80 U. S. 13 Wall. 264 (20 L. ed. 558); *Delaware*

*R. R. Tax*, 85 U. S. 18 Wall. 206 (21 L. ed. 888); *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287; *Lothrop v. Stedman*, 42 Conn. 588; *Allen v. Buchanan*, 9 Phila. 233; *Stevens v. Rutland & B. R. Co.* 20 Vt. 545; *Zabriskie v. Hackensack & N. Y. R. Co.* 18 N. J. Eq. 178; *Sinking Fund Cases*, 99 U. S. 737 (25 L. ed. 508); *Greenwood v. Union Freight R. Co.* 103 U. S. 13 (26 L. ed. 961); *New Orleans Gas Light Co. v. The Light & Heat Co.* 115 U. S. 650 (29 L. ed. 516); 11 Fed. Rep. 277. The charter of a railroad company is a contract which is protected by clause 1, sec. 10, art. 1, of the Constitution of the United States, unless the charter is by its terms repealable. *Ala. & F. R. Co. v. Burkett*, 46 Ala. 509; *New Orleans, J. & G. N. R. Co. v. Harris*, 37 Miss. 517; *Smead v. Indianapolis, P. & C. R. Co.* 11 Ind. 104. If not given with a reserved right to alter or repeal, it is not affected by subsequent changes in the statutes or constitution of the State. *Dodge v. Woolsey*, 59 U. S. 18 How. 381 (15 L. ed. 491); *Mechanics & T. Bank v. Thomas*, 59 U. S. 18 How. 384 (15 L. ed. 490); *Jefferson Branch Bank v. Skelly*, 66 U. S. 1 Black. 436 (17 L. ed. 173); *Franklin Branch Bank v. Henry County v. Nicolay*, 95 U. S. 17 L. ed. 180; *Henry County v. Nicolay*, 95 U. S. 619 (24 L. ed. 394); *New Orleans Gas Light Co. v. Louisiana Light & Heat Co.* 115 U. S. 650 (29 L. ed. 516); *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674 (29 L. ed. 525). An Act which impairs the charter by enlarging the powers of the State over the body corporate, or by abridging the franchise, or by altering the charter, is void. *Philadelphia, W. & E. R. Co. v. Bowers*, 4 Houst. 506; *Commercial Bank v. State*, 4 Smedes & M. 439; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37; *Desty, Fed. Const.* 170. So, a statute passed after granting the charter annexing a cause of forfeiture unknown to the charter, is unconstitutional. *Washington Bridge Co. v. State*, 18 Conn. 53; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 285; *Aurora & L. Turnp. Co. v.*

Legislature, in connection with connecting railroad companies ran its cars over such road and the connecting lines.

On May 14, 1886, in an action between the People, as plaintiff, and James A. Richmond, the former President of the Broadway Surface Railroad Company, as sole defendant, upon the application of the Attorney General, one John O'Brien was appointed receiver of the property formerly belonging to the Broadway Surface Company, by a Justice of the Supreme Court of the Third Judicial District, in an *ex parte* order based upon the summons and complaint in that action, in pursuance of and under the authority alone of the provisions of chapter 810 of the Laws of 1886.

The present action was brought July 8, 1886, by the Attorney-General, in the name of the People of the State, against the City of New York, the receiver of the Broadway Surface Railroad Company, and numerous other corporations and persons alleged to have had dealings with such company, either as stockholders, mortgagees, creditors, or contractors, for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties as affected by the dissolution of the corporation, determining the fact as to what were assets of the company and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors and others from taking legal proceedings to enforce their rights in and liens upon the property of the corporation.

It is not claimed that the State has any legal interest in the determination of these questions, or that the receiver has not ample power at law to obtain possession of such assets as he may be entitled to, or to protect the property of the corporation from unlawful claims. It is claimed that the action is maintainable under the pro-

visions of section 1 of chapter 810 of the Laws of 1886, by virtue of the provision making it the duty of the Attorney-General, upon the dissolution of a corporation by legislative action, "immediately thereafter to bring a suit to wind up and finally settle and adjust the affairs of such annulled and dissolved corporation." The mode by which such settlement and adjustment of affairs shall be made is prescribed particularly in the Act, and contemplates the appointment of a receiver, and proceedings by him to take possession of the property and convert it into money, to ascertain and determine the liabilities of the corporation to its creditors, and to distribute its assets among those entitled to them.

The complaint shows that, previous to the commencement of this action, the Attorney-General had brought a suit, in accordance with the statute, to wind up the affairs of the corporation; that a receiver had been appointed therein, and that such action was still pending, undetermined. It then proceeds to allege that, in consequence of various enumerated difficulties in obtaining possession of the property by the receiver, this action was brought "in aid of the former action, to prevent a multiplicity of suits, and to carry out the provisions of chapter 810 of the Laws of 1886."

It is not easy to see on what theory such an action can be maintained. The State has no interest entitling it to intervene to prevent a multiplicity of actions between other parties. Neither does the action seem necessary or proper, in aid of the former action. The modes by which the provisions of chapter 810 are to be carried out are specially provided by that Act to be through the instrumentality of a receiver, and it is not claimed that the receiver lacked power to litigate and settle any of the questions presented by this complaint.

Holtzhouse, 7 Ind. 50; State v. Tombeckee Bank, 2 Stew. (Ala.) 93; Desty, Fed. Const. 156.

*Constitutional law; protection guaranteed.* That "No person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation," are provisions of the Constitution which it is intended the courts shall enforce, even against persons assuming to act under the authority of the government. *U. S. v. Lee*, 108 U. S. 108, 27 L. ed. 171. The constitutional provision that "No person shall be deprived of life, liberty, or property without due process of law" is extended over the property of corporations as well as individuals; and an Act of the Legislature is in no sense the process of law designated in the Constitution. *Board of Education v. Bakewell*, 8 West. Rep. 49, 122 Ill. 339. The prohibition upon depriving persons of their property, etc., without due process of law does not require the Legislature to provide any particular course of procedure; but only that the individual shall in some manner have notice and an opportunity to be heard. Modes and forms are in the discretion of the Legislature. *Petition of the Mayor of N. Y.* 1 Cent. Rep. 149, 99 N. Y. 509.

*Protection of vested rights.* The Legislature cannot take away vested rights, nor create a cause of action for which there is no remedy at the time of its occurrence. *Cocoa River Steamboat Co. v. Barclay*, 30 Ala. 120; *Desty*, Fed. Const. 155. No one can be deprived of his property, or of vested rights except by due process of law. *Burns v. Multnomah R. Co.* 8 Sawy. 513; *Clark v. Mitchell*, 69 Mo. 627; *Perce v. Kitzmiller*, 19 W. Va. 564; *White v. Crump*, 19 W. Va. 563; *Desty*, Fed. Const. 328. If the incorporators of a railroad proceed by articles of association under a general incorporation law and in conformity therewith, the general law is an Act of incorporation; and the obligation of the statute to protect its vested rights and interest

created upon the faith of such general law is the same as if incorporated by special enactment. *Hongland v. Cincinnati & Ft. W. R. Co.* 18 Ind. 452; *Buffalo & N. Y. R. Co. v. Brainard*, 9 N. Y. 110; *Woolfolk v. State*, 10 Ind. 532; *San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

*Due process of law defined.* Due process of law undoubtedly means, in the due course of legal proceedings—amounting to those rules and forms which have been established for the protection of private rights. *Board of Education v. Bakewell*, 8 West. Rep. 52, 122 Ill. 339. Due process of law does not require a plenary suit and trial by jury in all cases where property or personal rights are involved; it is in all cases that kind of procedure which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. *Ex parte Wall*, 107 U. S. 255 (27 L. ed. 52). What is due process of law in the States is regulated by the law of the State. *Walker v. Sauvinet*, 92 U. S. 90 (23 L. ed. 678). Due process of law means, in due course of legal proceedings including notice, and an opportunity to be heard. *Perce v. Kitzmiller*, 19 W. Va. 564; *Burns v. Multnomah R. Co.* 8 Sawy. 513. A corporation may be dissolved for a breach of trust, but not until it is called upon to answer to the action brought for that purpose. *Thompson v. People*, 23 Wend. 576; *People v. Bristol & R. Turnp. Road*, 23 Wend. 235; *Ottawa & Quebec Woolen Co. v. Newton*, 57 Vt. 463. A forfeiture must be ascertained and declared by regular process of law. *Vernon Society v. Hills*, 6 Cow. 26, 16 Am. Dec. 481; *Allen v. New Jersey S. R. Co.* 40 How. Pr. 177; *Perce & B. Paper Works v. Willett*, 1 Robt. 147; *Importing & Exporting Co. of Georgia v. Locke*, 50 Ala. 334; *State v. Real Estate Bank*, 5 Ark. 545, 41 Am. Dec. 117; *Penobscot Boom Corp. v. Lamson*, 16 Maine, 224, 38 Am. Dec. 600; *Hestonville, M. & F. Pass. R. Co. v. Phila.* 80 Pa. 218; *Strong v. McCagg*, 55 Wis. 628, as reversed on error, in *Moss v. McCullough*, 7 Barb. 238.

The receiver might, perhaps, have brought an action similar in character to this, and would have had a legal interest, if any, in the property to be affected by it; but the State has no such interest, and has no greater authority to intervene in the litigation of controversies between individuals and corporations than any other indifferent party. *People v. Booth*, 82 N. Y. 897; *People v. Ingersoll*, 58 N. Y. 18; *Re New York Elevated R. Co.* 70 N. Y. 889; *People v. Brooklyn, F. & U. I. R. Co.* 89 N. Y. 98; *People v. Albany & S. R. Co.* 57 N. Y. 161.

The suit which the Attorney-General was authorized to bring, by section 1 of chapter 810, has been brought; and no reason is suggested why all of the objects of such a suit could not be attained in that action. His power to bring actions was exhausted by that suit, and it was not contemplated by the Act, or necessary to its purposes, that it should bring successive actions to determine questions arising between the receiver and adverse claimants of the property represented by him. Those causes of action were by the Act vested in the receiver, and how such questions can be judiciously and finally determined in an action between a party representing no legal interest in them and such claimants it is difficult to understand. If all of the persons interested in a litigation come in as parties, either plaintiffs or defendants, and voluntarily submit their claims to the determination of the court, it is not doubted that they may be bound by an adjudication rendered in such action; but it is not claimed that all of the creditors, bondholders or stockholders of the Broadway Surface Railroad Company have been made parties, and it affirmatively appears that several of those who have appeared, have objected to the right of the State to compel them to litigate their claims in this action. It might very well be held that the State was not a party aggrieved by the determination of the courts below, in such a sense as to entitle it to appeal therefrom.

It is not the duty of courts to entertain jurisdiction of actions brought for the purpose of determining abstract questions of law or of declaring the principles upon which contemplated controversies shall be determined; but they are created to deal with practical questions, in which the rights of parties are actually involved, and are presented by the persons interested in their determination.

It is claimed that this court held in *People v. O'Brien*, 4 Cent. Rep. 549, 103 N. Y. 657, that the action was maintainable. We think that claim is unfounded. The question was not involved in the motion there considered. That was a motion to change the place of trial of the action. Whether the complaint stated a good cause of action or not could not have been properly considered or decided on such a motion. The action is certainly unusual, and is believed to be unprecedented in its scope and design, and, if held to lie at all, presents a strong and unfavorable contrast to the mode in which legal controversies are usually brought to the attention of judicial tribunals. Some members of the court, however, are of the opinion that the right of the People to maintain the action depends wholly upon the question of the constitutionality of chapter 810, referred to.

2 L. R. A.

Considering the magnitude of the interests involved, and the importance to the public generally of a speedy determination of the questions involving the right of operating a street railroad on Broadway, notwithstanding the dissolution of the corporation to which that right was originally granted, we refrain from disposing of the case upon this ground, and proceed to an examination of the principal questions involved:

Their determination involves an inquiry into the rights secured by the mortgagees and bondholders through the mortgages upon the property and franchises of the railroad company, the validity of the traffic contracts made by it with other street railroad corporations, and the effect which the legislation of 1886, comprised in chapters 268, 271 and 810, had upon such questions. In other words, we think the material question for discussion here is whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation, and, if so, upon whom the right of administering its affairs devolved.

Upon the trial of the action, a judgment was rendered in favor of the contention of all the defendants, except the receiver, to the effect that the mortgages were valid liens upon the property and franchises of the company, and survived the dissolution of the corporation; that the traffic contracts were made by authority of law, and could be enforced, notwithstanding the dissolution of the corporation; and that chapter 271, and parts of chapter 810, of the Laws of 1886 were unconstitutional, as violative of the restrictions of the fundamental law in relation to legislation impairing the obligation of contracts, and constituting a taking of "property without due process of law." The court also held that this action was maintainable in the name of the People; that a receiver of the property of the dissolved corporation had been lawfully appointed; that he was entitled to take possession of its property, and wind up its affairs, and that the plaintiffs were entitled to a perpetual injunction, restraining all of the defendants except the receiver from proceeding with actions already begun, or from instituting other proceedings or actions to enforce, maintain or assert any of the claims, demands or rights of action affecting in any manner the affairs, property, rights and privileges of the Broadway Surface Railroad Company which have been tried and determined in this action. Not only the plaintiff, but each of the defendants, except the Broadway & Seventh Avenue Railroad Company, appealed from this judgment to the general term. That court affirmed the judgment of the trial court.

The plaintiff and all of the defendants, except the two railroad corporations, appeal from the judgment of affirmance to this court, and thus bring before us every determination involved in the judgment. A review of the judgment brings up for consideration propositions very grave in character, not only on account of the extent of the private interests involved, but because their determination will affect great public questions arising out of the limitations imposed by the Constitution upon the legislative power over the property of corporations lawfully acquired under state statutes.



The statutes upon which the action is predicated confessedly assume the right and power of the Legislature to wrest from the company its franchises, to transfer them to other persons, and bestow their value upon the donees of the State. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of mortgages upon such property; and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is therefore urgently contended by the Attorney-General that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal, and could not be enforced.

If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities. The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive Legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race, in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary; and we desire in unqualified terms to express our disapprobation of such a doctrine.

Whatever might have been the intention of the Legislature, or even of the framers of our Constitution, in respect to the effect of the power of appeal reserved in Acts of incorporation upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution. Considering the power which the State has to terminate the life of corporations organized under its laws, and the authority which its Attorney-General has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended from the overgrowth of power or the monopolistic tendencies of such organizations; but, whatever that danger may be, it is trivial in comparison with the widespread loss and destruction which would follow a judicial determination that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law. It is not, perhaps, strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented, that dicta couched in general language may be found, giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken either the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to

other persons or corporations, without provision made for compensation.

Among other claims made by the State, it is contended that the stated term of 1,000 years, prescribed in its charter for the duration of the company, constitutes a limitation upon the estate granted, and that therefore the corporation took a limited estate only in its franchises; and that the rights reserved by the Revised Statutes (Laws 1850, 1884) and the Constitution, to alter, amend and repeal the charters or laws under which corporations might be organized, also constituted a limitation upon the estate granted; and that the exercise of the right of appeal by the State accomplished the destruction of the corporation and the annihilation of all franchises acquired under its charter.

It will be convenient, in the first instance, to consider the nature of the right acquired by the corporation under the grant of the common council with respect to its terms or duration. This is to be determined by a consideration of the language of the grant, and the extent of the interest which the grantor had authority to convey. We think this question has been decided, by cases in this court which are binding upon us as authority, in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use, was decided in *Nicoll v. New York Railroad Company*, 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that, where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

The title to streets in New York is vested in the city, in trust for the people of the State; but under the Constitution and statutes it had authority to convey such title as was necessary for the purpose to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted, either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in public streets for a public use in perpetuity which should be irrevocable. *Yates v. Van De Bogert*, 56 N. Y. 526.

Grants similar in all material respects to the one in question have heretofore been before the courts of this State for construction; and it has been quite uniformly held that they are grants in fee, vesting the grantees with an interest in the street in perpetuity to the extent necessary for the purposes of a street railroad. *People v. Sturtevant*, 9 N. Y. 263; *Davis v. New York*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *New York v. Second Ave. R. Co.* 33 N. Y. 261; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 830. Other cases are also reported in the books, but it is deemed unnecessary to accumulate authorities on this point.

In *Milhau v. Sharp*, Judge Selden said, with reference to a grant from the Common Council of New York in no material respect differing from this: "It amounted to an immediate grant of an interest, and, it would seem, of a freehold, in the soil of the street to the defendants. The rails, when laid, would become a part of the real estate, and the exclusive right to main-

tain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it . . . The title to the rails, when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are, therefore, granted to the defendants by the resolution."

Judge Comstock, in *Davis v. New York*, said: "As the consideration for constructing the road, the ordinance clearly contemplates that it is to become the private property of the associates. They alone will be entitled to place their cars upon it, and, within a maximum limit, they can charge what they please for the carriage of passengers. These rights are, in effect, granted in perpetuity."

In the case of *New York v. Second Avenue Railroad Company*, 82 N. Y. 272, it was said: "Assuming that the common council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto, and the duties and obligations resulting therefrom, invested the latter with the right of property in the franchise, which the common council could not take away or impair by any subsequent act of its own."

The resolution of the common council in this case expressly provided for traffic contracts, by which the Broadway & Seventh Avenue Railroad Company should obtain a right to run cars over the tracks of the Broadway Surface Railroad; and no conditions upon the right granted to the Broadway Surface Railroad Company, in respect to the duration of such contract rights or otherwise, was imposed by the terms of the grant. It was clearly contemplated by its provisions that the rights granted should be exercised in perpetuity, if public convenience required it, by that corporation or those who might lawfully succeed to its rights. When we consider the mode required by the statutes and the Constitution to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible; for it cannot be supposed that either the Legislature or the framers of the Constitution intended to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees as often as popular caprice might require it to be done. Neither can it be supposed that they contemplated the resumption of property which they had expressly authorized their grantees to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent.

We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway, through its grant from the city, under the authority of the Constitution and the Act of the Legislature. It is also well settled by authority in this State that such a right constitutes property, within the usual and common signification of that word. *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 N. Y. 263.

When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the 3 L. R. A.

whole country, the numerous laws adopted in the several States providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question that, in the view of Legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term. It is, however, earnestly contended for the State that such a franchise is a mere license or privilege, enjoyable during the life of the grantee only, and revocable at the will of the State. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain and invested them with the attributes of property generally. We will refer to a few of the statutes on this subject, from which the implication arises, not only that the State intended to invest these franchises with the character of property, but also to enable their mortgagees; purchasers and assigns to enjoy their use under an indefeasible title in perpetuity.

Thus, railroad corporations have been authorized to contract with other corporations for a qualified transfer of such franchises for terms unlimited, except by the agreement of the parties (chap. 218, Laws 1839; § 2, chap. 843, Laws 1873; § 15, chap. 252, Laws 1884); to pledge them, by way of mortgage, as security for loans (subd. 10, § 28, chap. 140, Laws 1850); to consolidate with other companies owning connecting and continuous lines of railroad, and continue the use of such franchises under the name of their successors. Chap. 108, Laws 1875. See *Shields v. Ohio*, 95 U. S. 319 [24 L. ed. 357].

Mortgagees and others have been authorized to purchase such franchises upon mortgage sale and otherwise, and afforded the right to organize so as to enjoy their use thereafter. Sec. 1, chap. 444, Laws 1857; chaps. 469, 710, Laws 1878; chap. 118, Laws 1880; chap. 430, Laws 1874.

Purchasers upon a mortgage or execution sale have been authorized to form associations for the purpose of continuing the operation of such railroad, with all its powers, privileges and franchises. Sec. 1, chaps. 469, 710, Laws 1878; § 1, chap. 232, Laws 1854.

The sale of such franchises has been authorized by the municipality where located to parties proposing to build street railroads. Const. Amend. 1876; § 7, chap. 252, Laws 1884; chaps. 65, 642, Laws 1886.

And, by section 15 of the Act under which this corporation was organized, such companies were expressly permitted to lease or transfer their rights and franchises to other street railroad corporations. Indeed, it is a matter of public history that one half of the railroads of the State are now operated by organizations other than those to whom the franchises were originally granted, notwithstanding their dissolution, through transfers effected by the fore closure of mortgages and otherwise.

The statutes cited, as well as others not specially referred to, indicate the general policy of the State to render such interests independent of the life of the original corporation, and transferable as property, by means of judicial proceedings and otherwise, under certain restrictions not pertinent to our present purpose particularly to consider. *People v. Brooklyn, N. & O. I. R. Co.* 89 N. Y. 84.

In *New York v. Second Avenue Railroad Company*, 82 N. Y. 261, Judge Brown said: "The rights of municipal corporations to property in lands and its usual incidents, and to create ferries and railroad franchises, are quite distinct and separate from their duties as Legislatures, having authority to pass ordinances for the control and government of persons and interests within the city limits. The latter are powers held in trust, as all legislative powers are, to be used and exercised for the benefit and welfare of the whole community, while the former are property, in the ordinary sense, to be acquired and conveyed in the same manner as natural persons acquire and transfer property."

The same learned Judge said, in *Brooklyn Central Railroad Company v. Brooklyn City Railroad Company*, 82 Barb. 864: "The grant to the City Railroad Company, and its acceptance on the conditions annexed, with the duties and obligations and large expenditures resulting therefrom, would seem, therefore, upon the principles I have endeavored to state, to invest the company with the right of property in the franchise, of which it cannot be deprived without its consent or against its will."

It was held by this court, in *Langdon v. New York*, 98 N. Y. 129, that a grant from the city, of land to be used as a wharf, carried with it, as a necessary incident and appurtenance, a right of way for vessels over adjoining waters to the wharf; and that, under such grants, the property granted can only be resumed by the grantor when needed for public use, by the exercise of the right of eminent domain.

This court also held, in *People v. Brooklyn Railroad Company*, 89 N. Y. 75, that, upon a foreclosure of the property and franchises of a railroad corporation, an individual could lawfully become their purchaser, and could hold and transfer them to any corporation having or acquiring the right to exercise such franchises.

In *Sixth Avenue Railroad Company v. Kerr*, 72 N. Y. 380, it was held that the right of a street railroad company in the use of a street for the purpose of its business was a property right, subject to condemnation for public use.

As we have already seen, the cases of *People v. Sturtevant*, *New York v. Second Avenue Railroad Company*, *Davis v. New York*, and *Milbau v. Sharp*, hereinbefore referred to, sustain the same views. The case of *New Orleans Railroad Company v. Delamare*, 114 U. S. 501 [29 L. ed. 244] is directly in point. There the franchise, as here, was acquired by the corporation from the municipal authorities of a city, under general laws authorizing the formation of street railroad corporations. It was held: "Where there has been a judicial sale of railroad property under a mortgage, authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad pass to the purchaser . . . It follows that, if the franchises

of a railroad corporation, essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property upon the bankruptcy of the company carries the franchises, and they may be sold and pass to the purchaser at the bankruptcy sale."

In *Memphis Railroad Company v. Arkansas Railroad Commissioners*, 112 U. S. 619 [28 L. ed. 841] it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as a road."

These rights of property having been acquired and created under the express sanction and authority of the State, it remains to inquire whether they were defeasible and subject to be taken away through the exercise of any power reserved by the State to alter, amend and repeal laws or charters. The reservations applying to this case are claimed to be as follows: (1) section 1, art. 8, tit. "Corporations, How Created," (Const. 1846), providing that "All general laws and special Acts passed pursuant to this section may be altered from time to time or repealed;" (2) section 8, tit. 8, chap. 18, of the Revised Statutes (7th ed.), providing that "The charter of every corporation that shall be granted by the Legislature shall be subject to alteration, suspension, and repeal, in the discretion of the Legislature;" (3) section 48, chap. 140, Laws 1850, providing that "The Legislature may at any time annul or dissolve any incorporation formed under this Act; but such dissolution shall not take away or repair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred;" and (4) chapter 282, Laws 1884, under which this corporation was organized, giving it all the powers and privileges granted; and subject to all of the liabilities imposed by chapter 140, Laws 1850, and the several Acts amendatory thereof, and further providing that "The Legislature may at any time alter, amend or repeal this Act." Section 19.

The Constitution of 1846 for the first time introduced restrictions upon the power of Legislatures to grant special charters, and required that provisions for incorporations, save in exceptional cases, should thereafter be made by general laws. The obvious intent of the constitutional reservation was to remove any doubt as to the power of the Legislature to amend or repeal the laws, whether general or special, authorized by that instrument for the formation of corporations, and seemed to leave the provisions of the Revised Statutes in relation to reserved power over charters in full force and effect.

It will be observed that the Constitution and the Act of 1884 provide specially for the amendment and repeal of statutes alone; but the Revised Statutes and the Act of 1850 are addressed to the subject of the annulment and repeal of charters created under such statutes. It seems to us that these provisions relate to different subjects, viz.: the repeal of laws, and the annulment of charters formed under such laws;

and that the power to do one does not naturally or properly include the power to do the other. *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345.

Certainly, the repeal of a law authorizing corporations would not destroy organizations formed under it, nor would the annulment of a charter affect the law under which it was created. Neither does it seem reasonable to suppose, while taking away the power of the Legislature to create corporate bodies, the Constitution intended to confer power to destroy them, thus enabling them to accomplish indirectly that which they were precluded from doing directly. It must be assumed that the framers of the Constitution, as well as the Legislature, used the language employed by them intelligently, and according to its common and customary signification, and, when they spoke of the annulment and repeal of Acts and laws, did not intend to embrace charters as well. These two subjects have frequently been the occasion of legislative action, and, since the restrictions upon the powers of the Legislature to grant special charters, there is no reason to suppose that they did not use the language employed in its literal sense, and especially so when both subjects were immediately within the contemplation of the law makers.

In considering this question, the provisions of the Revised Statutes may be laid out of view; for, if they contain any broader power than the Act of 1850, they must be deemed to have been repealed by the provisions of the latter Act, as inconsistent therewith. The reservations, therefore, which apply to this case are contained in the Acts of 1850 and 1884, which constitute a part of the railroad charter. These Acts should be read and construed together, and, as thus considered, provide that the Legislature may at any time alter, amend and repeal this Act, and may also annul and dissolve charters formed thereunder; but such dissolution shall not take away or impair any remedy against such corporation, its officers and trustees, for any liability previously incurred. The contract proved between the corporation and the State was intended, in respect to a repeal of the charter, to survive the dissolution of the corporation, and to determine the rights of parties interested in the property in the event of dissolution. By virtue of this contract, the corporation secured rights subject to be taken away under certain restrictions, and protected itself from any consequences following a repeal of its charter, except those expressly agreed upon.

But, even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of Legislatures to waive or destroy, the question still remains, as to the effect of such a repeal upon the franchises of the corporation, whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business and exercise corporate functions after that time, or has a wider scope and effect. It may be assumed in this discussion that the authority of the Legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a

contract may lawfully provide for its termination at the election of either party, and it may therefore be conceded that the State had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed.

In speaking of the franchises of a corporation, we shall assume that none are assignable except by the special authority of the Legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz.: those requiring for their enjoyment the use of corporeal property—such as railroads, canals, telegraph, gas, water, bridge and similar companies—and not to those which are in their nature purely incorporeal and inalienable—such as the right of corporate life, the exercise of banking, trading and insurance powers, and similar privileges. The franchises last referred to, being personal in character and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. *People v. Brooklyn etc. R. Co.* 89 N. Y. 84; *Metc v. Buffalo, etc. R. Co.* 58 N. Y. 61.

In the former class it has been held that, at common law, real estate acquired for the use of a canal company could not be sold, on execution against the corporation, separate from its franchise, so as to destroy or impair the value of such franchise—*Gus v. Tide Water Canal Co.* 65 U. S. 24 How. 257 [16 L. ed. 635]—and, by parity of reasoning, it must follow that the tracks of a railroad company, and the franchise of maintaining and operating it in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

The statute of our State authorizing the sale of the franchise and property of a railroad company on execution seems to recognize the indissolubility of the connection between the corporeal property and its incorporeal right of enjoyment. It is also to be observed that in none of the provisions for repeal in this State is there anything contained which purports to confer power to take away or destroy property or annul contracts; and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. *Mumma v. Potomac Co.* 83 U. S. 8 Pet. 285 [8 L. ed. 945].

The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done, under power lawfully conferred. *Butler v. Palmer*, 1 Hill, 385.

The authorities seem to be uniform, to the effect that a reservation of the right to repeal enables a Legislature to effect a destruction of the corporate life and disable it from continuing its corporate business (*People v. Boston & A. R. Co.* 70 N. Y. 569; *Phillips v. Wickham*, 1 Paige, 590); and a reservation of the right to alter and amend confers power to pass all need-

ful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts. *Munn v. Ill.* 94 U. S. 128 [24 L. ed. 88]. We think no well considered case has gone further than this, while, in many cases, such power has been expressly held to be limited to the effect stated.

In the language of *Chief Justice Marshall* in *Fletcher v. Peck*, 10 U. S. 6 Cranch, 185 [8 L. ed. 162]: "If an act be done under a law, a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates; and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

It would seem to be quite obvious that a power existing in the Legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty or property of citizens, beyond the scope of express constitutional power.

Since the decision of the celebrated *Dartmouth College Case*, 17 U. S. 4 Wheat. 518 [4 L. ed. 629], the doctrine that a grant of corporate powers by the sovereign to an association of individuals for public use constitutes a contract within the meaning of the Federal Constitution prohibiting State Legislatures from passing laws impairing its obligations, has, although sometimes criticised, been uniformly acquiesced in by the courts of the several States as the law of the land, and may be regarded as too firmly established to admit of question or dispute. *People v. Sturtevant*, *Milbau v. Sharp*, and *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.* *supra*.

The intimation by *Judge Story* in that case, that the rule might be otherwise if the Legislature should reserve the power of amending or repealing it, led to the adoption, by the Legislatures of the various States, of the practice of incorporating such reservations in Acts of incorporation. Whatever may be the effect of such reservations, it is immaterial whether they are embraced in the Act of incorporation or in general statutes or provisions of the Constitution. In either case, they operate upon the contract according to the language of the reservation. 1 *Morawetz*, *Priv. Corp.* § 464.

It is manifest, therefore, that, in the absence of such reserved power, Legislatures have no authority to violate, destroy or impair chartered rights and privileges, or power over corporations, except such as they possess by virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract, with such effect upon the rights of the parties thereto as the law ascribes to it. *Sinking Fund Cases*, 99 U. S. 748 [25 L. ed. 512]; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 457 [21 L. ed. 205].

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In speaking of the exercise of this power by Congress in the *Sinking Fund Cases*, *Chief Justice Waite* says: "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made . . . Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs it retained the power to establish by amendment. In doing so it cannot undo what has already been done, and it cannot unmake contracts that have already been made; but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now, by direct legislation, vacate mortgages already made under the powers originally granted, nor release debts already contracted."

The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. *Mr. Justice Bradley* said: "The reserved power in question is simply that of legislation, to alter, amend or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but, interpreted as the reservation of the right to violate an executed contract, it is not sustainable."

This dissent proceeded upon the ground that the Acts of Congress under consideration changed some of the essential features of the contract, and were therefore void as being obnoxious to the provisions of the Constitution for the protection of lives, liberty and property. The majority of the court held, however, that such Acts were simply an exercise of the power of Congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the correctness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the Constitution.

An interpretation conferring the power of violating a contract at will upon one of its par-

ties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties lawfully to create. If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation, by the Legislature, of power to take away or destroy property lawfully acquired or created under authority conferred by a charter, would necessarily violate the fundamental law, and be void; and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void.

In *People v. National Trust Company*, 82 N. Y. 287, the question was raised that a dissolved corporation was discharged from the obligation to pay rent accruing upon a lease subsequent to its dissolution. Judge Rapallo said: "This denial is not founded upon the allegation of any payment, release or surrender, or anything affecting the merits of the claim, but upon the sole ground that by the dissolution of the corporation the lease was terminated, and the covenant to pay rent ceased to be obligatory. We do not regard the dissolution as having any such effect. Under the statutes of this State, on the dissolution of a corporation its assets become a trust fund for the payment of its debts; and these include debts to mature, as well as accrued indebtedness, and all engagements entered into by the corporation which have not been fully satisfied or canceled."

In *Commonwealth v. Essex Company*, 18 Gray, 239, Justice Shaw said: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." See *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345.

The case of *Detroit v. Detroit Plank Road Company*, 43 Mich. 140, is not only in point, but entitled to high consideration, on account of the distinction as a constitutional lawyer attained by the learned judge who wrote the opinion of the court. The question was whether the Legislature had power to compel the defendant to remove its toll gates from within the city limits after they had been lawfully placed there under the provisions of its charter. Judge Cooley says: "It cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired—whether by labor in the ordinary avocations of life, by gift, or descent, or by making a profitable use of a franchise granted by the State; it is enough that it has become private property, and it is thus protected by the 'law of the land.'"

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And, finally, upon this branch of our subject, we are unable to see why section 48 of the Law of 1850 does not express the rule by which the question under discussion must be determined. That section is expressly made a part of the contract between the State and corporations organized thereunder, and specially provides for the effect which an exercise of the reserved power of repeal by the State shall have upon the franchises of the company. It shall not impair any remedy existing against the corporation, its directors, or officers, upon a liability previously incurred. This was the contract under which the dissolved corporation issued its stock, mortgaged its franchises, entered into traffic engagements, and contracted debts. Creditors, contractors and stockholders had a right to rely upon the promise of the State that the annulment of the corporate charter should not affect the remedies existing in their favor against the corporation, and this promise is a contract protected by the provisions of the Federal Constitution. In the absence of any constitutional provision prescribing the effect of such repeal, it was competent for the Legislature to declare what that should be, and for the State to contract with reference to such a declaration. The right of repeal, as provided by the Constitution, is fully recognized by the Act of 1850, and the effect of the exercise of the power upon the rights of parties affected thereby is clearly defined. We are therefore of opinion that the Statute not only prescribes the rule, creates the contract, and regulates the rights of the parties upon the exercise by the State of the power of repeal, but it also correctly formulates the principle of law applicable to the situation.

We think it necessary to refer only to the leading cases cited by the plaintiff's attorney in support of his argument, and are of the opinion that they are plainly distinguishable from the case under consideration. That of *Greenwood v. Union Freight Railroad Company*, 105 U. S. 18 [26 L. ed. 961] was an action by a stockholder in the Marginal Company against the Union Freight Company and others, to obtain an injunction restraining the latter company from taking possession of the railroad tracks of the former company, after its dissolution by legislative action, and running cars thereon. The Marginal Company had refused to assert its rights, and the stockholder was therefore allowed to bring his suit to protect his interest in its property.

Judge Miller expressly says in that case: "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the Legislature does not provide some special remedy, enforce such rights by the means in their power. The rights of the shareholders of such a corporation to their interests in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights." It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable in that case, under the provisions

lions requiring compensation to be made therefor under the power of eminent domain.

Neither has the case of *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, any bearing upon the questions involved in this discussion. It was held in that case that contracts for personal services contemplated the continued existence of the parties, and when either of them died it necessarily effected a termination of such contracts. So, too, cases depending upon the effect of conditions in a grant to the creation of corporate life or the acquisition of property rights thereunder, are, for obvious reasons, foreign to the questions involved here. Here the grantee has performed every condition essential to its creation as a corporate being and its capacity to acquire and hold property, and the only question is as to the effect of a power to extinguish the corporate life reserved in its charter upon its property rights.

In *Erie Railroad Company v. Casey*, 26 Pa. 801, the question arose under a statute which specially provided that the State might resume all rights granted, in case of an abuse or misuse of the powers granted to the corporation. Upon an alleged abuse of the powers granted, the Legislature repealed the charter, and resumed the subject of the grant. The corporation forfeited its rights by its voluntary act. The reservation of the charter was expressly made a condition subsequent. The case was between the representative of the State and the railroad corporation, and no rights of creditors, mortgagees or stockholders were involved in its decision. It also appears by the case that the State and the corporation had settled their controversy by compromise during the pendency of the litigation, and it can hardly be said to have involved any practical question. We are therefore of the opinion that the Broadway Surface Company took an indefeasible title in the land, necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution.

We are thus brought to the question of the right of succession to the property of a dissolved corporation, in the absence of any provision in the Act of dissolution providing for such an event. Sections 9, 10, tit. 8, chap. 18, pt. 1, Rev. Stat. c. 1581, 1582 (7th ed.), seem to furnish a conclusive solution to the inquiry. They read as follows:

"Sec. 9. Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the Legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses."

"Sec. 10. The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation . . . and shall be jointly and severally responsible to the creditors and stockholders of such 2 L. R. A.

corporation, to the extent of its property and effects that shall come into their hands."

From these sections it would seem that, upon the dissolution of this corporation, its remaining trustees became vested with the title of its property, and responsible to its creditors and stockholders for the value thereof. By operation of law, a vested right of action accrued to all creditors and stockholders, immediately on the dissolution, against such trustees, for the value of all property which did or might by the exercise of reasonable diligence come into their hands. This was a liability which, after it once attached, was beyond the constitutional power of the Legislature to release or discharge. *Dash v. Van Kleeck*, 7 Johns. 477.

The evidence is undisputed that, upon the dissolution declared by the Legislature, the trustees took possession of the railroad property, and surrendered its operation to the mortgagees of such railroad. This, in the absence of any objection on the part of creditors or stockholders, they had undoubted authority to do, and the possession of such mortgagees thereafter was the possession of such trustees. They undoubtedly became liable for the value of such property to creditors and stockholders, by virtue of such possession; and their authority to administer the assets of the corporation for the purpose of discharging such liability became fixed by the law existing at the time the liability was incurred.

The cases in this State fully support these propositions. As was said by the Chancellor in *Kane v. Bloodgood*, 7 Johns. Ch. 133, "The reasonable construction of the Act is that the trustees succeeded to all the rights and privileges of directors, and to the same means of defense." In *McLaren v. Pennington*, 1 Paige, 102, it was held, as stated in the head note, that, "Where an Act of incorporation is repealed, all the property and rights of the corporation become vested in the directors then in office, or in such persons as by law have the management of the business of the corporation, in trust for the stockholders and creditors, unless the repealing law provides for the appointment of other persons than the officers of the corporation as trustees."

In *Heath v. Barmore*, 50 N. Y. 305, Judge Rapallo said: "Under the provisions of 1 Revised Laws, 248, and 1 Revised Statutes, p. 600, §§ 9, 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed) for the purpose of paying the debts of the corporation, and dividing its property among its stockholders; and these provisions apply as well to the real as to the personal property of corporations. Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor." *Allen, J.*, in *Central City Savings Bank v. Walker*, 68 N. Y. 423, speaking of the ownership of property, and the property rights of a corporation, said: "During the life of the corporation the body corporate was the legal owner, and, upon the expiration of the charter, the legal title vested in the trustees in office at the time, in trust for the creditors and stockholders."

There can be no valid distinction between



property held in trust and that owned by individuals, in respect to the protection afforded to it by the Constitution. The reason for its protection is equally strong in either case, and the inviolability of the title is equally beyond the reach of legislative action. *Dartmouth College Case, supra.*

It then remains for us to consider the validity of the provisions of chapters 271, 810 of the Laws of 1886. We are fully impressed with the importance of this question and the well settled principles of construction, which require every statute to be so interpreted as to uphold its constitutionality, if that may be done by a fair and reasonable interpretation of its language. Another rule, equally well settled, precludes courts from inquiring into the motives of Legislatures in making laws, and to consider them simply with reference to their legal effect upon the rights of persons subjected to their operation. If, however, upon such examination, it is found that constitutional rights will be invaded by the operation of the statute, it is the duty of courts to protect them by declaring the invalidity of the statute. Upon such examination, we are of the opinion that chapter 271 of the Laws of 1886 is unconstitutional and void. Its provisions show a naked and undisguised attempt to take away from the Broadway Surface Company, and its stockholders and creditors, its property, and bestow the benefit thereof upon the municipality of New York. The Act attempts to preserve the validity of the consents held by the corporation, notwithstanding its dissolution, and directs their sale and transfer to the purchaser, and the payment of the purchase price, to the city. These consents were the muniments of title to the enjoyment of the rights acquired thereunder by the railroad corporation, and could not be lawfully retained in existence, or transferred, except by its consent, manifested in some of the ways provided by law. Their possession by any lawful transferee would entitle him to the exercise and use of the rights thereby conferred. The attempt to transfer them to a third party by the mere force of the statute, without the consent or knowledge of their lawful owners was an effort to change their ownership without due process of law. *Parker v. Browning*, 8 Paige, 888.

Such legislation has been frequently and emphatically condemned. *Taylor v. Porter*, 4 Hill, 147; *Wynehamer v. People*, 18 N. Y. 434; *Westervelt v. Gregg*, 12 N. Y. 202; *Kilbourn v. Thompson*, 103 U. S. 168 [36 L. ed. 877].

In speaking of the reserved power to alter, amend and repeal laws authorizing incorporations, in *People v. Boston & A. Railroad Company*, 70 N. Y. 570, Judge Earl says: "Under this reserved power, the Legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires. It may not confiscate property, but it cannot be doubted that it may do all that is required by the Act of 1874."

Judge Thompson said, in *Dash v. Van Kleeck*, 7 Johns. 477: "It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take, by law, the property of an individual, without his consent, and give it to another."

The mala argument presented to maintain  
3 L. R. A.

the constitutionality of this Act is the assertion that these consents do not constitute property, within the usual signification of that term. We have considered that question, and do not agree with the claim. In view of the fact that the statute expressly contemplates their sale, transfer and acquisition by a purchaser, it would seem unnecessary to go further to prove the fallacy of such a contention.

These remarks apply with equal force to chapter 810. The plaintiff has argued the case upon the assumption that the chapter referred to applies to the Broadway Surface Railroad Company, and should control the proceedings to wind up its affairs. That company was, however, dissolved on January 4, and the Act now under consideration was not passed until January 11 thereafter, and could not have retroactive effect, unless its language expressly required it. We can see no ground for such a contention, unless we look beyond the language of the Act, and speculate as to the motives of the Legislature in passing it. The Act does not purport, in terms, to have a retroactive operation; and it is contrary to settled principles to give it such, unless there is something in the language of the Act requiring this to be done. Section 1 provides: "Whenever any corporation, organized under the laws of this State, shall be annulled and dissolved by an Act of the Legislature, it shall be the duty of the Attorney-General . . . to bring a suit . . . to wind up the affairs of the corporation." This language looks plainly to prospective cases arising under the Act, and those only; and there is nothing in the body of the Act to show that the Legislature intended it to apply to a dissolution already accomplished.

The character of a statute is to be determined by its provisions, and not by its title (*People v. McCann*, 16 N. Y. 58); but when its language is ambiguous and doubtful, resort may be had to its title, and the occasion of its enactment, to explain an ambiguity in its terms. There is no ambiguity in the terms of this Act, and nothing to indicate an intention to give it retroactive operation. The application of the Act to the Broadway Surface Company can be sustained only upon the theory that such Act applies to all corporations whatsoever theretofore dissolved by legislative Act, however remote in point of time such dissolution may have been effected. Whether there are such cases or not we are not informed, but we are invited to adopt a rule which would relate back and cover such cases if they exist.

We think such a decision would conflict with settled rules of construction.

In *New York Railroad Company v. Van Horn*, 57 N. Y. 478, it was held that a legislative intent to violate the Constitution will not be assumed, nor will a law be so construed as to give it a retroactive effect, when it is capable of any other construction; and that, if all of its language can be satisfied by giving it prospective operation only, that construction will be given to it.

In the case of *Dash v. Van Kleeck, supra*, it was decided that it is a principle of universal jurisprudence that laws, civil and criminal, must be prospective, and cannot have a retroactive effect; and in *Benton v. Wickwire*, 54 N. Y. 229, the court declared that neither original

statutes nor amendments can have any retroactive effect unless, in exceptional cases, the Legislature so declare. See also *People v. Columbia County*, 43 N. Y. 180; *People v. McCall*, 94 N. Y. 587; *N. Y. R. Co. v. Van Horn*, 57 N. Y. 478.

We do not deny the power of the Legislature to give retroactive operation to a statute in some cases, but we believe that to have such effect a statute should declare its purpose in plain and unmistakable language, and that so unusual a signification should not be attributed to it by resorting to vague and equivocal inferences, which have no support in the language employed. Such an interpretation would most emphatically be forbidden when it would interfere with vested rights. If we were at liberty to inquire into the circumstances under which this Act was passed, and its connection with other legislation of the same period, we might conjecture that the Legislature designed it to apply to the Broadway Surface Railroad Company; but it has not so expressed itself in the Act, and the rules of construction to which we have referred forbid us from supplying the language necessary to give it such effect. *Benton v. Wickwire*, 54 N. Y. 226.

But, assuming that the Act was intended to apply, and retroactive effect be given to it, we are of opinion that its material provisions are open to many serious objections, which cannot be obviated or reconciled with the provisions of the fundamental law. A receiver is the representative of the debtor. It is his duty to scrutinize the claims made against the estate, and reject and defend against those he believes to be unfounded or illegal. He cannot be impartial in a litigation between himself and creditors as to such claims. A law, therefore, which makes such a party the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. No man can be a judge in his own case; and it is immaterial whether he is a party in his own right, or as trustee of an express trust. In either event, he is a party to the action, interested therein, and precluded from acting in a judicial capacity in the determination of such a case. *Nemo debet esse iudex in propria causa*.

This law is unconstitutional, also, because it makes proof of the cost of the obligation the measure of the creditor's recovery instead of the liability of the debtor, as shown by the terms of his contract. And, again, it requires the creditor to accept payment of an obligation before maturity. The time of payment of a pecuniary obligation is a material provision in such contract, and we know of no authority to require a creditor to accept payment in advance, any more than one to compel such payment by the debtor. Each party has the right to stand on the letter of his contract and perform it according to its terms.

But an objection to this Act even more serious than those considered is found in the provision for the appointment of a receiver of the property of the dissolved corporation, and the transfer of its assets to him by force of the statute, after the title thereto had become vested in its directors. It will not be claimed that the appointment of such a receiver by the court, in

an action against a stranger, without notice to the trustees, in the absence of the authority conferred by chapter 810, would confer upon him title to property previously vested in others. *Parker v. Browning*, *supra*.

We cannot see how this case differs from the one supposed. The only authority the court had for making the appointment was derived wholly from the provisions of this Act; and the court was not thereby invested with any judicial authority or discretion, except that of designating the holder of the title assumed to be transferred by the Act. The court has, by virtue of its general jurisdiction over trusts, authority to appoint to a vacant trusteeship, and, perhaps, for cause, to remove fraudulent, dishonest or incompetent trustees and appoint others to perform the duties of the trust, in order to avoid a failure thereof; but we know of no authority for a court to appoint a receiver of property vested in trustees, without cause and without notice to them, or opportunity afforded to defend their title and possession.

As was said by Judge Earl in *Stuart v. Palmer*, 74 N. Y. 184: "Due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing and an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."

And the Chancellor had previously said in *Verplanck v. Mercantile Insurance Company*, 2 Paige, 450: "Another fatal objection to the regularity of these proceedings is that the appellants were deprived of the possession of their property without having an opportunity of being heard, and without any sufficient cause for such a summary proceeding. By the settled practice of the court in ordinary suits, a receiver cannot be appointed *ex parte* before the defendant has had an opportunity to be heard in relation to his rights." *Devos v. Ithaca & O. R. Co.* 5 Paige, 521; *Ferguson v. Crawford*, 70 N. Y. 256.

As we have seen, the property of this corporation vested in the persons who were its directors at the time of its dissolution. They took it as trustees for stockholders and creditors, and were not made parties to the action in which the receiver was appointed. No legislation can authorize the appointment of a receiver of the property of A in an action against C, without violating the provisions of the Constitution in relation to the taking of property without due process of law. That the Legislature might amend the provisions of the Revised Statutes in relation to the devolution of property of dissolved corporations is indisputable; and, if it had done so in the Act of dissolution, it would undoubtedly have prevented the vesting of the property in the trustees; but this it did not do, and it had no right, by mere force of legislative enactment, to take vested property from one individual or trustee and give it to another. *McLaren v. Pennington* and *Dartmouth College v. Woodward*, *supra*.

These conclusions must result in the condemnation of the scheme by which it was attempted to wind up the affairs of the Broadway Surface Railroad Company, as the provision for bringing an action by the Attorney-

General to wind up its affairs was incidental merely, and so intimately connected with the general plan of the scheme that it cannot be supposed it would have been enacted except in connection with the other provisions of the Act. We therefore think this law is obnoxious to the objection that it assumes to take property without due process of law and impairs the obligation of contracts.

The questions as to the rights of the several parties under the traffic contracts are not before us in such form as to authorize us to pass definitely upon them; but we may properly, in this action, determine their validity so far as any objections are made to them by the plaintiff in this action. The plaintiff has not alleged any want of power on the part of the defendant corporations to run cars over the Broadway Surface Railroad under their respective charters, and that question must be left until the Attorney-General arraigns them in a direct action for usurpation. *People v. Brooklyn etc. R. Co.* 39 N. Y. 98; *Denike v. New York & R. Lime & Cement Co.* 80 N. Y. 599.

It is claimed that the contract with the Broadway & Seventh Avenue Railroad is void because it is made with a company owning a parallel railroad. The trial court found that it was parallel to the Broadway Surface Railroad. Assuming, for the purposes of this decision, that this was a question of fact and not of law, and that we are bound by the finding, we do not conceive that fact to be conclusive on the question.

The material ground upon which the contention is based is the proviso to section 15, chap. 252, Laws 1884, authorizing companies organized thereunder to lease or transfer their rights to run upon or over any portion of their railroad tracks to any other street surface railroad company authorized to run upon such route. The proviso is that the section should not be construed to authorize any of such companies "to lease its rights or franchises" to any other company owning and operating a road parallel thereto. By these contracts, the Broadway Surface Railroad acquired the right from the Broadway & Seventh Avenue Railroad and from the Twenty-Third Street Railroad Company to run cars and make a continuous trip for a single fare, to the termination of their respective roads, over the tracks of such roads; and such roads, from their respective points of connection, were thereby respectively authorized to run cars over the Broadway Surface Railroad.

That these rights were important and valuable, and inured largely to the convenience and benefit of the traveling public, is not now denied. The uniform course of legislation in reference to street railroads shows a policy on the part of the State to facilitate arrangements for the connection of continuous lines and the transfer of passengers from one road to another, with the view of giving the longest service possible to the public without increase of fare. It can hardly be supposed that the Legislature, while expressly making provisions

for such facilities, intended to proscribe companies connecting with another road which happened to own a line parallel for a certain portion of its length, but which also owned other lines extending beyond the parallel portion, from the benefits to be derived from a traffic contract. It seems to us that the obvious intent of this provision was to avoid the monopoly of parallel lines, and to prevent the acquisition by one railroad company of the exclusive possession and control of such lines. It therefore prohibits leases to parallel roads. This does not, and, in our judgment, was not intended to, preclude such companies from making traffic contracts for the partial use of their respective routes beyond the line of parallelism. These contracts were not, in terms or in effect, leases of such rights, and did not surrender possession or control of the road by its original owner.

Such contracts were also authorized by chapter 218 of the Laws of 1839; and we do not consider that statute to have been repealed by the proviso of the Act of 1884 or other legislation on the subject.

There are many other interesting and important questions presented by the briefs of the able counsel for the respective parties which it might be proper to discuss, were it not that the demands made by the claims of practical litigation upon our time are so imperative as to forbid the consideration of abstract and speculative investigations. Such questions must be left to occasions when parties actually aggrieved present them, in a litigation where their consideration is essential to the determination of rights.

The views expressed lead to a denial of the relief sought in the action by the plaintiff. *The judgments of the Special and General Terms should be reversed, and the complaint dismissed, with costs to the defendants other than the receiver.*

All concur.

**Andrews and Earl, JJ.**, agree in the result upon these grounds: (1) The annulling Act is constitutional and valid, and its effect was only to take the life of the corporation. (2) All the property of the corporation, including its street franchises and its mortgages and valid contracts—including what are called the "traffic contracts with other railway companies,"—survived. (3) The Act (chapter 271) is unconstitutional. (4) That Act and the Act chapter 810 are parts of the same scheme, adopted by the Legislature for the purpose of winding up the affairs of the corporation and disposing of and distributing its property. The main features of the latter Act are unconstitutional and void; and thus so much of the legislative scheme has failed that there is not enough left to save the whole Act from condemnation. (5) As the latter Act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance, and therefore the judgment should be reversed and complaint dismissed.

## UNITED STATES CIRCUIT COURT, DISTRICT OF OREGON.

POWELL  
v.  
OREGONIAN R. CO.

(....Sawy..... Fed. Rep.....)

\*A corporation, being the lessee of property, permitted waste thereon, for which the lessor, in an action for damages, recovered a judgment for \$5,300, and, the corporation being insolvent, brought suit against a stockholder thereof, on whose stock more than that amount was then unpaid, to enforce the payment of the judgment. Held, that, whether the original claim of the plaintiff for damages was or was not an "indebtedness" of the corporation within the scope of section 2, art. 11, of the Constitution of the State, which declares that a stockholder of a corporation "shall be liable for the indebtedness" of the same to the amount unpaid on his stock, the judgment obtained thereon is such an "indebtedness;" and any stockholder of the corporation is liable therefor to the plaintiff therein, to the amount unpaid on his stock.

(December 2, 1888.)

ON demurrer to a bill in equity to enforce a stockholder's liability for the debt of a corporation. *Demurrer overruled.*

The case is stated in the opinion.

Mr. Earl C. Bronaugh for defendant, for the demurrer.

Mr. A. L. Fraser for plaintiff, *contra*.

Deady, J., delivered the following opinion:

This suit is brought by the plaintiff, a citizen of Oregon, against the defendant, a British corporation having its principal office in Dundee, Scotland, to enforce the payment of a judgment heretofore obtained by him against the Dayton, Sheridan & Grand Round Railway Company, to wit: on April 8, 1887, for the sum of \$5,300.

It is alleged in the bill that the Dayton, Sheridan & Grand Round Railway Company is a corporation formed under the Laws of Oregon, with a capital stock of 2,000 shares, of the par value of \$100 each; that Joseph Gaston,

under the name of J. Gaston & Co., subscribed 1,000 shares of such stock, while all the other subscriptions to the same only amounted to 504 shares, which were paid in full; that in 1880 Gaston sold and transferred his stock, without having paid anything thereon, to Ellis G. Hughes, who on February 27, 1884, sold and transferred the same to the defendant, who now is, and ever since has been, the owner of the same; that no part of Gaston's subscription was ever paid by anyone, except the sum of \$61,000, paid by the defendant, in pursuance of a decree given against it by the supreme court of the State, on January 14, 1884, in the suit of *Branson v. Oregonian Railway Company*, 11 Or. 161, and that there is still due and unpaid on the same the sum of \$39,000.

That on January 29, 1887, the plaintiff commenced an action in the Circuit Court of the State for the County of Yamhill, against the Dayton, Sheridan & Grand Round Railway Company, to recover damages for an injury to plaintiff's property, while leased to said company, and obtained a judgment therein for the sum of \$5,300, and at the same time served a notice on the defendant herein, as the successor in interest of the Dayton, Sheridan & Grand Round Railway Company, to defend the said action, and that the plaintiff would look to the defendant for the payment of any judgment he might recover therein; that the defendant, by its attorneys, did make a defense to said action, and on September 12, 1887, caused an appeal to be taken from the judgment therein to the supreme court, where the same was affirmed, with costs, amounting to \$77.20 [16 Pac. Rep. 868]; that since July 1, 1888, the Dayton, Sheridan & Grand Round Railway Company has been and now is wholly insolvent, and has no property within the State, subject to execution; and that the defendant, being the owner, as aforesaid, of the stock of said company, on which the sum of \$31,000 is due and unpaid, is liable to the plaintiff, as a creditor of the company, for the amount of said judgment against the same.

The prayer of the bill is that the defendant be compelled to pay into court on the unpaid stock of the Dayton, Sheridan & Grand Round Railway Company a sum sufficient to satisfy its indebtedness to the plaintiff, or that he lat-

\*Head note by the Court.

NOTE.—Judgment against corporation conclusive on stockholder. A stockholder being in privity with the corporation is concluded by a judgment rendered against the corporation. *Thomp. Liab. Stockh.*, § 829; citing *Merrill v. Suffolk Bank*, 31 Maine, 57; *Came v. Brigham*, 37 Maine, 35; *Milkken v. Whitehouse*, 49 Maine, 529; *She v. Bloom*, 20 Johns. 669; *Moss v. Onkley*, 2 Hill, 268; *Belmont v. Coleman*, 1 Bosw. 188; *Hampson v. Wearre*, 4 Iowa, 13; *Donworth v. Coolbaugh*, 5 Iowa, 300; *Wilson v. Pittsburgh & Y. Coal Co.*, 43 Pa. 424; *Grund v. Tucker*, 5 Kan. 70. See, *contra*, *Moss v. McCullough*, 5 Hill, 131; *Strong v. Wheaton*, 38 Barb. 616; *Miller v. White*, 50 N. Y. 137; *McMahon v. Macy*, 51 N. Y. 154; *Moss v. Averell*, 10 N. Y. 44; *Belmont v. Coleman*, 21 N. Y. 96. A stockholder when sued on a judgment obtained by default against the corporation, cannot dispute that the signer of the note as treasurer was in fact the treasurer, where the evidence shows that he acted as such. *Milkken v. Whitehouse*, 49 Maine, 57. He cannot show that the indebtedness for which the judgment was rendered against the company

was a liability of its president, and not of the company. *Donworth v. Coolbaugh*, 5 Iowa, 300. Where a supplementary proceeding has been instituted, under a statute, to charge the stockholders individually, the judgment obtained against the stockholders is equally conclusive. *Hampson v. Wearre*, 4 Iowa, 13.

Right of creditor to proceed against stockholder. Under the statutory schemes of nearly all the States, it is made a condition precedent to the right of a creditor to proceed against a stockholder that he must first have exhausted his remedy against the company. *Thomp. Liab. Stockh.*, §§ 812, 817; citing *McClaren v. Franciscus*, 43 Mo. 432; *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 536; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380; *Cambridge Water Works v. Somerville Dyeing & B. Co.*, 4 Allen, 239; *Dauchy v. Brown*, 24 Vt. 197; *Wehrman v. Reankirt*, 1 Cin. Sup. Ct. 230; *Shellington v. Howland*, 53 N. Y. 374, affirming *S. C. 67 Barb* 14; *Blake v. Hinkle*, 10 Yerg. 218; *Lindley v. Simonds*, 2 Abb. Pr. N. R. 69; *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154; *Laue v. Harris*, 16 Ga. 217; *Thornton*

ter have a decree against the defendant for the amount of the judgment against the company, with interest.

The defendant demurs to the bill, for that the plaintiff, on the case stated in the bill, is not entitled to any relief against it.

On the argument the only point made in support of the demurrer was that the claim of the plaintiff, having arisen out of a tort, is not such an "indebtedness" as a stockholder is liable for.

The Constitution of Oregon (article 11, § 2) provides that "Corporations may be formed under general laws;" and (Id. § 8) enacts:

"The stockholders of all corporations, and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

Section 14 of the Corporation Act (Comp. 1887, § 8230) provides:

"All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser."

At common law, the members or stockholders of a corporation are not individually liable for the debts of the same (Thomp. Liab. Stockh. §§ 1, 4); but the capital stock of a corporation is considered a trust fund for the payment of its debts (Id. § 10); and an unpaid subscription to the stock of a corporation is a part of such capital stock (Id. § 11).

From this it appears that the rule prescribed in the Constitution of the State, concerning the liability of stockholders, is neither more nor less than that of the common law. Under either the stockholder is liable for the indebtedness of the corporation to the extent of his unpaid subscription or stock, "and no more."

Several cases have been cited on the argument of counsel for the respective parties, but none of them are altogether in point.

In *Mill Dam Laundry v. Hovey*, 21 Pick. 417, the statute made the stockholder liable for the existing debts of the corporation, if the latter failed to publish annually the amount paid in of its capital stock and existing debts; and

the question in the case was whether a claim for unliquidated damages, arising out of a breach of a contract to manufacture certain articles, was a "debt," within the statute. And although the statute was in effect a penal one, the court held that "All such claims for damages were intended to be included in the term 'debts.'" Id. 454, 455.

In *Carver v. Daintree Manufacturing Company*, 2 Story, 482, a statute that made a member of any manufacturing corporation individually liable for all "debts contracted" during his membership was held to be remedial in its character, and the phrase "debts contracted," as used therein, to include a claim for unliquidated damages growing out of a tort—the infringement of a patent.

But in both these cases the question only arose incidentally on the exclusion on account of interest of a witness, and in the former one it appears to have been decided without any consideration.

In *Haynes v. Brown*, 86 N. H. 545, under a statute which made the stockholders in a corporation liable for "all debts and contracts" thereof, while it omitted to file for record a certificate of the amount of its capital stock, it was held that the right to recover against the stockholder was not limited to liquidated claims, but included an open account for work and labor.

In *New Jersey Insurance Company v. Meeker*, 87 N. J. L. 283, it was held that under a statute giving an action in favor of a "creditor" against the heirs and devisees of a "debtor," the former might maintain an action against the heir for unliquidated damages arising out of a breach of covenant.

A Statute of Missouri provides that every corporation shall give notice annually in a newspaper "of all the existing debts of the corporation," and a failure to do so makes each stockholder liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given. In *Cable v. McCune*, 26 Mo. 371, it was held, in a suit brought under the statute, against a stockholder, to enforce the payment of a judgment obtained against the corporation for damages caused by its negligence in docking a steamboat, that the stockholder was not liable. The ground of the decision is that the statute is penal, and therefore the word "debt" ought to be taken in "that limited and definite sense to

*v. Lane*, 11 Ga. 450; *Drinkwater v. Portland Marine B. Co.* 18 Maine, 85.

A creditors' bill to reach unpaid stock subscription cannot be maintained without proof that plaintiff recovered valid judgment against the corporation, and cannot resort to original claim against it if judgment appears to be void. *Hemington v. Samana Bay Co.* 1 New Eng. Rep. 707, 140 Mass. 494. This is the general rule and rests upon the ground that equity withholds its aid where there is an adequate remedy at law. *Blake v. Hinkle*, 10 Yerg. 218. This rule is applied even under those statutes where the liability of the stockholder is primary, like that of an original contractor or partner. *Marcy v. Clark*, 17 Mass. 533; *Stone v. Wiggin*, 5 Met. 216; *Stedman v. Eveleth*, 6 Met. 114; *Leland v. Marsh*, 16 Mass. 389. Section 736, Revised Statutes of Missouri, substantially the same as section 11, p. 323, General Statutes 1885, providing that upon return of an execution against a corporation *nulla bona*, execution may issue against any stockholder, is not retrospective, nor does it impair the obligation of the contract created by the company's charter. *Marobants Ins. Co. v. Hill*, 1 West. Rep. 2 L. R. A.

424, 86 Mo. 466. To subject stockholders' balance of stock to execution on judgment against the corporation, an order of court is necessary, after sufficient notice. *Paxon v. Talmage*, 2 West. Rep. 105, 87 Mo. 13. In Rhode Island a statutory remedy is provided, which remedy is exclusive. *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 80 L. ed. 825. The statutory provisions were substantially copied from the Revised Statutes of Massachusetts, as clearly appears on a comparison of the statute books of the two States, and has been expressly recognized by the Supreme Court of Rhode Island. *Moies v. Sprague*, 9 R. I. 544; *Cambridge Water Works v. Somerville Dyeing & B. Co.* 4 Allen, 299; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 751, 80 L. ed. 827. The provisions of the Revised Statutes of Massachusetts, as well as the similar provisions of the earlier statutes therein embodied and re-enacted, were always construed by the Supreme Judicial Court of Massachusetts to allow the stockholders to be charged for the debts of the corporation by no other form of proceeding than that given by the statute themselves. *Fourth Nat. Bank v. Franklyn*, 120 U. S. 751, 80 L. ed. 827.

which long established usage has restricted it;" and that the use of the word "contracted," with reference to the "debt" which a stockholder may become liable to pay, indicates clearly that it was the intention of the Legislature to limit such liability to debts arising out of contract and not a wrong.

A Statute of New York made each stockholder of the Buffalo Hydraulic Association holden to the amount of his stock, "for the payment of debts contracted by the corporation;" and any person having any demand against said corporation "might sue any stockholder, and recover the same, provided no stockholder should be obliged to pay more in the whole than the amount of his stock at the time the debt accrued. In *Heacock v. Sherman*, 14 Wend. 58, it was held, in an action against a stockholder of this corporation, that the term "debt," as used in this Act, was limited to claims arising out of contract, and did not include one for damages, arising out of the wrong of the corporation. It was admitted that the word *demand*, standing by itself, was comprehensive enough to include the claim. But it was said that the liability of the stockholder was first fixed and limited to the debts of the corporation, and the word *demand*, was not used for the purpose of enlarging this liability, but in a clause only intended to further the remedy; and that the subsequent phrase, "the debt accrued," used in limiting the amount of the stockholder's liability, clearly qualifies the enlarged sense of the word *demand*, and shows that it was used by the Legislature "to donate a demand arising on contract."

A Statute of Michigan provides that every stockholder of a corporation shall be individually liable for all labor performed for the corporation, and for all debts of the same, to an amount equal to his stock when "such debt was contracted and suit commenced thereon."

In *Bohn v. Brown*, 38 Mich. 257, it was held, in a suit brought under this Act against a stockholder in a railway corporation to enforce the payment of a judgment obtained against said corporation for damages caused by its negligence in carrying a passenger, that the stockholder was not liable, for the reason that such damages are not a debt within the meaning of the statute, and that the putting the claim for them into a judgment against the corporation did not change their character in this respect.

The statute (Comp. 1887, § 8230) does not undertake to declare or define what debts or claims a stockholder in an Oregon corporation shall be liable for; nor does it appear that the Legislature, under the Constitution, has the power to do so.

It is admitted by the demurrer that the defendant has been a stockholder in the corporation against whom the judgment in question was given since February 27, 1884. Its liability as such stockholder must then depend on the proper construction of the term "indebtedness," as used in the section of the Constitution above quoted.

The provision in the Constitution on the liability of stockholders is neither remedial nor penal. It gives no new right to the creditor, nor does it impose any extraordinary liability or penalty on the stockholder. It is therefore not to be construed liberally or loosely with a

view of making the remedy adequate to the redress of some pre-existing hardship or wrong, nor strictly because of its penal character.

According to Worcester, "indebtedness" means "the state of being indebted." The indebtedness of a corporation is, then, the sum of its debts. And so it will be convenient to consider the constitutional provision as if it read, "shall be liable for the debts of said corporation."

"The legal acceptance of debt is a sum of money due by certain and express agreement; as by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specified, and does not depend on any subsequent valuation to settle it." 3 Bl. Com. 154. And where the agreement to pay is implied by law, the sum to be paid is also a debt.

Blackstone (bk. 3, p. 158) says: "Every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law . . . Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." This includes a judgment for a particular sum of money.

In *Gray v. Bennett*, 3 Met. 528, it is said that "The word *debt* is of large import, including not only debts of record, or judgments and debts by specialty, but also obligations arising under simple contract, to a very wide extent; and in its popular sense includes all that is due to a man under any form of obligation or promise."

In *Crouch v. Gridley*, 6 Hill, 250, it was held that a discharge in bankruptcy from all the debts owed by the bankrupt at the filing of his petition did not discharge him from a claim for damages for a tort which was in suit at the filing of the petition, but had not then ripened into judgment.

In *Kellogg v. Schuyler*, 2 Denio, 78, it was held that a claim for damages for a trespass was not a debt within the Bankrupt Act, and therefore was not affected by the bankrupt's discharge, although the claim was in suit at the time, and a verdict had been found for the plaintiff. In disposing of the case, the court, in speaking of the claim, said: "Until judgment is rendered there is no debt which is reached by the discharge."

In *Zimmer v. Schleehauf*, 115 Mass. 52, it was held that a claim for damages for slander and malicious prosecution was not a "debt" or "liability contracted" by the bankrupt, and was therefore not affected by a discharge of the bankrupt under the Act of 1867. The claim for damages was in suit when the proceeding in bankruptcy was commenced, and there had been a verdict for the plaintiff on which a judgment was given thereafter, but before the discharge. In delivering the opinion of the court Chief Justice Gray said: "A claim for damages in an action of tort does not become a debt by verdict before judgment." See also, as to what is a debt, Burrill, Law Dict.; Rapalje & L. Law Dict.; Whart. Legal Max.

The nature of the plaintiff's property and the damage to it, for which the judgment was obtained, is not stated in the bill; but it was understood on the argument that the property was



a warehouse at Dayton, on the Yamhill River, which the lessee negligently permitted to be washed away during a season of high water. In other words, the claim was unliquidated damages, alleged to have been caused by a permissive waste.

Such a claim is not a "debt" in any ordinary sense of the word. Nor do I see any good reason why the term "indebtedness," as used in the Constitution with reference to corporations, should be construed to include such a claim. But it is not necessary now to decide that question, and it may be left to the determination of the supreme court of the State, whose office it is to expound the Constitution thereof.

When this claim for unliquidated damages became, by the action of the parties under the direction and the limitation of the law, a judgment against the corporation for a definite sum of money, it became, in my opinion, an "indebtedness" of such corporation; and any person then or since being a stockholder thereof at once became liable to the plaintiff for such debt to the amount unpaid on his stock.

A claim for unliquidated damages may become a debt against a corporation otherwise than by judgment. For instance, the corpora-

tion may have compromised with the plaintiff, and given him its note for a portion of this claim in satisfaction thereof, or, being satisfied of the justice of the claim, or the impolicy of contesting it, may have given its note for the full amount thereof. In this way the claim would become a debt of the corporation, within the strictest definition of the term, and the liability of the stockholder would commence.

The effect of allowing the plaintiff to take a judgment on this claim, or of his obtaining one notwithstanding a defense thereto by the corporation, is the same, in this respect, as a voluntary liquidation thereof. What was once a mere claim for an undetermined amount becomes in either case a debt—a legal obligation to pay a definite sum of money.

Assuming that there is neither fraud nor collusion in the premises, whatever indebtedness a corporation may lawfully contract or incur, the stockholder, to the amount of his stock, is bound to pay. Such is the obligation which the law, under these circumstances, raises in favor of the creditor of the corporation and against a stockholder thereof.

On the facts stated in the bill the plaintiff is entitled to the relief sought.

*The demurrer is overruled.*

## PENNSYLVANIA SUPREME COURT.

**FARMERS DEPOSIT NAT. BANK,**  
*Plff. in Err.,*

**PENN BANK,** for Use of Henry Warner,  
Assignee.

(....Pa.....)

**A bank holding for collection a cashier's check**

of an insolvent bank may, when sued by the assignee of the latter, use such check as a set-off, where no defense is shown against the check.

(January 7, 1889.)

**ERROR** to Common Pleas, No. 1, of Allegheny County (Stowe, J.), brought by the defendant below, to review a judgment in fa-

**NOTE.—Equity rule as to cross demands.** It is a rule in equity that cross demands, though unliquidated by judgment, will be set off against each other if, from the situation of the parties, justice cannot otherwise be done; and the insolvency of one of the parties is a sufficient ground for the allowance of a set-off in equity, even if not within the Statute of Set-Offs. *Gay v. Gay*, 10 Paige, 369; *Davidson v. Alfaro*, 80 N. Y. 663, 16 Hun, 358; 54 How. Pr. 485; *Pignolet v. Geer*, 19 Abb. Pr. 288; *Smith v. Felton*, 43 N. Y. 419; *Knapp v. Burnham*, 11 Paige, 353. Equity sometimes allows a set-off when law will not, because of the insolvency of one debtor, and the willingness of the other to anticipate the time for the payment of the debt owing by him, if the whole or a part of that owing to him may be applied as a set-off. Even had the bank been insolvent, and then been the owner of the note, the deposit of the plaintiff was not due and payable, the certificate was outstanding and negotiable, and equity would not have compelled an application of the amount of the note upon the deposit, until some act of the plaintiff making the certificate due and payable in his hands. *Munger v. Albany City Nat. Bank*, 85 N. Y. 589. See *Bradley v. Angel*, 3 N. Y. 475; *Smith v. Felton*, 43 N. Y. 419; *Chance v. Isaacs*, 5 Paige, 592. It has the power, in cases not within the statute, if from the nature of the claim, or the situation of the parties, justice cannot be obtained by a cross action, and that, even though the debt of the complainant to the defendant is not due, if the defendant is insolvent. *Gay v. Gay*, 10 Paige, 369; *Rothschild v. Mack*, 42 Hun, 75. But the right of set-off does not attach until the debt owing by the insolvent has become due. *Keep v. Lord*, 2 Duer, 83, 11 Legal Obs. 181.

**Debtor of insolvent bank right to set off demand.** The debtor had a right to offset any demands held against the bank at the time it stopped payment,

and it was the duty of the receiver to set off the bills, so held by the debtor, against the counter claims of the bank. *Miller v. Franklin Bank*, 1 Paige, 444; *America Bank v. Wall*, 56 Maine, 169; *Niagara Bank v. Roosevelt*, 9 Cow. 409; *Thorp v. Wegefarth*, 56 Pa. 82. The fact that the deposit was in his official capacity does not alter the rule which allows a set-off of deposit against his debt due to the bank. *Rubey v. Watson*, 4 West. Rep. 759, 22 Mo. App. 498; *Morse, Banks & B.* 40. The amount of a partnership deposit with an insolvent banker was a proper subject of set-off in an action brought by the assignee in trust for creditors of such banker, on a note held by the banker made by one of the partners and indorsed by the other for partnership purposes, although such note was not due at the time of the assignment. *Smith v. Felton*, 43 N. Y. 423; *Luckenbach v. Brickenstein*, 5 Watts & S. 145; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Clark v. Flint*, 22 Pick. 231; *Griffin v. Marquardt*, 17 N. Y. 28; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Slade v. Van Vechten*, 11 Paige, 21; *Re Howe*, 1 Paige, 125; *Corning v. White*, 2 Paige, 567.

**Right may be asserted against assignee.** Whatever equity or right the debtor possesses against the assignor he may assert against the assignee. *Thompson v. Van Vechten*, 6 Bosw. 409; *Hamill v. Stokes*, 4 Price, 161; *Mathews v. Wallwyn*, 4 Ves. Jr. 118. Any equitable set-off which the debtor had at the time the bank stopped payment was not altered by the appointment of a receiver. *Re Receiver of Middle Dist. Bank*, 1 Paige, 585; *Van Wagoner v. Paterson Gas Light Co.* 23 N. J. L. 233, 336. See *Pardo v. Osgood*, 2 Abb. Pr. N. S. 368. The receiver succeeds only to the rights of the bank existing at the time it goes into liquidation. *Hade v. McVay*, 81 Ohio St. 238; *American Bank v. Wall*, 56 Maine, 167; *Colt v. Brown*, 12 Gray, 233; *Miller v. Franklin Bank* 1 Paige 444.



vor of the plaintiff below in an action in case (assumpsit). *Reversed.*

This was an action of assumpsit brought by the Penn Bank for use of Henry Warner, Assignee, against the Farmers' Deposit National Bank, to recover the sum of \$38,218.59, with interest from May 28, 1884, the Penn Bank having kept an account with the Farmers' Deposit National Bank, and claiming that sum as the balance due on final settlement. The defense was payment and set-off.

On and prior to May 24, 1884, the Farmers' Deposit National Bank and the Penn Bank were carrying on a general banking business in the City of Pittsburgh. The Farmers' Deposit National Bank was a member of the clearing house; the Penn Bank was not, but was represented therein by the former as its agent. The course of business between the two banks was as follows:

The Penn Bank kept a large deposit with the Farmers' Bank. All checks, etc., on the former held by any clearing house bank were presented to and received by the latter at the clearing house as though drawn on it.

Immediately after the clearing house, a memorandum of the amount of all checks on the Penn Bank held by the Farmers' Bank, whether received through the clearing house or deposited with it by its customers, was made out and rendered, and the "Penn" would give its own check on the "Farmers'" for the amount.

Prior to May 24, 1884, the Germania Savings Bank was the holder for value of a cashier's check of the Penn Bank for \$88,000. On May 24, 1884, the president of the Germania Savings Bank took this check properly indorsed to the Farmers' Bank for deposit; it was handed to the cashier, and the amount thereof credited to the Germania Bank in the books of the Farmers' Bank and in the Germania's pass or deposit book.

May 24 was Saturday. On Monday, May 26, the Farmers' Bank, in the regular course of business, made out its account against the Penn, including in it the \$88,000 check, and asked it for its check for the amount; this the Penn Bank failed to give, and about 12 o'clock closed its doors and never resumed business. The Farmers' Bank then caused the check to be formally presented to both the Penn and Germania Banks, and it not being paid protested it for nonpayment.

On May 28 the Penn Bank made an assignment to Henry Warner, who demanded payment of the above sum, which was refused, the Farmers' Bank claiming the right to apply the same to this check. Thereupon this suit was brought.

At the trial the plaintiff submitted the following point, *inter alia*:

2. If the jury believe that the check of \$88,000, Ex. No. 2 in this case, was taken by the defendant from the Germania Savings Bank, and the amount thereof credited in the account of the latter bank on condition that in case of nonpayment it should be returned to the Germania Savings Bank and the credit canceled, and that said check was not paid, and the defendant notified the Germania Savings Bank of such nonpayment, and tendered the check back to the latter bank, and charged back the

amount of the said check to said Germania Savings Bank's account, as shown by the book of the defendant in evidence, then said check cannot be set off in this action, and the verdict should be for the plaintiff for the amount of his claim, with interest. *Affirmed.*

The defendant submitted the following points:

1. That, under all the evidence in the case, the Farmers' Deposit National Bank has the right to set off the check, Exhibit No. 2, in this action. *Refused.*

2. That, under all the evidence in the case, the Farmers' Deposit National Bank, as the holder of the check, Exhibit No. 2, has the right to set off the same in this action. *Refused.*

3. That, if the jury find from the evidence in the case that the Farmers' Deposit National Bank, on May 24, 1884, received the check, Exhibit No. 2, from the Germania Savings Bank, as cash, and credited the same to the said the Germania Savings Bank on its books as cash, and delivered to the said the Germania Savings Bank a pass book in which the same was credited as cash, and the said the Germania Savings Bank accepted said pass book and checked against the said deposit as cash, the said the Farmers' Deposit National Bank has the right to set the same off in this action, even though it has a remedy over against the Germania Savings Bank in case the check is not paid by the said Penn Bank. *Refused.*

4. That the fact that the said the Farmers' Deposit National Bank subsequently charged said check back to the account of the said the Germania Savings Bank will not deprive it of the right to set it off in this case, if the jury find that the same was done without the consent of the Germania Savings Bank, and the said the Germania Savings Bank refused to accept said check or to approve of the action of the Farmers' Deposit National Bank in so doing. *Refused.*

The court charged the jury as follows:

[The evidence, as I understand it—of course in saying that, I do not intend to take the testimony from you, because where a case is submitted to a jury at all, they have the right to pass upon the facts and the credibility of the witnesses—upon the part of the plaintiff, given by Mr. Given and contained in plaintiff's second proposition, which I will read presently, would, if you find it to be true, preclude the defendant from setting up this amount that they seek to by way of a set-off against the Penn Bank, and make it your duty to find a verdict for the amount that it is shown the Penn Bank has credit for on the books of the Farmers' Deposit National Bank, with interest to the present time.]

(The court read the plaintiff's second point.)

That, gentlemen, comprehends all the questions of fact that seem to be involved in this case for you to determine. You will recollect that the teller's check was the property of the Germania Savings Bank; that it was taken to the Farmers' Deposit Bank, and there received, and a cash credit for \$88,000 given just as if the Germania Savings Bank had deposited that amount of money. If it had deposited cash it would have had a right to call on the Farmers' Deposit Bank to respond to that amount, and so with this check, apparently,

until something else occurred; and if there were nothing else in the case, the Farmers' Deposit Bank would be responsible for that amount of money to the Germania Savings Bank. But the check was not to be presented until Monday morning. It was deposited with the Farmers' Deposit Bank on Saturday, and on Monday morning the final crash of the Penn Bank came and the check was not paid.

The Farmers' Deposit Bank, then, not receiving the money as it ought to have received it from the Penn Bank, or would have received it if that bank had not failed, stood in this position: [It had given the Germania Savings Bank credit for this money; it had this worthless check in its hands, and it immediately, or shortly afterwards, notified the Germania Savings Bank that the check had not been paid, and charged back the amount that credit had been given for, notified the Germania Savings Bank of the fact, and then and there ceased, as I understand it, to have any further interest in the matter.]

[So far as the Farmers' Deposit Bank was concerned, the money that it had given the Germania Savings Bank credit for had been recaptured, as it were—taken from the credit of the bank; and, of course, there could be no claim by the Germania Savings Bank for that, for they were the indorsers, and they would have been liable if there had been no indorsement for any money paid for their use without sufficient consideration. That is not all, because it appears that the Germania Savings Bank had drawn a check for several thousand dollars. That was charged back, and to-day, so far as the evidence shows, if you believe it, and there is nothing to the contrary, the Farmers' Deposit Bank has no interest or title to this check whatever.]

[It has by its own act paid everything it had as against the Germania Savings Bank in this transaction, and that being the case it would, in that point of view, have no title to the check—would have apparently, to my mind, no more right to set it up than if entire strangers, although it has possession of the check, and although it appears that the Germania Savings Bank refused to receive it back when tendered].

[The Farmers' Deposit Bank holds it in trust for the Germania Savings Bank, which is entitled to it, and if the latter should demand, and the Farmers' Deposit Bank should refuse to deliver it, I apprehend it could be recovered, either its value, or the check itself, by proper legal action.]

[If you find these facts as testified to, and as they are apparently established by the evidence, the defendant has no such interest in this check as would justify it in setting it up as a defense to this action, and nothing which would prevent the jury from giving a verdict for the plaintiff for the entire amount of the claim, with interest.]

The jury returned a verdict for the plaintiff for \$28,442.24, being the whole amount claimed with interest; and, judgment having been entered thereon, defendant brought this writ, assigning as error the affirmation of plaintiff's point, the refusals of defendant's points, and the portions of the charge inclosed in brackets.

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**Messrs. D. T. Watson, Geo. W. Guthrie, Knox & Reed and Kennedy & Doty**, for plaintiff in error:

The instrument which the defendant claimed the right to set off in this action, although in the form of a check, and commonly called a "cashier's check," was, in legal effect, a note of the Penn Bank, payable on demand, and would be sued upon as such.

Byles, Bills, \*89; *Roach v. Ostler*, 1 Man. & R. 120; *Miller v. Thomson*, 8 Man. & Gr. 576.

Drafts or checks held by banks, drawn in their own favor, are *prima facie* presumed to have been received by them on deposit as cash from their customers, and not to have been deposited for collection merely.

*Gettysburg Nat. Bank v. Kuhns*, 63 Pa. 88, 92; *Metropolitan Nat. Bank v. Loyd*, 25 Hun, 101.

Where a commercial instrument is deposited in the manner and under the circumstances shown in this case, the bank becomes absolute owner of the instrument, and the debtor of the depositor for the amount for which he is credited; and its only remedy in case of its nonpayment is against the depositor on his indorsement; and the only remedy of the depositor is as a creditor of the bank.

*Hoffman v. First Nat. Bank*, 46 N. J. L. 604.

This rule was applied in *St. Louis & S. F. R. Co. v. Johnston*, 27 Fed. Rep. 243. See also *Bolles, Banks*, §§ 16, 21.

A bank holding paper for collection has a right to demand and receive payment from the maker, and, if not paid, to maintain an action thereon in its own name.

*Sterling v. Marietta & S. Trading Co.* 11 Serg. & R. 179; *Ward v. Tyler*, 52 Pa. 393; *Brown v. Clark*, 14 Pa. 479; 2 *Parsons, Notes & Bills*, p. 443.

The assignee is not a purchaser, he is a mere volunteer; he represents only the assignor, and his rights are only such as the assignor himself had at the date of the assignment.

*Re Fullon's Estate*, 51 Pa. 211; *Jordan v. Sharlock*, 84 Pa. 363.

If the "Farmers" could claim this set-off in an action by the Penn Bank alone, it can do so in this case.

If it was the duty of the Farmers' to apply the deposit of the Penn Bank to the check, the court will not deprive it of the power and subject it to an action by the Germania for its failure to do so.

See *Commercial Nat. Bank v. Henninger*, 105 Pa. 496; *First Nat. Bank v. Shreiner*, 110 Pa. 188, 1 Cent. Rep. 135; *Bank v. Kinsler*, 16 W. N. C. 509; *Bank v. McKee*, Id. 510.

The person having the right of action may set off a debt due to him as a trustee against a debt due by him in his own right.

*Wolf v. Beales*, 6 Serg. & R. 244; *Soliday v. Boney*, 12 Pa. 347. See also *Irish v. Johnston*, 11 Pa. 487; *McGowan v. Budlong*, 79 Pa. 470.

**Messrs. A. M. Brown, S. A. McClung and H. A. Miller**, for defendant in error:

The cases cited by plaintiff in error simply decide that, as to the depositor, the transfer of the check was absolute; they do not decide the question here, namely: the rights of the bank in case of the nonpayment of the check.

On the other hand, the courts of England (*Boyd v. Emmerson*, 2 Ad. & El. 184; *Kilsby v. Williams*, 5 Barn. & Ald. 815); the courts of Alabama (*National Com. Bank v. Miller*, 77 Ala. 178); the courts of Louisiana (*Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin, 185); the courts of California (*National Gold Bank & Trust Co. v. McDonald*, 51 Cal. 64)—hold that such a deposit and credit is merely for collection by the bank, or the agent of the depositor, and the bank does not own the amount until collection is accomplished, and this even as to the depositor; and to the same effect see *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675.

Text-book writers have also adopted the theory that checks so deposited, in the absence of any special agreement, are deemed to be taken for collection.

Daniel, Neg. Inst. § 1623; Morse, Banks & B. 2d ed. p. 320, 321, 3d ed. § 506; 2 Edwards, Bills & Notes, § 749; Rand. Com. Paper, § 1894.

Banks always claim and exercise the right of charging to the depositor all conditionally deposited checks returned unpaid—which is not consistent with the theory of an understanding that the title passes absolutely.

Morse, Banks & B. 3d ed. § 596.

Where, at the maturity of a note held by a bank, the maker's balance on deposit is insufficient to pay the note, the bank is not bound to apply the balance to the payment of the note for the protection of the indorser.

*People's Bank v. Legrand*, 108 Pa. 309; *First Nat. Bank v. Shreiner*, 1 Cent. Rep. 185, 110 Pa. 188; *Martin v. Mechanics Bank*, 6 Harr. & J. 285; *Voss v. German American Bank*, 83 Ill. 599; *Newburgh Nat. Bank v. Smith*, 66 N. Y. 271; Morse, Banks & B. 3d ed. § 562 a.

Nor can the indorser of a check, in a suit brought against him by his indorsee, have the insolvent drawer's deposit with the indorser set off in his favor.

*Union Nat. Bank v. Cannonsburgh Iron Co.* 4 Cent. Rep. 262, 48 Legal Int. 466.

When a note is held for collection the holder cannot set it off against his own debt.

*Lewis v. Sheaman*, 28 Ind. 427; *Central R. Co. v. First Nat. Bank*, 78 Ga. 883; *Cecil Bank v. Farmers Bank*, 22 Md. 148; *First Nat. Bank v. Gregg*, 79 Pa. 884; *Hackett v. Reynolds*, 5 Cent. Rep. 521, 114 Pa. 328; *Glazebrook v. Bagland*, 8 Gratt. 842.

The Farmers' Bank cannot be said to hold the paper as a trustee, in the ordinary sense, for it merely held the paper—was a mere depository; and a mere depository of commercial paper cannot even maintain a suit on such paper.

*Sherwood v. Roys*, 14 Pick. 172.

Whatever may be the general rule, it is certainly the law that a trustee of a note or check or other commercial paper, or a party holding such paper as trustee, cannot set it off against his individual debt.

2 L. R. A.

Rand. Com. Paper, § 1860; *McDonald v. Harrison*, 12 Mo. 447; *Fair v. McTeer*, 16 East, 180; Babington, Set-Off, Law Lib. vol. 6, p. 28; Waterman, Set-Off, § 60, p. 65.

**Paxson, J.**, delivered the opinion of the court:

It is not denied that at the time of the failure of the Penn Bank and its assignment to Henry Warner for the benefit of creditors, the Farmers' Deposit Bank (defendant below) was the lawful holder of the check of the said Penn Bank for \$88,000, and that it was such holder at the time of the trial below. In a suit brought by the assignee of the Penn Bank against the said Farmers' Deposit Bank to recover a balance of \$23,218.59, admittedly due the Penn Bank at the time of its failure, the Farmers' Deposit Bank attempted to use the check of \$88,000 as a set-off. The court below instructed the jury that the latter bank could not so use it. This is the one error of the case and it runs all through it.

The theory of this ruling was that the check belonged to the Germania Savings Bank, and a large amount of time was wasted in trying this unimportant fact. Of what possible concern was it to the Penn Bank whether the defendant held it for collection or for value? It had no reference to the check in the hands of either bank. If there had been a defense as to the Germania then the Penn Bank might have called upon the defendant to show that it had paid value. But as the case stood—with no defense as to either bank—it had no standing to inquire into the relations between the defendant and the Germania any more than the check had been presented at its counter and payment demanded before its insolvency.

If we concede that the defendant was a mere collecting bank, so far as this check was concerned, it does not alter the case. As such its title was sufficient to maintain a suit in its own name. This is settled law. *Brown v. Clark*, 14 Pa. 469; *Ward v. Tyler*, 53 Pa. 393.

If it could maintain a suit on this check in its own name it is difficult to see any good reason why it could not set the check off in a suit against it by the assignee of the Penn Bank. The rights of the assignee rise no higher than those of his assignor. Neither the Penn Bank nor its assigns have any concern with the question of the ownership of the check, unless a defense be shown as against the Germania, or that the defendant became the holder after the assignment. As no defense was set up against the check in the hands of anyone, and as it is an undisputed fact that the defendant became the lawful holder thereof several days before the assignment, we are all of opinion that the set-off should have been allowed.

All of the assignments of error are sustained.

*Judgment reversed, and a venire facias de novo awarded.*

## MICHIGAN SUPREME COURT.

James M. TURNER, *Appt.*,

v.

Frederick H. STEPHENSON.

(.....Mich.....)

**Adverse possession** of the south half of a quarter section of land, claimed by another under a prior patent, is not constituted by actually occupying adversely part of the north half of such quarter section under a registered patent for the whole quarter section.

(November 23, 1888.)

**A**PPEAL by plaintiff, from a judgment of the Circuit Court for Grand Traverse County (Ramadell, J.), in favor of the defendant in an action of ejectment. *Reversed.*

The facts are stated in the opinion.

*Mr. Frank B. Robson* for plaintiff, appellant.

*Messrs. Pratt, Hatch & Davis* for defendant, appellee.

*Morse, J.*, delivered the opinion of the court:

Action of ejectment. The land in controversy, the S.  $\frac{1}{4}$  of the N. E. fractional  $\frac{1}{4}$  of section No. 4, T. 25 N. of R. 11 W., and being eighty acres, belongs to the lands granted in the State under the Swamp Land Act of 1850. It was patented to the State in that year. In 1872 the State issued a patent under which, by mesne conveyances, the plaintiff claims title. The defendant, under the Homestead Law, located 160 acres, described in his patent as the N. E.  $\frac{1}{4}$  of section No. 4, same town and range as the state patent to Turner. It will be seen that the 160 acres located by defendant as a homestead included the eighty acres claimed by Turner, and conveyed to his grantors by the State.

It was conceded that Turner had the better title of record, and must recover unless the defendant could avoid the same by showing adverse possession. Defendant actually entered into possession of his homestead in October, 1863, which possession had been continuous and uninterrupted since that time. But he lived and made his improvements almost entirely upon the northwest forty acres. There was evidence tending to show that he made some clearing or chopping quite early, upon some small portion of the southwest forty which Turner claims; and he testified that in the last three years he has chopped about ten acres upon it, and cleared six of the ten; also, that he paid taxes upon the whole 160, nearly if not all of the years since it became taxable, and has used the southwest forty as a wood lot, and pastured his cattle thereon.

The Circuit Judge, as we think, erroneously instructed the jury that "The occupancy of the northwest corner of the premises under a patent claiming the whole, and registered, was possession of the entire 160 acres. Therefore, if you find from the evidence that the defendant in this case has occupied that portion of the premises for the whole period, consecutively, of twenty years, adversely, openly, notoriously and in defiance of the rights of the plaintiff, or the rights of any other parties, then he is entitled, under the law, to the premises; and your verdict will be for the defendant."

under the law, to the premises; and your verdict will be for the defendant."

The question as to the payment of taxes, or the use or improvement of the land claimed by Turner, or any portion of the same, was by this direction eliminated from the case; and it is therefore unnecessary to determine what bearing such facts, if established, might have upon the question of title to the same in the defendant by adverse possession. The jury were clearly informed that if the defendant had occupied the northwest forty alone, for the requisite number of years, adversely to all the world, and under a recorded deed to the whole 160 acres, it was not necessary that anything should have been done upon the eighty acres claimed by plaintiff, or towards it, in order to hold it by adverse possession.

We cannot see how a man, by simply occupying his own land, the title to which is not disputed, can acquire title to another's land, simply because the deed to the land he occupies covers adjoining land, which he neither owns nor occupies. If so, then the mere recording of a deed would amount constructively to actual possession. The plaintiff in this case, or any other person, is not bound to suppose that a man occupying adjoining land to his own is thereby claiming title to or possession of his premises.

The cases cited by the counsel for defendant are hardly applicable to the case at bar. They are cases, as far as cited from this State, where there had been acts of user going further than the mere record of title. The eighty acres claimed by plaintiff, and the eighty acres upon the west forty of which the defendant made his occupation, are distinct tracts of land, and so regarded by the general government, the source of the original title. These authorities might have some application to the proofs as made by the defendant on the trial, but they do not support the charge of the court, upon which, it must be presumed, the jury acted. *Murray v. Hudson* (Mich.) 9 West. Rep. 347; *Younge v. Cunningham*, 57 Mich. 153; *Hardy v. Powell*, 40 Mich. 413; *Campau v. Campau*, 44 Mich. 33. The same may be said of most of the other authorities cited. See *Fletcher v. Fuller*, 120 U. S. 534 [30 L. ed. 759]; *St. Louis Public Schools v. Risley*, 40 Mo. 870; *Davis v. Easley*, 13 Ill. 201; *Whitford v. Drexel*, 118 Ill. 600, 3 West. Rep. 523; *Fraswell v. Hughes*, 8 Fed. Rep. 596; *Murphy v. Doyle*, 37 Minn. 113.

In *Murray v. Hudson*, *supra*, the parcel of land in issue had been used by Bryce, and those claiming under him, as a wood lot appurtenant to a farm, in the usual and ordinary way pertaining to ownership of farm lands; and this possession, being adverse for a sufficient length of time, was held a good defense to the original title. The other cases cited in this State are not analogous in their facts to the case under consideration.

In the case of *Murphy v. Doyle*, *supra*, the defendant acquired a tax deed to an eighty acre tract of land. The land was vacant and unimproved, and was all heavy timber, except about eight acres of marsh. Claiming title to the whole tract under his tax title, Doyle entered upon

the premises, and cleared and fenced a few acres, the first year, and planted it with a crop. Each year thereafter he made additional clearing, until at the time of the suit he had in all some thirty or forty acres inclosed and under cultivation. He also cut hay every year upon the marsh land, which he had drained but not fenced. Every spring he made sugar upon the uninclosed land. He paid taxes each year on the whole eighty acres. It was held that these facts constituted adverse possession of the whole tract. Doyle did not reside on any of the land. It is stated in the opinion that where the occupant of land enters under color of title through a deed, he is presumed to have intended his entry to be coextensive with the description contained in his deed, although the actual improvements are on only a portion of the land; and when there has been a continued occupation of some part of the land included in such conveyance he will be deemed to have been in the adverse possession of the whole of such premises, if they were not in the adverse possession of someone else.

It is, however, stated further that this proposition is subject to the proviso that the premises described in the conveyance consist of a single tract of a proper size to be managed and used in one body, according to the usual manner of business of the country. But the holding was based upon the facts as before stated—it being considered that the eighty acres were within the ordinary size of a single farm, and that Doyle, except making his residence upon the land, had done all in the way of occupying the whole tract that the nature and condition of the property reasonably admitted of.

Under the direction of the Circuit Judge in the case at Bar it was not necessary that the jury should find that Stephenson had ever

used or touched in any way the land in controversy here, or paid taxes upon it, or asserted any dominion over it, if he had occupied and used any portion of the quarter section within which this eighty was included, under a deed of the whole. The mere occupancy of the northwest forty acres, with no dominion exerted over the south eighty, save what might be inferred from his deed, would not be sufficient to gain title by adverse possession. In such case there would be no notice, actual or constructive, to Turner, who holds the legal title, of any claim on the part of the defendant to the unoccupied eighty.

Turner might well suppose that Stephenson was only claiming title to the land actually occupied by him, or within the bounds of the smallest government subdivision. There would exist no circumstance or reason why Turner would be put on inquiry to ascertain whether his neighbors, living on and cultivating other parcels than his own, were claiming title to his lands. Therefore it has been held that where a grantor embraced land to which he had no title in the same deed with that to which he had a title (as it is conceded the United States did in its deed to Stephenson), and the grantees entered upon and occupied that part only to which the grantor had a title, it did not operate as a disseisin of the owner of the other land described in the deed, although such deed was duly recorded. See 3 Washb. Real Prop. 5th ed. marg. p. 498, and cases cited; *Hole v. Bittenhouse*, 25 Pa. 491; *Thompson v. Burhans*, 61 N. Y. 52-69; *Tritt v. Roberts*, 64 Ga. 156.

We find no error in the record except as above stated.

*The judgment will therefore be reversed, and a new trial granted, with costs to plaintiff.*

The other Justices concurred.

## MISSOURI SUPREME COURT.

City of ST. LOUIS, *Resp't.*,

*v.*

BELL TELEPHONE CO. of Missouri,  
*App't.*

**1. A telephone company having special franchises and privileges, including the right of eminent domain, is subject to public regulations; and the State has power to fix and prescribe a**

maximum rate to be charged by it for telephone service.

**2. Power to fix rates to be charged by a telephone company is not conferred upon a city by provisions of its charter giving it power to "license, tax and regulate," businesses of various kinds, including that of telephone companies; nor is such power included in the general police power of a municipal corporation.**

(December 20, 1888.)

**NOTE.**—*Telephone company subject to legislative control.* A telephone company is a common carrier, subject to legislative control. *Hockett v. State*, 2 West. Rep. 764, 106 Ind. 250; *Central Union Teleph. Co. v. State*, 2 West. Rep. 773, 106 Ind. 1. It is a carrier of news, in the sense in which a telegraph company is a common carrier. *Ibid.* Notwithstanding the patented quality of the instrument, used by it to transmit the news, the State may regulate the prices to be charged by the company. *Cent. Union Teleph. Co. v. State*, 2 West. Rep. 773, 106 Ind. 1; *Patterson v. Kentucky*, 97 U. S. 301 (24 L. ed. 1115). The power of a State Legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded or articles of property furnished for use in its business, is plenary and complete. *Hockett v. State*, 2 West. Rep. 771, 105 Ind. 250. Property thus devoted to a public use becomes a legitimate subject of legislative regulation and control. *Munn v. Ill.* 94 U. S. 113 (24 L. ed. 77). This state regulation and control of property devoted to a public

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use is not the taking of property for a public purpose within the meaning of section 66 of article 1 of the Constitution of this State. Nor is such regulation and control an interference with the guaranteed rights of the citizen in private property. *Hockett v. State*, 2 West. Rep. 770, 105 Ind. 250. What the Legislature may do, it may delegate the authority to do. Thus, from the earliest history of the State, authority to vacate highways in country districts has been conferred on special tribunals. Like authority has frequently been conferred on municipalities. No reason appears why all such authority possessed by the Legislature may not be thus delegated. But the delegation of such power must plainly appear, either by express grant or by necessary implication. *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 363; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *State, Montgomery v. Trenton*, 36 N. J. L. 79; *Patterson & P. Horse R. Co. v. Paterson*, 24 N. J. Eq. 158; *Glasby v. Norris*, 18 N. J. Eq. 72; *State, Domestic Telegr. & Teleph. Co. v. Newark*, 6 Cent. Rep. 540, 49 N. J. L. 344.

**A** PPEAL by defendant, from a judgment of the St. Louis Court of Criminal Correction in favor of the plaintiff in an action for a penalty for the violation of a city ordinance. *Reversed.*

The facts are stated in the opinion.

**Messrs. Hitchcock, Madill & Finkelnburg**, for appellant:

The power of the municipal authorities is exclusively confined to the limits prescribed by the charter and such ordinances as are passed in conformity thereto.

*Kansas City v. Swope*, 79 Mo. 448, 449; citing and affirming *Leach v. Cargill*, 60 Mo. 317; *Cape Girardeau v. Riley*, 72 Mo. 223, 224; *Corrigan v. Gage*, 68 Mo. 544; *St. Louis v. Weber*, 44 Mo. 547. See also 1 Dillon, Mun. Corp. 8d ed. § 89; *St. Louis v. Laughlin*, 49 Mo. 562.

The contention that the ordinance in question is valid, under the decision of the United States Supreme Court in *Munn v. Illinois*, known as the *Warehouse Case*, is unfounded. That decision and all others based thereon are irrelevant here. They relate exclusively to the sovereign powers of a State, and are expressly based on "the powers inherent in every sovereignty."

*Munn v. Illinois*, 94 U. S. 113, 124, 125 (24 L. ed. 77, 84); "*Granger Cases*," 94 U. S. 155, 165, 179, 180 (24 L. ed. 94, 97, 99); *Wabash St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 566, 567, 571, 574 (30 L. ed. 244, 247, 249, 250); *Mugler v. Kansas*, 123 U. S. 628, 660, 661 (31 L. ed. 205, 210); 2 Morawetz, Priv. Corp. 2d ed. §§ 1073, 1074.

The doctrine of these cases has no application to municipalities, which are mere creatures of the State, having no element of sovereignty whatever.

*St. Louis v. Weber*, 44 Mo. 547, 550; affirmed in *Corrigan v. Gage*, 68 Mo. 544, 545; affirmed in *Cape Girardeau v. Riley*, 72 Mo. 223, 224; again affirmed in *Kelly v. Meeks*, 2 West. Rep. 507, 87 Mo. 401, 402; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 254.

A municipal corporation cannot, in virtue of its incidental power to pass by-laws, or under any general grant of that authority, adopt by-laws which infringe the spirit or are repugnant to the policy of the State as declared in its general legislation.

1 Dillon, Mun. Corp. 8d ed. § 329.

Even express grants of power in the City Charter of St. Louis were repealed by General State Laws, enacted since 1876 and inconsistent therewith.

*St. Louis v. Sternberg*, 69 Mo. 304; *Ewing v. Hoblitzelle*, 85 Mo. 64.

The general law authorizing the incorporation of telegraph and telephone companies, enacted in 1879, three years after said city charter was adopted, under which General State Law, and upon the faith of which, this company was organized in December, 1879, expressly provides that such companies shall fix their own rates and charges for services rendered.

Mo. Rev. Stat. 1879, chap. 21, art. 5, §§ 875, 883.

Even if the City Charter of 1876 had expressly authorized the city to fix telephone rates (which defendant denies) this General State Law, subsequently enacted, would have repealed such grant of power.

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Mo. Const. art. 9, §§ 23, 25; *St. Louis v. Sternberg*, 69 Mo. 304; *Ewing v. Hoblitzelle*, 85 Mo. 73.

**Mr. Leverett Bell**, for respondent:

Telephone companies are public corporations and common carriers, making use of the streets of the city to transact their business, and possessing the right of eminent domain; and they are subject to regulation by the State as to their charges, under its police power.

1 Mo. Rev. Stat. §§ 875, 879, 880, 883; *State v. Neb. Teleph. Co.* 17 Neb. 126; *State v. Bell Teleph. Co.* 38 Ohio St. 296; *Julia Building Assn. v. Bell Teleph. Co.* 5 West. Rep. 357, 88 Mo. 258; *Munn v. Illinois*, 94 U. S. 113 (24 L. ed. 77); *Chicago etc. R. Co. v. Iowa*, 94 U. S. 155 (24 L. ed. 91); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24 L. ed. 97); *Croley, Const. Lim.* 5th ed. 739; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 121; *Hockett v. State*, 2 West. Rep. 764, 105 Ind. 250.

The City Charter of St. Louis has by transfer from the State, vested in the municipal government authority to establish by ordinance the maximum annual charge for the use of a telephone within the city.

City Charter, art. 8, § 26, ¶¶ 2, 5, 14; 2 Rev. Stat. pp. 1585, 1586, 1588; *St. Louis v. Herthel*, 3 West. Rep. 823, 88 Mo. 128; *Menz v. Mo. Pac. R. Co.* 4 West. Rep. 592, 88 Mo. 672; *Richmond F. & P. R. Co. v. Richmond*, 96 U. S. 521 (24 L. ed. 734); *Ferrenbach v. Turner*, 86 Mo. 416.

**Black, J.**, delivered the opinion of the court:

This was a prosecution against the Bell Telephone Company of Missouri for the violation of an ordinance which provides that "The annual charge for the use of the telephone in the City of St. Louis shall not exceed \$50." A violation of the ordinance is made a misdemeanor, and subjects the offender to a fine of not less than \$50 nor more than \$500. The defendant appealed from a judgment assessing a fine of \$300 against it.

The defendant is a corporation organized under article 5 of chapter 21 of the Revised Statutes of this State, and hence has all the powers therein conferred upon such corporations. Among others it has the power to own and operate lines of telephone, to make such reasonable charges for the use of the same as it may establish, to erect its poles along and across public roads and streets, to condemn private property for a right of way; and it is charged with the duty of receiving and transmitting messages with impartiality and good faith. The defendant neither affirms nor denies the power of the State itself to fix a maximum rate of charges, but does contend that no such power has been delegated to the City of St. Louis.

The defendant's property, consisting of poles, wires, fixtures and the like, is, of course, private property; but the property is devoted to public use; and since the defendant has conferred upon it special franchises and privileges, including the right of eminent domain, the corporation is subject to public regulations; and we shall take it for granted that the State has the power to fix and prescribe a maximum rate for telephone service. That this power

could be delegated to municipal corporations is equally clear. The ordinances of the City of St. Louis must not be in conflict with the general laws of the State. If the city has had this power to fix rates conferred upon it, then an ordinance which fixes reasonable maximum rates would not be in conflict with the law under and by virtue of which the defendant is organized, and which law constitutes its charter.

A telephone company, when once its poles are planted and wires stretched on or over the streets of a city, becomes in effect a monopoly, and the company must submit to such reasonable regulations as the municipal corporation has power to prescribe. The important question, then, is whether the City of St. Louis has the power to enact the ordinance in question, the power to fix reasonable maximum charges for telephone service—and nothing to the contrary being shown in this case, it is assumed that the rate fixed is reasonable, so that the question is narrowed down to one of power on the part of the city to fix telephone rates at all. If the city has such power it must be found in a reasonable and fair construction of its charter.

Judge Dillon makes this full and comprehensive statement of the rule as to municipal powers: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 Dillon, Mun. Corp. 8d ed. § 89. See also *St. Louis v. Laughlin*, 49 Mo. 582. The rule, as before stated, is in accord with what we said in *St. Louis v. Herthel*, 88 Mo. 128, 3 West. Rep. 823.

The city places some reliance on its general power to regulate the use of streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation. *Ferrenbach v. Turner*, 86 Mo. 416.

The erection and maintenance of telephone poles is one of new uses; such use is a proper use of the streets. *Julia Building Assn. v. Bell Teleph. Co.* 5 West. Rep. 357, 88 Mo. 258. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant. Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground.

By the fifth subdivision of section 26, article 3, of the Charter of St. Louis, the mayor and assembly have power "to license, tax and regulate lawyers, doctors, etc., etc., telegraph

companies as corporations, etc., etc., and all other business, trades, avocations or professions whatever." Telephone companies are not mentioned, though a vast number of trades, professions and avocations are specified. They are not mentioned in all probability because not existing at the date of the charter. In construing this paragraph of the charter we held in the case of *St. Louis v. Herthel*, *supra*, that architects were, for purposes of construction, *ejusdem generis* with lawyers, doctors, dentists and artists, and therefore included by the general concluding words. So in this case it may with equal propriety be said that telephone companies are *ejusdem generis* with telegraph companies, and therefore included in the words of the general concluding clause.

It can make no sort of difference that these telephone companies were not in existence at the date of the charter. One of the objects had in view by the use of the general clause was to provide for just such cases. As aptly observed in that case, "We are to construe it (the charter) according to the intent of the framers, and that intent must be gathered from the language and objects of the charter provisions, and giving that language and interpretation neither strict nor strained." Does then the power to regulate telephone companies, when that term is coupled with the powers to license and tax, give the city the power to regulate the charges for telephone service?

By the General Statutes of Massachusetts of 1860, page 167, it is provided that the mayor and aldermen of any city may make rules and orders for the regulations of carriages, and may receive \$1 annually for each license granted to a person to use a carriage in the city. Under this power it was held, in *Commonwealth v. Gage*, 114 Mass. 328, that a city might fix the compensation to be charged by hackney coachmen. This case would at first seem to furnish some authority for the claim made by the city in this case. Turning to other provisions of the charter we find that express power is given to establish ferry rates; to fix the rates for carriage of persons, and of wagonage, drayage and cartage of property; to regulate the price of gas, and to regulate and control railways within the city as to their fares, hours and frequency of trips. These express powers to fix prices, fares and charges, in these specified cases, are followed by no general words. With this specific enumeration of cases where the city may regulate the compensation to be charged, it impliedly appears that such a power was not intended to be given in other cases. This conclusion presents itself with more force when we see that by the clause before quoted the city has power to license, tax and regulate private carriages, omnibuses, carts, drays and other vehicles; so that the framers of the charter did not regard the power to license, tax and regulate sufficient to give the power to fix rates and charges. The power to regulate, it may be conceded, gives the city the right to make police regulations as to the mode in which the designated employment shall be exercised. 1 Dillon, Mun. Corp. § 358.

But taking these charter provisions together, we think it would be going to an extreme length to say that they confer upon the city the power to fix telephone rates. If it has power



to do this, it may also fix the charges for telegraph services and for the other designated services which are of a public character.

We conclude that the city has no power to pass the ordinances in question by reason of any of the charter powers before considered. This brings in the general welfare clause, which is in these words: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the State, as may be expedient, in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines," etc. Sometimes the power to enact ordinances is given in general terms, and in other cases there is a specific enumeration of the powers. "This difference," says Dillon, "is essential to be observed, for the power which the corporation would possess under what may be termed the welfare clause, if it stood alone, may be qualified, or where such intent is manifest, impliedly take away by provisions specifying the particular purposes for which by-laws may be made." 1 Dillon, Mun. Corp. 8d ed. § 815.

Under a general power like the one now in question this court has held that the city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, and prohibiting cruelty to dumb animals. *St. Louis v. Schenbusch*, 95 Mo. 618, 15 West. Rep. 258, and cases cited.

These matters are all within police regulations, strictly speaking, and naturally fall within the domain of municipal legislation and regulation. To say that under this general power the city may fix rates for telephone services would be going entirely too far. This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges. What has been said in respect of the power to license, tax and regulate applies with equal force here. We are not cited to, nor have we found, any adjudicated case which will support the ordinance now under consideration under the present charter powers of the City of St. Louis.

*The judgment in this case is therefore reversed.*

### TEXAS SUPREME COURT.

GULF, COLORADO & SANTA FÉ R. CO.,

*Appl.,*

*v.*

T. E. SMITH *et al.*

(....Texas....)

**A covenant running with the land is not created by a stipulation in a deed of right of way to a railroad company, that the company shall construct and maintain a fence along its right of way where land is used solely for pasturage and inclosed on the other side, so long as it is used exclusively for pasturage; and such stipulation cannot be enforced by a subsequent owner of such land.**

(November 27, 1888.)

**APPEAL** by defendant from a judgment of the District Court of Bell County (Blackburn, J.), in favor of the plaintiffs in an action for damages for breach of a covenant in a deed of right of way. *Reversed.* (Commissioners' decision.)

The facts are stated in the opinion.

*Messrs. Harris & Saunders* for appellant.

*Messrs. Monteith & Furman* for appellee.

**Hobby, J.**, delivered the following opinion:

Appellant (the Gulf, Colorado & Santa Fé Railroad Company) was granted the right of way through and over a tract of land of about 1,200 acres, in Bell County, by the terms of a deed from Guy M. Bryan executed to it on the 23d day of July, 1881. The deed conveying the right of way contained the following stipulations: "It is expressly understood and agreed that, whenever the whole or any portion of said land crossing the line of said railway is inclosed and used exclusively for pasturage, the said company shall, so long as such land is used exclusively for pasturage as aforesaid, construct and maintain a lawful fence on each side of the right of way within such inclosure sufficient to keep off sheep and goats. Wherever any portion of said land adjoining and abutting the right of way is used exclusively for pasturage, and is inclosed on all sides, except the side abutting on said right of way, said company shall fence its right of way on the side of its railway next to said pasture."

By deed dated December 15, 1883, the same land was conveyed to the appellee T. E. Smith, and Peter G. Rucker. In April, 1885, Rucker conveyed his interest to appellee T. E. Smith,

**NOTE.—Grant to railway of right of way.** A right of way for a railroad is an incumbrance. *Harlow v. McKinley*, 24 Iowa, 69; *Beach v. Miller*, 51 Ill. 206; *Van Wagner v. Van Nostrand*, 19 Iowa, 422; *Williamson v. Hall*, 62 Mo. 405; *Kellogg v. Malin*, 50 Mo. 500, 62 Mo. 429; *Haynes v. Young*, 36 Maine, 557; *Giles v. Dugro*, 1 Duer, 331; *Harlow v. Thomas*, 15 Pick. 68; *Lamb v. Danforth*, 59 Maine, 322; 2 Devlin, Deeds, 215. It cannot exist by parol, but must be created by deed. *Tickle v. Brown*, 4 Ad. & E. 369; *Fitch v. Seymour*, 9 Met. 462; *Noyes v. Chapin*, 6 Wend. 461; *Hays v. Richardson*, 1 Gill & J. 363. A grant of a right to open a road must be acknowledged and recorded in accordance with the Recording Laws. *Wright v. Freeman*, 5 Har. & J. 467. See also *Cook v. Stearns*, 11 Mass. 533; *Russell v. Scott*, 9 Cow. 279; *Morse v. Copeland*, 2 Gray, 302; *Houston v. Lafee*, 46 N. H. 505, 507; *Curtis v. Jack-*

*son*, 13 Mass. 107; — *v. Deberry*, 1 Hayw. (N. C.) 248; *Hall v. Chaffee*, 13 Vt. 150; *Bullen v. Runkel*, 2 N. H. 255, 9 Am. Dec. 55; *Thompson v. Gregory*, 4 Johns. 81, 4 Am. Dec. 255; 1 Devlin, Deeds, 62. Such a right is an incorporeal hereditament, and consent alone is nothing but license (*Veghte v. Haritan Water Power Co.*, 19 N. J. Eq. 142); and when an easement has been once created, it can be conveyed only by deed. *Ferrell v. Ferrell*, 1 Baxt. 829. An agreement on the part of a railroad company to establish a turn-out track and stopping place near the land of another, and to stop there with freight and passenger trains, must be in writing, because it would create a negative easement in the company's land. *Pitkin v. Long Island R. Co.* 2 Barb. Ch. 221, 47 Am. Dec. 320. For easement generally, see Ill. Cent. R. Co. v. Houghton, 1 L. R. A. 218; lost nonuser, see *Snell v. Levitt*, 1 L. R. A. 414.

who, with appellee O. P. Smith, are shown to be the owners of the land, and who instituted this suit against the appellant for the recovery of damages alleged to have been sustained by them by reason of the failure and refusal of the appellant to erect and maintain a fence adjoining and abutting its right of way, in compliance with the stipulation embraced in the deed from Bryan to appellant; and which failure to erect the fence resulted in stock entering upon said land, eating and destroying the grass thereon, and trampling upon and injuring the soil, rendering it unfit and worthless for pasturage purposes. The trial resulted in a judgment in favor of the appellees, for the sum of \$1,000, from which appellant appeals.

There are several assignments of error presented for consideration, but we think the disposition of the case is involved in the first and third, and these relate to the proper construction of the stipulation or covenant contained in the deed from Bryan to appellant. The court instructed the jury, with reference to this clause in the deed, as follows: "By the terms of the contract in which the right of way was granted by Bryan to defendant, it was agreed by defendant on its part that whenever plaintiffs inclosed any part or the whole of their land exclusively for pasturage, then, within a reasonable time after notice of plaintiffs' intention to use said land for pasture exclusively, and that they had inclosed it for that purpose, except that portion adjoining the right of way, then upon such notice the defendant would be required to fence its right of way along such portions as plaintiffs may have inclosed for the exclusive use of a pasture; and, upon defendant's failure to construct such fence, it would be responsible for such damages as arise from such failure.

The court was requested by appellant to instruct the jury, that "The deed offered in evidence from Guy M. Bryan to the Gulf, Colorado & Santa Fé Railway Company, taken in connection with the deed from Guy M. Bryan to Smith and Rucker, offered in evidence, do not give to plaintiffs a right of action against defendant for breach of the covenant contained in the said deed from Bryan to defendant, and you will find for defendant."

There has been much discussion in the cases turning upon this point, "concerning express covenants and covenants in law; and which

covenants run with the land, and which of them are collateral, and do not go with the land; and where the assignee shall be bound without naming him, and where not."

In *Spencer's Case*, 5 Coke, 16 a, b, which is recognized as the leading authority upon this subject, the rule is said to be that, when the covenant extends to a thing *in esse*, part of the demise, the thing to be done by force of the covenant is annexed and appurtenant to the thing demised, and shall go with the land, and bind the assignee, though he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which has no being."

If the covenant be to erect or set up a new house and the like, it will not bind the assignees unless they be named in the covenant. *Tallman v. Coffin*, 4 N. Y. 136; *Watertown v. Cowen*, 4 Paige, 510; *Barrow v. Richard*, 8 Paige, 351.

Those covenants which are held to run with the land, and inure to the benefit of the assignee, are such as generally affected the land itself, and conferred a benefit on the grantor. In the case before us the rule announced in the authorities cited above would apply with additional force, from the fact that it appears from the language of the contract or covenant that it was intended to protect stock from injury by the railroad, rather than confer a benefit upon the grantor, affecting the land itself. It was contingent, and necessarily temporary in its application. To construe this contract as a covenant running with the land, and the breach of which would authorize the action in this case, would be an extension of the rule beyond the limits already clearly established in the cases cited. *Weid v. Nichols*, 17 Pick. 543; *Easter v. Little Miami R. Co.* 14 Ohio St. 51; *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400; *Hartung v. Witts*, 59 Wis. 285; *Hurd v. Curtis*, 19 Pick. 462.

We are of opinion that the charge complained of was error, and should not have been given, and that the charge requested should have been given; and for these errors we think the judgment should be reversed, and the cause remanded.

*Stayton, Ch. J.:*

Report of the commissioners of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

## IOWA SUPREME COURT,

W. H. INNIS, *Appt.*,

v.

CEDAR RAPIDS, IOWA FALLS &  
NORTHWESTERN R. CO. *et al.*

((....Iowa....))

1 Iowa Code, section 3331, giving the right to "any person injured thereby" to maintain an action to abate a nuisance, does not change the ordinary rule that a private individual will not be allowed to maintain an action to restrain or abate a public nuisance unless he can show some peculiar or special damage or injury to himself.

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2. A person who, after the erection of a bridge over a lake, has purchased boats and engaged in the business of renting them, has no other or different rights than are enjoyed by other persons in respect to the navigation of the lake, sufficient to enable him to maintain an action to abate the bridge as a nuisance on the ground that it obstructs the navigation of the lake.

(December 13, 1883.)

APPEAL by plaintiff, from a decision of the District Court for Palo Alto County (Thomas, J.), dismissing the petition in an action in equity to abate a nuisance. *Affirmed.*

The facts are stated in the opinion.

**Mr. B. E. Kelly**, for appellant:

If waters can be navigated and are public, they are navigable; the real test being their use or some public act or declaration.

*McManus v. Carmichael*, 3 Iowa, 1. See also *Rice v. Ruddiman*, 10 Mich. 125; *Gould, Waters*, § 107; *Moore v. Sanborne*, 2 Mich. 524; *Brown v. Chadbourne*, 81 Maine, 9; *Sullivan v. Spotswood*, 82 Ala. 163; *Thunder Bay River Booming Co. v. Speechly*, 81 Mich. 386.

The construction or maintenance of an obstruction unnecessarily interfering with navigation is unlawful, without reference to any Act of the Legislature.

*Sweeney v. Chicago etc. R. Co.* 60 Wis. 60; *Re Eldred*, 46 Wis. 580.

While the nuisance in suit is both a public and private one, plaintiff is, by reason of his injuries entitled to ask for its abatement.

Iowa Code, § 3381. See also §§ 3386, 2508; *Hougham v. Harvey*, 33 Iowa, 208; *Sutherland, Damages*, p. 423; *Ewell v. Greenwood*, 26 Iowa, 377; *Wilson v. Sezon*, 27 Iowa, 15.

**Meera E. B. Soper and S. K. Tracy** for appellees.

**Reed, J.**, delivered the opinion of the court:

The act complained of is the erection and maintenance of a railroad bridge over a body of water known as Medium Lake. Plaintiff alleged that said lake is a public, navigable water, and that the bridge maintained by defendants is an obstruction to the free use thereof for purposes of navigation. On the hearing in this court a number of questions were elaborately argued by counsel, but we have found it necessary to consider the single question whether, conceding the navigable character of the lake, and that the bridge is an obstruction, plaintiff has such interest as will enable him to maintain an action in his own right for the abatement of the nuisance.

Plaintiff is a resident of the Town of Emmetsburg, which is situated at the south end of the lake, and is the owner of a number of small boats, which he keeps for hire, and which he rents to others for use on the lake. They have been used for purposes of pleasure, and by persons engaged in fishing, and are not adapted to any other use. The lake is five or six miles long, and its width varies from one fourth to three fourths of a mile. The bridge is situated about one mile from the south end, and spans the whole width of the lake at that point. There is no draw nor opening in it, and the bottom timbers are so near the water that boats cannot safely or conveniently pass under it. The boat house and landing are situated at the south end next to the town, and that is the only point of convenient access to the water from the town, and the part of the lake north of the bridge is better adapted to boating than that lying south of it.

Plaintiff's complaint is that, owing to the obstruction caused by the bridge, the business of boating on the lake has greatly fallen off, and as a consequence his business has been impaired, and his profits therefrom diminished. He also alleged, and the evidence tended to prove, that he and others contemplated placing a small steamer on the lake, but were deterred

from engaging in the enterprise by the existence of the obstruction. The evidence also shows that he did not engage in his present business until four or five years after the bridge was constructed. His counsel contended that the bridge is such an obstruction to the free use of his property "as entitles him to maintain an action in his own right for its abatement." He relied on section 3381 of the Code, which is as follows: "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance; and a civil action . . . may be brought thereon by any person injured thereby," etc.

It is very clear that under this provision, a person who sustains a special injury from a public nuisance, aside from and independent of that sustained by the general public, may maintain an action for its abatement, or to restrain its continuance. Indeed, that is the law in the absence of any statute on the subject. But independent of statutory provisions the rule undoubtedly is that a private individual will not be allowed to maintain an action to restrain or abate a public nuisance unless he can show that it occasions some peculiar or special damage or injury to him. 1 High, Inj. § 762; *Gould, Waters*, §§ 121, 122; *Blackwell v. Old Colony R. Co.* 123 Mass. 1; *Willard v. Cambridge*, 3 Allen, 574; *Prince v. McCoy*, 40 Iowa, 588; *Prosser v. Ottumwa*, 42 Iowa, 509. And in the latter case it was held that this rule is not changed by our statute.

The case depends, then, upon whether plaintiff has established that he suffers any injury from the alleged nuisance distinct from that sustained by the general public; and we think it clear that he has not. The substance of his complaint is that the bridge obstructs the navigation of the lake. But with reference to the right to navigate it he occupies precisely the same position as other members of the general public. The fact that, since the bridge was erected, he has purchased boats, and engaged in the business, gives him no other or different rights with reference to the subject than are enjoyed by others, for everyone had the right to do the same thing. His sole right in the premises is to use the lake as a highway. But every other member of the public has the same right. We have no occasion to consider whether his right would have been different if he had owned the property and been engaged in the business when the bridge was erected, or had subsequently purchased from one who at that time was engaged in it; for it is not claimed that he did either.

It was held by this court in *Ewell v. Greenwood*, 26 Iowa, 377; *Wilson v. Sezon*, 27 Iowa, 15; and *Hougham v. Harvey*, 33 Iowa, 208—that the plaintiffs could maintain actions to abate obstructions in public highways. But in each of those cases the plaintiff suffered injuries in consequence of the nuisance not sustained by the general public, and it was that fact which gave him a standing in the court; and the general rule which has been applied was recognized in each of the cases.

We were urged by counsel for appellees to determine whether Medium Lake is a navigable water; but we think it would be manifestly im-

proper for us to attempt any determination of that question in the present case. It is one in which the general public, or individuals other than plaintiff, may be deeply concerned, and any judgment or order we might enter with reference to it would be binding only upon the parties before us. The conclusion we have

reached, viz.: that plaintiff has not shown himself entitled to maintain an action to restrain or abate the alleged nuisance, necessarily determines the present case, and we must decline to enter into other questions which might be important if his position in that respect were different. *Affirmed.*

## NORTH CAROLINA SUPREME COURT.

**RICHMOND & DANVILLE R. CO., *Appt.*,**

*v.*

**Town of REIDSVILLE.**

(.....N. C.....)

**A municipal ordinance levying a tax of \$50 upon every railroad running through the corporate limits, whether it be called a privilege tax or by some other name, being a tax imposed upon business in the town, if authorized by the state law, is not void as a tax on interstate commerce nor as a violation of the principle of uniformity in taxation.**

(December 3, 1888.)

**A PPEAL** by plaintiff, from a judgment of the Superior Court of Rockingham County (Connor, J.), in favor of the defendant, on a submission, under the Code, of a controversy without action, to determine the validity of a tax imposed by a municipal ordinance. *Remanded for amendment.*

The facts agreed are set forth in the opinion. *Messrs. F. H. Busbee and D. Schenck* for appellant.

*Messrs. Boyd & Johnston* for appellee.

**Smith, Ch. J.**, delivered the opinion of the court:

This proceeding is, under section 567 of the Code, a submission of a controversy without action between the parties, and its object is to obtain the decision of the court upon the question of the validity of a tax imposed on

the plaintiff by a municipal ordinance passed by the defendant. The facts agreed are as follows:

(1) The Town of Reidsville is a municipal corporation organized under the Laws of North Carolina. Its charter, marked "Exhibit A," is annexed as part of this case. (2) It has passed an ordinance, levying \$50 tax on every railroad running its road through its corporation. Ordinance, marked "B," is hereunto annexed. (3) The Piedmont Railroad Company is a corporation organized under the Laws of North Carolina, and its track runs through the Town of Reidsville. (4) The Piedmont Railroad Company has depots, tracks, roadbed, and other corporate, tangible property in Reidsville, which is taxed by the State, county and town as other corporate property, *ad valorem*, under the Constitution. For taxation the road is valued at \$10,000 per mile by the properly constituted assessors. (5) The Richmond & Danville Railroad Company is the lessee of the Piedmont Railroad, and is in possession thereof. The plaintiffs resist this tax as unconstitutional, and the matter in difference is submitted without action, under section 567 of the Code.

D. Schenck, attorney for plaintiffs.

Boyd & Johnston, attorneys for defendant.

May 17, 1888.

*Piedmont Railroad Company, and Richmond & Danville Railroad Company, Lessees Thereof, v. The Town of Reidsville.*

W. P. Watt, being duly sworn, says that he

**NOTE.—Municipal taxation of occupations.** The general rule is that the powers of a municipal corporation are to be construed with strictness as to their right to impose taxes on occupations. *Latta v. Williams*, 87 N. C. 128; *New Iberia Trustees v. Miques*, 8 La. Ann. 923; *Cooley*, Taxn. 574. A municipal corporation has no inherent power to tax. *Vance v. Little Rock*, 30 Ark. 435; 2 Desty, Taxn. 1382. The authority granted is subject to the limitations implied in the commercial clause of the Federal Constitution. *Goodale v. Finnell*, 27 Ohio St. 423. It can impose no tax on any occupation unless authorized to do so by its charter. Mayor of Plaquemine v. Roth, 29 La. Ann. 231. If it is not manifest that there has been a purpose by the Legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal. *Kip v. Patterson*, 26 N. J. 238. For the general principle, see *Robinson v. Franklin*, 1 Humph. 155; *St. Louis v. Laughlin*, 49 Mo. 559; *Dubuque v. Life Ins. Co.* 29 Iowa, 9; *Charleston v. Oliver*, 16 S. C. 47. Authority given in the charter of a city to raise money for its purposes by taxes and assessments in such manner as the common council shall deem expedient in accordance with the laws of the State and of the United States will authorize license fees. *Ould v. Richmond*, 23 Gratt. 464; *W. U. Tel. Co. v. Same*, 23 Gratt. 1. The statute contemplates in its policy both the earning of revenue and protection to resident traders. *Temple v. Sumner*, 51 Miss. 13; 1 Desty, Taxn. 302. The Legislature has the con-

stitutional power to tax occupations, and to authorize municipal corporations to tax them, and to license trades and professions in the absence of constitutional prohibition. *San Jose v. S. J. & S. C. R. Co.* 53 Cal. 481; *People v. Coleman*, 4 Cal. 46; *Sacramento v. Cal. Stage Co.* 12 Cal. 134; *Sacramento v. Crocker*, 16 Cal. 129; *Ex parte Hurl*, 49 Cal. 557; 1 Desty, Taxn. 302; *Fretwell v. Troy*, 18 Kan. 271; *Ex parte Montgomery*, 61 Ala. 433; *Gilman Shieboygan*, 2 Black, 510; *Lentz v. Allegheny Co.* 10 Pittsb. L. J. 241; *Durach's Appeal*, 62 Pa. St. 491. See *Hodgson v. New Orleans*, 21 La. Ann. 301. Or it may restrict the power of taxation. *Goodale v. Finnell*, 27 Ohio St. 423. It is the occupation that is taxed, and not the goods; and it is incumbent upon him who engages in the business, whether he be agent or owner, to take out the license. *Temple v. Sumner*, 51 Miss. 13. When the power to license occupations is given, it involves the determination of the extent or duration, and the sum to be paid, and it must be exercised exclusively by the common council. *Barling v. St. Paul*, 19 Minn. 389. And the power may be extended over persons plying vocations within the corporate limits, whether they actually reside there or not. *Edenton v. Capehart*, 71 N. C. 156. An act which simply enumerates certain businesses and occupations, and declares what should be paid for by licenses by each, does not operate as a repeal of a statute which authorizes municipal corporations to fix the sum to be paid for licenses, except to the extent of the business specified. *Ex parte Bernert*, 62 Cal. 524.

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is Mayor of the Town of Reidsville; that the controversy submitted without action, in the above entitled action, is real, and the proceedings in good faith to determine the rights of the parties.

W. P. Watt.

Sworn and subscribed before me this 22d day of May, 1888.

H. B. Burnett, Notary Public.

Superior Court; Rockingham County.

July Term, 1888.

*Piedmont Railroad Company and Richmond & Danville Railroad Company, Lessees Thereof, v. The Town of Reidsville.* (Judgment.)

This cause coming on to be heard, upon the statement of facts admitted in the controversy without action, and after argument of counsel, it is ordered, adjudged and decreed, that the Town of Reidsville is authorized to levy the tax of fifty dollars imposed under the ordinance of said town against plaintiff company, and that the same is not unconstitutional.

It is further ordered that the action be dismissed, and that the plaintiff pay the cost thereof.

H. G. Connor, Judge Presiding.

This method of procedure, introduced in the Code as a summary and inexpensive way of securing a judicial determination of matters in law, contemplates somewhat as in a proceeding in the nature of a special verdict under our former system, a complete and concise statement of all the facts necessary to a solution of the controversy. The statement before us refers to Exhibits A and B, said to be, but which are not, annexed, nor in the title. Again; in the case on appeal, wholly unnecessarily, it is left to either party to add to the facts in the case agreed, the public laws taxing railroads, and any action taken by the board of appraisers and assessors in the valuation of the plaintiff company; thus introducing new matter in the case agreed, which is wholly inadmissible, because the controversy is to be determined solely upon the facts therein contained. For these reasons the cause must be dismissed or remanded; and we prefer the latter course, because, when amended so as to present all the facts, not by reference to be hunted up, but in direct and positive form, it may be decided in the court below, and reviewed on appeal in this.

We are unable to see any well grounded objection founded upon the Constitution of the United States, or of this State, to the tax put upon the plaintiff. It is in no sense a tax upon interstate commerce; that is, upon freight or passengers conveyed out of this State into another State, or brought from the latter into this State, nor upon the coaches and cars, instruments of such commerce, employed in such transportation. The tax is upon the corporate body created by the State, and doing business within the corporate limits of the town; and this liability cannot be evaded by the fact that the road transports beyond as well as within the boundaries of the State. It is such commerce as is carried on between the States as a distinct species of taxable property that is protected by the Constitution of the United States from state assessment when separately taxed, or when intermingled with that which is purely and solely state.

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In *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 [21 L. ed. 164] a tax upon the gross receipts of a railroad, though entering into the aggregate are sums derived from a transportation beyond the state lines, is held not to be an invasion of the exclusive right to regulate commerce between the States; and the distinction is taken between a tax upon freights carried between States, because of their carriage, and a tax upon the fruits of such transportation after they have become intermingled with the other property of the carrier.

Again; a tax of one fourth of one per cent in addition to other taxes, upon the value of every share of its stock, with a proviso that, when the road so taxed lay partly within and partly without the State, the company should only be responsible to the State levying the tax upon such number of shares as would be in the same ratio to the whole as the number of miles of its track in the State bore to the entire line of the road, was upheld as not interfering with interstate commerce. *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206 [21 L. ed. 888].

So it has been decided that a railroad 455 miles in length, of which forty-two only were within the State that incorporated the company, was "doing business within the latter State, and subject to a tax imposed upon" all railroad companies "doing business within the State, and upon whose road freight may be transported." *Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 492 [23 L. ed. 595].

It is then manifest that the municipal tax imposed by the defendant invades no prohibitory provision contained in the Constitution of the United States.

We are equally clear that it is not repugnant to our own organic law, nor does it depart from the principle of uniformity therein recognized. The tax is imposed upon every railroad "running its road through its corporate limits;" and whether it be called a privilege tax, or by some other name, it is imposed upon its business in the town; or if the road simply passes over the corporate territory, in view of the perils to the place, it is a tax which the State can authorize, and, when imposed under such authority, is valid. Nor is it wanting in uniformity, as the term is defined by *Mr. Justice Miller*, speaking for the court in *State Railroad Tax Cases*, 92 U. S. 575 [23 L. ed. 668], and followed by this court in *Worth v. Wilmington & W. Railroad Company*, 89 N. C. 291.

While we give our opinion upon the point intended to be presented, for reasons stated the case must be remanded, and it is so ordered.

William BOWLING, *Appt.*,

A. J. BURTON.

1. A covenant of warranty of title in a deed conveying a tract of land on which is situat-

NOTE.—Conveyance of mill; what passes. A grantor conveys all the easements he has or claims and purports to have at the time of the conveyance, incident and necessary to the just enjoyment of the property conveyed. So a devise of a grist mill "with the appurtenances" passes everything necessary for the full and free enjoyment of the grist mill, and requisite for the support of the establishment, such as dam, water, the race leading to the

ed a mill and dam embraces (in the absence of anything to the contrary appearing) an easement claimed by the grantor, as to ponded water occasioned by such dam, or back water therefrom on an adjoining tract of land of another person, and like easements necessary and incident to the free use and beneficial enjoyment of the mill and dam conveyed, although such easements are not expressly mentioned in the deed; and the grantee may maintain an action for breach of the covenant in respect to such easements.

(October 23, 1883.)

**A**PPEAL by plaintiff, from a judgment of nonsuit rendered by the Person County Superior Court (Shipp, J.), in an action for damages for breach of a covenant of title. *Error found.*

The case appears from the opinion.

*Mr. A. W. Graham*, for appellant, cited—*Rawle*, Cov. § 158; *Adams v. Conover*, 87 N. Y. 422; *Whitehead v. Garris*, 3 Jones, L. (N. C.) 171; *Berrett v. Dockery*, 7 Jones, L. (N. C.) 890. (No counsel appeared for appellee.)

*Merrimon, J.*, delivered the opinion of the court:

The following is a copy of the plaintiff's complaint: "The plaintiff, William Bowling, complaining of the defendant, A. J. Burton, alleges:

"(1) That on the 28th day of March, 1883, by a certain deed, which is hereto annexed and asked to be taken as a part of this complaint, the defendant, A. J. Burton, and Nannie L. Burton, his wife, for a valuable consideration therein stated, bargained, sold and conveyed to the plaintiff a certain tract or parcel of land described as follows: 'All of their interest (the said interest being one undivided half) in a certain tract or parcel of land upon the waters of Flat River, and known as the "Burton Mill Tract," containing, by estimation, forty-five acres, be the same more or less, and bounded as follows, viz.: Bounded on the south by the lands of A. J. Burton, lands known as the "Mangum Tract;" and on the east by the lands of A. J. Burton, lands known as the "Moore Tract;" and on the north and west by the lands of Sarah A. Burton; together with all of their interest in the Burton Mills, and their right to erect dams across the river at said mills, with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, suits, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said parties of the first part, either in law or in equity, of, in and to the above granted interest in the premises, with the said hereditaments and appurtenances; to have and to hold the

above mentioned and described interest in the premises, with the appurtenances, and every part and parcel thereof, to the said party of the second part, his heirs and assigns, forever.'

"(2) That, among other things in said deed, the defendant did covenant with the plaintiff to 'warrant and forever to defend the before granted interest in the premises, and every part and parcel thereof, now being in the quiet and peaceable possession of the said party of the second part, against parties of the first part, their heirs, executors, administrators and assigns, and against all and every other person or persons claiming or to claim the said interest in the premises, or any part thereof.'

"(3) That plaintiff hath not at all times since the making of said indenture and deed been able to peaceably and quietly enjoy the said premises; but, on the contrary, he alleges that one Monroe Cash, who at the time of the making of said deed, and continually from that time up to the 15th day of November, 1884, had and still hath a lawful title to the land on both sides of said Flat River, above and adjoining the land herein described, instituted an action in the superior court of said county and State, against this plaintiff and his cotenant, J. I. Cotbran, for ponding the water on the lands of said Monroe Cash, and injuring various springs of water on the lands of said Cash, and on the said 15th day of November, 1884, recovered judgment against said plaintiff and J. I. Cotbran in said action, for the sum of \$90 per annum for 5 years, and the costs of the action, amounting to ———.

"(4) That, in accordance with the terms of said judgment, and in order to avoid the necessity of another suit, the plaintiff has been compelled to tear down the dam to his sawmill at least two feet, at a very great cost, to wit, \$75; which has very materially reduced the capacity of said mill and impaired its value.

"(5) That plaintiff has already paid the costs of said action, \$144.68, and \$252.50, said judgment for damages, and expended about \$50 in a petition to have said judgment modified.

"(6) That, by reason of the failure of the covenant of the defendant, plaintiff hath not only lost and been deprived of the premises as aforesaid, but has been obliged to expend and has expended a large sum of money, to wit, \$502.50, in the payment of costs and charges recovered against him by the said Monroe Cash, in the action aforesaid, for ponding water on his land, and injury to the springs of said Cash, as well as to spend much time and labor in the defense of said action, to the great damage of said plaintiff. Wherefore, the plaintiff demands that he recover of defendant the sum of \$503.50, together with interest from November 15, 1884, and the costs of the action, to be taxed by the clerk."

mill, etc. *Blaine v. Chambers*, 1 Serg. & R. 160. The appurtenances which pass in such case are not limited to those absolutely necessary to the enjoyment of the property conveyed: it is sufficient if full enjoyment of the property cannot be had without them. *Simmons v. Cloonan*, 51 N. Y. 557. The incidents which pass as appurtenant must be "open and visible" from which fact the knowledge of their existence by the grantor is a natural inference. *Id.* The deed passes the right to use the water, as the water power is necessary to the full enjoyment of the property. *Id.*; *Voorhees v. Burchard*, 55 N. Y. 96; *Pickering v. Stapler*, 5 Serg. & R. 109. An easement in the mill pond is 3 L. R. A.

embraced in the grant of a "dam." *Maddox v. Goddard*, 15 Maine, 218, 33 Am. Dec. 604; *Hutchinson v. Chicago & N. W. R. Co.* 37 Wis. 582; *Sabine v. Johnson*, 35 Wis. 183; 2 Devlin, Deeds, 143. The owner of property on which were two mills propelled by power obtained from the water of a contiguous river, sold a portion of the property on which was situated one of the mills. The deed, after describing the property, granted the right to use water; and the construction put upon it was that the amount of water to which the grantee was entitled was to be measured by the capacity of the wheel in the mill at the time of the conveyance. *Doan v. Metcalf*, 46 Iowa, 120.

The defendant having answered, the court gave judgment, whereof the following is a copy: "In the above entitled action it is considered by the court that the complaint does not state facts sufficient to constitute a cause of action; whereupon, the plaintiff being called and failing to appear is nonsuited, and the defendant will recover of the plaintiff the costs of this action to be taxed by the clerk."

The plaintiff, having excepted, appealed to this court.

We do not doubt that the injured party can maintain an action, in a proper case, for a breach of the covenant of warranty of title in a deed conveying a tract of land on which is situate a mill, and a dam connected therewith, that embraces an easement as to ponded water occasioned by such dam, or back water therefrom, on an adjoining tract of land of another person, and like easements incident and necessary to the free use and beneficial enjoyment of the mill and dam conveyed, although such easements are not expressly mentioned in the deed or covenant. If the deed, in effect, though not in terms, embraces them, and the covenant is comprehensive enough to include them, a breach thereof in respect to such easements is actionable. This is so, because, in the nature of the matter, nothing to the contrary appearing, a party who conveys a mill and dam, or other things, conveys whatever and all that he has, or claims and purports to have, at the time of the conveyance, in connection therewith, incident and necessary to the just enjoyment of the thing he undertakes and professes to convey.

It is not to be presumed that a vendor sold property in a less complete condition, as to things incident and appurtenant to it, than it appeared to be at the time he sold it. Thus, if he sold a mill and dam, and the site thereof, and he appeared and professed to have a right in connection therewith to pond water on the land of another, the deed, nothing to the contrary appearing, would be construed as embracing and carrying such easement as incident to, and part of, the mill, dam and site, to the extent, and in the measure, he appeared and professed to have and own it; otherwise, he would sell a property different from and less valuable than that he professed to sell. The right to so pond the water might be essential to give the mill positive value; indeed, it might be valueless without the easement, and it might be less valuable if the easement should not exist to the extent claimed by the vendor. The easement being thus incident and appurtenant to the property

sold, and constituting part of its value, it must be taken that the vendee paid for it. It therefore justly comes within the covenant of warranty of title, and the vendee would have his remedy for a breach of the covenant in respect to it. *Whitehead v. Garri's*, 8 Jones (N. C.) L. 171; *Boerett v. Dockery*, 7 Jones (N. C.) L. 890; *Adams v. Conover*, 87 N. Y. 423; Ang. Watercourses, § 158 *et seq.*; Gould, Waters, § 305; Washb. Easem. 183 *et seq.*

In this case the terms and scope of the deed of conveyance, relied upon by the plaintiff, are broad and comprehensive. They certainly embrace the right to erect dams across the river at the mill mentioned, and to pond the water as and to the extent claimed and exercised by the vendor at the time he executed the deed. The covenant of warranty of title is correspondingly comprehensive. If the vendor, at the time he sold and conveyed the land and mills to the plaintiff, claimed and exercised the right to pond the water on the lands of an adjoining owner by the erection of dams across the river, then his deed to the plaintiff embraced that right, and so did the covenant of warranty therein; and the plaintiff can, for the reasons already stated, maintain his action, if there was a breach of the covenant in respect to such right.

The assignment of the breach of covenant in the complaint is very general and defective. It should have been made more specific and definite as to the extent and nature of the easement, and the breach of the covenant in respect thereto; but we think the complaint is not so defective, in the respect mentioned, as to warrant the court in forcing the plaintiff to suffer a judgment of nonsuit. A cause of action is defectively, imperfectly stated; and this might be ground for demurrer, but not for a motion to dismiss the action because the complaint does not state facts sufficient to constitute a cause of action.

The plaintiff might have been allowed to amend the complaint; and, if the defendant would not require a better pleading, the court might *ex mero motu*, have required him to make proper amendments. *Johnson v. Finch*, 98 N. C. 205; *Halstead v. Mullen*, Id. 252; *Warner v. Western N. O. R. Co.* 94 N. C. 256.

It seems, however, that the court was of the opinion that the plaintiff alleged no cause of action at all, and it therefore gave the judgment of nonsuit appealed from.

*There is error. Let this opinion be certified to the Superior Court, to the end that further proceeding may be had in the action there according to law. It is so ordered.*

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

HEYB

NORTH GERMAN LLOYD.

(.....Fed. Rep.....)

**Effects of passengers not in daily use or attached to the person are not only to be contributed for, but are liable to contribute, in general average.**

**NOTE—Effects of passengers liable to contribute in general average. All property exposed to the risk of stranding must contribute in general average.**  
2 L. R. A.

(November 14, 1888.)

**A**PPPEAL by respondent from a decree of the District Court in favor of the libellant on a libel in admiralty for damages to the contents of libellant's trunks by fire on the respondent's steamer Ems. *Affirmed.*

*Mr. W. G. Choate* for appellant.

*Mr. R. D. Benedict* for appellee.

*Mutual Safety Ins. Co. v. The George, Olcott*, 157. All property on board the vessel at the time of the jettison and saved, unless attached to the person of



**Wallace, J.**, delivered the following opinion:

The only question which has been argued upon this appeal is whether passengers' effects are a subject of average contribution when sacrificed under the conditions of necessity and common peril constituting a general average loss.

The counsel for the appellant insists that they are not to be contributed for, but cites no authority directly to the point; and there seems to be no decided case in the courts of this country or England in which the question has been determined or considered. His argument is that passengers' effects do not contribute in a general average loss, and therefore should not be contributed for; because the principle of general average contribution is reciprocity of burden and benefit. But all the commentators, without exception, assert or assume as unquestionable that passengers' effects are to be paid for in case of sacrifice. Even the English text writers do not question this. Thus it is stated in 1 Maude & P. Shipp. 434, 435:

"But although these [the wearing apparel, luggage, jewels, or other property of this description belonging to the passengers, on board for use, but not for traffic] do not contribute, it is apprehended that if ammunition, passengers' baggage or other goods which are exempt, are sacrificed for the general good, they must be paid for, as other goods, by general contribution." See also Macl. Shipp. 684.

Among our own text writers, Mr. Phillips adverts to the question by quoting the language of Emerigon:

"The trunks of a passenger, thrown overboard for the general safety, must be contributed for; and why, if they are preserved, should they be exempted from contribution?" He also quotes Benecke: "Passengers ought to contribute for their trunks and luggage, because, if cast overboard, their value is allowed for." 2 Phil. Ins. § 1394.

There seems to be no American case in which the question has been considered whether passengers' effects contribute in general average to the payment of the loss. The argument that if they do not contribute they ought not to be contributed for is a legitimate one, and has commonly been invoked by the commentators to show that passengers' effects should contribute to the loss because they are contributed for. The doctrine that they do not contribute by the Law of England is supported by the authority of *Lord Tenterden* and *Chancellor Kent*. But the former, after remarking upon the wisdom and equity of the rule that all are to contribute toward a loss sustained by some for the benefit of all, observes: "The principle of the rule has been adopted by all commercial Nations; but there is no principle of maritime law that has been followed by

more variations in practice." Abb. Shipp. 474.

*Chancellor Kent* repeats this observation and adds: "And the rules of contribution in different countries, and before different tribunals, are so discordant, and many of the distinctions are so subtle and so artificial, that it becomes extremely difficult to reduce them to the shape of a connected and orderly system." 8 Kent, Com. 235.

The court below, in deciding that such effects are to be contributed for, considered the question whether they also contribute, and concluded that they do. The opinion of the District Judge is such a complete exposition of the whole subject upon authority and reason, that any further discussion of the questions involved is wholly unnecessary and would be superfluous. It is proper, however, to add to his citations, showing the views of the great admiralty authorities from the earliest ages that the effects of passengers not in daily use or attached to the person are to contribute in general average, some others which have been found by the counsel for the libellant.

In Brown's Civil Law, Vol. 2, p. 201 (published in 1802), the law is stated as follows: "All persons for whose benefit the act was done—the freighter, the master, the owner, the sailors, the passengers—must contribute. . . . All things in the ship and the bodies of the men [unless servants] must bear a proportionable share in the contribution. Doubts were formerly held whether money and jewels contributed, but they are now certainly included in the general rule."

In Jacobsen on Sea Laws, translated by Wm. Frick (published in 1818), it is said: "The trunks and effects of passengers are included in the adjustment of general average. The case does not often occur; but, when it does, the question arises, By what standard shall they be estimated? Oléirac, in his commentary upon the *Rolle of Oléron*, says: 'The passengers are required to have produced to the master previous proofs of the contents, or obtain indemnity only for the value of the empty trunk.'"

In Bedarride's Commentaire, Vol. 5, the distinguished author, after quoting Emerigon and Pothier to the effect that passengers' baggage must contribute, says (§ 1848): "The Code having only repeated the words of the Ordinance of 1681, we can, under it, accept as settled the principles taught by Emerigon and Pothier. Till now the question has not been raised. What has led to this result is that ordinarily the value of the passenger's baggage would not compensate for the delays or the expense of a settlement in general average, or the delays which would entail on navigation."

*The decree of the District Court is affirmed, with costs of this court.*

the passengers, is brought into contribution. *Harris v. Moody*, 30 N. Y. 290; *McAndrews v. Thatcher*, 70 U. S. 3 Wall. 374 (18 L. ed. 162); *Columbian Ins. Co. v. Ashby*, 38 U. S. 13 Pet. 331 (10 L. ed. 186); *U. S. v. Ames*, 1 Wood. & M. 81; *U. S. v. Wilder*, 3 Sumn. 318; *U. S. v. Barney*, 3 Hughes, 543, 3 Am. L. J. 123; *The Siren*, 74 U. S. 7 Wall. 161 (19 L. ed. 133); *The Davis*, 77 U. S. 10 Wall. 18 (19 L. ed. 870); *S. C. v. Blatchf.* 133; *The Marquis of Huntly*, 3 Hagr. Adm. 246; *Brown v. Stapleton*, 4 Bing. 119; *Revenue Cutter No. 1*, 1 Brown, Adm. 76, 11 Law Rep. N. S. 231; *The Santa-*

*simas Trinidad*, 20 U. S. 7 Wheat. 233 (5 L. ed. 454). Bank bills are regarded as property. *Harris v. Moody*, 30 N. Y. 290. Money, bills of credit, choses in action, etc., are excepted only when carried like clothes or luggage under the personal care of the passenger or seaman. *Peters v. Milligan*, cited in *Park Marine Ins. 8th ed. 230*; *Thanas v. Royal Ex. Assur. Co. Mar. Dig. 164*. It is only property saved which can be made to contribute for the loss. *Simonds v. White*, 2 Barn. & C. 805; *Souder v. Bradford*, 14 Pick. 13. See *Desty, Shipp. & Adm. § 229*.

## UNITED STATES CIRCUIT COURT, DISTRICT OF KENTUCKY.

## KENTUCKY &amp; INDIANA BRIDGE CO.

## LOUISVILLE &amp; NASHVILLE R. CO.

(.....Fed. Rep.....)

**1. Constitutional law; constitutional tenure of office of federal judges.** Congress, in establishing "inferior courts," and prescribing their jurisdiction, must confer upon the judges, appointed to administer them, the constitutional tenure of office, that of holding "during good behavior," before they can become invested with any portion of the judicial power of the government.

**2. Constitutional law; Interstate Commerce Commission; judicial powers.** The Act to Regulate Commerce does not undertake either to create an "inferior court," or to invest the Commission, appointed thereunder, with judicial powers, or functions.

**3. The Interstate Commerce Commission; judicial powers.** The Interstate Commerce Commission is invested with only administrative powers of supervision and investigation, which fall far short of making it a court, or its action judicial, in the proper sense of the term. Its action, or conclusion, upon matters brought before it for investigation, is neither final nor conclusive. Nor is it invested with any authority to enforce its decision, or award. It hears, investigates, and reports upon complaints made before it, but subsequent judicial proceedings are contemplated, and provided for, as the remedy for the enforcement of the order or report of the Commission, in all cases where the party against whom its decision is rendered does not yield voluntary obedience thereto.

**4. Interstate Commerce Commission; its duties and functions.** The Commission is charged with the duty of investigating and reporting upon complaints; and the facts, found or reported by it are only given the force and weight of "*prima facie*" evidence, in such judicial proceedings as may thereafter be had, for the enforcement of its recommendation, or order. The functions of the Commission are those of referees, or special commissioners, appointed to make preliminary investigation of, and report upon, matters for subsequent judicial examination and determination. In respect to interstate commerce matters, covered by the Law, the Commission may be regarded as the general referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred, of enforcing the rights, duties and obligations recognized and enforced by said law.

**5. Constitutional law; Interstate Commerce Commission; evidence.** Congress, under its sovereign and exclusive power to regulate commerce among the several States, has the power to create a commission, for the purpose of supervising, investigating, and reporting upon, matters or complaints connected with, or growing out of, interstate commerce. And no valid constitutional objection can be urged against making the findings of the Commission "*prima facie*" evidence, in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence, clearly within well recognized powers of the Legislature, and in no way encroaches upon the court's proper functions.

**6. Constitutional law; jurisdiction of**

**United States Circuit Court, under the Act to Regulate Commerce.** The Act does not make the circuit court the mere executioner of the Commissioners' order, or recommendation, so as to impose upon the court a nonjudicial power. The court is not restricted to the mere ministerial duty of enforcing an order of the Commission. The suit in this court is, under the provisions of the Act, an original and independent proceeding, in which the Commissioners' Report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case, as heard and reported by the Commission; but hears and determines the cause *de novo*, upon proper pleadings and proofs; the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy.

**7. Jurisdiction of the United States Circuit Court, independent of citizenship.** The right asserted by petitioner arises, and is claimed, under a law of the United States, which relates to a subject over which Congress has exclusive control; and this is sufficient to sustain the court's jurisdiction, independent of the citizenship of the parties to the controversy, since it involves a federal question.

**8. Common carriers; bridge companies.** Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for the engines, cars and trains of the railway company, the first section of the "Act to Regulate Commerce" regards the railway company as the owner or operator of the bridge and approaches, for the time being, as to all freight transported by the railway company over the bridge. And as to all such traffic, the railway company, and not the bridge company, must be regarded as the common carrier. Such a bridge company is not, either in law or in fact, a common carrier of interstate traffic, within the scope and meaning of said section; and it cannot invoke the provisions of said Act, to compel railway companies to transact business with or through such bridge company. Between such a bridge company and the railway carriers of the country, the Act establishes no such reciprocal relations, duties, and obligations as require the latter to form business connections with the former.

**9. Common carriers; transfer companies; switching cars.** Where a corporation which is under no legal obligation to do so, voluntarily contracts to switch cars over its tracks between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported, or transferred, in the cars, such corporation, in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman. In respect to cars or traffic thus handled, such corporation can only be regarded as a switchman or transfer company; and it is no more a common carrier of interstate commerce, or traffic within the provisions of the Law, than a city transfer company, which checks a passenger's baggage at the hotel where it is received, and carries it for an agreed compensation, to the station of the railway over which it is to be transported into another State.

**10. Common carriers, bridge companies,**

\*Head notes by the COURT.

2 L. R. A.

plain of another, that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions, which, under private contract or agreement, are conceded to other lines.

**24. Act to Regulate Commerce; rates for transportation of interstate traffic.** The first section of the Act provides that all charges for services, rendered by common carriers subject to the provisions of the Law, "shall be reasonable and just," and prohibits and declares unlawful "any unjust and unreasonable charge." This is the sole requirement of the Law, upon the subject of rates, which common carriers subject to the provisions of the Law may demand for the transportation of interstate traffic.

**25. Through routes and through rates.** Arrangements in respect to through freight traffic, and joint through rates or charges, as well as the forms of bills of lading, and the apportionment to be made, of such joint traffic rates, and of losses or damage to freight in course of transit, are all matters of private arrangements. Such arrangements, which usually include the reciprocal interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases and with other connecting lines, they might be prejudicial, and injurious to the interest of one, or both; and companies in the latter situation cannot properly claim, as matter of right, what the former have acquired under, and by virtue of, private contract or arrangement.

**26. Through routes and through rates; discrimination in charges or facilities.** At common law, the refusal of a common carrier to make through traffic arrangements, at, or upon joint through rates, with one connecting railroad company, such as it makes or enters into with another connecting line, does not constitute any undue or unreasonable discrimination in charges or facilities.

**27. Through routes and through rates; discrimination in charges or facilities; U. S. Rev. Stat. § 5258.** Section 5258 of U. S. Rev. Stat. (embracing the Act of June 15, 1886) imposes no duty; it merely permits, or authorizes, the carriage of traffic from one State to another, and to that end, the formation of continuous lines, by mutual agreement. It confers no power to compel a railroad company to make through routes and through rates with one connecting line because it has, by agreement, made them with another.

**28. Through routes and through rates; Act to Regulate Commerce.** It is clear that from the provisions of section 6 of the Act, two or more common carriers may lawfully enter into contracts, or agreements for the establishment of through routes at or upon joint through rates; because copies of such contracts and agreements, and of the joint tariffs of such carriers, are required to be filed with the Commission. If, in the exercise of the right, thus impliedly if not expressly recognized, a common carrier, by private arrangements forms a through route, and establishes joint through rates, with certain connecting lines, it cannot be compelled to concede to all other connecting railroads the same or equal through rates, on traffic which the latter may offer for transportation.

**29. Through routes and through rates; Act to Regulate Commerce.** The Act does not undertake to create between connecting lines

such an agency, or "quasi" partnership relation, as is necessarily involved in agreements, or arrangements, for the establishment of through routes, and the making of through rates; as such arrangements exist by contract, express or implied, the fact that a common carrier enters into them, with one or more connecting lines, does not impose upon such carrier the duty, or obligation, to make the same or like contracts with all other lines.

**30. Through routes and through rates; Act to Regulate Commerce.** No authority is conferred upon common carriers of interstate commerce, to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies.

**31. Through routes and through rates; Act to Regulate Commerce; English Acts of 1854 and 1873.** The Commission is not invested with authority to establish through routes, nor to fix through rates, between connecting lines. The English Act of 1873, amendatory of the Act of 1854, did confer such authority upon the English Commission; but our Act to Regulate Commerce contains no such provision, and confers no such authority.

**32. Through routes and through rates; rights of consignors to route their shipments.** An individual shipper, or consignor, cannot legally require a railroad company to send a shipment by a particular route, beyond the company's line, at the same, or equivalent through rates, which such company may have established with other connecting lines; and what the individual shipper of interstate commerce may not lawfully demand, common carriers engaged in transporting such commerce may not lawfully require of connecting lines.

**33. Through traffic, and local traffic; discrimination in rates.** In the absence of through traffic arrangements between two railroad companies, the one has the right to treat freights tendered to it by the other as local business, and to charge for the transportation thereof its local rates to destination; and in doing so, no discrimination is made against the other company, on the traffic it carries. Nor does the company, charging local rates on such freights, make, or give, any undue or unreasonable preference to other lines, or to the traffic they handle, with whom it has agreements for through routing, and at through joint rates which may be lower than its local rates to the same points; because the service in the two cases is not the same, or identical.

**34. Act to Regulate Commerce; U. S. Rev. Stat. § 5258; effect upon existing contracts.** Neither the Act to Regulate Commerce, nor the Act of June 15, 1886 (U. S. Rev. Stat. § 5258), was ever intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the Law. The observance of good faith between parties, the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the States, which the Act of June 15, 1886, aimed to promote.

**35. Act to Regulate Commerce; rule of construction in contests between common carriers.** The law should be as liberally

construed, in favor of commerce among the States, as its language will permit; but when complaint is made, or relief is sought, solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred. And where the complaining carriers are not in a position to commend themselves to the favorable consideration of a court of equity, no strained construction of the Law should be made, in order to afford them, or either of them, the relief they seek at the hands of the court.

**§1. Act to Regulate Commerce; reasonable, proper, and equal facilities; abandonment.** Under the terms and operations of a contract, made by a bridge company and three railroad companies, the railroad companies secured and enjoyed all reasonable, proper, and equal facilities, for the interchange of cars and traffic between them, which interchange was conducted for many years at the regular, established yard or depot of one of them, and the expenses of such interchange was shared by them, in certain proportions fixed by contract. After the passage of the Act to Regulate Commerce, one of the railroad companies voluntarily abandoned those facilities, and changed its business to another bridge—not in the interest of the public, nor of the interstate commerce it handled, but for its own private benefit and advantage; and then sought to compel the company (at whose yard the interchange of traffic had been conducted), to allow such interchange at a new point of connection, and to afford at such point facilities equal to those which the applicant had voluntarily abandoned. *Held*, that the application ought not to be granted.

**§2. Constitutional law; Act to Regulate Commerce.** Possessing such sovereign and exclusive power over the subject of commerce among the States, it is difficult to understand why Congress may not legislate, in respect thereto, to the same extent, both as to rates, and all other matters of regulation, as the States may do in respect to purely local or internal commerce; but the court is not called upon in the present case to say what would or would not come within this regulating power, for the existing Law does not undertake to prescribe anything more upon the subject of rates, than that they shall be reasonable and just; and it does not undertake to require a common carrier subject to its provisions to establish through routes and through rates with all connecting lines merely because it may have done so with one of them.

(Decided January, 1888.)

**PETITION** to the United States Circuit Court for the District of Kentucky, by the Kentucky & Indiana Bridge Company, under section 16 of the Act to Regulate Commerce (known as the Interstate Commerce Act), to compel the Louisville & Nashville Railroad Company to obey an order of the Interstate Commerce Commission requiring it to furnish to the Bridge Company (which owned and operated a railroad track) the same equal facilities for connection and interchange of traffic at a certain point which it furnished to certain railroad companies at another point. *Petition dismissed.*

2 L. R. A.

On final hearing before Howell, *Circuit Judge*, and Barr, *District Judge*, on petition, answer, referee's report, and exceptions.

The report, opinion, and order of the Interstate Commerce Commission in question, are reported in 2 Interstate Commerce Reports, page 102.

The facts and questions presented are set forth in the present opinion.

*Messrs. Ramsey, Maxwell & Ramsey, Bullitt & Shield*, and *E. F. Trabue*, for petitioner.

*Mr. Edward Baxter*, with *Mr. Lyttleton Cooke*, for respondent.

The Act to Regulate Commerce is unconstitutional.

I. The power to regulate commerce among the States does not include the power to destroy it.

Though the power to regulate commerce "with" foreign Nations, and "with" the Indian Tribes, is given to Congress in the same clause with the power to regulate commerce "among" the States, and though Congress may, by embargo, and nonintercourse laws, destroy all commerce between this country and foreign Nations, or the Indian Tribes, it cannot pass any such prohibitory laws in regard to commerce among the States.

See *Groves v. Slaughter*, 40 U. S. 15 Pet. 505, 506 (10 L. ed. 800); *Federalist* (ed. 1888) p. 555; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 572 (80 L. ed. 249); *Stone v. Farmers Loan & Trust Co.* 116 U. S. 881 (29 L. ed. 644).

II. The power "to regulate" commerce among the States does not include the power to create it.

The power to regulate commerce cannot be more extensive than the power to tax. It is said that, subject to certain limitations, the power to tax "reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State, in order to tax it."

*License Tax Cases*, 72 U. S. 5 Wall. 471 (18 L. ed. 500).

If Congress cannot authorize a business within a State in order to tax it, Congress cannot force a citizen of a State to engage in the business of interstate commerce in order to regulate his business.

III. The power delegated to Congress was the power to regulate commerce "among the several States;" the power has never been delegated to Congress, to regulate commerce among the people of the States.

The history of this clause of the Constitution conclusively proves that its sole object was to confer upon Congress the power to prevent, by appropriate regulation, such action by the several States, as might have a tendency to prefer their own commerce over that of their sister States; and that it was never intended to authorize Congress to interfere with the commercial transactions of private citizens, whether such transactions related to matters wholly confined to a single State, or to matters which extended to several States.

See *The Federalist*, Nos. 7, 22, 42; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 224, 225, 231 (6 L. ed.

plain of another, that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions, which, under private contract or agreement, are conceded to other lines.

**24. Act to Regulate Commerce; rates for transportation of interstate traffic.** The first section of the Act provides that all charges for services, rendered by common carriers subject to the provisions of the Law, "shall be reasonable and just," and prohibits and declares unlawful "any unjust and unreasonable charge." This is the sole requirement of the Law, upon the subject of rates, which common carriers subject to the provisions of the Law may demand for the transportation of interstate traffic.

**25. Through routes and through rates.** Arrangements in respect to through freight traffic, and joint through rates or charges, as well as the forms of bills of lading, and the apportionment to be made of such joint traffic rates, and of losses or damage to freight in course of transit, are all matters of private arrangements. Such arrangements, which usually include the reciprocal interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases and with other connecting lines, they might be prejudicial, and injurious to the interest of one, or both; and companies in the latter situation cannot properly claim, as matter of right, what the former have acquired under, and by virtue of, private contract or arrangement.

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**M. Act to Regulate Commerce; reasonable, proper, and equal facilities; abandonment.** Under the terms and operations of a contract, made by a bridge company and three railroad companies, the railroad companies secured and enjoyed all reasonable, proper, and equal facilities, for the interchange of cars and traffic between them, which interchange was conducted for many years at the regular, established yard or depot of one of them, and the expenses of such interchange was shared by them, in certain proportions fixed by contract. After the passage of the Act to Regulate Commerce, one of the railroad companies voluntarily abandoned those facilities, and changed its business to another bridge—not in the interest of the public, nor of the interstate commerce it handled, but for its own private benefit and advantage; and then sought to compel the company (at whose yard the interchange of traffic had been conducted), to allow such interchange at a new point of connection, and to afford at such point facilities equal to those which the applicant had voluntarily abandoned. *Held*, that the application ought not to be granted.

**N. Constitutional law; Act to Regulate Commerce.** Possessing such sovereign and exclusive power over the subject of commerce among the States, it is difficult to understand why Congress may not legislate, in respect thereto, to the same extent, both as to rates, and all other matters of regulation, as the States may do in respect to purely local or internal commerce; but the court is not called upon in the present case to say what would or would not come within this regulating power, for the existing Law does not undertake to prescribe anything more upon the subject of rates, than that they shall be reasonable and just; and it does not undertake to require a common carrier subject to its provisions to establish through routes and through rates with all connecting lines merely because it may have done so with one of them.

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The facts and questions presented are set forth in the present opinion.

*Messrs. Ramsey, Maxwell & Ramsey, Bullitt & Shield*, and *E. F. Trabue*, for petitioner.

*Mr. Edward Baxter*, with *Mr. Lyttleton Cooke*, for respondent.

The Act to Regulate Commerce is unconstitutional.

I. The power to regulate commerce among the States does not include the power to destroy it.

Though the power to regulate commerce "with" foreign Nations, and "with" the Indian Tribes, is given to Congress in the same clause with the power to regulate commerce "among" the States, and though Congress may, by embargo, and nonintercourse laws, destroy all commerce between this country and foreign Nations, or the Indian Tribes, it cannot pass any such prohibitory laws in regard to commerce among the States.

See *Groves v. Slaughter*, 40 U. S. 15 Pet. 505, 506 (10 L. ed. 800); *Federalist* (ed. 1888) p. 555; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 572 (30 L. ed. 249); *Stone v. Farmers Loan & Trust Co.* 116 U. S. 831 (29 L. ed. 644).

II. The power "to regulate" commerce among the States does not include the power to create it.

The power to regulate commerce cannot be more extensive than the power to tax. It is said that, subject to certain limitations, the power to tax "reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State, in order to tax it."

*License Tax Cases*, 73 U. S. 5 Wall. 471 (18 L. ed. 500).

If Congress cannot authorize a business within a State in order to tax it, Congress cannot force a citizen of a State to engage in the business of interstate commerce in order to regulate his business.

III. The power delegated to Congress was the power to regulate commerce "among the several States;" the power has never been delegated to Congress, to regulate commerce among the people of the States.

The history of this clause of the Constitution conclusively proves that its sole object was to confer upon Congress the power to prevent, by appropriate regulation, such action by the several States, as might have a tendency to prefer their own commerce over that of their sister States; and that it was never intended to authorize Congress to interfere with the commercial transactions of private citizens, whether such transactions related to matters wholly confined to a single State, or to matters which extended to several States.

See *The Federalist*, Nos. 7, 22, 42; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 224, 225, 231 (6 L. ed.

283); *Southern Steamship Co. v. New Orleans Port Wardens*, 73 U. S. 6 Wall. 83 (18 L. ed. 750); *Veazie v. Moor*, 55 U. S. 14 How. 574 (14 L. ed. 545); *Passenger Cases*, 49 U. S. 7 How. 394, 445 (12 L. ed. 702); *State Freight Tax Case*, 83 U. S. 15 Wall. 275 (21 L. ed. 161); *State Tonnage Tax Cases*, 79 U. S. 12 Wall. 214 (20 L. ed. 873); *License Cases*, 48 U. S. 5 How. 595 (12 L. ed. 256); *Welton v. Missouri*, 91 U. S. 280 (23 L. ed. 349); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204 (29 L. ed. 162); *Brown v. Maryland*, 25 U. S. 12 Wheat. 438, 440 (6 L. ed. 678); *State Tax on R. R. Gross Receipts*, 82 U. S. 15 Wall. 297 (21 L. ed. 169); 5 Elliott, Debates (ed. of 1881), pp. 112, 119.

IV. The cases, involving a construction of the clause of the Constitution conferring upon Congress the power to regulate commerce among the States, which have come before the supreme court for decision, have all arisen upon state legislation, where some State has attempted to discriminate against the commerce of other States; or to impose a tax, or other burden upon it; or to oppose some obstruction to it.

The cases decided prior to 1876 are summarized by *Justice Field* as follows: Upon an examination of the cases, it will be found that the legislation involved, imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles, or between particular places, was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on.

*Sherlock v. Alling*, 98 U. S. 102 (23 L. ed. 820).

The cases decided since 1876 can all be divided into the same classes.

In the following cases, a State by its legislation, attempted to impose a tax upon commerce:

*Cook v. Pennsylvania*, 97 U. S. 569, 570 (24 L. ed. 1016); *Guy v. Baltimore*, 100 U. S. 484 (25 L. ed. 743); *Webber v. Virginia*, 103 U. S. 350 (26 L. ed. 567); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067); *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59 (27 L. ed. 383); *Fargo v. Michigan*, 121 U. S. 230 (30 L. ed. 888); *Philadelphia & S. Steamship Co. v. Pennsylvania*, 122 U. S. 326 (30 L. ed. 1200); *Ratterman v. Western U. Teleg. Co.*, 127 U. S. 411 (32 L. ed. 229).

In the following cases a State, by its legislation, attempted to require a license for carrying on commerce:

*Moran v. New Orleans*, 112 U. S. 75 (28 L. ed. 655); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. ed. 153); *Walling v. Michigan*, 116 U. S. 446 (29 L. ed. 691); *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34 (29 L. ed. 785); *Robbins v. Shelby County Tazing Dist.*, 120 U. S. 439 (30 L. ed. 601); *Corson v. Maryland*, 120 U. S. 502 (30 L. ed. 699); *Leloup v. Mobile*, 127 U. S. 640 (32 L. ed. 811); *Asler v. Texas*, 128 U. S. 129 (32 L. ed. 363).

In the following cases a State, by its legisla-

tion, attempted to impose conditions for carrying on commerce:

*Hannibal & St. J. R. Co. v. Husem*, 95 U. S. 470 (24 L. ed. 529); *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, 96 U. S. 10 (24 L. ed. 710); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 224); *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347 (30 L. ed. 1187); *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465 (31 L. ed. 700).

In all cases referred to above the action condemned by the court was state action, and not the action of private citizens. In no case has the court held that the actions or contracts of individuals were illegal or void, simply because they may have amounted to burdens upon, or discriminations in regard to, commerce passing between the States.

V. There is nothing in the Constitution that requires the regulating power of Congress to be exercised by legislation.

"This power of regulation may be exercised without legislation as well as with it."

*Hall v. De Cuir*, 95 U. S. 490 (24 L. ed. 548).

Inaction by Congress on this subject is equivalent to a declaration that interstate commerce shall be free and untrammelled," so far as state action is concerned.

*Welton v. Missouri*, 91 U. S. 282 (23 L. ed. 350).

It is conceded, however, that congressional regulation is not limited to inaction. Congress may regulate state action by legislation, as well as without it; and many cases may arise where legislation by Congress may be necessary.

But when Congress attempts to regulate by legislation, or otherwise, the acts or contracts of private citizens, merely because they may amount to commerce passing between the States, then it assumes to exercise a power which the framers of the Constitution never dreamed of conferring.

VI. While laws affecting steamboats, steamships, and other vessels upon navigable waters, have at all times been regarded as commercial regulations, such has not been the case in respect to laws affecting roads.

See *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 235 (6 L. ed. 23); *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 470, 471 (22 L. ed. 638); *Veazie v. Moor*, 55 U. S. 14 How. 574 (14 L. ed. 545).

VII. The rights of commerce delegated to Congress by the Constitution, give to it no authority to invade the rights of private property. The franchise to charge tolls, fares and freights is a valuable property interest, conferred upon the turnpike and railroad companies by the States; and while such franchises are subject to public use, upon payment of lawful charges, they are the private property of the companies, and cannot be taken by the United States without due compensation.

*Conway v. Taylor*, 66 U. S. 1 Black, 632, 634 (17 L. ed. 202, 203); *State Freight Tax Case*, 83 U. S. 15 Wall. 277, 278 (21 L. ed. 162); *Passenger Cases*, 48 U. S. 7 How. 403 (12 L. ed. 702); *Searight v. Stokes*, 44 U. S. 8 How. 179 (11 L. ed. 537).

VIII. The "Act to Regulate Commerce" confers upon the Interstate Commerce Commission



judicial powers, in violation of the Constitution.

See U. S. Const. article 3, § 1; Act to Regulate Commerce, §§ 12, 18, 14, 15, 16, 17, 18; Rules of Practice of Commission, 1 Inters. Com. Rep. Appendix I, 1 Inters. Com. Com. Rep. p. 4; *United States v. Ferreira*, 54 U. S. 18 How. 46 (14 L. ed. 42); *United States v. Arredondo*, 31 U. S. 6 Pet. 708, 709 (8 L. ed. 547); *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 718, 750, 751 (9 L. ed. 1233).

The Interstate Commerce Commission is authorized to exercise every judicial power known to a court, except the power to issue effective process to enforce its decrees.

The members of the Commission hold office for the term of two, three, four, five, and six years respectively (sec. 11); and none of them hold "during good behavior." Congress must not only ordain and establish inferior courts within a State and prescribe their jurisdiction, but the judges appointed to administer them must possess the constitutional tenure of office [Const. art. 3, § 1] before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution.

*Benner v. Porter*, 50 U. S. 9 How. 244 (13 L. ed. 119).

IX. The Act of Congress "to Regulate Commerce" confers upon this court nonjudicial power.

See *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 284 (15 L. ed. 877); *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 718 (9 L. ed. 1233).

"Federal courts, under the Constitution, cannot be made the aids to any investigation by a commission or committee into the affairs of anyone."

*Re Pacific Railway Commission*, 32 Fed. Rep. 258.

**Jackson, C. J.**, delivered the opinion of the court:

On February 10, 1888, the Kentucky & Indiana Bridge Company, a corporation created by the Laws of Kentucky and Indiana, owning and operating a bridge across the Ohio River between Louisville and New Albany, and claiming to be a common carrier of interstate commerce, filed its petition before the Interstate Commerce Commission, against the Louisville & Nashville Railroad Company, alleging, as the ground of its complaint, that said Railroad Company, in violation of the provisions of the Act to Regulate Commerce, approved February 4, 1887, and in combination and conspiracy with the Louisville Bridge Company, a corporation owning and operating the only other bridge across the Ohio River at Louisville, and with other railroad companies interested in, and using, said last named bridge, for the purpose of preventing or obstructing the transfer of traffic and freight over petitioner's bridge, had refused, and was still refusing, to interchange traffic with, or to receive from petitioner, or the railroad companies using its bridge, cars, or freight, tendered said Louisville & Nashville Railroad Company, for transportation over its line or lines southward, or to deliver to petitioner, or any railroad company using its tracks and bridge, freights arriving by the Louisville

& Nashville Railroad at Louisville, for, or consigned to points on petitioner's said railway, or to any railroad connecting therewith at New Albany; although said Louisville & Nashville Railroad Company afforded such facilities for the interchange of traffic, to said Louisville Bridge Company, and to the railroads north of the Ohio River using that bridge. The point of connection between petitioner's track and that of the Louisville & Nashville Railroad, at which said interchange of traffic was demanded and refused, was at Seventh Street and Magnolia Avenue, in the City of Louisville. The prayer of the petition was "that the defendant (the Louisville & Nashville Railroad Company) be required, by the order of the Commission, to interchange traffic with the petitioner, and with the railway companies using its railroad, at said point of connection at Seventh Street and Magnolia Avenue, and to receive from petitioner, and said railway companies using its railroad, all freight tendered by it or them to said defendant for transportation to points on, or beyond, and by way of its railroad or railroads, and to deliver to petitioner, and to the railroad companies using petitioner's railroad, at said point of connection, all freights arriving at Louisville, over defendant's railroad, and consigned to petitioner, or to railroad companies using petitioner's railroad, or to points on the line of petitioner's railroad, or the railroads using its track."

In its answer to said petition, the defendant did not concede that the petitioner was a common carrier of interstate commerce. It admitted the physical connection of its own and the petitioner's tracks, at Seventh Street and Magnolia Avenue, which connection, under its charter, it could not prevent; but denied that such connection imposed upon it, either by the state or federal law, the duty of making a business connection for the interchange of traffic at that point.

It denied that said connection was a suitable and convenient place for the interchange of cars, or freight, with the petitioner, or railroads using its tracks and bridge, for the reason that neither itself nor the petitioner had any depot, platforms, buildings or other suitable facilities there, for the interchange of traffic, and because defendant had no clerks, agents, car inspectors, repairers or other employees at that point, to attend to the business of such interchanges.

It further denied that such interchange at said point could be made without the use of its tracks and terminal facilities by the petitioner. It further claimed that the requirement to interchange traffic at said point of connection would be unreasonable and improper, because the defendant already had in the City of Louisville four regular yards and depots, with ample facilities and accommodations for the handling and interchange of traffic arriving at or going from said city. That its main yard and depot for the reception and delivery of freight was at Ninth Street and Broadway, in the City of Louisville, where it interchanged traffic with the Louisville Bridge Company, and the railroads north of the Ohio River using that bridge, and where it had ample accommodations, and an adequate force of clerks, agents and employees to transact the business, and to make

all exchanges of traffic. The defendant further set up the fact that, in 1872, it had entered into a written contract with said Louisville Bridge Company, and with the Jeffersonville, Madison & Indianapolis Railroad Company, and the Ohio & Mississippi Railroad Company, under and by virtue of which it had agreed to interchange freights and traffic with said railroad companies, and any other company using said bridge, upon certain terms more favorable to itself than the Kentucky & Indiana Bridge Company had, or could offer, and which contract (hereafter fully set out) defendant felt was still obligatory and binding upon it. For these and other reasons set forth in its answer, the Louisville & Nashville Railroad Company claimed that it was not discriminating against petitioner, and was justified in not acceding to its demand for an interchange of traffic at the Seventh Street and Magnolia Avenue connection, as such interchange with petitioner at that point would entail upon it extra expense, inconvenience, and trouble, and compel it to violate its contract and obligations with the Louisville Bridge Company.

On the issues thus made, testimony, oral and written, was presented, and arguments were heard, before the Interstate Commerce Commission, which, on August 2, 1888, rendered its decision in the premises as follows:

"This case having been heretofore submitted on the evidence, and on written and printed briefs, and having been maturely considered, and the Commission now finding that complainant is a common carrier, and that, as such, defendant is bound and obliged by law to give to it equal facilities for the interchange of traffic, to those it affords to other common carriers; that defendant cannot lawfully refuse to receive traffic which is brought to it over the bridge of the complainant, on the ground that the railroad company bringing it had contracted with defendant to bring all its traffic across the Ohio River at this point on the Louisville bridge; and that the point of connection of complainant's line with defendant's road, in the City of Louisville, is a suitable point at which defendant should receive traffic for and from complainant—it is now ordered that the complaint be and the same is hereby sustained, and that defendant cease from refusing to receive from complainant, and the carriers using its track, the traffic brought and offered to it at the point of connection aforesaid. It is further ordered that defendant allow and afford to complainant, as a common carrier, at that point, the same equal facilities which it affords to other common carriers at the points of connection with their lines respectively. And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of the fifteenth section of the Act to Regulate Commerce."

Notice, embodying the order of the Commission, together with a copy of its report and opinion in the premises, was promptly sent to, and received by, the Louisville & Nashville Railroad Company; and thereafter, on the 12th day of September, 1888, the Kentucky & Indiana Bridge Company tendered to the Louisville & Nashville Railroad Company, at said

point of connection (Seventh Street and Magnolia Avenue in the City of Louisville), a Cincinnati, Hamilton & Dayton car, No. 18,083, from Cincinnati, Ohio, via the Ohio & Mississippi Railway, loaded with machinery, consigned to Columbia, Tenn., a point on the Nashville & Decatur division of the Louisville & Nashville Railroad—which the latter declined to receive. The general freight agent of the Kentucky & Indiana Bridge Company, in making tender of this car, addressed to T. J. Kean, the agent of the Louisville & Nashville Railroad Company, under date of September 12, 1888, the following note:

"Dear Sir—Cincinnati, Hamilton & Dayton car 18,082, from Cincinnati, via Ohio & Mississippi Railroad and the Kentucky & Indiana Bridge Company, containing machinery for Columbia, Tenn., is now standing on track, connecting Louisville & Nashville Railroad and the Kentucky & Indiana Bridge Company's belt line, at Seventh Street and Magnolia Avenue, and convenient for your engine to get hold of it. The regular billing for this car has been sent to your office, by the Ohio & Mississippi people, in the usual manner. Please say if you will accept and forward this freight."

The billing referred to in said letter, which was sent by the Ohio & Mississippi Railway to the Louisville & Nashville Railroad, was in the following form:

(FORM 1829.)

L. & N.—Louisville, Sept. 12, 1888.  
M. Harry Smythe, Columbia, Tenn.,  
No. 1442.  
To Ohio & Mississippi Railway Co. Dr.  
For transportation of merchandise from Cincinnati, 9, 12, 1888,  
W. B. Mem. car 18,083, C. H. D.

Address	Pack- age.	Description of Property.	Weight.	Rate.	Charges.
		Machinery, O. R., C. H. & D. ....	6980	15	\$10 44
		L. & N. ....		12	8 25
		Through .....		55	\$18 79
				80	

Received payment:

, Cashier.

Way-bill, Mem. car 18,083. From Cincinnati, O., 9, 12, 1888.  
No. 1442.—C., H. & D.

Louisville, 12th, 1888.

Received of Ohio & Mississippi Railway, the following described property, in good order except as noted:

Address.	Description of Property.	
Harry Smythe, Columbia, Tenn.,	Machinery, O. R.	6980

C., H. & D.

Charges, \$18.79.

The car thus tendered having been declined, the agent of the Louisville & Nashville Railroad Company returned said billing to the agent of the Kentucky & Indiana Bridge Com-

pany on the same day of the tender. Thereupon, the Kentucky & Indiana Bridge Company, on the 18th of September, 1888, filed its bill, or petition in this court, against the Louisville & Nashville Railroad Company, under the provisions of the sixteenth section of the Interstate Commerce Act, setting out and reciting therein the said proceedings had before the Commission, together with its report and order in the same, alleging that the findings of fact by said Commission were correct and true, and charging that, since the order of the Commission in the premises was made, and notice thereof delivered to defendant, complainant had, on its own behalf, and on behalf of other common carriers using its tracks, requested said defendant to make interchange of freight with it and with said carriers at the point of connection (Seventh Street and Magnolia Avenue), between petitioner's line and defendant's road, in the City of Louisville, and had brought and offered to defendant, at said point of connection, freight in car loads, coming from points beyond the State of Kentucky and north of the Ohio River, and destined to points beyond and south of the south line of the State of Kentucky, and had requested defendant to receive and forward the same, and had further requested defendant to afford petitioner as a common carrier, and to the common carriers using its tracks, the same facilities for the interchange of freight which defendant afforded to other common carriers in the City of Louisville, with their lines respectively; but that defendant had refused, and was still refusing, to interchange interstate freight of any sort, or under any circumstances, with it at said point of connection, or elsewhere in the City of Louisville, or to so interchange with any common carrier using its tracks; that defendant refused and was still refusing, either to receive or to deliver at said point of connection, or elsewhere in the City of Louisville, any freight whatever from or to petitioner, or any common carrier using its tracks; and in all respects had violated, refused and neglected, and would continue to violate, refuse and neglect to obey, in any respect, the lawful directions and requirements of said Commission as set forth in its said report and order, and would continue its refusal, in any manner, to interchange freight with, or to afford any facilities whatever to, petitioner, or to said common carriers using its tracks, for such interchange of traffic, or for receiving, forwarding and delivering passengers and property between the connecting lines of the petitioner and defendant. Wherefore the petitioner prayed "that by the writ of injunction, or other proper process issuing from this court, the defendant, the Louisville & Nashville Railroad Company, may be restrained from further continuing to violate or disobey said order and requirement of said Commission, and may be enjoined to render obedience to the same; and that the defendant may be so enjoined, and required to interchange traffic with your petitioner, and with the railway companies using your petitioner's railroad, at the said point of connection, at Seventh Street and Magnolia Avenue, in Louisville, Ky., and to receive from your petitioner, and said railroad companies using petitioner's railroad, all freight tendered by it, or them, to the said defendant

for transportation to points on, beyond and via defendant's railroad or railroads, and to deliver to the petitioner, or railroad companies using petitioner's railroad at said point of connection, all freight arriving at Louisville on defendant's railroad and consigned to the petitioner, or to said railroads using petitioner's railroad, or to points on the line of petitioner's railroad, or of railroad companies using petitioner's tracks, and for such other and further relief in the premises as to this honorable court may seem just, proper and equitable."

Upon the filing of said petition, this court, in conformity with the provisions of the sixteenth section of the Interstate Commerce Act, and to the end that a speedy hearing and determination of the matter in controversy might be had, issued its order directing defendant to be served with a copy of said petition, and requiring it to make its response or defense thereto on the third day of October, 1888, at which time the defendant appeared and filed its answer, which is quite lengthy and sets up various matters and grounds of defense, to the relief sought.

Respondent, after admitting petitioner's corporate capacity, sets out the Acts of Kentucky and Indiana, under and by virtue of which it was organized, and certain provisions of its amended and original charter showing the extent and character of its corporate powers and franchises, which respondent alleges constitute petitioner nothing more than a bridge company, having no right as a common carrier whatever, and only authorized to demand and receive tolls for the use of its bridge and terminal tracks connected therewith. Respondent denies that petitioner is, either *de jure* or *de facto*, a common carrier of interstate commerce, and disputes the correctness of the Commission's finding of fact, or conclusion of law, on that question. Respondent denies that petitioner, as such carrier, had tendered it any interstate freight or passengers for transportation over respondent's road since the order of the Commission.

In that connection, and as showing the character in which petitioner handles the freight or traffic which it sought to have interchanged at said point of junction in Louisville, respondent states that petitioner, on September 29, 1886, entered into a written contract with the Ohio & Mississippi Railroad Company, whose road enters Louisville from the north side of the Ohio River, under and by the terms of which the latter was allowed, for a period of twenty years, and upon the payment of an annual rental by way of toll, "to run its locomotives, cars and trains over petitioner's bridge and approaches;" said Ohio & Mississippi Railroad Company agreeing, on its part, "to carry and transport over the said bridge, approaches and railway tracks, all of its locomotives, cars, freight, passengers, mail, express matter, and everything else carried or transported by it on its own line of railroad, destined, or consigned to or from Louisville, and to or from points which require their passage over the Ohio River at or near Louisville;" "the interchange of freight business at Louisville, and New Albany, between said (Ohio & Mississippi) railway company, and any connecting road, shall be done over the tracks of the bridge company, between

the south approach to its bridge, and the tracks of such connecting road;" and that, by the fourth clause of said contract, petitioner agreed to transfer cars from the Ohio & Mississippi Railway Company's transfer yard south of Bank Street, in Louisville, to respondent's railroad, or the Chesapeake, Ohio & Southwestern Railroad, at a switching charge of \$1 per car.

Respondent further states that on June 21, 1887, the petitioner made and entered into a written contract with the Louisville Southern Railroad Company, whose road enters Louisville from the south, by the terms of which petitioner had leased to said railroad company, for the period of ninety-nine years, the equal right to possess and own, in common with petitioner, for railroad purposes, the railroad right of way, roadbed, main and side tracks, and switches, appurtenances, and fixtures, possessed or owned, or hereafter possessed or owned, by petitioner, on the south side of the Ohio River, between Magnolia Avenue and the yard of said Louisville Southern Railroad Company in Louisville; that by said contract it was further agreed that petitioner and said railroad company should construct a line of track, with the necessary switches and sidings, eastwardly along Magnolia Avenue to a connection with the track of respondent at or near the intersection of said Magnolia Avenue and Seventh Street, said connection to be constructed and maintained, at the joint expense of petitioner and said Louisville Southern Railroad Company, and to be operated by the latter in the manner stipulated; that by the eighth clause of said contract, the Louisville Southern Railroad Company agreed to provide and keep a sufficient number of suitable switching engines on hand, and to handle promptly all freight cars, to be moved between petitioner's transfer tracks in Louisville and the railroads of respondent, and the Chesapeake, Ohio & Southwestern, at a charge or switching rate to be fixed by the parties to said contract, which charge, or the gross revenue thus obtained, was to be divided between petitioner and the said railroad company, in the proportion of 55 per cent to the latter, and 45 per cent to the former, except as to the switching charges on cars of the Ohio & Mississippi Railway Company, which petitioner had, by its contract of September 29, 1886, agreed to transfer at \$1 per car. The Louisville Southern Railroad Company was to make no charge for switching such cars of the Ohio & Mississippi Railway Company, but the switching charge of \$1 for transferring the cars of that company was to be paid wholly to petitioner.

Under the operation of said contracts with the Ohio & Mississippi and the Louisville Southern Railroad Companies, respondent insists that petitioner had nothing to do with the carriage or transportation of any interstate freights coming from, or destined to, said Ohio & Mississippi Railway Company, except the duty of transferring the cars of said railway company between certain points south of the Ohio River, for an agreed switching charge of \$1 per car; and that by its contract with the Louisville Southern Railroad Company petitioner had assigned and transferred to the former the right to do all the switching business passing over petitioner's tracks; so that, as the

result of the two contracts, petitioner had nothing at all to do with interstate freight, carried either by the Ohio & Mississippi Railway Company or the Louisville Southern Railroad Company, and in respect to said freights was neither *de jure* nor *de facto* a common carrier. Respondent further states that petitioner owned no freight cars; that it had five engines and ten passenger cars, and assumed to transfer passengers between the Cities of Louisville and New Albany, but had never tendered respondent any passengers for transportation; that petitioner also assumed to carry freight locally between said cities, but has tendered none of such freight, to respondent, for transportation on its road.

Respondent also states that petitioner has on several occasions procured freight cars from railroad companies, and having loaded them on some one of the five side tracks in Louisville, connected with petitioner's track, assumed to issue bills of lading therefor, to points beyond Louisville or New Albany; but in all such cases the freight charges are paid to the railway companies, from whom the cars were ordered or procured, and that petitioner's only charges in the matter were for bridge tolls, and for its terminal services, in switching the loaded car; said bridge tolls varying from one and one fourth to six cents per hundred pounds, according to classification of freight, and the switching charges varying from \$1 to \$8 per car.

Respondent admits that it is a common carrier of interstate freight and passengers between points situated upon its railroad, but denies that it is a common carrier of such interstate traffic to or from points beyond its own railroad, or that it holds itself out to the public as a common carrier, undertaking to transport beyond its own lines.

Respondent avers that it has at all times refused to engage in the transportation of either freight or passengers to or from points beyond its own lines, except where certain agreements or arrangements had been made between itself and the other railroad companies, whose roads were part of the through routes under which agreements or arrangements certain through rates were established, and the proportions of these rates to be received by the different companies, whose roads formed the through routes were agreed upon; also the proportion in which losses resulting from such through business should be borne by said companies; also the terms and conditions to be inserted in the through tickets and bills of lading—but that respondent had never entered into any such agreement or arrangement with petitioner, and was unwilling to do so, or to act under through tickets or through bills of lading, which petitioner might see proper to issue, in the absence of such agreement, fixing and defining the terms and conditions of through traffic received from or to be delivered to petitioner.

Respondent admits the proceedings had before, and the report and order made thereon by, the Commerce Commission, as alleged in the petition; admits that since said Commission's order was made, and said notice thereof was delivered to respondent, petitioner had, on its own behalf, and, perhaps, assuming to act on behalf of the Ohio & Mississippi Railway

Company, requested the respondent to make interchange of freight with it, and with carriers using its track, at the point of connection between petitioner's track and respondent's track, at Seventh Street and Magnolia Avenue in the City of Louisville; that petitioner had requested respondent to afford it and the common carriers using its track the same facilities for the interchange of traffic at said point of connection which respondent affords to other common carriers in the City of Louisville, at other points where their connections are made, and that respondent had refused, and was still refusing, to interchange interstate freight of any sort, or under any circumstances, with petitioner, or with any common carrier using its track at petitioner's said point of connection. Respondent states that to accommodate certain local shippers at Louisville, whose establishments are located upon side tracks connected with the track of petitioner at Louisville, it has been, and is still willing, without being legally bound to do so, to accept at said point of connection car load freights, destined to points south of Louisville, on or reached by respondent's railroad system, and to transport the same at Louisville rates proper, provided such car load freights originate at or on local Louisville sidings, except a certain siding claimed to be owned by the Kentucky & Indiana Stock Yard Company; that since the order of said Commission, the petitioner had not brought or offered to respondent, at said Seventh Street and Magnolia Avenue connection, any freight, in car load lots, coming from points beyond the State of Kentucky, and north of the Ohio River, and destined to points beyond and south of the south line of the State of Kentucky, or any other interstate freight, which it had requested respondent to receive and forward, except in one instance, viz.: the car containing machinery, as above described, tendered on September 12, 1888, which respondent declined to receive; and respondent insists that in declining to receive said car, and in refusing to interchange traffic with petitioner, at said point of connection, it has not violated any lawful order or requirement of said Commission.

Respondent claims that the order of said Commission in petitioner's favor is not lawful, and it is not therefore bound to obey the same. Respondent denies the truth and correctness of said Commission's findings of fact, in several material particulars. It denies that petitioner is either *de jure* or *de facto* a common carrier of interstate commerce, as found and reported by the Commission. It denies that petitioner, as such carrier, has tendered respondent any interstate freight or passengers for transportation over its road since the order of the Commission. It denies that petitioner, even as a *de facto* common carrier, is now, or was, at the time of instituting said proceedings before the Commission, engaged in interstate traffic between points south or east of Louisville, or north of New Albany, and avers that the Ohio & Mississippi Railway Company was the only common carrier, engaged in said interstate traffic, handled or switched over petitioner's track.

In this connection, respondent says "that wherever petitioner has undertaken to load cars upon its sidings, either in New Albany, or Louisville for points in other States, it has pro-

cured the cars from railroad companies owning the lines for which said freight was destined; and the charges for the transportation of such freight were and are paid to said railroad company or companies furnishing the cars, the said bridge company (petitioner) rendering no service, and making no charge, in regard to said cars (or freight), except charges for switching them," and receiving its regular bridge toll, if the cars passed over its bridge.

Respondent denies that petitioner's connection with its track at Seventh Street and Magnolia Avenue, in Louisville, is a proper, suitable, and convenient point for the interchange of traffic, between respondent and petitioner, or with common carriers using the latter's tracks, as found by the Commission. Respondent states that there are no buildings at that point for clerks, porters or other employés, needed and required in carrying on an interchange of traffic there; that such interchange at that connection would entail extra expense and trouble upon respondent, would involve the use of its terminal facilities, as all cars interchanged at that point would have to be hauled from there over respondent's main track to its yard and freight depot at Ninth and Broadway, in Louisville; and if all the common carriers who might choose to use petitioner's tracks were to have an interchange of traffic at that point it would be very inconvenient and unsuitable, etc.

Respondent denies the correctness of the Commissioners' finding—that it refuses to afford petitioner, or common carriers using its bridge, all proper, reasonable and equal facilities for the interchange of traffic, such as respondent furnishes to other carriers of interstate commerce, at the City of Louisville—and states that "Respondent is, and has always been, willing to receive from, and deliver to, petitioner, at respondent's regular freight depot at Ninth and Broadway Streets, in Louisville, any freight that may be consigned to or by petitioner, upon being paid therefor Louisville rates proper;" and further says that "The facilities afforded by respondent at said depot are reasonable and proper in themselves, and are equal to the facilities which respondent affords to all other Louisville consignees or consignor; and as petitioner and respondent have made no agreements, or arrangements, for doing through business of any kind, petitioner is a mere local Louisville customer, so far as respondent is concerned, and is therefore entitled to no other facilities than those which respondent furnishes to all of its other Louisville customers."

Respondent further shows that it has three freight yards in the City of Louisville, and a fourth near thereto, which are fully adequate for the transaction of all its business, both freight and passenger; that its main or principal yard and depot is located at Ninth and Broadway, where the traffic crossing the Ohio River at Louisville is interchanged with the various railroads leading north from Louisville, and where local freight brought from the South, destined to Louisville, or received at Louisville destined to points south, is handled. Respondent says such is the capacity and commodious character of this yard and depot, that six trains, of eighteen cars each, making an aggregate of one hundred and eight cars, standing upon six tracks, can be loaded and unloaded at the same

**soliciting agents.** When a bridge company, owning no freight cars of its own, solicits freight for railway companies, who will furnish the cars, and over whose lines the freight is to go, and merely transfers such cars over its bridge, delivering them to the railway companies furnishing the same, and charging for its service its regular bridge toll, but making no charge for transporting the freight contained or carried in the cars, such a bridge company is not a common carrier of such interstate freight. The object and purpose of the bridge company, in thus constituting itself the soliciting agent for the railway companies, who are willing to provide the cars for the freight it may secure, is manifestly to obtain tolls for the use of its bridge; and the Law does not require the railway companies to keep up such an arrangement with the bridge company, in order to protect its interest in securing tolls for its bridge.

**11. Bridge companies; construction of charters; common carriers.** Where the charter of a bridge company makes its bridge and approaches thereto, such as it had authority to construct; a public thoroughfare, or highway, for the use of which, by railroads, or street cars, wagons, vehicles, animals and foot passengers, it was authorized to charge "reasonable tolls," for the collection of which, suitable toll gates could be established; the word "tolls," as used in such a charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services which the bridge company may perform, or be permitted to render.

**12. Bridge companies; construction of charters; common carriers.** Where the charter of a bridge company confers upon it the franchises and powers of building, maintaining, and operating its bridge and approaches, designated as its terminal facilities, such franchises and powers do not, in and of themselves, constitute the bridge company a common carrier of property; on the contrary they are appropriately confined to the erection, operation, and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private parties, upon making compensation therefor, in the shape of "reasonable tolls."

**13. Kentucky & Indiana Bridge Company; construction of charter; common carrier.** The charter powers of said company neither expressly, nor by any clear implication, confer upon it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor," nor do they, in any way, constitute said company a common carrier—the rule of construction applicable to such charters being, that "No power is conferred upon a corporation, which is not given expressly or by clear implication."

**14. Rights of connecting railroads; interchange of traffic.** Where the charter of a railroad company provided "that any and all such railroad or railroads, hereafter constructed, may connect and join with the road, hereby contemplated," the connection thus authorized is a physical, and not a business, connection, and it does not require an interchange of traffic at the point of junction.

**15. Act to Regulate Commerce; combinations to prevent the carriage of freight from being continuous; connecting railroads; through routes and through rates.** The seventh section makes it unlawful for any common carrier, subject to the provisions of the Act, to enter into any combination, con-

tract, or agreement, express or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights, from being continuous from the place of shipment to the place of destination," etc. It is no violation of said section for a railroad company to enter into contracts with other companies for the establishment of through routes, and through rates, for the continuous carriage of interstate traffic. Such contracts are in no wise inconsistent with the things forbidden by said section.

**16. Act to Regulate Commerce; reasonable, proper, and equal facilities; common carriers; connecting railroads.**

The second clause of the third section provides that "Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities, for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property, to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, etc.;" but neither this, nor any other provision of the Law, requires of the common carrier of interstate commerce the duty of either forming new connections, or of establishing new stations for the reception and delivery of freights. The Act to Regulate Commerce deals with such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish. When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable and ample stations and depots, for the accommodation of their business, the Law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards, or depots, even though such additional constructions might be for the convenience of the public, or of other carriers—Congress has certainly not undertaken, even if it possessed the power, to deal with such matters.

**17. Act to Regulate Commerce; reasonable, proper and equal facilities; connecting railroads.** When a new railroad makes a physical connection with an old railroad, at a point other than the established yard or depot of the old road, but neither company has any yard, station, depot, or ground, at the point of connection; nor any buildings, sheds, or platforms there, for the reception and accommodation of freights, to be handled and exchanged at that point; nor any clerks or employes, stationed there for the inspection of cars, reception of freights, etc.—an interchange of traffic at such a point cannot be made in a proper and convenient way to either company; and no authority is conferred upon the Commission, or upon this court, to compel the old company to provide at said point of connection the same or equal facilities, which it had previously provided at its regular, established yards and depots.

**18. Act to Regulate Commerce; reasonable, proper, and equal facilities; connecting railroads; receiving, forwarding and delivering freight.** Where a new railroad makes a physical connection with an old railroad, at a point other than the established yard or depot of the old road, and there are no facilities at said connection for receiving, forwarding, or delivering freight, individual shippers, or consignees of freight, have no right to

require the old company to receive or deliver their traffic at such point of connection; and the new company, or other companies using its tracks, cannot properly demand or require of the old company, to concede to it, or them, rights and facilities which the old company is under no obligation, or duty, to grant, or provide for individual owners or shippers of interstate commerce. This would be conferring upon common carriers, engaged in transporting interstate traffic, rights and privileges superior to those intended for the benefit of such commerce itself. The Law was not designed to advance the interests of carriers; but was intended for the benefit and advantage of the commerce they transported; and the provisions of the Act all look to that as its object and purpose.

**21. Act to Regulate Commerce; discrimination; undue or unreasonable preference or advantage; facilities for interchange of traffic; connecting railroads.** The fact that a railroad company interchanges traffic with certain railroads, at its regular established yard or depot (where it has provided all reasonable, proper, and equal facilities for that purpose), and refuses to interchange traffic with a new road, at a point of connection where no such facilities exist, does not constitute any "discrimination," or any "undue or unreasonable preference or advantage," in favor of the railroads, with which such interchange is made. The third section of the Act does not mean that whatever facilities a railroad company may furnish, or provide, for the interchange of business with connecting lines, at any one place (such as its regularly established and properly equipped depot), it is bound to provide for any and all other railroads, at such other and different points as they may select in making their connection. On the contrary, said section means, that where a railroad subject to the provisions of the Act has provided and established, at any given place, its facilities, in the shape of yards, stations, and depots, for the interchange of traffic, or for the receiving, forwarding, and delivering of passengers and property, and there affords such facilities to some of its connecting lines, it shall not deny to other connecting lines at that point, the same proper, reasonable, and equal facilities.

**22. Act to Regulate Commerce; facilities for interchange of traffic; connecting railroads.** It by no means follows because certain facilities for the interchange of freight are furnished by a railroad to another connecting line or lines at one point, upon certain terms, conditions and considerations, and where ample accommodations for the transaction of such business are provided and maintained at the joint expense of the companies using them, that another company, making a physical connection with the road (furnishing such facilities) at another, different, and distant place, is entitled to demand at said different point of connection, the same, or equal facilities. The company making the physical connection, at a point other than that at which the established road has already provided its facilities, and conducts its interchange with other connecting lines, cannot demand or require an interchange at such point of physical connection, without first furnishing at such point reasonable and proper facilities for the interchange sought. It cannot rely upon the terminal facilities at another point of the road, with which it has formed the physical connection; nor can it compel the road, with which the connection is made, to join with it, in the expense of providing,

at that point, the facilities necessary and proper for the interchange.

**21. Act to Regulate Commerce; dissimilar circumstances and conditions; discriminations; preferences; connecting railroads.** No provision of the Act confers equal facilities upon connecting lines, under dissimilar circumstances and conditions. On the contrary, even as to interstate commerce itself, the distinction is recognized throughout the law, between discriminations and preferences which are just and reasonable, and those which are unjust and unreasonable, according as they are made, or given, under similar or dissimilar circumstances and conditions. All discriminations and preferences are not forbidden, or made unlawful; but only such as are unjust, or undue, or unreasonable. In each and every case, therefore, the question whether a discrimination is unjust, or a preference is undue, or unreasonable, either as to the common carrier, or the commerce it may transport, involves a consideration of the circumstances and conditions under which such discrimination, or preference, is made or given.

**22. Act to Regulate Commerce; use of tracks and terminal facilities; connecting railroads.** An interchange of traffic at a new point of connection between railroads, where there are no buildings, sheds, platforms, or other facilities, for the proper care, protection, and handling of freight, and no clerks, or employees, stationed there to look after, and attend to the business, cannot possibly be carried on, without requiring the old road to concede the use of its track and terminal facilities to the new road, or without imposing upon the old road the trouble, inconvenience, and expense of handling the traffic interchanged between them; and neither the Commission, nor this court, has any authority to require the old road to concede the use of its tracks and terminal facilities, in order to accomplish an interchange of traffic; nor can this court, or the Commission, impose upon the old road the duty of making such interchange, at its own expense, over its own tracks, with its own engines, at its own yard, and with its own employees. Such interchanges between railroads are arranged by mutual agreements, fixing the compensation to be paid for services, and for the use of improvements, and providing for "prorating," the expense incident to such interchange. But if the parties cannot themselves agree upon such terms, neither this court nor the Commission can make an agreement for them, under the existing Law, and under circumstances such as exist in this case.

**23. Act to Regulate Commerce; use of tracks and terminal facilities; connecting railroads; discrimination.** The provision in the third section of the Act, to the effect that a common carrier shall not be required "to give the use of its tracks and terminal facilities to another carrier engaged in like business," is a limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities, for the interchange, or for the receiving, forwarding, and delivering, of traffic to, from, and between, connecting lines; and therefore it is left open to any common carrier to contract, or enter into arrangements, for the use of its tracks and terminal facilities, with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in such arrangements. No common carrier can, therefore, justly com-



plain of another, that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions, which, under private contract or agreement, are conceded to other lines.

**24. Act to Regulate Commerce; rates for transportation of interstate traffic.** The first section of the Act provides that all charges for services, rendered by common carriers subject to the provisions of the Law, "shall be reasonable and just," and prohibits and declares unlawful "any unjust and unreasonable charge." This is the sole requirement of the Law, upon the subject of rates, which common carriers subject to the provisions of the Law may demand for the transportation of interstate traffic.

**25. Through routes and through rates.** Arrangements in respect to through freight traffic, and joint through rates or charges, as well as the forms of bills of lading, and the apportionment to be made of such joint traffic rates, and of losses or damage to freight in course of transit, are all matters of private arrangements. Such arrangements, which usually include the reciprocal interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases and with other connecting lines, they might be prejudicial, and injurious to the interest of one, or both; and companies in the latter situation cannot properly claim, as matter of right, what the former have acquired under, and by virtue of, private contract or arrangement.

**26. Through routes and through rates; discrimination in charges or facilities.** At common law, the refusal of a common carrier to make through traffic arrangements, at, or upon joint through rates, with one connecting railroad company, such as it makes or enters into with another connecting line, does not constitute any undue or unreasonable discrimination in charges or facilities.

**27. Through routes and through rates; discrimination in charges or facilities; U. S. Rev. Stat. § 5258.** Section 5258 of U. S. Rev. Stat. (embracing the Act of June 15, 1880) imposes no duty; it merely permits, or authorizes, the carriage of traffic from one State to another, and to that end, the formation of continuous lines, by mutual agreement. It confers no power to compel a railroad company to make through routes and through rates with one connecting line because it has, by agreement, made them with another.

**28. Through routes and through rates; Act to Regulate Commerce.** It is clear that from the provisions of section 6 of the Act, two or more common carriers may lawfully enter into contracts, or agreements for the establishment of through routes at or upon joint through rates; because copies of such contracts and agreements, and of the joint tariffs of such carriers, are required to be filed with the Commission. If, in the exercise of the right, thus impliedly if not expressly recognized, a common carrier, by private arrangements forms a through route, and establishes joint through rates, with certain connecting lines, it cannot be compelled to concede to all other connecting railroads the same or equal through rates, on traffic which the latter may offer for transportation.

**29. Through routes and through rates; Act to Regulate Commerce.** The Act does not undertake to create between connecting lines

such an agency, or "quasi" partnership relation, as is necessarily involved in agreements, or arrangements, for the establishment of through routes, and the making of through rates; as such arrangements exist by contract, express or implied, the fact that a common carrier enters into them, with one or more connecting lines, does not impose upon such carrier the duty, or obligation, to make the same or like contracts with all other lines.

**30. Through routes and through rates; Act to Regulate Commerce.** No authority is conferred upon common carriers of interstate commerce, to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies.

**31. Through routes and through rates; Act to Regulate Commerce; English Acts of 1854 and 1873.** The Commission is not invested with authority to establish through routes, nor to fix through rates, between connecting lines. The English Act of 1873, amendatory of the Act of 1854, did confer such authority upon the English Commission; but our Act to Regulate Commerce contains no such provision, and confers no such authority.

**32. Through routes and through rates; rights of consignors to route their shipments.** An individual shipper, or consignor, cannot legally require a railroad company to send a shipment by a particular route, beyond the company's line, at the same, or equivalent through rates, which such company may have established with other connecting lines; and what the individual shipper of interstate commerce may not lawfully demand, common carriers engaged in transporting such commerce may not lawfully require of connecting lines.

**33. Through traffic, and local traffic; discrimination in rates.** In the absence of through traffic arrangements between two railroad companies, the one has the right to treat freights tendered to it by the other as local business, and to charge for the transportation thereof its local rates to destination; and in doing so, no discrimination is made against the other company, on the traffic it carries. Nor does the company, charging local rates on such freights, make, or give, any undue or unreasonable preference to other lines, or to the traffic they handle, with whom it has agreements for through routing, and at through joint rates which may be lower than its local rates to the same points; because the service in the two cases is not the same, or identical.

**34. Act to Regulate Commerce; U. S. Rev. Stat. § 5258; effect upon existing contracts.** Neither the Act to Regulate Commerce, nor the Act of June 15, 1880 (U. S. Rev. Stat. § 5258), was ever intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the Law. The observance of good faith between parties, the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the States, which the Act of June 15, 1880, aimed to promote.

**35. Act to Regulate Commerce; rule of construction in contests between common carriers.** The law should be as liberally

construed, in favor of commerce among the States, as its language will permit; but when complaint is made, or relief is sought, solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred. And where the complaining carriers are not in a position to commend themselves to the favorable consideration of a court of equity, no strained construction of the Law should be made, in order to afford them, or either of them, the relief they seek at the hands of the court.

**5. Act to Regulate Commerce; reasonable, proper, and equal facilities; abandonment.** Under the terms and operations of a contract, made by a bridge company and three railroad companies, the railroad companies secured and enjoyed all reasonable, proper, and equal facilities, for the interchange of cars and traffic between them, which interchange was conducted for many years at the regular, established yard or depot of one of them, and the expenses of such interchange was shared by them, in certain proportions fixed by contract. After the passage of the Act to Regulate Commerce, one of the railroad companies voluntarily abandoned those facilities, and changed its business to another bridge—not in the interest of the public, nor of the interstate commerce it handled, but for its own private benefit and advantage; and then sought to compel the company (at whose yard the interchange of traffic had been conducted), to allow such interchange at a new point of connection, and to afford at such point facilities equal to those which the applicant had voluntarily abandoned. *Held*, that the application ought not to be granted.

**6. Constitutional law; Act to Regulate Commerce.** Possessing such sovereign and exclusive power over the subject of commerce among the States, it is difficult to understand why Congress may not legislate, in respect thereto, to the same extent, both as to rates, and all other matters of regulation, as the States may do in respect to purely local or internal commerce; but the court is not called upon in the present case to say what would or would not come within this regulating power, for the existing Law does not undertake to prescribe anything more upon the subject of rates, than that they shall be reasonable and just; and it does not undertake to require a common carrier subject to its provisions to establish through routes and through rates with all connecting lines merely because it may have done so with one of them.

(Decided January, 1890.)

**P**ETITION to the United States Circuit Court for the District of Kentucky, by the Kentucky & Indiana Bridge Company, under section 16 of the Act to Regulate Commerce (known as the Interstate Commerce Act), to compel the Louisville & Nashville Railroad Company to obey an order of the Interstate Commerce Commission requiring it to furnish to the Bridge Company (which owned and operated a railroad track) the same equal facilities for connection and interchange of traffic at a certain point which it furnished to certain railroad companies at another point. *Petition dismissed.*

3 L. R. A.

On final hearing before Howell, *Circuit Judge*, and Barr, *District Judge*, on petition, answer, referee's report, and exceptions.

The report, opinion, and order of the Interstate Commerce Commission in question, are reported in 2 Interstate Commerce Reports, page 102.

The facts and questions presented are set forth in the present opinion.

*Messrs. Ramsey, Maxwell & Ramsey, Bullitt & Shield, and E. F. Trabue*, for petitioner.

*Mr. Edward Baxter*, with *Mr. Lyttleton Cooke*, for respondent:

The Act to Regulate Commerce is unconstitutional.

I. The power to regulate commerce among the States does not include the power to destroy it.

Though the power to regulate commerce "with" foreign Nations, and "with" the Indian Tribes, is given to Congress in the same clause with the power to regulate commerce "among" the States, and though Congress may, by embargo, and nonintercourse laws, destroy all commerce between this country and foreign Nations, or the Indian Tribes, it cannot pass any such prohibitory laws in regard to commerce among the States.

See *Groves v. Slaughter*, 40 U. S. 15 Pet. 505, 506 (10 L. ed. 800); *Federalist* (ed. 1888) p. 555; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 572 (30 L. ed. 249); *Stone v. Farmers Loan & Trust Co.* 116 U. S. 381 (29 L. ed. 644).

II. The power "to regulate" commerce among the States does not include the power to create it.

The power to regulate commerce cannot be more extensive than the power to tax. It is said that, subject to certain limitations, the power to tax "reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State, in order to tax it."

*License Tax Cases*, 72 U. S. 5 Wall. 471 (18 L. ed. 500).

If Congress cannot authorize a business within a State in order to tax it, Congress cannot force a citizen of a State to engage in the business of interstate commerce in order to regulate his business.

III. The power delegated to Congress was the power to regulate commerce "among the several States;" the power has never been delegated to Congress, to regulate commerce among the people of the States.

The history of this clause of the Constitution conclusively proves that its sole object was to confer upon Congress the power to prevent, by appropriate regulation, such action by the several States, as might have a tendency to prefer their own commerce over that of their sister States; and that it was never intended to authorize Congress to interfere with the commercial transactions of private citizens, whether such transactions related to matters wholly confined to a single State, or to matters which extended to several States.

See *The Federalist*, Nos. 7, 22, 42; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 224, 225, 231 (6 L. ed.

ized to be issued by the respective parties to such arrangements to and from the points designated by their agreement.

If the railroads north of the river, although parties to such arrangements with the Louisville & Nashville Railroad Company, bring freight to Louisville for transportation south, via the Louisville & Nashville Railroad Company, in violation of the terms, conditions and restrictions of the agreement for through route and through rate, or for points other than those embraced in the arrangement, the Louisville & Nashville Railroad Company refuses to receive and transport the same, except at local Louisville rates, treating such freight as a local Louisville shipment. In the absence of express contract, fixing the period during which such arrangements for through routes and rates shall continue, they are subject to change, modification, or abrogation, on notice from any of the parties, and are actually changed, or abrogated, from time to time, as the interest of the companies may dictate or require.

Respondent's existing arrangements or agreements with railroad companies entering Louisville from the north side of the Ohio River over the Louisville Bridge, for through routing and through rating, upon agreed *pro rata* division of rates, provide, and require, that all such traffic shall be interchanged at Tenth and Maple Streets, or between Ninth and Tenth Streets, near Broadway, where respondent's main freight yard is located, and where ample facilities have been provided for such interchange.

The Louisville & Nashville Railroad Company has never entered into any arrangement with the petitioner for the interchange of interstate traffic on through routes and at through rates, and refuses to receive such freight from it, except the same be delivered at one of respondent's freight stations, where respondent will receive such freight, issue proper bills of lading therefor, and transport it, upon precisely the same terms and conditions on which like kind of property is received and handled for other Louisville shippers.

It is shown by the evidence that arrangements for joint through routes and through rates, which create and establish a quasi partnership and agency relation between the parties thereto are always and necessarily the subject matter of private contract or agreement between the railway companies, over whose roads the traffic is conducted, based upon various considerations, such as the division of rates, the solvency, reliability, and promptness of the respective lines; their ability to furnish equipment and suitable facilities for the dispatch of business; their ability to deliver business to the through line, or the traffic each can furnish; the mileage rate to be paid or allowed on cars passing on or over each other's line, the method of adjusting losses, the effect upon their other traffic, etc.

From 1850 to 1872 traffic crossing the Ohio River at Louisville had to be transferred by means of ferry boats, which was attended with great expense, delay and trouble, and often subject to serious interruptions by low stages of water and ice on the river. To remedy this condition of things the Louisville Bridge Company was incorporated by the State of Kentucky March 10, 1856, with powers to construct

a railroad bridge across the Ohio River at Louisville.

By an amendment to the charter made in 1863, the bridge company was authorized to contract with any railroad company incorporated under the Laws of the State of Kentucky, or any other State of the United States, to warrant the annual profits of the bridge, to be built by said company, to be equal to the keeping of the bridge in repair, and of its operation, and that the net earnings should be equal to 6 per cent on the cost of \$1,000,000. It was further authorized to contract, at any agreed sum or rate, with any railroad company chartered by the State of Kentucky, or any other State of the United States, for the annual use of said bridge by the cars, or for the purpose of said railroad company; and any railroad company incorporated by the State of Kentucky was authorized to subscribe to the stock, or make the guaranties and agreements, authorized by the charter.

The bridge was declared to be a lawful structure by an Act of Congress approved July 14, 1862. This Act was amended in 1865, so as to authorize the Louisville & Nashville Railroad Company, and the Jeffersonville Railroad Company, to construct a railroad bridge over the Ohio River at Louisville.

Under these Acts of legislation, the capital stock of the Louisville Bridge Company was subscribed for by the Jeffersonville, Madison & Indianapolis Railroad Company, the Louisville & Nashville Railroad Company, and other corporations, and by individuals. The Louisville & Nashville Railroad Company owned \$300,000 of the stock until December, 1880, when it ceased to be a stockholder.

On June 5, 1872, upon the completion of said bridge, a written contract was entered into between the Louisville Bridge Company of the first part, the Jeffersonville, Madison & Indianapolis Railroad Company of the second part, the Ohio & Mississippi Railway Company of the third part, and the Louisville & Nashville Railroad Company of the fourth part, in which it was recited that the capital stock of the bridge company was \$1,500,000, and that its mortgage debt was \$800,000, evidenced by bonds to mature December 1, 1888, bearing interest at 7 per cent, payable semi-annually. The contract provided that the second, third and fourth parties agreed to use the bridge as covenanted therein; that the tolls and charges over and for the use of the bridge and its tracks, in the transportation of freight, passengers, mails and other goods, received from or delivered to the roads of said second, third and fourth parties, per ton, and per passenger, or per car, engine, or other means of transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll, or charge, sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge, paying a dividend semi-annually of 6 per cent on the capital stock of \$1,500,000, the interest upon the bonds, as the same shall become payable, a sinking fund sufficient to pay off the bonds of \$800,000 at maturity, the amount necessary to keep up the corporate organization of the first party, with its proper officers and servants, and such taxes as may be chargeable against the bridge company on said bridge, or other prop-

erty appertaining thereto, or otherwise. That the charges and tolls shall, from year to year, be reduced in proportion to the reduction of interest on the bonds, by the operation of said sinking fund, and the tolls and charges shall always be the same to each of the second, third and fourth parties; that the tolls and charges to other railroads or railroad companies, for like use of the bridge and the approach owned by the first party, shall not be less than those charged to or incurred by the parties to the contract; that all such tolls and charges paid by other railroads, or other railroad companies, shall be applied to, and form a part of, the fund provided for the payment of expenses, sinking fund, interest, dividends and taxes, the same as if paid by the second, third and fourth parties to the contract.

The parties of the second and third parts agree that they will pass over the said bridge all the freight, passengers, mails, express matter and other goods carried on or over their roads to and from Louisville, and to and from points which require their passage over the Ohio River at or near Louisville, during the existence of the agreement, and will pay punctually to the bridge company the tolls and charges for the use by them of the bridge, tracks and approaches owned by the bridge company.

The Louisville & Nashville Railroad Company covenanted with each of the other companies to deliver to the Louisville Bridge Company, to be passed over the said bridge, or to the parties of the second or third parts, or to such other railroad company or companies as may, for the time being, be transporting freight, passengers, mails, express matter and other goods over the bridge, all the freight, passengers, mails, express matter and other goods carried on or over its roads, or any part thereof, destined for any points which require their passage over the Ohio River at or near Louisville, during the existence of the agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of tolls and charges provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party.

The approach to said bridge at the north end was owned by the Jeffersonville, Madison & Indianapolis Railroad Company; and the Ohio & Mississippi Railway Company agreed with the Jeffersonville, Madison & Indianapolis Railroad Company to use said approach to said bridge in going into and over it; and it was agreed between them that all the trains, cars and engines passing over the approach, and over the bridge, shall be under the control and direction of the Jeffersonville, Madison & Indianapolis Railroad Company, and that whatever rules are prescribed for the government of the trains, cars and engines of that company shall be equally applicable to the trains, cars and engines of the Ohio & Mississippi Railway Company, each being dealt with alike. And the Jeffersonville, Madison & Indianapolis Railroad Company covenanted to furnish all needful and sufficient engines for the service so provided for, and at all times to transfer with the same promptness and care over said bridge the trains, cars, engines and traffic of the third and fourth parties, that it does the trains, cars, engines and

traffic received from or to be delivered to its own road, it being intended that each of the parties shall enjoy equal facilities over the approach and the bridge.

A reasonable compensation is provided for, to be paid to the Jeffersonville, Madison & Indianapolis Railroad Company for the service to be rendered, to be apportioned between the parties to the contract in proportion to the service to each.

It is further provided that the contract shall continue in force and operation until it shall be terminated by some one of the parties thereto giving notice in writing to the other parties, of its intention to terminate the same at the expiration of two years from the giving of such notice; at the expiration of two years the same shall terminate as to all the parties thereto included in such notice.

When said contract went into operation, and to provide for the interchange of the traffic as therein contemplated, the Louisville & Nashville Railroad Company, at its own expense, constructed freight platforms and improvements therefor on the south side of Maple Street, in Louisville, near Tenth Street, at which point connection was readily and easily made with the tracks of the Louisville Bridge Company and the Jeffersonville, Madison & Indianapolis Railroad Company, running south from the river along Fourteenth Street.

On May 22, 1873, the Louisville & Nashville Railroad Company, the Jeffersonville, Madison & Indianapolis Railroad Company, and the Ohio & Mississippi Railroad Company, designated as the parties of the first, second and third parts respectively, entered into a written contract whereby the first party leased to the second and third parties a portion of the ground and terminal facilities, then occupied jointly by the three parties and situated on the south side of Maple Street, in Louisville, between Eleventh and Tenth Streets, and on Tenth Street, where interchange of traffic had been and was being effected between them, for which the second and third parties were to pay the first party \$200 per month; the proportion of said sum which the second and third parties were respectively to pay being graduated according to the number of car loads of freight transferred for each by the first party. Said second and third parties were also to pay the first party the sum of \$7,515.80, being one half of the actual cost of the improvement, consisting of platforms, etc., made on said ground; the proportion which the second and third parties were to pay of said sum being 57 per cent for the former, and 43 per cent for the latter. The agreement further provided that when said parties of the second and third parts should pay said amount, with interest from January 1, 1873, they should be joint owners with the first party, of said improvement, in proportion to the amounts paid toward the whole cost of the same, viz.: \$15,080.58. The contract provided for the readjustment of this one half ownership in the building, from year to year, on the basis of the work done at said transfer platform, for said second and third parties respectively. The lease was to continue for five years, after which it was optional with the first party to continue the same. The arrangement was not terminated at the expiration of five years, but

was continued thereafter by the parties to the same.

The Louisville & Nashville Railroad Company having, some years after the execution of said contract, changed its track gauge to conform to that of other roads north of the Ohio River, and constructed much more commodious platforms, and buildings, and large yards, at Ninth and Broadway Streets, about four or five hundred feet east of the Maple Street platform, it was agreed between said parties that their interchange of traffic should take place at that point; and it was accordingly done at said Ninth and Broadway yard and depot until terminated by the Ohio & Mississippi Railway Company, as hereinafter stated.

On May 10, 1888, the Louisville & Nashville Railroad Company and the Louisville Bridge Company entered into a written contract which, after reciting the said contract of May 22, 1873, and that it was for the mutual benefit of the parties thereto—that the location of said union (or Maple Street) transfer platform should be changed, and the business conducted on the ground of the Louisville & Nashville Railroad Company, situated on the south side of Broadway Street, between Ninth and Tenth Streets, provided that the second party, and all railroad companies running cars over its bridge subject to the right reserved to admit any other railroads not using said bridge, should have the joint use of said yards, platforms and buildings of the first party located at Ninth and Broadway (designated in the record as Yard No. 4); that for such joint use the second party (the Louisville Bridge Company) agreed to pay a monthly rental of \$200, and, in addition thereto, such proportion of the interest, at 6 per cent per annum, upon the cost of said transfer platform and tracks, as the number of cars handled for the second party bears to the total number of cars handled. Said contract further provided that the expense of the operation of said transfer platforms and tracks (viz.: labor of loading and unloading, clerk hire, maintenance and repair, etc., premiums of insurance, and taxes which might be lawfully levied and assessed upon said property) should be divided between the parties to the agreement, in the proportion that the number of cars handled at said platforms for each party, and for any other railroad companies that might thereafter be admitted to its use, bears to the total number of cars so handled, "it being understood that the total number of cars shall not only include cars handled for the first party, and the railroad companies using the second party's bridge and tracks, but also such as may be handled for other parties hereafter admitted to the use of said transfer platforms and tracks;" and it was further agreed that other railroad companies than those now using the bridge and tracks of the second party may also be admitted to the joint use of said transfer platform and tracks, on the terms herein set forth—that is to say, that they will bear their proper proportion of the ground rent, interest on the cost of the platforms and tracks, and the expense of maintenance and operation of the said platforms and tracks, based upon the number of cars handled, as per the second and third articles hereof." The switching of cars to and from said transfer platforms was to be

done by the Louisville & Nashville Railroad Company between the points of the old joint siding on south side of Maple Street without cost to the second party. The contract provided for a readjustment of the monthly rental from time to time upon certain terms not necessary to notice, and the arrangement was to continue in force until terminated by six months' notice in writing from either party. It is still in full force and operation, as between respondent and the Louisville Bridge Company, and all the railroad companies entering Louisville from the north side of the Ohio River, except the Ohio & Mississippi Railway Company, which latter company ceased to make its transfer of traffic with respondent at said Ninth and Broadway yards in February, 1888.

While this contract bears date in May, 1888, its terms and provisions were agreed upon and arranged in January, 1888, with the knowledge and consent of the Ohio & Mississippi Railway Company.

Since the aforesaid contract of June 5, 1872, was entered into, the Louisville, Evansville & St. Louis Railroad Company, and the Louisville, New Albany & Chicago Railroad Company have been allowed to use, and are still using, said Louisville Bridge and approaches, in substantial accordance with the terms and provisions thereof. Said railroad companies also make their transfers and interchanges of freight traffic with respondent at said Ninth and Broadway yard. Since the date of said contract, the rates of tolls and charges have decreased per ton, and per passenger, as the volume of traffic over the bridge has increased. About eight years ago the dividends agreed to be paid upon the capital stock of the bridge company were reduced from 6 to 4 per cent semi-annually, and under the operation of said contract, the sinking fund therein provided for is now sufficient to pay off the bonds of the bridge company, which mature in December, 1888.

Under the operation of said contracts of June, 1872, and May, 1873, the business between the railroads north of the Ohio River and Louisville & Nashville Railroad Company was conducted in this manner: the parties having established the yard of the Louisville & Nashville Railroad Company at Ninth and Broadway, in Louisville, as the point for the interchange of traffic, the railroads from the north brought their cars to their respective yards on the north side of the river. From there they were hauled by the Jeffersonville, Madison & Indianapolis Railroad Company for the Louisville Bridge Company, to the yards of the several companies on the south side of the river; and cars containing freight to be delivered to the Louisville & Nashville Railroad Company were then by the Jeffersonville, Madison & Indianapolis Railroad Company switched over Fourteenth and Maple Streets to respondent's yard and transfer station, at Ninth and Broadway, where they were received and the goods, in less than car load lots, were assorted, distributed and reloaded into cars, and placed in trains for their proper destination. Car load lots were generally transferred to proper tracks, and placed in trains destined to points of shipment. Cars coming over respondent's road from the south, containing goods destined to

points north of the river, were brought to the same yard and delivered at the Maple and Tenth Street platform and tracks, where the Louisville Bridge Company, or the Jeffersonville, Madison & Indianapolis Railroad Company, acting as its switchman, received the same, and transferred the freight to proper points, on the lines of the railroads, north of the river. The expenses connected with such interchange of traffic together with a rental allowance to respondent for the use of its terminal facilities, as shown by said contract of May, 1873 and 1888, was borne by the several railroad companies *pro rata*, all companies interchanging business with respondent being placed upon the same footing, and all furnished the same facilities. The interchange of traffic continues in the same manner, at said point, as to all the roads north of the Ohio River, except the Ohio & Mississippi Railway Company, which, on February 4, 1888, gave notice that it would, and did, withdraw from said contracts at noon on that day. Said Ohio & Mississippi Railway Company has, since its withdrawal from the contract of June 5, 1873, ceased to interchange traffic with respondent at Ninth and Broadway, as formerly, and now conducts its business over the Kentucky & Indiana Bridge Company, which was chartered by the State of Kentucky in 1880, and completed its bridge across the Ohio River, between New Albany and Louisville, in 1886.

Its charter provisions and powers, as conferred by the Laws of Kentucky, so far as material to this case, are as follows:

"Said Kentucky & Indiana Bridge Company is hereby empowered to locate, build, construct and maintain, under the Laws of the United States, a bridge for railway, wagon, street railway and other purposes, between the Cities of Louisville, Ky., and New Albany, in the State of Indiana, from any convenient and accessible point within the limits of the City of Louisville, or within one mile thereof, and said company is hereby clothed with all the powers, privileges, rights and franchises necessary for the carrying out the purposes named herein.

"Said corporation shall have the power to lay down on said bridge a single or double track, for railroad cars or street cars, or for wagons or other vehicles, and all animals, and to erect footways for passengers, and to charge for the use thereof reasonable tolls; and for said purpose may erect on either or both sides of said bridge, toll-gates, and may do all other acts or things necessary for collecting the charges for the use of said bridge, and may also run any line of railways, through the City of Louisville, upon such terms as may be prescribed by ordinance of said City of Louisville, or along any street or alley, to connect with any railway, bridge, transfer company, or depot; and shall have the right to operate, or lease said connecting line, or lines, and may charge a reasonable compensation for the use of the same.

"Said corporation may contract with any railroad company, in or out of this State, for the use of said bridge by its cars and engines, or for other purposes; and any railroad, or street railway, or person, or municipal corporation, in or out of this State, may subscribe for the capital stock of said corporation, upon

any terms or conditions agreed upon, and may make such contracts or agreements as may be deemed expedient, for the use, management, or control of said bridge.

"Said Kentucky & Indiana Bridge Company is authorized to contract with, or to construct any railway, or terminal line, either in Kentucky or in the State of Indiana, which may be necessary for completing its terminal facilities; and it may construct such line or lines in the County of Jefferson, State of Kentucky, as may be necessary to complete the connection with other railways or depots.

"Said Kentucky & Indiana Bridge Company is authorized to contract with any company organized under the Laws of the State of Kentucky, for the erection of said bridge, and the construction of any terminal lines connecting with it, and to pay for the same in bonds or stock of said company, at such price as may be agreed upon.

"Said Kentucky & Indiana Bridge Company is authorized to contract with, or to construct any railway or terminal line, either in Kentucky or in the said State of Indiana, which may be necessary for completing its terminal facilities; or it may extend such branch lines through the City of New Albany, State of Indiana; and it may construct such line or lines in the County of Jefferson, State of Kentucky, as may be necessary to complete the connection with other railways or depots; said Kentucky & Indiana Bridge Company is authorized to connect its line with the line of the Short Route Transfer Company, and for that purpose may cross other railway or bridge lines, passing either under or over the same; the said company is also authorized to cross the land of other railway or bridge companies, in case it may be necessary in running its connecting lines.

"The Kentucky & Indiana Bridge Company shall have the right and power to condemn any land in the City of Louisville, or County of Jefferson, State of Kentucky, that may be necessary or proper, for the construction or maintenance of any line of railway, which said company is authorized by its charter, or amendment or amendments thereto, to construct, maintain or operate."

On March 2, 1881, under a general law of the State of Indiana, providing for the incorporation of companies formed for the purpose of constructing bridges for railway or common roadway purposes, or both, over rivers and streams forming the boundaries of said State, certain parties adopted articles of association, "for the purpose of constructing, operating, and owning a bridge, for railway, and common roadway purposes, over and across the Ohio River," between New Albany and Louisville. The association was styled the Kentucky & Indiana Bridge Company, and the articles recited that "The object and purpose of said company is to construct, own, and operate a bridge, from a point in said City of New Albany, across the said Ohio River, to a point in said City of Louisville, for both railway and common roadway purposes, together with—as an extension of, and in connection with, said bridge—a firm and substantial causeway," etc.

The Statutes of Indiana empowered said company "to construct a railway, with one or

more tracks from said bridge and embankment, and to connect the same with other railway tracks, and to fix the rates of toll, for persons and property passing over said bridge and tracks connected therewith, whether in cars propelled by steam, or otherwise." The company, under the statute, had authority "to connect the line of railway over said bridge, by continuous line of railway, in such manner, and upon such route and terms, as may be deemed most expedient, with any other line of railway whatever, and to maintain, use, operate, and control the said connection, when completed, and charge and receive tolls for the use thereof."

The two bridge companies thus formed under the Laws of Kentucky and Indiana were, on March 10, 1881, consolidated under the same name; whether such consolidation was effected under proper legislative authority does not appear. The bridge was built by the consolidated company, which thereafter, on September 29, 1886, entered into a written contract with the Ohio & Mississippi Railway Company, the important provisions of which are the following:

"The bridge company agrees to allow the railway company to run its locomotives, cars, and trains over the Kentucky & Indiana Bridge and approaches, from a convenient point of connection at Vincennes Street, New Albany, to the ground of the railway company at Fourteenth Street, in Louisville, or, should the railway company elect to do so, to a connection with the track of the Short Route Railway Transfer Company, near Thirteenth Street, in Louisville; the railway company's locomotives, cars, and trains to have preference over those of a similar class of other railroad companies that may use the bridge, so far as such preference can be legally granted by the bridge company."

The bridge company is to keep its bridges, approaches, and lines of railway in repair at its own expense; it agrees "to establish, provide, and maintain tracks connecting its present tracks with the tracks of all other railroads now seeking New Albany, within a reasonable time, either directly, or through the use of the other railway lines, and to switch the cars of the railway company, over such connecting tracks, at a switching charge of \$1 per car; also, to transfer cars from the railway company's transfer yards south of Bank Street, in Louisville, to the Louisville & Nashville Railroad, or the Chesapeake, Ohio & Southwestern Railroad, at the same rate per car."

It is agreed that "The tolls shall be fixed at the same rate, from time to time, as the rate of the Louisville Bridge Company, and these tolls shall be paid monthly by the railway company to the bridge company, it being provided, however, that whenever the sum so collected shall exceed the sum of \$17,500 per quarter, any excess over such amount shall be paid back to the railway company; but the railway company agrees to pay to the bridge company \$17,500 per quarter, whether or not the amount of tolls so collected equals that sum, the intention being to give a fixed annual rental to the bridge company of \$70,000 per annum." But the railway company is to "endeavor, with reasonable dispatch, to clear itself of future liability for tolls, 2 L. R. A.

rentals, charges, or otherwise under its present contract for the use of the Louisville Bridge, and until such liability shall be removed, the railway company shall not be compelled to pay any tolls hereunder to the bridge company. And the Kentucky & Indiana Bridge Company may, at its own cost, and in the name of the said Ohio & Mississippi Railway Company, defend against any claim of liability on the part of said Ohio & Mississippi Railway Company under said contract."

"The railway company agrees . . . to carry and transport over said bridge, approaches, and railway tracks, all of its locomotives, cars, freight, passengers, mails, express matter, and everything else carried or transported by it on its own lines . . . destined, consigned to or from Louisville, or to or from points which require their passage over the Ohio River at or near Louisville. Provided, however, that said railway company is at liberty, if it so desires, to perform its passenger service over any other bridge, but the rental to be paid hereunder, shall not be decreased by reason thereof. The interchange of freight at Louisville and New Albany, between said railway company and any connecting road, shall be done over the tracks of the bridge company, between the south approach to its bridge and the tracks of such connecting road, so far as the Ohio & Mississippi Railway Company can lawfully control the same; and the charge for the use of such tracks shall not exceed that on any other line.

"The railway company agrees, so far as it lawfully may, not to carry or transport over the said bridge and the approaches and tracks thereto, any locomotives, cars, freight, passengers, mail, and express matter, between Louisville and New Albany, that originates in, or comes from any railroad or water line, entering the one place, and destined for the other, it being mutually understood and agreed between the parties thereto, that the bridge company shall have the sole, exclusive right, to control, carry, and transport over the bridge and the approaches and tracks thereto, all traffic not received from or destined to points reached over the railroad of the railway company, north and east of New Albany.

"The railway company agrees to furnish, at its own cost, all power necessary for the transfer of its locomotives, cars, freight, passengers, mails, and express matter transported by it, over the said bridge and the approaches and tracks thereto."

Said contract was to continue in force and in operation twenty years from the date of commencement of payment of tolls by the railway company to said bridge company, and it is still in full force and being acted upon by said parties.

On June 21, 1887, the petitioner entered into a written contract with the Louisville Southern Railroad Company, which connects Louisville with the South by way of the Cincinnati Southern Railroad, under and by the terms of which said bridge company leased to the Louisville Southern Railroad Company, for a period of ninety-nine years, an equal right to possession and use in common with it for railroad purposes, the railroad, right of way, road-bed, main and side tracks, switches, telegraphs and telegraphic facilities, and other appur-



tenances and fixtures, now possessed or owned, or which may be hereafter possessed or acquired by the Kentucky & Indiana Bridge Company, between a point in Magnolia Avenue, where the Louisville Southern Railroad Company's tracks join with those of the Kentucky & Indiana Bridge Company, to the connection with the tracks leading to the yard of the said Louisville Southern Railroad Company, on or near the line of Hardin Street, between Bank and Market Streets, in Louisville. The parties to said contract agreed to construct a line of track, with the necessary switches and sidings, eastwardly along Magnolia Avenue, from the junction of the Kentucky & Indiana Bridge Company's and the Louisville Southern Railroad Company's tracks, to a connection with the main tracks of the Louisville & Nashville Railroad Company, at or near the intersection of Magnolia Avenue and Seventh Street, said connection to be constructed and maintained at the joint expense of the Kentucky & Indiana Bridge Company and the Louisville Southern Railroad Company, in the manner described in said contract.

The Louisville Southern Railroad Company agreed to provide and keep a sufficient number of suitable switch engines on hand, and to handle promptly and with dispatch all freight cars to be moved between the Kentucky & Indiana Bridge Company's transfer tracks, between Bank and Market Streets, and the Chesapeake, Ohio & Southwestern Railroad Company's railroad, and the Louisville & Nashville Railroad Company's railroad, at a charge to be fixed by the parties to the contract. The Louisville Southern Railroad Company agreed to pay to the Kentucky & Indiana Bridge Company, of the revenue thus obtained, in the following proportion—namely: 55 per cent to the railroad company, and 45 per cent to the bridge company. In case said railroad company fails or refuses to remove all freights passing over this part of said tracks with promptness and dispatch, then the bridge company reserves the right to move said freight, and to receive and collect all tolls due for said service.

The bridge company was not to grant any other party or parties, the right to do any switching, or make transfers of cars or freight on the line of road or tracks aforesaid.

Said contract further provided as follows: "And whereas, the said Kentucky & Indiana Bridge Company has heretofore entered into a contract with the Ohio & Mississippi Railway Company, providing for the transportation of all freight, from said railway to the roads south of the Ohio River, over the tracks herein described, and for which a charge is to be made by said bridge company: Now it is agreed, and it is part of the consideration of inducing the bridge company to enter into this agreement, that all such freight coming from the said Ohio & Mississippi Railway Company, and delivered and deliverable to the said railways south of the Ohio River, shall be moved over the tracks herein described, from the yards on Hardin, between Bank and Market Streets, to such railways, without charge or cost, and shall be made by the railroad company, with its engines, at rates to be fixed by the bridge company, and the *tolls or revenue* derived from such freight so moved, shall belong exclusively

to the bridge company, and shall not be subject to division, as herein provided, for the revenue derived from freight moved or handled on said tracks."

Said contract was to continue in force for and during the whole period of ninety-nine years, from and after September 1, 1887. It has not since been changed or modified, and the business being done between petitioner and said Louisville Southern Railroad Company, is carried on and transacted under and in pursuance of the provisions of said contract. The Louisville Southern Railroad Company has not, however, fully performed the switching service on the tracks of the Kentucky & Indiana Bridge Company, as it undertook to do. It has only done said switching from Thirty-Second and Market Streets, south, at night, using one engine. The rest of said switching has been done by the Kentucky & Indiana Bridge Company. All the transfer slips or bills, on freight so switched, are made out by the Kentucky & Indiana Bridge Company, which collects the charges therefor from the company or companies for whom the service is performed. The petitioner and the Ohio & Mississippi Railway Company and the Louisville Southern Railroad Company, have a yard near Thirty-Second and Market Streets in Louisville, at which said companies' interchanges of traffic are made.

Petitioner's tracks in Louisville branch in two lines, the point of divergence being near the intersection of Twenty-Ninth and Rudd Streets. From this point, one of said lines extends eastwardly near the canal bank to a point on Thirteenth Street, where it connects with the road of the Short Route Railway Transfer Company, over which and the Chesapeake, Ohio & Southwestern Road, running eastwardly, petitioner and railroads using its bridge can readily connect with respondent's yard No. 1, at First and Water Streets, and extending thence to Preston Street. Petitioner's other line extends southwardly to Magnolia Avenue, where it connects with the Louisville Southern. Under several ordinances of the City of Louisville, passed from time to time, petitioner was given authority to construct and extend its tracks, in or over certain designated streets in said city.

The ordinance which conferred upon said bridge company the right to lay its tracks on or along Magnolia Avenue was approved April 12, 1887. It granted to said bridge company the right "to locate, construct, maintain, and operate a single or double track railway, with necessary switches, turnouts, sidings, crossings, signals, and watch houses, along Magnolia Avenue from Eleventh to Eighteenth Streets, and along other land acquired, or to be acquired, west from Eighteenth Street to the city limits, and to connect, with proper curves, with the Chesapeake, Ohio & Southwestern Railway, and the Louisville Southern Railroad, and other railroad lines which may hereafter desire to make connections with the same."

By the second section of the ordinance the said bridge company was required, under proper regulations for the safe and convenient use of said tracks constructed between the points named, to "permit other roads now built or

hereafter to be constructed, desiring to connect through such portions of the city, to use the railway tracks laid down or constructed through and along said line as herein provided, upon conditions, however, that, before entering on the use of said tracks, any railway company shall pay to the Kentucky & Indiana Bridge Company its *pro rata* share of the cost of constructing the same, including damages awarded by reason of the construction thereof, and shall bind itself, by contracts with the City of Louisville, for the benefit of all parties interested, that it will contribute its *pro rata* share toward the repair and maintenance of any additional tracks, and of any gates, approaches, culverts, bridges, or trestles, or fills that may be necessary to the safe and efficient use of said tracks, and toward the maintaining of such watchmen as may be necessary to the proper guarding of the street crossings," etc. Similar provisions are found in the other ordinances.

This Ordinance of April 12, 1887, is the only one produced which gives said bridge company authority to locate its tracks on Magnolia Avenue, and grants the right from Eleventh Street westward.

Respondent's tracks at the intersection of Seventh Street and Magnolia Avenue are located eight hundred and twenty feet, or over two squares, to the eastward from Eleventh Street. The said bridge company has shown no authority or license from the City of Louisville, to extend its line or track from Eleventh Street, eastward along Magnolia Avenue to the Seventh Street and Magnolia crossing, or to a connection with respondent's tracks at that point; but it has actually made such an extension, and on the 20th of October, 1887, effected or formed a physical connection of its track with respondent's main line, at Seventh Street and Magnolia Avenue.

This connection was made under the following circumstances: the Vice-President and General Manager of the said bridge company, under date of September 6, 1887, addressed to the Vice-President of the Louisville & Nashville Railroad Company a note as follows:

"DEAR SIR—The Kentucky & Indiana Bridge Company desire a connection with your road, at the corner of Seventh Street and Magnolia Avenue, for the purpose of mutual interchange of freight, between your road, and the various other roads, with which the Kentucky & Indiana Bridge Company, as a transfer company, connects. At Seventh Street and Magnolia Avenue, there are two private switches connected with your road, the one belonging to the Union Warehouse Company, and the other to Mrs. Bullitt and the Bank of Louisville. If we should make arrangements with either of these parties for the use of their switch, is it satisfactory to you for us to make connections at that point, provided your present rights of connection with the property of these parties is not interfered with?"

The Louisville & Nashville Railroad Company objected to the desired connection at said point, and to the bridge company's use of said private switches. The matter was referred to their respective attorneys. The attorney for the Louisville & Nashville Railroad Company advised its officers that under the eighteenth section of its original charter, respondent could

not lawfully object to or prevent the proposed connection, but that such connection would not, under a decision of the Kentucky Court of Appeals cited, necessitate or require a business connection at said point, or confer any right on the bridge company to use its track or run cars over its road. The bridge company having the right to thus force a physical connection, the Louisville & Nashville Railroad Company thereupon, on October 14, 1887, withdrew its opposition to such connection, and it was made October 20, 1887.

Said point of connection at Seventh Street and Magnolia Avenue is situated between the South Louisville yard and the Ninth and Broadway yard and station of respondent. It is 1.17 miles south of the Ninth and Broadway Station, and 1.44 miles north of the South Louisville yard. Between said yards respondent's trains and engines are constantly passing and repassing, day and night. The Louisville & Nashville Railroad Company neither receives nor delivers freight at said connection, either for private parties or other railroads. It has never been established or recognized as a station, or place at which freight should be received or delivered. There are no buildings, platforms, sheds or other facilities at said point for the interchange of business traffic, nor has either petitioner or respondent any ground or land at that place on which such buildings, platforms and facilities, suitable and convenient for the interchange of freights and the accommodation of clerks and employes, could be erected. Respondent has only 6½ feet right of way at said point, which is needed for its tracks, while the petitioner has not even such right of way, if the license or permission of the City of Louisville to lay its track eastwardly along Magnolia Avenue from Eleventh Street is necessary to confer said right. By means of said connection it is practical to switch freight cars, loaded or empty, from the track of petitioner to the main track of respondent, and *vice versa*; but no interchange of freight cars and freight business between respondent and petitioner and railway companies using petitioner's bridge and tracks, can be conducted at said Seventh Street and Magnolia connection without subjecting respondent to extra expense, trouble and inconvenience, beyond what it is required to incur in interchanging with other roads at its regular yards and stations—and the greater the traffic to be interchanged at said junction the greater would be such expense to and burden upon the respondent.

The interchange of freights in broken lots, or less than car loads, cannot be made at said connection; such freights received from petitioner at said junction have to be hauled 1.44 of a mile to the Ninth and Broadway Depot of respondent, to be assorted and reloaded into cars, and placed in trains for destination. Neither can car load lots of mixed or miscellaneous freights destined for different points be interchanged there without being transferred to and assorted and reloaded at Ninth and Broadway. If such freights are to be delivered by respondent to petitioner at said point, they have first to be carried to respondent's said depot, there unloaded, assorted, reloaded and hauled back by respondent's engines and placed upon petitioner's track. So that in re-

ceiving and delivering less than car load lots of freight at said Seventh and Magnolia connection, respondent would be put to the expense and trouble of hauling all such freight  $2\frac{1}{2}$  miles of a mile without compensation, together with the expense incident to the unloading, distributing and reloading the same at its Ninth and Broadway Station. Freight in car load lots interchanged at said connection would require respondent to switch or haul the same to the same station, to be there put into or taken from trains, and then carried back to or beyond said point. If petitioner makes such delivery of either car loads or broken lots of freight at Ninth and Broadway, it involves the use of respondent's terminal facilities. If respondent performs said service, there is involved the use of its engines, its tracks, its platforms, its clerks and employes at said Ninth and Broadway Station, for which no compensation has been agreed upon between petitioner and respondent. All such services and matters as to other railroads entering Louisville from the north side of the Ohio River and interchanging traffic with respondent at its Ninth and Broadway Station are made the subject of private contract and agreement, under and by the terms of which respondent is allowed and paid a consideration for the use of its engines, tracks and terminal facilities, in the shape of a monthly rental, interest on its improvements, and a "pro rata" proportion of the depot expenses connected with the transfer of freight, such as clerk hire, salary of employes and wages of laborers, based on the amount of business done for each of said roads. The petitioner has made no offer of such compensation to respondent for the interchange of traffic it seeks at its said connection. The mere reception of car load lots of freight by respondent at said Seventh and Magnolia Junction, without reference to any transfer thereof to said Ninth and Broadway yard and depot to be put into trains for distribution, would necessitate the employment by respondent of car inspectors, both day and night, to examine the condition of such cars, take their numbers and keep a record thereof, it not being usual or proper for one railroad company to receive from another company car load freights without having such cars inspected by its own agents at the point of reception, to ascertain the condition of the same. This would entail upon respondent some additional expense.

If respondent accepted loaded cars at said point of connection, it might or might not have the right to transport the freight to destination in such cars. If it had the right to use and did use such cars, it would, besides the expense of getting the same to its Ninth and Broadway Station and placing them in proper trains, be required to pay to the owner thereof wheelage or mileage at the rate of three fourths of one cent per mile, and be responsible for all damage done the cars while in its possession or on its road. If respondent had not the right, or did not desire to use such cars, it would be under the necessity of not only conveying them to the Ninth and Broadway Station, but of unloading and reloading them there, at its own cost and expense. Petitioner has no freight cars of its own, and can make no reciprocal interchange of cars with respondent.

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Petitioner never sought to effect a direct connection with respondent's Ninth and Broadway yard. A direct approach to said yard might have been made, up Broadway and Tenth Street, with the consent of the City of Louisville, but no application was made for leave to pursue that route. Nor was any effort made by petitioner to secure a nearer and more direct connection with respondent's road than at Seventh Street and Magnolia Avenue. That connection was made in pursuance of petitioner's contract with the Louisville Southern Railroad Company, bearing date June 21, 1887.

It is entirely practicable for petitioner, and the railroads using its bridge and tracks, to interchange traffic with respondent at the latter's Ninth and Broadway yard and depot, which can be reached by transferring or switching over the Short Route Transfer line, and the Chesapeake, Ohio & Southwestern, and thence up Fourteenth Street, over the line of the Louisville Bridge Company, and Jeffersonville, Madison & Indianapolis line to the junction at Tenth and Maple, where respondent receives from, and delivers to, other roads all freight to be interchanged. To reach respondent's said yard by this approach involves a switching charge of \$2 per car to the petitioner, or the railroads using its bridge; the Short Route Company and the Chesapeake, Ohio & Southwestern making a charge of \$1, and the Louisville Bridge Company and the Jeffersonville, Madison & Indianapolis also charging \$1 per car for such switching services. Prior to October 21, 1887, petitioner, and the railroads using its bridge and track, having freight for the Louisville & Nashville Railroad Company destined to points on its roads south of Louisville, delivered such freight at said Ninth and Broadway yard, by bringing or having the same brought over said approach or route and paying therefor switching charges of \$2 per car. The same facilities still exist, and are still open to petitioner, and the railroads using its bridge, for reaching respondent's Ninth and Broadway yard, and for the interchange of traffic at said point. In addition to this mode of reaching a connection with respondent, the petitioner and the railroads using its bridge had, and still have, another approach, by way of the Short Route and Chesapeake, Ohio & Southwestern line, to respondent's yard at First and Water Street in Louisville, which would involve a switching charge of only \$1 per car. These routes, which were open and accessible to petitioner, and the railroads using its bridge, prior to October 20, 1887, when it made the physical connection at Seventh Street and Magnolia Avenue, have since continued to exist, and are still available to petitioner, as a convenient means of reaching respondent's regular yards, with such freight as it seeks to have respondent transport over its lines.

Respondent is willing to accept and receive at its Ninth and Broadway, or other yards, all freight brought to it, by or over petitioner's bridge, and to transport the same to destination on its lines, at local Louisville rates, such as it charges all other Louisville shippers; but is not willing, and declines to accept and transfer such freight, upon a through routing and at through rates, such as it has agreed upon with the railroads using the Louisville Bridge. This

refusal is rested upon the ground that respondent has no arrangement or agreement with petitioner, and the railroad companies using its bridge, fixing and defining the terms and conditions, upon which such through routing shall be made, and the through rates prorated between them.

The Louisville & Nashville Railroad Company has, at all times, both before and since the passage of the Interstate Commerce Act, refused to engage in the transportation of freight or passengers, to or from points beyond its own lines, except where previous agreements or arrangements have been made between itself and other carriers, whose lines were part or parts of the through routes to be thus established, which agreements prescribed the terms, conditions, and restrictions on which the business should be done, and defined the share which each road was to receive of the through rates. The interchange of traffic between connecting lines, constituting the through route over which such traffic is to be passed, at or upon through rates, is always a matter of contract between the several companies operating such lines, and such arrangements are, in the absence of express agreement to the contrary, terminable at the pleasure of either party.

Petitioner is not a member of, and has no representation in, any freight or passenger associations, by whom through rates are fixed, and it has never offered or attempted to interchange any passenger traffic with respondent. Its passenger traffic business to and from the South, is done exclusively with the Louisville Southern Railroad Company.

Petitioner has no voice in making the division of through rates on traffic carried over or across its bridge. Its bridge toll is the only charge to be paid it, by the companies engaged in such through traffic. Under a contract entered into between them in 1887, the petitioner receives from, and delivers to, the Louisville, New Albany & Chicago Railroad Company, at New Albany, freights transported, or to be transported over its bridge to and from Louisville, said contract being terminable by either party upon thirty days' notice.

Petitioner issues no bills of lading for shipments from Louisville to any points south, reached either by the Louisville Southern or the Louisville & Nashville Railroad Companies; nor does it issue any bills of lading for shipments from Louisville to Cincinnati, or other points reached via the Ohio & Mississippi Railway Company. If a consignor at Louisville desired to ship over petitioner's bridge to Cincinnati, or other point on the Ohio & Mississippi Railway Company's lines, the latter would issue the bill of lading and collect the freight. If shippers at Louisville wished their freight for St. Louis to go over the Kentucky and Indiana Bridge, via the Louisville, Evansville & St. Louis Railroad, petitioner would accept and receive such freight on one of its Louisville tracks, provided the cars in which to load the same were furnished by the Louisville, Evansville & St. Louis Railroad Company; would then way-bill such car and freight to the latter road, which would issue the regular bill of lading therefor, and charge and collect its regular transportation rates thereon, and pay to petitioner its bridge toll for passing over its bridge.

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So, if a Louisville shipper desired to ship his goods to Chicago over petitioner's bridge and over the Louisville, New Albany & Chicago Railroad, petitioner would accept such shipment on its tracks in Louisville, if said railroad company would furnish the cars in which to load it, and would bill the same to the Louisville, New Albany & Chicago Railroad, which would perform the transportation service, and charge or collect the freight or fares thereon. So, if New Albany shippers wished to ship goods south over the Louisville & Nashville Railroad, petitioner would accept such shipment, if respondent would furnish the car or cars in which to load it; would then furnish to respondent a way or transfer bill for such car and freights, and respondent would issue its own bill of lading therefor, pay petitioner its bridge toll for passing the freight over its bridge, and collect its regular charges for transporting the goods to destination. Petitioner has no freight cars of its own, and neither procures nor furnishes cars in any other manner. On business thus handled, the rates given or charged the shippers are in some cases the bridge tolls, and the rates of the railroad over which the shipment has to be carried by the company furnishing the car or cars, and performing the service. In other cases, the line furnishing such car or cars pays the bridge toll itself. Jeffersonville, New Albany, and Louisville being grouped, and having the same rates to and from all points south, on shipments thus procured by petitioner for respondent, and loaded in cars furnished by respondent, the bridge toll would be paid by respondent, and to that extent would reduce its regular rate to destination of goods, going south of Louisville. The petitioner makes the transfer and delivery of such cars to the road over which the freight is to go, and collects from such road its bridge toll.

In addition to its bridge toll, thus charged and collected of roads for which petitioner may have solicited shipments, petitioner, in some cases, where cars are loaded on its tracks, or loaded cars are received from one railroad to be transported to some other line over its tracks, makes and collects a switching charge from the company for whom the service is performed, ranging from \$1 to \$3 per car.

Where the respondent, and railroads north of the Ohio River, have entered into arrangements, or agreements, forming through routes and through rates, as to which the bridge companies are not consulted, and have no voice, the bridge tolls are first deducted from the through rate, and the remainder of the traffic charges for the service is "prorated" between the parties forming the through route, according to their agreement. The shipper does not, as a matter of fact, pay the bridge tolls, in every instance, either under such through routing and through rating, or when there is no such arrangement for through traffic. Owing to its competition with the Cincinnati Southern Railroad, which owns its own bridge, and pays no bridge tolls, respondent, in respect to much of its southern traffic, has to bear the burden of such tolls at Louisville, or deduct such tolls from its rates to Louisville, and across the bridge at that point. So, in respect to through rates, competition will force the roads, crossing the river at Louis-

ville, to fix such through rates, as though no arbitrary bridge charge or toll was to be paid, or deducted therefrom; and, in such cases, the roads, and not the shippers, pay said tolls.

From March, 1887, to October 20, 1887, petitioner, to a limited extent, interchanged traffic with, or delivered traffic to, respondent at the latter's yard at Ninth and Broadway, such traffic being brought over the connections reaching Maple and Tenth Streets, and in some instances issued bills of lading for such freight, whether at through or local rates does not appear. The Ohio & Mississippi Railway Company continued to interchange with respondent at said yard, under the terms of the contracts of June 5, 1873, and May, 1878, until February 4, 1888, when the said Ohio & Mississippi Railway Company gave notice to the Louisville Bridge Company and to respondent, that it would and did withdraw from said contract of June 5, 1873, at noon on that day. The said Ohio & Mississippi Railway Company has, since February 4, 1888, ceased to use said Louisville Bridge and the connections afforded by that route for reaching respondent's yard at Ninth and Broadway, but instead uses the petitioner's bridge under the contract of September 29, 1886, and through petitioner seeks an interchange with respondent at said Seventh Street and Magnolia junction.

By the withdrawal of the Ohio & Mississippi Railway Company from said contract of June 5, 1873, and its abandonment of the Louisville Bridge, there has been a decrease in the receipts or revenues of said bridge, to the amount which would have been derived from the Ohio & Mississippi Railway Company's traffic. This loss to the bridge company amounts to about one fifth of its income, or about \$129,167.17 on the basis of receipts for 1887. Said bridge company has not increased its tolls for 1888, but the loss of the Ohio & Mississippi Railway Company's business has prevented any decrease or reduction in said tolls, which it could and would otherwise have made, if said railway company had continued the use of said bridge, and complied with said contract of June 5, 1873. Said bridge company's revenues are, in part, made up of tolls upon freight interchanged by respondent with the roads using said bridge, and such freights, or the roads themselves, will have to pay an increase of some \$27,000 in tolls, in consequence of the Ohio & Mississippi Railway Company's withdrawal from the use of said bridge, and the respondent's proportion thereof will amount to about \$18,000 per annum.

The respondent is otherwise interested peculiarly in the tolls of said bridge, and in the reduction thereof, inasmuch as under its competition with other routes, said tolls, to a considerable extent, have to come out of its revenues received on through rates, and are not paid by shippers or consignees. Said Louisville Bridge Company, for some years past, has had surplus revenues, which have been, from time to time, prorated and paid back to certain of the railroads using its bridge. The respondent has received no part of such surplus earnings, and made no demand for it. Whether it is entitled to share in such surplus earnings is not involved in this controversy. Respondent is, however, interested

in having all the earnings of the bridge company, not required to meet the charges provided for in the contract of June 5, 1873, applied in a way to reduce the bridge tolls, which affects its rates and business.

The Louisville Bridge Company can do business over its bridge and terminal lines as cheaply and promptly as the Kentucky and Indiana Bridge Company can over its bridge and terminal lines; and had, in 1888, and prior thereto, and still has, capacity to transact all the business which the railroads crossing the Ohio River were able to bring to it.

The capital stock of the Louisville Bridge Company amounts to \$1,500,000. Its bonded debt, of \$300,000, is paid, or fully provided for. The capital stock of the Kentucky & Indiana Bridge Company is \$1,700,000, and its bonded debt \$1,400,000. The respondent ceased to be a stockholder in the Louisville Bridge Company in 1880. The Ohio & Mississippi Railway Company never complained of the manner in which it was served over the Louisville Bridge, before withdrawing from said contract of June 5, 1873. Its own yards, at Louisville, and on the north side of the river, were insufficient for the handling of its business. This occasioned, at times, some delay in transferring its cars. On one occasion, while the employes of the Louisville & Nashville Railroad Company were on a strike, and the cars of the Ohio & Mississippi Railway Company were crowded in the yards of respondent, it declined to receive other cars from the Ohio & Mississippi Railway, until the latter's cars, which were blocking its yard, were removed. This occasioned some short interruption to the interchange of traffic between them. The yards of the respondent, and other roads than the Ohio & Mississippi Railway Company, were ample for the handling of all the business passing over the Louisville Bridge.

The main line of the Ohio & Mississippi Railway Company enters Jeffersonville, Indiana, convenient, and readily accessible to the Louisville Bridge. After entering into the contract with the petitioner, dated September 29, 1886, the Ohio & Mississippi Railway Company extended a branch line from Watson, Indiana, a town northeast from Jeffersonville, over a route provided for it by petitioner, to New Albany, Indiana, so as to form a connection with the Kentucky & Indiana Bridge Company's line and bridge. While the Ohio & Mississippi Railway Company has the right, under said contract of September 29, 1886, to use petitioner's terminal lines in New Albany, and its bridge and southern approaches thereto, down to said railway company's yard at Hardin and Bank Streets, it has not, under said contract or otherwise, the right to use petitioner's lines or tracks in Louisville south of said yard, or out to the junction which petitioner has made with respondent's track at Seventh Street and Magnolia Avenue—to reach which point, its cars and freight have to be switched by the petitioner, or its ally, the Louisville Southern, at or for a switching charge of \$1 per car, which the Ohio & Mississippi Railway Company has to pay petitioner. Nor does it appear from the record that said Ohio & Mississippi Railway Company has any authority, either from the State of Kentucky or the

City of Louisville, to extend its own line or track south from its said yard, so as to form a direct connection with respondent at any point.

At said Seventh Street and Magnolia Avenue connection a limited interchange of traffic was carried on between petitioner and respondent from October 21, 1887, up to and including the 16th of November, 1887; but such interchange was had without the knowledge of the officers of the respondent, having authority to direct and sanction the matter. When it was brought to the attention of respondent's officers, having authority to control the subject, such interchange was stopped at said point, and respondent thereafter treated all freight coming over its road for petitioner, or points on its tracks, as Louisville City business, and required petitioner to pay the freight and charges thereon, before delivery would be made. The expense bills furnished petitioner showed that the business was placed upon respondent's city, and not upon its transfer, books. A number of empty cars were returned to the respondent at said connection, and a considerable number of stock cars were delivered by respondent to petitioner at said point, under a temporary injunction from the Chancery Court of Louisville, which injunction was subsequently dissolved.

The car which petitioner tendered on September 12, 1888, at Seventh Street and Magnolia Junction, and which respondent refused to accept, was brought from Cincinnati, and over petitioner's bridge, by the Ohio & Mississippi Railway Company, to its yard south of the river in Louisville, which was the southern terminus of said railway. From that yard it was placed upon the tracks of the petitioner, and by it switched to said Seventh Street and Magnolia connection, under the contract of September 29, 1886, at and for a switching charge to the Ohio & Mississippi Railway Company, of \$1. The transfer slip, which petitioner offered respondent with said freight, specified the rate of fifty-three cents per hundred pounds, as the charge which respondent was to receive, for transporting the car of freight to Columbia, Tenn., its point of destination. It does not appear that Columbia, Tenn., was one of the points to or from which respondent interchanged traffic with other railroads north of the river, upon a through routeing and at through rates; nor does it appear that the rate of fifty-three cents per hundred pounds, which the transfer slip proposed to allow respondent, conformed either to respondent's rates from Louisville to Columbia, Tenn., or the through rates arranged between respondent and its northern connections over the Louisville Bridge. The terms, conditions and stipulations of the bill of lading which was issued by the Ohio & Mississippi Railway Company to the shippers, or forwarded to the consignee, were not made known to respondent. Nor was the rate charge apportioned to it tendered respondent, either before or at the time of offering the freight. Respondent's agents, however, assigned no reasons for refusing to receive and transport said car.

There are certain private sidings, constructed under written contracts between their owners and the respondent, connecting with respondent's main tracks, between its Ninth and Broad-

way yard and its South Louisville yard, to and from which respondent delivers and receives its own cars, loaded or to be unloaded with what is called dead freight, such as lumber and other nonperishable articles, on the transportation of which respondent charges and collects local Louisville rates. Respondent is fully provided with cars, both freight and passenger, for the transaction of its business, and is unwilling and refuses to transport the cars of other railroads offered it by petitioner, who has no freight cars of its own, and pay mileage for the use of the same; and also declines to deliver its own cars to petitioner, to be carried away from respondent's lines and yards, and look to petitioner, either for mileage therefor, or damage for injury while in its possession.

In the absence of buildings, platforms, sheds, and employes at said Seventh Street and Magnolia Avenue connection, such as are required and necessary to carry on an interchange of traffic between petitioner and respondent at that point, respondent, in order to comply with the order of the Commission, must either allow petitioner and the railroads using its bridge the use of its tracks and terminal facilities, without any provision or arrangement as to the compensation to be paid for the use thereof, or must, against its will, receive and use cars offered by petitioner, paying mileage thereon, and incurring the expense of switching the same to its Ninth and Broadway yard, there to be put into trains and again hauled over the same distance; and it must also permit its own cars containing freight consigned to it, or to be handled by petitioner, to go into petitioner's possession and be used by it, after respondent has been to the trouble and expense of carrying such freight to its Ninth and Broadway Depot, and there unloading, assorting, and re-loading, and then bringing the same back to said Seventh Street and Magnolia connection for delivery.

All other railroads entering Louisville, including the Louisville Bridge Company, having connections, directly or indirectly, with respondent, and interchanging business with it, whether on through or local rates, allow and pay respondent an agreed consideration for the use of its tracks and terminal facilities, and bear their *pro rata* proportion of the expense of handling the traffic interchanged, and also arrange for the mutual allowance and payment of mileage on cars of each used by the other, where cars are interchanged.

No complaint is made, nor does it appear that respondent's local Louisville rates of freight charges on interstate traffic are unreasonable.

Petitioner's bridge is used principally by the Ohio & Mississippi Railway Company, and the Louisville Southern Railroad Company. The latter, being in active competition with respondent from Louisville south, to and beyond Chattanooga, interchanges little or no business with the Louisville & Nashville Railroad Company, either directly or through the instrumentality of petitioner. The through business carried or brought by the Ohio & Mississippi Railway Company over petitioner's bridge south, constitutes the main, if not sole, traffic which petitioner seeks to have interchanged with respondent at Seventh and Magnolia Avenue connection.

On the foregoing statement of facts, and under the pleadings, the leading and important questions presented for consideration and determination are the following:

*First.* Is the Commission created by the Act to Regulate Interstate Commerce invested with, and does it exercise, judicial powers such as to make its orders the judgment of a court, which is wanting in constitutional authority, because its members have no such tenure of office as required by the Constitution in the establishment of "inferior courts?"

*Second.* What is the nature of the present proceeding in this court? Is this court merely to enforce the order of the Commission, and thus exercise a non-judicial power, or is the case in this court to be treated as an *original* and *independent* suit, in which its own judgment on the facts and merits may be rendered?

*Third.* Is petitioner, either in law or fact, such a common carrier of interstate commerce within the scope and contemplation of the Act to Regulate Commerce among the States, as will entitle it to claim the benefits of said Law, or to have its provisions enforced in its behalf?

*Fourth.* Is petitioner's connection with respondent's road at Seventh Street and Magnolia Avenue in the City of Louisville a suitable and convenient point for the interchange of traffic between them and the railroads using petitioner's tracks? And is respondent's refusal to interchange business at said point an unjust and unreasonable discrimination against petitioner?

*Fifth.* Does the Law impose upon respondent the duty of making an interchange with petitioner at said connection, if such interchange of traffic involves the use by petitioner, and the roads using its bridge, of the tracks and terminal facilities of respondent or subjects respondent to expense over and above what it incurs in interchanging traffic with other railroads, at its regular and established yards in Louisville?

*Sixth.* Does the Interstate Commerce Law, rightly construed, require respondent not only to interchange traffic, at said point of connection, with petitioner and railroads using its tracks, but also to afford and concede to them, on such interchange of business, the same through routing, and upon the same joint through rates, which respondent has, by contract, arranged and agreed upon with certain railroads entering Louisville from the north side of the Ohio River? In other words, does said Act require that if respondent has entered into traffic arrangements with one or more railroads, connecting with it over the Louisville Bridge, for the joint through routing of business, at or upon through rates, to be apportioned between them, it shall concede to, or make with, any or all other roads engaged in interstate commerce, and connecting with it at other and different points, and running in different directions, the same or similar arrangements for through traffic, and upon the same joint through rates? And if this is required by the Law, is such requirement valid, and within the constitutional power and authority of Congress to regulate commerce among the States?

The first and second of said propositions are so connected and dependent upon each other, that they may properly be considered together.

3 L R. A.

In respect to the question presented by the first, counsel for respondent takes the position that the Interstate Commerce Law confers judicial powers upon the Commission, that such judicial powers are exercised in its proceedings, that its orders are judgments of a court, not lawfully created, since its members are not appointed and commissioned in accordance with art. III, sec. 1, of the Constitution, inasmuch as they hold office only for designated periods and not "during good behavior," which latter "constitutional tenure of office judges must possess before they can become invested with any portion of the judicial powers of the Union," and that the proceedings before, and the order or judgment of, the Commission are, and were, consequently void.

In respect to the second question, it is claimed by counsel for respondent that, aside from the judicial character and power attempted to be conferred upon said Commission, the Interstate Commerce Law imposes upon this court non-judicial powers, which it cannot properly exercise, inasmuch as it is limited and restricted by the sixteenth section of the Act to the mere enforcement of the Commissioner's orders, if found to be lawful, with no authority to go into the merits of the controversy between the parties, and make its own adjudication thereon; but if not so limited and restricted to the mere enforcement of an order made by another body, and the proceeding in this court can be regarded and treated as an original and independent suit to determine the rights of the parties, that the court has no jurisdiction of the case, because the parties, complainant and defendant, are both corporations of the State of Kentucky.

In support of their position, that judicial powers are conferred upon and exercised by the Commission, counsel refer to various provisions contained in sections 12, 13, 14, 15, 16, 17, and 18 of the Act, which, together with the rules of practice adopted, show, as they insist, that a proceeding before the Commission, like the one in question, involves and embodies features and ear marks of judicial procedure and action, in the following particulars, viz.:

*First.* A petition, corresponding with the petition or bill in equity, is filed.

*Second.* Notice is issued for, and service thereof made upon, the defendant, or party complained of, conforming to, and corresponding with, the process of subpoena in courts of the United States, requiring such defendant to satisfy the complainant, or to appear and answer the same.

*Third.* The filing of defendant's answer, as in equity, which makes up, or forms the issue or issues.

*Fourth.* The issuance of subpoenas requiring the attendance of witnesses, or for the taking of depositions, upon the issues made up by the answer.

*Fifth.* The assignment of a time and place for the hearing, when and where the parties appear in person or by attorney—witnesses are sworn and examined, and arguments are made orally, or by brief.

*Sixth.* When the conclusion is reached, a written report, corresponding in all respects to an opinion, is delivered, filed, and published.

*Seventh.* The order of the Commission is re



corded by its secretary, as decrees in equity are recorded by clerks of court; and—

*Eighth.* A copy of such order, under the seal of the Commission, issues to the defendant, requiring obedience thereto.

This mode of procedure certainly conforms, in many respects, to the regular practice of courts, and is no doubt authorized by the Law; but does it involve the performance of judicial acts, and the exercise of judicial powers, by the Commission, as claimed?

It is well settled that Congress, in ordaining and establishing "inferior courts," and prescribing their jurisdiction, must confer upon the judges, appointed to administer them, the constitutional tenure of office, that of holding "during good behavior," before they can become invested with any portion of the judicial power of the government, and if the act to Regulate Interstate Commerce does not in fact establish an inferior court, the Commissioners appointed thereunder for certain fixed periods, are clearly not such judges as can be invested with any portion of the judicial power of the United States, and their decision in matters affecting personal or property rights, could have no force or validity. But does the Interstate Commerce Law undertake either to create an "inferior court," or to invest the Commission appointed thereunder with judicial functions? We think not. While the Commission possesses and exercises certain powers and functions, resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the Act designates as the "recommendation," "report," "order," or "requirement," of the board, is neither final nor conclusive; nor is the Commission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the Law, we are clearly of the opinion that the Commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court or its action judicial in the proper sense of the term. The Commission hears, investigates, and reports upon complaints made before it, involving alleged violations of, or omission of duty under the Act; but subsequent judicial proceedings are contemplated and provided for, as the remedy for the enforcement, either by itself, or the party interested, of its order or report in all cases where the party complained of, or against whom its decision is rendered, does not yield voluntary obedience thereto. By the fourteenth and sixteenth sections of the Act, it is provided that the report or findings made by the Commission, "should thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found."

The Commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence, in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. The functions of the Commission are those of referees or special commissioners, appointed to make preliminary investigation of, and report

upon, matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the Law, the Commission may be regarded as the general referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations, recognized and imposed by the Act. It is neither a federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings.

This Federal Commission has assigned to it the duties, and performs for the United States, in respect to that interstate commerce, committed by the Constitution to the exclusive care and jurisdiction of Congress, the same functions which state commissioners exercise in respect to local or purely internal commerce, over which the States appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners, invested with powers as ample and large as those conferred upon the federal commissioners, have not been successfully questioned, when limited to that local or internal commerce over which the States have exclusive jurisdiction; and no valid reason is seen for doubting or questioning the authority of Congress, under its sovereign and exclusive power to regulate commerce among the several States, to create like commissions, for the purpose of supervising, investigating, and reporting upon matters or complaints connected with, or growing out of, interstate commerce. What one Sovereign may do, in respect to matters within its exclusive control, the other may certainly do, in respect to matters over which it has exclusive authority.

We are also clearly of opinion, that this court is not made by the Act the mere executioner of the Commission's order or recommendation, so as to impose upon the court a nonjudicial power. Congress has, in some cases, assigned to federal courts duties which, though of a quasi judicial nature, did not come within the judicial power granted in the Constitution. Thus, the Act of March 23, 1792 (1 U. S. Statutes at Large, 243), required the circuit judges to examine into the claims of persons asking for pensions, and make report thereon, to the Secretary of War. The Judges of the Circuit Courts for the Districts of New York and Pennsylvania, held that the function, or duty, thus imposed, was not judicial. So, the Circuit Court for the District of North Carolina declared that it could not execute that part of the Act which required it to examine, and report an opinion on, the unfortunate cases of officers and soldiers disabled in the service of the United States. *Hayburn's Case*, 2 U. S. 2 Dall. 409 [1 L. ed. 436].

In *U. S. v. Ferreira*, 54 U. S. 13 How. 40 [14 L. ed. 43], which arose under the Act of March 3, 1849, directing the Judge of the District Court of Northern Florida to adjudicate upon certain claims for injuries, and report the evidence thereon, the supreme court held that the authority thus conferred was not "authority to exercise any of the judicial powers of the United States under the Constitution." And the judge's decision was held, not to be the judg-

ment of a court of justice, but simply "the award of a commissioner."

The principle announced in this case would sustain counsel's position, if this court, under the provisions of the Interstate Commerce Law, is limited and restricted to the mere ministerial duty of enforcing an order or requirement of the Commission, whether it be regarded as a judicial or a nonjudicial tribunal. But such is not, in fact, the jurisdiction which this court is called upon to exercise. The suit in this court is, under the provisions of the Act, an original and independent proceeding, in which the Commissioners' report is made *prima facie* evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere re-examination of the case, as heard and reported by the Commission, but hears and determines the cause *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce bearing upon the matters in controversy. The court is empowered "to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to perform a just judgment in the matter of such petition; and on such hearing, the report of said Commission shall be *prima facie* (not conclusive) evidence of the matters therein stated." No valid constitutional objection can be urged against making the findings of the Commission *prima facie* evidence in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence clearly within well recognized powers of the Legislature, and in no way encroaches upon the court's proper functions. *Holmes v. Hunt*, 123 Mass. 505.

It is further provided in said sixteenth section, that when the subject in dispute shall be of the value of \$2,000 or more, either party to such proceedings before said court may appeal to the Supreme Court of the United States, under the same regulations as now provided by law in respect of security for such appeal.

In view of these provisions, relating to the substance of the proceeding in this court, and clearly indicating its true character as an original suit, we should not be misled by other expressions in that section, which seem to imply that the duty imposed upon the court is only to enforce, in a ministerial way, the requirement of the Commission.

In the case of *U. S. v. Ritchie*, 58 U. S. 17 How. 525 [15 L. ed. 298], which arose under the Act of March 3, 1851 (9 Statutes at Large, 631), and August 31, 1852 (10 Statutes at Large, 90), creating a Board of Commissioners to settle private land claims in California, and providing for an "appeal" to the district court, the supreme court held that what was called an "appeal" was a mere mode of removing the papers and evidence from the Board of Commissioners, and the institution of an original proceeding in court, where all questions were to be reheard and re-examined *de novo*. The rule laid down in that case is directly applicable to the present proceedings, and sustains the construction which we placed upon the provisions of section 16 of the Law under consideration.

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As an original and independent suit, can the jurisdiction of this court be maintained, inasmuch as both petitioner and respondent are corporations, and therefore citizens, of the State of Kentucky? We think there can be no doubt on this question. The right asserted by petitioner arises, and is claimed, under a law of the United States, which relates to a subject matter over which Congress had exclusive control. This is sufficient to sustain the court's jurisdiction, independent of the citizenship of the parties to the controversy, since it involves a federal question.\* The first and second of the above propositions are accordingly ruled against the respondent's contention.

Upon the third inquiry presented—involving the question whether petitioner is such a common carrier of interstate commerce as entitles it to invoke and assert the provisions of the Act in its own behalf, or in behalf of other railroads which use its bridge, or for whom it transfers cars—our conclusions are: first, that petitioner is certainly a common carrier in fact of interstate passenger traffic between New Albany and Louisville; but that traffic is not involved in this controversy, since petitioner has not offered, nor does it propose, to interchange such passenger traffic with respondent at any point; and, secondly, that petitioner is not, in law or in fact, a common carrier of property or freights within the true meaning of section 1 of the Act to Regulate Commerce, and that in respect to freight, which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection, it is only a transfer company, or agency, engaged in performing a switching service, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the shifting of cars, loaded or empty, from one line of connection to another.

Little, if anything, can be added to what has been so well said in the dissenting report of *Mr. Commissioner Schoonmaker* (†) on the subject of petitioner's legal "status" and character under its charter and articles of association, the provisions of which are fully set out in the foregoing statement of facts. We concur in the views expressed and the conclusions reached by him, that petitioner's corporate powers fall short of making it a common carrier of property having the right to engage in the transportation of freight for hire. The charter powers and franchises conferred upon petitioner make its bridge and approaches thereto, such as it had authority to construct, a public thoroughfare or highway, for the use of which, by railroads or street cars, wagons, vehicles, animals and foot passengers, it was authorized to charge "reasonable tolls"—for the collection of which suitable toll-gates could be established. The word "toll" is, no doubt, sometimes employed in railroad charters to express the charge for transportation rather than for the use of the structure over which such transportation may be conducted; but it is manifestly not used in that sense when applied to a bridge built and maintained for use by the public or others

\*See *Connor v. Vicksburg & M. R. Co.* 1 L. R. A. 381. [Rep.]

†2 Inters. Com. Rep. 113. [Rep.]

engaged in transporting property. The franchises and powers conferred upon petitioner of building, maintaining, and operating its bridge and approaches, designated as its terminal facilities, do not, in and of themselves, constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties, upon making compensation therefor, in the shape of "reasonable tolls." These "tolls" which petitioner is authorized to charge for the use of its bridge are not applicable to, nor demandable for, any transportation service it may perform or be permitted to render. The word, as used in its charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services to be performed by itself. The distinction between such an incorporated bridge, or highway, established and maintained for use by common carriers, and others, upon paying compensation for such use, in the way of "tolls," however graduated, and that of an incorporated common carrier engaged in transporting property for hire, is well defined. It is pointed out and illustrated in the case of *Boyle v. Philadelphia & R. R. Co.* 54 Pa. 310, and *Lake Superior & M. R. Co. v. U. S.* 93 U. S. 442-445 [23 L. ed. 965-968]. In the latter case, *Mr. Justice Bradley*, speaking for the court, says, p. 451 [970]: "But it is not alone in charters which contemplate the creation of railroads, as public highways, that we find evidence of the understood distinction between railroads as mere thoroughfares and the operations to be carried on upon them by means of locomotives and cars." This is manifest from the fact, among other things, that express power is invariably given (if intended to be conferred) to the railroad company to equip its road, and to transport goods and passengers thereon, and charge compensation therefor. This practice evidently springs from the conviction that a railroad company is not necessarily a transportation company, and that to make it such express authority must be given for that purpose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication."

The rule here laid down applies with more force to the case of an incorporated bridge company, like petitioner, whose charter powers neither expressly nor by any clear implication confer upon the company authority "to equip its road and to transport goods and passengers thereon, and charge compensation therefor." The powers and franchises conferred upon petitioner find their legitimate scope and operation in the building, operating and maintaining of its bridge and approaches thereto, for the public purposes it was intended to subserve: that of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods, or passing as they pass over a turnpike, a canal, or a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare; and do not in any way constitute petitioner a common carrier of goods, authorized to equip its road, or to charge compensation for transporting goods on or over

the same. Nor does petitioner, in the legal sense of the term, act or hold itself out to the public as a common carrier of property, in connection with the railroads on either side of the Ohio River. It has no freight cars. When it solicits or accepts freight upon its tracks on either side of the river for any railroad company it is compelled to call upon the railroad for whom the freight is intended, or over whose line it is to go, to furnish the cars in which to load the same. Such cars the petitioner merely transfers over its bridge and delivers to the railroad furnishing the same, charging for its service its regular bridge toll, which is in no sense a charge for transporting the freight contained or carried in the car or cars. In some cases it makes an additional charge for switching cars, which require to be transferred from one connection to another. Its object and purpose in thus constituting itself the soliciting agent for the railroad companies, who are willing to provide the cars for the freight it may secure, is manifestly to obtain "tolls" for use of its bridge.

Again: it is perfectly clear that petitioner cannot be properly regarded as a common carrier of the interstate freight transported over its bridge by the Ohio & Mississippi Railway Company, for the obvious reason that said bridge and approaches thereto, to and from the yard and depot of the Ohio & Mississippi Railway Company, at Hardin and Bank Streets, in the City of Louisville, under the terms of the contract of September 29, 1886, between petitioner and said railway company, and under the provision of section 1 of the Act to Regulate Commerce, constitute a part and portion of the Ohio & Mississippi Railway Company's lines over which said railway performs its own transportation service. The provision of section 1, referred to, provides that "The term 'railroads,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage." Having, by contract with the petitioner, not only acquired the right to use said bridge and its approaches but secured for its engines, cars, and trains, a preference over all other railroads in such use, down to its southern terminus in the City of Louisville, and being in the actual use thereof, under said contract, during the period covered by the present controversy, the Ohio & Mississippi Railway Company must, for the time being, be regarded as the owner or operator of said bridge and approaches, under the above provision of law, as to all freights transported by said company; and the through traffic which it carries over said bridge, to its yard and depot in Louisville, is in no sense either handled or moved by petitioner as a common carrier. In thus making the bridge and approaches a part or portion of the line of the railroad which uses or operates it under contract, there is a clear implication that the Act to Regulate Commerce did not intend to include such bridges as independent carriers or "railroads" coming within the purview of the Law.

The Ohio & Mississippi Railway Company

neither owns nor operates any connecting line with respondent. It has no authority, either from the State of Kentucky or the City of Louisville, to connect with respondent at any point. Under its contract with petitioner it has no right to use petitioner's tracks south of Hardin and Bank Streets, or to the petitioner's connection with respondent's road at Seventh Street and Magnolia Avenue. What, then, is, or was, the real relation which petitioner sustains to the Ohio & Mississippi Railway Company in respect to freights which the latter transports from the north side of the Ohio River to its yard in Louisville, and which petitioner has tendered and seeks to have interchanged with respondent at its Seventh Street and Magnolia connection? The case of the car tendered on the 12th of September, 1888, will serve to illustrate this relation. That car was brought by the Ohio & Mississippi Railway Company over its road, including said bridge as a part thereof, to said company's yard in Louisville, the southern terminus of its lines. It was then placed on the track of petitioner who, for a switching charge of one dollar, to be paid by the Ohio & Mississippi Railway Company, transferred the car to said Seventh Street and Magnolia connection and requested respondent to receive it there. The service performed was wholly within the limits of Louisville. The charge for that service was not made for the transportation of the goods contained in the car, but simply for switching the car itself. Upon what principle is petitioner to be held or regarded as a common carrier, either of this car or of its contents? It was transferred under the obligation of its contract with the Ohio & Mississippi Railway Company to perform the service for one dollar. It was under no public duty to do such switching for any common carrier. It could not be required, aside from its agreement, to perform such service; and in performing the same it assumed none of the responsibilities of a common carrier, but only those of a switchman moving the vehicle in which the Ohio & Mississippi Railway was transporting its traffic. In respect to cars or traffic thus handled, petitioner can only be regarded as a switchman or transfer company. In the performance of such service it is no more a common carrier of interstate commerce or traffic, within the provisions of the Law, than a city transfer company which checks a passenger's baggage at the hotel where it is received and carries it, for an agreed compensation, to the station of the railroad over which it is to be transported into another State. The Act to Regulate Commerce does not extend to such agencies, or embrace such transfer companies, nor can they invoke the provisions of said Act in their behalf, or in behalf of those whom they thus serve.

The Ohio & Mississippi Railway Company could readily have effected the delivery of said car (tendered by petitioner on the 12th of September, 1888), at respondent's Ninth and Broadway yard, through connections via the Short Route Transfer, the Chesapeake, Ohio & Southwestern, and the Jeffersonville, Madison & Indianapolis lines, reaching and extending up Fourteenth Street, to Maple and Tenth Streets, at a cost of two dollars or it could have

reached respondent's yard at First and Water Street, over the Short Route Transfer Company's line, at a charge of one dollar. Under its contract with petitioner it paid for cars switched to said Seventh Street and Magnolia connection one dollar per car, making a saving to itself of one dollar per car in going to that point rather than to the Ninth and Broadway yard; but in pursuing this course for the benefit of itself and petitioner there is imposed upon defendant, if it is compelled to accept such cars at said Seventh and Magnolia connection, an extra expense of more than one dollar, in keeping someone at said point to inspect and receive such cars, and in addition thereto, the cost of switching the same to said Ninth and Broadway yard, to be put into proper trains for destination. The interchange of traffic between the Ohio & Mississippi Railway Company and respondent, at the latter's Ninth and Broadway yard, which is entirely practicable, and where respondent is entirely willing to make such interchange, would deprive petitioner of its switching charge of one dollar, and would increase the cost to the Ohio & Mississippi Railway Company to the extent of one dollar per car, and this benefit to the one and increased cost to the other, without regard to the extra expense imposed upon the respondent at one point over the other, discloses one of the objects sought to be effected in seeking to force or compel an interchange at the point of connection selected by petitioner for its own convenience; but what public interest is to be subserved in aiding the petitioner to accomplish this object, or what bearing it has upon interstate commerce, which the Act of Congress undertakes to regulate, is difficult to perceive. It is, however, certain that the business thus transacted by petitioner does not make it, in law or in fact, a common carrier of interstate traffic. It is equally certain that petitioner is not a common carrier of that class of interstate freight which it solicits for railroads, either under express or implied agreement, and for which such roads furnished it with cars, for the transfer of which over its bridge petitioner charged and collected bridge tolls only. The Law does not require respondent or any other railroad company to keep up such an arrangement with petitioner as to continue to supply it with cars in order to obtain such traffic; thus making petitioner its soliciting or collecting agent in order to protect its interest in securing tolls for its bridge. Aside from the service performed by petitioner in these two classes, there is nothing in its business, as actually conducted, to sustain its claim to be even a *de facto* common carrier of interstate freight traffic.

The petitioner and the Louisville Bridge Company occupy precisely the same position and character—they both charge tolls for the use of their bridges. They differ in the manner of doing business in this: that petitioner, in addition to its bridge tolls, collects, in certain cases, for the services performed in making transfers of cars, a switching charge, which the Louisville Bridge does not make against the railroads using its bridge. Neither of them are, in law or in fact, common carriers of interstate traffic within the scope and meaning of the first section of the Act to Regulate Com-

merce, and neither can invoke the provisions of that Law to compel railroad companies to transact business with or through them. Between such a bridge company as petitioner and railroad carriers of the country, the Law establishes no such reciprocal relations, duties and obligations, as require the latter to form business connections with the former. We accordingly rule this third proposition against the petitioner.

The fourth point presented in this case—which is whether petitioner's connection with respondent's road at Seventh Street and Magnolia Avenue in Louisville is a proper, suitable, and convenient place for the interchange of traffic between them and the railroads using petitioner's track, and whether respondent's refusal to interchange at said point is an unreasonable and unjust discrimination against petitioner and the carriers using its track—involves questions both of fact and law. We think it clear that petitioner cannot, either in its own behalf or in behalf of railroads using its bridge, assert any valid right to an interchange of business with respondent at said point, under the eighteenth section of the latter's charter, which authorizes other railroads to make connections with its line of road. It is settled by the cases of the *Shelbyville R. Co. v. Louisville, O. & L. R. Co.* 83 Ky. 541, and *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 681 [28 L. ed. 296], that the connection thus authorized is a physical, and not a business, connection requiring an interchange of traffic at the point of junction. Petitioner's claim must, therefore, be founded, if it has any existence in law, upon some provision or requirement of the Act to Regulate Commerce. Counsel for petitioner, accordingly, rely upon the second clause of the third section, in connection with the seventh section of said Act, as sustaining petitioner's right to demand and require an interchange of traffic with respondent at said junction. The seventh section of the Law makes it unlawful for any common carrier, subject to the provisions of the Act, "to enter into any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption, made by such common carriers, shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption, was made in good faith, for some necessary purpose, and without any intent to avoid, or unnecessarily interrupt, such continuous carriage, or to evade any of the provisions of this Act." The facts show no violation of this provision of the Law on the part of the respondent. The contracts which it had with several railroads when the Act to Regulate Commerce went into operation, and which still continue in force, are in no wise inconsistent with the things forbidden by this section, and there is no pretext for saying that defendant has, since the passage of the Interstate Commerce Act, entered into any combination, contract, or agreement "to prevent by change of time schedules, carriage in different cars," or by

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other means or devices, the carriage of freight from being continuous. It has made no change in its method of doing business, indicating the slightest intention of violating the provisions of said section, and petitioner cannot, and does not in its petition, assert any such claim. Its right of interchange must, therefore, rest alone upon the second clause of the third section of the Act, which provides that "Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Neither this nor any other provision of the Law requires of the common carrier of interstate commerce the duty of either forming new connections or of establishing new stations for the reception and delivery of freights. The Act to Regulate Commerce deals with such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines—the connections they may form, and the yards and depots they may choose to establish. When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable, and ample stations and depots, for the accommodation of their business, the Law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards, or depots, even though such additional constructions might be for the convenience of the public, or of other carriers. Congress has certainly not undertaken, even if it possessed the power, to deal with such matters.

Now, it clearly appears, from the foregoing statement of facts, that respondent has already established, and has in use in the City of Louisville, four suitable, ample, and conveniently located and fully equipped yards and depots, at one or the other of which it receives and delivers all freights arriving at, or departing from, Louisville, and makes all its interchanges of freights with other lines, furnishing to the latter, at said places, "all reasonable, proper, and equal facilities," not only for such interchange of traffic, but also "for receiving, forwarding, and delivering, of passengers and property to and from its line or lines, and those connecting therewith," and does this without discrimination in its rates and charges, as between such connecting lines. At petitioner's Seventh Street and Magnolia Avenue connection neither respondent nor petitioner has any yard, station, or depot; neither owns any ground there, except respondent's right of way 66 feet in width, on which its double main tracks are located; neither has any buildings, sheds, or platforms there for the reception and accommodation of freights to be handled and exchanged at that point; nor has either of them any clerks or employes stationed there for the inspection of cars, receipting for freights, etc. Without such accommodations, and without

the employment of such clerical force located there, an interchange of traffic at said point cannot be made in a proper and convenient way to either party. No authority is conferred upon the Commission, or upon this court, to compel respondent to provide at that connection the same or equal facilities which it had provided at its regular established yards and depots in Louisville, in order to effect an interchange with petitioner and the railroads using its bridge. Respondent neither receives nor delivers Louisville freights, whether local or through, at that point. In some instances it receives and delivers its own cars on, and from, certain private sidings in Louisville, and at local Louisville rates—said private sidings being constructed and used under special contracts with the owners, and subject to respondent's right to remove or sever its connection with them at any time. Under said contracts such private sidings constitute, for the time being, portions of respondent's Louisville lines. The interchange sought by petitioner is entirely different. Louisville shippers or consignees, of either local or interstate freight, could not require respondent to receive or deliver their traffic at said Seventh Street and Magnolia Avenue connection, and in refusing to accept from or to deliver interstate traffic to private shippers or consignees at said point, it could not be claimed that respondent was denying to them the same proper, reasonable and equal facilities which it afforded to other shippers or consignees, who delivered and accepted their through freight, at its Ninth and Broadway yard and depot.

If we assume that petitioner is a common carrier within the meaning of the Law, can it, or the railroads using its track in the manner heretofore stated, properly demand or require of respondent to concede to it, or them, rights and facilities which respondent is under no obligation or duty to grant or provide for the owners and shippers of interstate commerce? This would be conferring upon common carriers, engaged in transporting interstate traffic, rights and privileges superior to those intended for the benefit of such commerce itself. The Law was not designed to advance the interests of or to benefit the carriers, but was intended for the benefit and advantage of the commerce they transported, and the provisions of the Act all look to that as its object and purpose. With no facilities at said Seventh Street and Magnolia connection, for the interchange of traffic, or for the receiving, forwarding and delivering of property there, and being under no legal duty or obligation to provide such facilities at said point, upon what principle can it be successfully asserted that in declining to transact such business at such place respondent is refusing or denying to petitioner, and the roads using its track, "all proper, reasonable, and equal facilities" for the interchange of traffic, or for receiving, forwarding, and delivering of property, such as it has provided and affords to other connecting lines at its Ninth and Broadway yard and depot? Can it be properly said that such refusal involves any discrimination against petitioner and the railroads using its track, and seeking a connection at that point with respondent—or against the traffic it or they may handle? In refusing to transact

business with petitioner at Seventh Street and Magnolia Avenue junction, while interchanging with other connecting lines at Ninth and Broadway Station, is respondent making or giving "any undue or unreasonable preference or advantage" to the latter companies or the traffic they transport?

An affirmative answer cannot be made to these questions, unless the third section of the Commerce Act is construed to mean that whatever facilities a railroad company engaged in interstate traffic may furnish or provide for the interchange of business with connecting lines at any one place, such as its regular established and properly equipped depot, it is bound to provide for any, and all other railroads, at such other and different points as they may select in making their connection. The section does not admit of this construction. It obviously means that where a railroad subject to the provisions of the Act has provided and established at any given place its facilities in the shape of yards, stations, and depots, for the interchange of traffic, or for the receiving, forwarding, and delivering of passengers and property, and there affords such facilities to some of its connecting lines, it shall not deny to other connecting lines, at that point, the same proper, reasonable, and equal facilities, for such interchange, or for receiving, forwarding and delivering of property, to and from such other connecting line. The question, therefore, as to what constitutes reasonable, proper, and equal facilities, necessarily involves a consideration of the place, accommodations, terms, and conditions at and under which facilities for interchange are sought, as compared with those where such interchange is conceded or afforded. It by no means follows, because certain facilities for the interchange of freight are furnished by a railroad to another connecting line, or lines, at one point, upon certain terms, conditions, and considerations, and where ample accommodations for the transaction of such business are provided and maintained, at the joint expense of the companies using them, that another company, making a physical connection with the road furnishing such facilities, at another different and distant place, is entitled to demand at said different point of connection the same or equal facilities.

The company making the physical connection, at a point other than that at which the established road has already provided its facilities and conducts its interchange with other connecting lines, cannot demand or require an interchange of freight at such point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought. It cannot rely upon the terminal facilities at another point of the road with which it has formed the physical connection; nor can it compel the road with which the connection is made to join with it in the expense of providing at that point the facilities necessary and proper for the interchange. In saying that petitioner, or other road in its position, could not properly require an interchange at the new point of physical connection, before it had first provided reasonable facilities there for transacting the business incident to an interchange of traffic, we do not mean to be understood as

holding that after providing such facilities at the point of connection it could then lawfully require respondent to interchange traffic with it and the railroads using its tracks at that place. We do not pass upon that question now, as it is not involved in the present controversy.

It is perfectly manifest from the location of the said Seventh Street and Magnolia connection, and from the lack of all suitable and proper accommodations there, for conducting the business involved in the interchange of freights, and from the manner in which such freight, whether in car load or broken lots, would have to be handled by respondent, that if respondent is required to furnish at that point all proper, reasonable, and equal facilities, or, as required by the order of the Commission, "the same equal facilities," which it furnishes and affords to the lines connecting with it at Ninth and Broadway yard, petitioner will, thereby, secure benefits and advantages superior to those conferred upon any other connecting line or lines, and largely, if not entirely, at respondent's expense. The order of the Commission imposes no terms and conditions under which the interchange at said connection shall be made. Petitioner is not required to pay respondent anything for switching services, which it will be compelled to perform in interchanging, or any rental for the use of its terminal facilities at Ninth and Broadway, where the freights, both in car loads and broken or mixed lots, have to be transferred, and put into proper trains. Neither is petitioner required to bear any portion of the expense of handling the traffic at said yard; and in seeking the aid of this court to compel obedience to said order, or to enforce its rights, petitioner makes no offer to compensate respondent for such services and expenditures. The Commission did not, perhaps, have the authority to impose such terms and conditions upon the petitioner; nor has this court either the right, or the necessary data, to settle and adjust those matters, which are the subject of private contract and arrangements between the parties. But without the imposition of such terms and conditions, it is clear that petitioner, and the railroads using its tracks and seeking an interchange at said connection, will secure, without cost to themselves or compensation to respondent, services, and the benefit of facilities, and of employes, for which other connecting lines interchanging at other places, make respondent compensation, and bear their proportion of the terminal expense. The Law never contemplated such results. No provision of the Interstate Commerce Act confers equal facilities to connecting lines, under dissimilar circumstances and conditions. On the contrary, even as to interstate commerce itself, the distinction is recognized throughout the Law, between discriminations and preferences which are just and reasonable and those which are unjust and unreasonable, according as they are made, or given, under similar or dissimilar circumstances and conditions. All discriminations and preferences are not forbidden or made unlawful, but only such as are unjust, or undue, or unreasonable, are prohibited. In each and every case, therefore, the question whether a discrimination is unjust, or a preference is undue or unreasonable, either as to the com-

mon carrier, or the commerce it may transport, involves a consideration of the circumstances and conditions under which such discrimination or preference is made or given.

Our conclusion upon this fourth proposition is, that said Seventh Street and Magnolia Avenue connection is not a proper, suitable, and convenient point for the interchange of freights between respondent, and petitioner, and railroads using its tracks; and that in declining to deliver and receive freight at that point, to and from petitioner, respondent is neither discriminating improperly against petitioner, and the carriers using its tracks, nor giving the roads with which it does interchange traffic at the Ninth and Broadway yard any undue or unreasonable preference or advantage.

Upon the fifth question presented, viz.: Does the Law impose upon respondent the duty of making an interchange with petitioner at said connection, if such interchange or traffic involves the use, by petitioner and the roads using its bridge, of the tracks and terminal facilities of respondent, or subjects respondent to expense over and above what it incurs in interchanging traffic with other railroads at its regular and established yards in Louisville?—little need be said. An interchange at that connection in its present situation, with no buildings, sheds, platforms or any facilities whatever for the proper care, protection, and handling of freight, and with no clerks, or employes stationed there, to look after and attend to the business, cannot possibly be carried on without requiring respondent either to concede the use of its tracks and terminal facilities to petitioner and the roads using its tracks, or without imposing upon respondent the trouble, inconvenience, and expense, of handling such traffic, both that received and delivered, in the manner above stated; that is, transferring it to said Ninth and Broadway Depot, and then rehandling, reloading or placing it into proper trains. Petitioner's superintendent, A. J. Porter, properly states that it is a physical impossibility to carry on an interchange of traffic, at that point, between the parties, without using each other's tracks. It does not admit of any question that neither the Commission nor this court has any authority to require respondent to concede the use of its tracks and terminal facilities in order to accomplish the desired interchange. Nor can this court or the Commission impose upon respondent the duty of making such interchange at its own expense, over its own tracks, with its own engines, at its own yard, and with its own employes. Other railroads connecting with respondent, and interchanging traffic with it at its regular yards, contribute their proportion of the expense incident to such interchanges, and compensate respondent for its services in handling their freight in a less inconvenient way, and for a shorter distance, than respondent would be necessarily compelled to handle the traffic received from or to be delivered to petitioner. The terms under which other railroads, connecting and interchanging with respondent at said Ninth and Broadway yard, are allowed to use its tracks and terminal facilities, and have their freights handled and transferred, are arranged by mutual agreements, which secure to respondent compensation for services, and for use of its improve-



ments, and provides for "prorating" the expense incident to such interchanges. Is it either legal or equitable to require respondent to handle traffic for petitioner upon terms less favorable? And, if the parties cannot themselves agree upon such terms, can this court make an agreement or contract for them in the matter? We think this is beyond the province of any court or commission, under existing law, and under circumstances such as exist in this case.

An interchange on the main line or tracks of a railroad is essentially different from such an interchange at its regular yard, where such business is usually transacted and where suitable conveniences and facilities are provided. If respondent is required "to allow and afford" to petitioner at said Seventh Street and Magnolia connection, "the same equal facilities" which it affords to railroads connecting with it at its established yards, without prescribing the terms, conditions, and considerations under or upon which such facilities shall be afforded, it is manifest that petitioner will secure not equal, but exceptional, advantages over all other connecting lines—and it is furthermore clear, from the foregoing statement of facts, that such exceptional advantages will involve either the use of respondent's tracks and terminal facilities by petitioner, or will impose upon respondent expenses and inconveniences and the performance of services without compensation, such as it does not perform or incur in effecting its interchanges with the carriers connecting with it at the Ninth and Broadway yard.

If, under such circumstances, an interchange can be demanded and enforced at a physical connection with respondent's main track, one mile and seventeen one hundredths of a mile from its regular depot, at what distance from such depot may such an interchange be properly refused? If the principle involved in the requirement of the Commission, or asserted in the claim of petitioner, is correct, as applied to the present case, where shall the line be drawn in respect to the distance from its regular yards, at which respondent can be compelled to allow and afford to other roads intersecting, or joining its main track, "the same equal facilities," which it affords to other connecting lines, which reach, and interchange business at, such established yards? The Law furnishes no answer to those questions, and if the right herein asserted is well founded, this court could not fix the limitation, upon its application to any distance.

The sixth inquiry suggested above is, "Does the Interstate Commerce Law, rightly construed, require respondent not only to interchange traffic, at said point of connection (Seventh Street and Magnolia Avenue), with petitioner, and the railroads using its tracks, but also to afford and concede to them, on such interchange of business, the same through routing, and upon the same joint through rates, which respondent has, by contract, arranged and agreed upon with certain railroads entering Louisville from the north side of the Ohio River? In other words, does said Act require that if respondent has entered into traffic arrangements with one or more railroads, connecting with it over the Louisville Bridge, for the joint through routing of business, at and upon joint through rates, to be apportioned

between them, it shall concede to, or make with, any and all other roads engaged in interstate commerce, and connecting with it, at other and different points, and running in different directions, the same or similar arrangements for through traffic, and upon the same joint through rates? And if this is required by the Law, is such requirement valid, and within the constitutional power and authority of Congress to regulate commerce among the States?"

Aside from the place at which the interchange of traffic is sought, the present controversy clearly involves the question as to whether such interchange shall be effected at local Louisville through rates, or at such through joint rates as respondent has arranged with the roads connecting and interchanging with it over the Louisville Bridge. Respondent is now, and has always been, willing to interchange freights with petitioner and the Ohio & Mississippi Railway Company, when such freights are tendered at its proper yards, and it is allowed to charge for the transportation thereof its local Louisville rates to destination. The petitioner and the Ohio & Mississippi Railway Company, since the latter's abandonment of the Louisville Bridge, and its contractual relations with the Louisville & Nashville Railroad Company, have not been willing to concede to respondent the right of charging local Louisville rates on the freight they sought to have interchanged. Duncan, the general freight agent of the Ohio & Mississippi Railway Company, states that his company could not interchange traffic with the Louisville & Nashville Railroad Company on these terms, which would leave the Louisville & Nashville Railroad Company in position where it could decline "to pay any of our charges on freight that we offered them at Louisville rates." The agents and officers of petitioner also state that they expected respondent to accept and carry at through joint rates the freight as to which interchange was sought. Petitioner claimed before the Commission, for itself and the railroads using its tracks, that it was entitled, at its said connection, to an interchange of freight, upon the same terms, as to through routing and through joint rates, which respondent made with other railroads using the Louisville Bridge; and that respondent in refusing such routing and rating was discriminating against it. If, therefore, the question of rates was not passed upon by the Commission, or covered by its report and order, one of the real points in controversy between the parties was not disposed of. To leave it open, as suggested by counsel for petitioner, will only be to invite, and necessitate, further litigation between the parties; for if this court were to issue its mandate requiring respondent to obey the award of the Commission, expressed in the general and indefinite terms of "ceasing its refusal to receive traffic offered at said connection, and of allowing and according to petitioner at said point 'the same equal facilities' which respondent affords to other common carriers at the points of connection with their lines respectively," the question would come back to the court at once, as to whether "the same equal facilities" included through routing, and through joint rates, such as respondent makes with other carriers connecting with it, or is satisfied with Louisville

routing, and local Louisville rates, to destination of freight offered for interchange.

Or if the court should be in error in its conclusions that said Seventh Street and Magnolia Avenue connection is not a proper, suitable, and convenient point for the interchange of traffic between the parties, and that such an interchange at that connection could not be effected without either the use, by petitioner, of respondent's track and terminal facilities, or the imposition, upon respondent, of expenses and burdens such as it is not required to incur in conducting its interchanges of business with other railroads, reaching its Ninth and Broadway yard, then the question of through routing, and through joint rating, is a necessary and material matter for determination in the present controversy.

The first section of the Act to Regulate Commerce, provides that "all charges" for services rendered by common carriers subject to the provisions of the Law, "shall be reasonable and just," and prohibits, and declares unlawful, "any unjust and unreasonable charge." This is the sole requirement of the Law, upon the subject of rates, which common carriers subject to the provisions of the Law, may demand for the transportation of interstate traffic. The second section of the Act clearly defines what shall constitute the "unjust discrimination" which is prohibited. The third section prevents the making, or giving of any undue or unreasonable preference or advantage to any firm, company, person, corporation, locality, or traffic, or the subjecting of any person, company, firm, corporation, locality, or description of traffic, to any undue or unreasonable prejudice, or disadvantage; and by its second clause, requires common carriers to afford all reasonable, and proper, and equal facilities for the interchange of traffic, and for the receiving, forwarding, and delivering of passengers and property between their lines and those connecting therewith, and prevents them from discriminating in their rates and charges, between such connecting lines; but without requiring any such common carrier "to give the use of its tracks and terminal facilities to another carrier engaged in like business."

Now, under this last limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding, and delivering, of traffic, to and from, and between, connecting lines, it is clearly left open to any common carrier to contract, or enter into arrangements, for the use of its tracks and terminal facilities, with one or more connecting lines without subjecting itself to the charge of giving an undue, or unreasonable, preference, or advantage, to such lines, or of discriminating against other carriers, who are not parties to, or included in, such arrangements. No common carrier can, therefore, justly complain of another, that it is not allowed the use of that other's tracks and terminal facilities, upon the same, or like terms and conditions, which, under private contract or agreement, are conceded to other lines.

It is equally clear from the provisions of section 6 of the Act that two or more common carriers may lawfully enter into contracts or

agreements for the establishment and operation of through routes, at or upon joint through rates. Copies of such contracts and agreements have to be filed with the Commission. "And in case where passengers and freight pass over continuous lines, or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates, or fares, or charges, for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission." Such joint rates, fares or charges on such continuous lines are to be made public when directed by the Commission, and the failure of any common carrier to comply with such requirements will authorize this court, upon the application of said Commission, to restrain such common carrier from receiving or transporting property among the several States, etc.

If, in the exercise of the right, thus impliedly if not expressly recognized, a common carrier, by private arrangement, forms a through route, and establishes joint through rates, fares, or charges, with certain connecting lines, is it compelled to concede to all other connecting railroads, the same or equal through rates, on traffic which the latter may offer for transportation? It is settled by the case of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 683 [28 L. ed. 297], that neither at common law nor under the Constitution of Colorado (section 6)—providing that all individuals, associations and corporations shall have equal rights to have persons and property transported on any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State—does the refusal of a common carrier to make through traffic arrangements, at or upon joint through rates, with one connecting railroad company, such as it makes or enters into with another connecting line, constitute any undue or unreasonable discrimination in charges or facilities. That decision is conclusive of the present question, unless some provision of the Act to Regulate Commerce has expressly, or by clear implication, provided otherwise. It is insisted for petitioner that such is the case, and the second clause of section 8 of that Act is relied on, in connection with section 5258, Revised Statutes of the U. S. (embracing the Act of June 15, 1866), as establishing a different rule and regulation, from that announced in the above decision. We think it is very manifest that section 5258, Revised Statutes, which imposes no duty, but merely permits or authorizes the carriage of traffic from one State to another, and to that end, the formation of continuous lines, evidently by mutual agreement, does not sustain petitioner's proposition. That section was in full force when the cases of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. supra*, and *Dubuque & S. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 584 [22 L. ed. 178], were decided, and was not considered by the supreme court as conferring any right to a through route and a joint through rating. Is it a public duty imposed by the Act to Regulate Commerce, that every common carrier subject to the provisions of that Law, shall concede or afford through

routing and through rates, to all connecting lines, whenever and so long as it voluntarily makes or enters into such arrangements with any connecting lines?

After a careful examination of the Act, and the arguments of counsel, and authorities cited, we fail to discover any such requirements. In the report of the Commission in the case of *Chicago & A. R. Co. v. Pennsylvania Co.* (1 Inters. Com. Com. Rep. 94, 1 Inters. Com. Rep. 360), it is well and properly said, in reference to through tickets, that "Such tickets very evidently are a great convenience to travelers, and perhaps to connecting roads; but they are a part of the voluntary arrangements for business purposes, like joint tariffs, interchange of cars, and common use of depots. It being, therefore, under our statute, matter of mutual agreement, whether coupon or through tickets shall be sold by a railroad company, over roads of other companies, it follows that the form of such tickets, and the manner of their sale, are also matters of agreement by the companies interested. If companies can agree upon their tariffs, the form of their tickets, and how they shall be sold, they have the right to do so, and by such agreement, become interstate carriers; but if they cannot agree, the Act does not undertake to coerce them to do business together upon terms that may be justly objectionable or injurious."

It will hardly be insisted that a different rule applies in respect to through freight traffic, and joint through rates or charges, the arrangement for which, as well as the forms of the bills of lading, and the apportionment to be made of such joint tariff rates, and of losses or damage to freights in course of transit, are all matters of private agreement. Such arrangements, which usually include the reciprocal interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations, varied and complex, as shown in the above statement of facts. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases, and with other connecting lines, they might be prejudicial, and injurious to the interest of one or both. Can companies in the latter situation properly claim as matter of right what the former have acquired under and by virtue of private contract and arrangement?

No provision of the Law, rightly construed, sanctions or supports such a proposition. The statute does not undertake to create between connecting lines such an agency, or quasi partnership relation as is necessarily involved in agreements, or arrangements, for the establishment of through routes and the making of through rates. As such arrangements exist by contract, express or implied, the fact that a common carrier enters into them, with one or more connecting lines, does not impose upon such carrier the duty, or obligation, to make the same, or like contracts, with all other lines. The Law possesses no such elastic or expansive quality, as to reach, or bring within its operation, in favor of all common carriers subject to its provision, every varying right and privilege which any other carrier may acquire, or concede by private contract, not in conflict with the Act. No authority is

conferred upon common carriers of interstate commerce, to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies. Neither is the Commission invested with authority to establish through routes, or to fix through rates, between connecting lines. The English Act of 1878,\* amendatory of the Act of 1854, did confer such authority, in providing that "The said facilities to be afforded are hereby declared to, and shall, include the due and reasonable receiving, forwarding, and delivering, by any railway company and canal company, at the request of any other such company, of through traffic to, and from, the railway or canal of any other such company, at through rates, tolls, or fares;" but, in the apportionment of such through rates, said Act required the commissioners "to take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or making of the route, or any part of the route, as well as any special charges, which any company may have been entitled to make, in respect thereof."

Our Act to Regulate Commerce contains no such provision, and confers no such authority. The English cases, under the Act of 1873, cited by counsel, cannot, therefore, have any bearing upon the present case, and need not be referred to.

Looking at this question from another standpoint, we find that the Law was intended, primarily, for the benefit of the interstate traffic, rather than for the advantage of the designated common carriers engaged in its transportation; and the latter, as the instrumentalities and agencies of commerce, can hardly assert rights and privileges, under the statute, which could not be properly or lawfully claimed by such commerce itself. Let us, then, by way of illustration, and to bring out more distinctly the question under consideration, take the case of a shipper or consignor at Nashville, Tenn., wishing to have his goods transported to Cincinnati, Ohio. Could he legally require the Louisville & Nashville Railroad Company, not only to accept such shipment, but to route it over, or via, the petitioner's bridge and the Ohio & Mississippi Railway, and at the same through rates, from Louisville to Cincinnati, as respondent's own *pro rata* charge between said points would be, if it carried the goods direct from Nashville to Cincinnati? Or could such shipper require respondent to route his goods, in the way stated, at the same, or equivalent, through rates, which respondent has established with connecting roads leading north from Louisville to Indianapolis, St. Louis, or Chicago? The Louisville & Nashville Railroad Company could not decline to accept and carry such goods to Louisville at its regular rates, between Nashville and Louisville, but could it not properly decline the demand to route and rate them beyond Louisville to Cincinnati, on the ground that it had a direct line of its own to Cincinnati, over which the property could be carried by itself—that it had no arrangement or agreement with the Kentucky and Indiana Bridge Company and the Ohio & Missis-

\*See 1 Inters. Com. Rep. 848, [Rep.]

Mississippi Railway Company for such through routing and through joint rating—and that between Louisville and Cincinnati it was a competing, and not a connecting, line with the Ohio & Mississippi Railway Company? Could the Nashville shipper successfully urge, in support of his demand for such through routing and rating, that the Louisville & Nashville Railroad Company had existing arrangements with lines (other than the Ohio & Mississippi Railway Company) crossing the Louisville Bridge, under which interstate traffic was carried at through rates between certain points? There can be but one answer to these questions. The Law confers no such right upon the shipper, and imposes no such duty upon the common carrier. If Cincinnati is made the point of shipment, and the Ohio & Mississippi Railway Company is taken as the initial carrier, it is equally clear that, in the absence of any through traffic arrangement between the Louisville & Nashville Railroad Company and the Ohio & Mississippi Railway Company, a shipper at Cincinnati could not lawfully require the Ohio & Mississippi Railway Company to accept his goods, and issue a through bill of lading therefor to Columbia, Tennessee, via the Kentucky and Indiana Bridge, and via the Louisville & Nashville Railroad, at the same through rates from Louisville to Columbia, which the Louisville & Nashville Railroad Company would charge from Louisville to Columbia, under its through rate from Cincinnati to Columbia. What the shipper of interstate commerce may not lawfully demand, the common carrier engaged in transporting such commerce may not lawfully require of connecting lines.

In the absence of traffic arrangements between respondent and petitioner, and the railroads using its tracks, the former has a right to treat freights tendered it at Louisville, as local Louisville business, and charge for the transportation thereof, its Louisville rates to destination, and in doing this no discrimination is made against said parties, or the traffic they carry; nor does respondent make, or give, any undue or unreasonable preference or advantage to other lines, or the traffic they handle, with whom it has agreements for through routing, and at through joint rates, which may be lower than its Louisville rates to the same points. The service in the two cases is not the same, or identical, as was settled in the case of the *Union Pac. R. Co. v. U. S.* 117 U. S. 355 [29 L. ed. 920], where the supreme court held that "The service rendered by a railway company in transporting a local passenger from one point on its line to another is not identical with the service rendered in transporting a through passenger over the same rails." There is nothing in the Commerce Act of Congress to change this rule. The effect of a through traffic arrangement between different companies is to extend a railroad's line, during the existence of such arrangement, to the point or points agreed upon; and over such extended routes it may charge, as a through rate, less than for transporting local traffic from one point to another on its own line, provided that in so doing the fourth section of the Act is not violated.

The Louisville & Nashville Railroad Company is under no legal duty or obligation to 2 L. R. A.

extend its line across the petitioner's bridge to New Albany; and if it was, petitioner has, by its contract of September 29, 1886, with the Ohio & Mississippi Railway Company, shut itself off from affording to respondent the same or equal facilities in the use of said bridge, by having given the locomotives, cars, and trains of the Ohio & Mississippi Railway Company a preference over those of a similar class of other railroad companies that may use said bridge. So that it is not in a position, while that contract is in force, to grant, or concede, such traffic arrangements as it demands for itself, and the railroads using its bridge.

While the Ohio & Mississippi Railway Company is not an actual party to this controversy, which this court is required "to hear and determine as a court of equity," it is, however, perfectly manifest that this proceeding, as well as that before the Commission, is intended for the private benefit, not merely of petitioner, but of the Ohio & Mississippi Railway Company; and its object is to relieve the latter from the contract of June 5, 1872, in order that petitioner may secure from it the rental stipulated to be paid for the use of its bridge—the Ohio & Mississippi Railway Company not being bound by the contract of September 29, 1886, to pay petitioner "any tolls" thereunder, until its liability for tolls, charges, or rentals, under the contract of June 5, 1872, with the Louisville Bridge Company, is removed. Now the contract of June 5, 1872, which the Ohio & Mississippi Railway Company entered into with the Louisville Bridge Company and other railroad companies, including respondent, and in the maintenance and enforcement of which respondent has a direct business and pecuniary interest, was neither abrogated nor annulled by the Act to Regulate Commerce. The provisions of that contract are not in conflict, but in strict conformity, with both the letter and spirit of the Act of Congress.

Under the terms and operation of that contract, which is still in full force as against the Ohio & Mississippi Railway Company, and all parties thereto, the Ohio & Mississippi Railway Company had and enjoyed all reasonable, proper, and equal facilities with any and every other railroad company entering Louisville from the north side of the Ohio River, and interchanging traffic with respondent. It voluntarily abandoned these facilities in 1888, changed its business to the petitioner's bridge, not in the interest of the public or of the interstate commerce it handled, but for its private benefit and advantage; and petitioner now seeks to secure for it, as well as for itself, the same terms and facilities which existed under the contract of June 5, 1872, and without subjecting either to the obligation of compensating respondent, or sharing in the expense of an interchange, as provided in the contracts of May 22, 1873, and May 16, 1888. The Act to Regulate Commerce, no more than the Act of June 15, 1866 (section 5258, Rev. Stat. U. S.), was never intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the law. In *Dubuque & S. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 590 [23 L. ed. 176], the supreme court says of such contracts "that the observance of good faith

between the parties and the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the States, which the Act of June 15, 1866, aimed to promote."

Under such circumstances as surround the parties, neither the Ohio & Mississippi Railway Company, nor the petitioner, who, for private advantage, is co operating with the Ohio & Mississippi Railway Company in trying to escape from the obligations of said contract of June 5, 1872, are in a position to commend themselves to the favorable consideration of a court of equity; and no strained construction of the Law should be made, in order to afford them, or either of them, the relief they seek at the hands of the court. The Law should be as liberally construed in favor of commerce among the States, as its language will permit; but when complaint is made, or relief is sought, solely, or mainly, in the interest of the common carriers engaged in the transportation of such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred. But under no construction, which can properly be placed upon the present case, can it be maintained that a public duty is imposed upon respondent of interchanging traffic with petitioner, and the railroads using its tracks, upon the same terms as to through routing and through joint rates which it has, by private agreement, established with other connecting roads using the Louisville Bridge.

Having reached the conclusion that the Act to Regulate Commerce, rightly construed, does not sanction nor support the affirmative of the proposition presented, it is not deemed necessary to go into any discussion as to the power of Congress over the subject of rates, which common carriers may charge on interstate commerce, or whether Congress, under the power conferred by the Constitution to regulate commerce among the States, could require all connecting lines engaged in transporting such commerce, to establish through routes, and make through joint rates, which should be equal between all such companies. No court has attempted to define the extent, limit, or scope of the power, conferred by the Constitution upon Congress, to regulate commerce among the States. The power is undoubtedly sovereign and exclusive. Prior to the passage of the Interstate Commerce Act this power and exclusive authority over the subject was only exercised—with the exception of regulations for the protection of passengers upon navigable waters, and the transportation of livestock by railroads—through the judicial department of the general government in the way of restraining or annulling state legislation or action, which undertook to interfere with, obstruct, or impose burdens or restrictions upon, interstate commerce. But the power is manifestly not confined or limited to this negative form of action upon the States. It clearly admits of affirmative exercise on the part of Congress, as much as any other power granted by the Constitution. R. A.

stitution to the federal government. *Chief Justice Marshall in Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 [6 L. ed. 23], gave this comprehensive definition of this power: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign Nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Possessing such sovereign and exclusive power over the subject of commerce among the States, it is difficult to understand why Congress may not legislate, in respect thereto, to the same extent both as to rates and all other matters of regulation, as the States may do in respect to purely local or internal commerce. But we are not called upon in the present case to say what would or would not come within this regulating power, for the existing Law does not undertake to prescribe anything more, upon the subject of rates, than that they shall be reasonable and just. It does not undertake to require a common carrier, subject to its provisions, to establish through routes and through rates with all connecting lines, if it does so with one or more lines, and does not, as we construe its provisions, entitle petitioner to the relief which it seeks in this proceeding.

For the foregoing reasons our conclusions upon the whole case are that the order of the Commission was not a lawful requirement, such as respondent is bound to obey, and that petitioner is not entitled to the relief which it seeks in this court. *It is accordingly ordered and decreed that petitioner's bill or petition be dismissed at its costs, to be taxed, including in such costs an allowance of \$600 to the referee, as compensation for his services in taking proof and making report herein.*

#### **Barr, D. J.:**

I agree with so much of His Honor's—*Judge Jackson's*—opinion as decides the Interstate Commerce Act constitutional, and that this court has original jurisdiction in this cause.

I also concur with him in the opinion that the complainant is not a common carrier of interstate traffic, within the meaning of the Interstate Commerce Act, and that there are not proper and suitable facilities for the interchange of traffic at the intersection of Seventh Street and Magnolia Avenue; but I do not concur in so much of his opinion as seems to indicate that complainant, or the railroads using its bridge, must bring their freight for interchange to one of the established depots of the Louisville & Nashville Railroad Company.

On the contrary, I think the intersection of Seventh Street and Magnolia Avenue is a proper place for the interchange of traffic, if suitable platforms and other structures were

erected. These necessary facilities should be furnished by the complainants or those demanding the interchange of traffic at that point, as they have no right to use either the track or terminal facilities of the Louisville & Nashville Railroad Company without its consent.

Having concurred in the opinion that the complainant cannot obtain an interchange of

traffic with the Louisville & Nashville Railroad Company, and that the petition must be dismissed, I do not wish to give an opinion as to the rates which should be charged as between common carriers in the interchange of traffic under and by virtue of the Interstate Commerce Act, until a case arises which requires a decision.

## GEORGIA SUPREME COURT.

A. L. DRUCKER & Bro., *Plffs. in Err.*,

v.

WELLHOUSE & Sons.

(.....Ga.....)

1. **Though a firm or partnership is not a person, it is a legal entity, and for some purposes is recognized as a quasi person, having powers and functions exercisable by one of the partners severally or all of them jointly. It may be a debtor or a creditor, within the meaning of a statutory enactment.**

2. **Statutes which relate to voluntary assignments by "insolvent debtors" for the benefit of creditors, and require sworn schedules of assets and creditors to be prepared and attached to the deed or instrument of assignment by "the person, firm or corporation" making such assignment, and provide that "in case of assignments by firms" the required oaths may be made by any member of the firm, assume the right of insolvent firms to assign the partnership property for the benefit of their creditors, though the partners themselves, as individuals, may be solvent. It follows that the individual property of the partners, respectively, need not be assigned in order to render the assignment valid.**

\*Head notes by the COURT.

NOTE.—*Partnership; assignment for benefit of creditors.* Although the personal property of a partnership may be assigned by the joint act of all the partners, yet an individual partner cannot lawfully step aside from the ordinary course of business and assign the partnership effects to a trustee, even for the payment of the partnership debts, giving preference. *Havens v. Hussey*, 5 Paige, 30; *Kirby v. Ingersoll*, 1 Doug. (Mich.) 477; *Fisher v. Murray*, 1 E. D. Smith, 341; *Mabbett v. White*, 12 N. Y. 460; *Loeschick v. Addison*, 3 Robt. 343, 19 Abb. Pr. 182; *Moir v. Brown*, 14 Barb. 47. See *Stevens v. Brown*, 9 Up. Can. L. J. Ch. 110. Such an assignment is void (*Pettee v. Orser*, 18 How. Pr. 451, 6 Bosw. 136; unless made with the assent or concurrence of all the copartners. *Wetter v. Schlieper*, 6 Abb. Pr. 125; *Anderson v. Tompkins*, 1 Brock. 465; *Fisher v. Murray*, 1 E. D. Smith, 341; *Romp v. Carnley*, 3 Duer, 1; *Haggerty v. Granger*, 15 How. Pr. 243; *Dana v. Lull*, 17 Vt. 380. One partner cannot, against the wishes of his copartner, assign the partnership effects to trustees for the benefit of creditors making preferences between them. *Deming v. Colt*, 3 Sandf. 291; *Bowen v. Clark*, 1 Hiss. 135; *Haggerty v. Granger*, 15 How. Pr. 243; *Everson v. Gehrman*, 10 How. Pr. 304, 1 Abb. Pr. 171; *Hitchcock v. St. John*, Hoffm. Ch. 517; *Egberts v. Wood*, 3 Paige, 517. There may, therefore, be some doubt as to the right of the general partner to make any assignment of all the partnership effects to a trustee, for any purpose, without the express or implied assent of the special partner; unless provision is made for such an assignment, in case of insolvency, in the articles of copartnership. *Miller v. Arnull*, 6 Paige, 582; *Hayes v. Heyer*, 4 Sandf. Ch. 485; *Hughes v. Ellison*, 5 Mo. 463; *Drake v. Rogers*, 6 Mo. 317; *Loeb v. Pierpoint*, 58 Iowa, 499. A general assignment, executed by one of the partners, has been sustained; but in these cases the

3. **Where the schedules required by statute are in fact attached to the deed of assignment, and there is no reason to conclude or even suspect that they were not attached at the time the assignment was executed, failure of the writings to declare expressly on their face that they were then attached is of no consequence.**

4. **That one of the preferred debts was a due-note payable to the attorney who drafted the assignment, and was given to him by the firm "for services rendered in drawing this deed of assignment, and for advice and counsel in reference thereto, and services to be rendered hereafter for the purpose of protecting and upholding this assignment," does not render the assignment void *per se*. If there was actual fraud, the fraud is matter for proof *aliunde*; and if no fraud was intended, but the amount of the note is more than the services rendered and to be rendered are worth, or if the assignee should not accept the attorney as his counsel in behalf of the creditors, or should not need his services, a proper deduction from the amount can be made, and the note be left to stand good against the assets for the balance only.**

(November 9, 1888.)

**ERROR** from the Superior Court of Fulton E. County (Clarke, J.), brought by the defendants below to review a judgment in favor of

assent of all has been inferred; and hence even these cases do not present an exception to the rule that, to make a general assignment valid, the same must have been executed with the assent of all the partners. *Osborne v. Barge*, 29 Fed. Rep. 727. See *Emerson v. Senter*, 118 U. S. 3 (30 L. ed. 49); *Deming v. Colt*, 3 Sandf. 284; *McGregor v. Ellis*, 3 Dism. (Ohio) 238; *Graves v. Hall*, 32 Tex. 665; *Dana v. Lull*, 17 Vt. 380; *Stein v. La Dow*, 13 Minn. 413; *Brooks v. Sullivan*, 32 Wis. 449.

*Contract; validity; conflict of laws.* The rule that contracts made out of the State, which contravene the policy of the State, will be held void, does not make an assignment void, because it does not have annexed to it the schedule required in such cases by the laws of that State, as such schedules are not parts of the contract. *Birdseye v. Baker* (Ga.), ante, 99; *Bacon v. Horne*, (Pa.) post, —. Where the statute requires schedules or inventories of assets and liabilities to be annexed to the assignment, they are essential features of the contract and must accompany it. *Talcott v. Hess*, 31 Hun. 232; *Terry v. Butler*, 43 Barb. 136; *Coggins v. Stephens*, 73 Ga. 414; *Wilt v. Franklin*, 1 Binn. 162; *Stevens v. Bell*, 6 Mass. 332. But omissions from the schedules or inaccuracies in the inventories, if caused by an innocent mistake of assignors, do not invalidate the assignment. *Smith v. Bowen*, 61 Wis. 58; *Hatten v. Smith*, 62 Wis. 32. So, of a mere mistake in computation. *Barrollhet v. Fisch*, 61 Cal. 462. Under a Statute of South Carolina, declaring that an assignment for creditors shall be absolutely null and void if any preference or priority is given thereby, an assignment executed in New York, preferring employes conveying property in South Carolina, will be held void there although valid by the Laws of New York. See *Sheldon v. Blauvelt* (S. C.) 1 L. R. A. 685, and note.

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the plaintiffs below on a bill to set aside an assignment. *Reversed.*

The firm of A. L. Drucker & Bro. made an assignment, as such firm, of all said firm's property, for the benefit of the creditors of the firm, to Malcolm Johnston as assignee. The assignment was attacked by Wellhouse & Sons, creditors, who charge:

1. That defendants are seeking "how to wrong and injure orators: *first*, because they left out of the assignment the individual property of the members of the firm; *second*, because in providing that the fee of \$150, for which they preferred their attorney, J. C. Jenkins, should cover any future services rendered by him in upholding and protecting the assignment, they thereby reserved a benefit to themselves.

2. That the assignment is fraudulent and void: *first*, because the affidavits attached to the schedules do not recite that such schedules were annexed at the time of the execution of the deed; *second*, because the schedules are not sufficiently identified.

The foregoing embraces the whole of the charges in the bill.

Defendants filed a general demurrer to the bill—that it was without equity and that the allegations therein do not set forth any sufficient ground in law or equity why the assignment should be interfered with by the court.

Complainants put in evidence the deed of assignment and an affidavit of Wellhouse that he saw the defendants have on their persons watches and diamond pins.

The court passed an order appointing a receiver and directing him, not only to take possession of the firm assets in the hands of the assignee, but also of all the individual property of the defendants, A. L. Drucker and S. L. Drucker.

The judge announced that his decision was rendered solely on the ground that the deed of assignment was void because the assignors had not included in the deed the individual property of the members of the firm in addition to the copartnership property. Whereupon, defendants excepted.

**Mr. Malcolm Johnston with Mr. J. C. Jenkins**, for plaintiffs in error:

An assignment of firm property for the payment of firm debts is valid, although it does not embrace the individual property of any of the partners.

Ga. Acts 1880-81, p. 174; 1884-85, p. 100; Burrill, Assignments, 5th ed. p. 308, foot note 1; *Auley v. Osterman*, 65 Wis. 118, 122, 123; *Ex parte Hopkins*, 1 West. Rep. 208, 104 Ind. 187; *McFerran v. Davis*, 70 Ga. 661.

A firm is a quasi person; it is a legal unit. Our law abounds in instances in which it can act in its collective capacity as a person—it can hold and convey property as a firm, can sue and be sued, judgment can be rendered against it, attachment can issue against it, etc. But nowhere is this unity or personality more clearly recognized than in the Acts of 1880-81 and 1884-85 above referred to, respecting assignments by insolvent debtors.

When a copartnership and the individual members unite in making an assignment, the firm property must first be applied to the pay-  
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ment of the firm debts, and the individual property of each member to his individual debts.

Burrill, Assignments, 5th ed. p. 308; *Kirby v. Schoonmaker*, 3 Barb. Ch. 51; *Wilson v. Robertson*, 21 N. Y. 592.

Surviving partner may make general assignment of firm property for firm creditors.

*Salsbury v. Ellison*, 7 Colo. 167, 49 Am. Rep. 847; *Loeschig v. Hatfield*, 51 N. Y. 660.

The provision for the attorney's fee as herein made is proper and valid.

*Mutton v. Judd*, 59 Mass. 99; *Hill v. Agnew*, 12 Fed. Rep. 230; *Butt v. Peck*, 1 Daly, 83 at seq.

**Messrs. Weil & Brandt**, for defendants in error:

A deed of assignment of an insolvent trader, containing a reservation of benefit to himself, is void.

Ga. Code, § 1952.

Assignments, considered as modes of provision for creditors, should in all cases be actual, and, to the full extent, what they profess to be.

Burrill, Assignments, 5th ed. p. 238.

Assignment of partnership assets is a partial assignment when debtors have separate property.

1 Am. & Eng. Encyclop. Law, p. 846. See also Burrill, Assignments, 5th ed. § 93, p. 146.

Assets mean all the property of every name, kind and nature, chargeable with the debts of the bankrupt.

*Re Taggart*, 16 Nat. Bankr. Reg. 355.

A provision in an assignment, that the assignee, who was a lawyer, should retain, over and above the expenses of a trust, a reasonable counsel fee, was held to render the assignment void.

Burrill, Assignments, 5th ed. § 232, p. 232.

**Bleckley, Ch. J.**, delivered the opinion of the court:

1. Partners are called, collectively, a firm. "Merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, *i. e.*, as a body distinct from the members composing it, and having rights and obligations distinct from those of its members; hence, in keeping partnership accounts, the firm is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the firm for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions, but are always either debtors to or creditors of the firm."

"Owing to this impersonification of the firm, there is a tendency to regard its rights and obligations as unaffected by the introduction of a new partner, or by the death or retirement of an old one. Notwithstanding such changes among its members, the firm is considered as continuing the same; and the rights and obligations of the old firm are regarded as continuing in favor of or against the new firm as if no changes had occurred. The partners are the agents and sureties of the firm; its agents for the transaction of its business; its sureties for the liquidation of its liabilities, so far as the



assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets.

"But this is not the legal notion of a firm. The firm is not recognized by lawyers as in any way distinct from the members composing it. In taking partnership accounts, and in administering partnership assets, courts have to some extent adopted the mercantile view; and actions may now be brought by or against partners in the name of their firms; but, speaking generally, the firm has no such legal recognition. The law, ignoring the firm, looks to the partners composing it. Any change among them destroys the identity of the firm. What is called the 'property of the firm' is their property, and what are called the 'debts and liabilities of the firm' are their debts and their liabilities.

"In point of law, a partner may be the debtor or the creditor of his copartners, but he cannot be either debtor or creditor of the firm of which he is himself a member. A member of an ordinary partnership is at law, as in commerce, the agent of the firm for the purpose of transacting its business; but he is not the surety of the firm. Every member of an ordinary partnership, however numerous the partners may be, is liable to have his property seized for a partnership debt, whether the firm has assets to pay it or not; and not only so, but the property of the firm is liable to be seized for the private debts of any of the members composing it. This nonrecognition of the 'firm,' in the mercantile sense of the word, is one of the most marked differences between partnerships and incorporated companies." 1 Lindley, Partn. \*163, 4th ed. 207; Dicey, Parties (by Truman), 169, 138.

"Upon the same principle—namely, that the firm is not distinguishable from its members, and that the name of the firm is only a conventional name for those members—if a firm is appointed by its mercantile name to any office, *e. g.*, the office of trustee, guardian or executor, the partners in the house at the time of its appointment to the office are the persons who, in point of law, are considered as filling it." 1 Lindley, Partn. \*166; *De Mazar v. Pybus*, and *Knudson v. Pybus*, 4 Ves. Jr. 644.

The firm, as such, cannot hold an office, nor can rights, personal to the members of a given firm, be exercised by new members who may be introduced into it. See *Barron v. Fitzgerald*, 6 Bing. N. C. 201, 37 E. C. L. 846; *Stevens v. Benning*, 1 Kay & J. 168; 1 Collyer, Partn. 6th ed. Wood's Notes, 288, note.

"Partnership is but a relation. It is not a person—it is not a legal being. The real owners of partnership property are the partners." *Harris v. Viischer*, 57 Ga. 229.

"It is not a being distinct from the members which compose it." *Chambers v. Sloan*, 19 Ga. 84.

"As among partners, the extent of the partnership is determined by the contract and their several interests. As to third persons, all are liable, not only to the extent of their interest in the partnership property, but also to the whole extent of their separate property." Code, § 1888.

The foregoing quotations are more than ample  
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to show that in contemplation of law there is no merger or fusion of the several persons composing a partnership into a common or comprehensive person including them all. A firm adds nothing to population, and in this respect is unlike a corporation, which augments population in the legal, though not in the natural, world. Still the law does take note, on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and obligations. Judgment may be entered and execution issue for or against it. Code, §§ 1899, 3576.

Attachment may issue against it as nonresident (*Chambers v. Sloan*, 19 Ga. 84; *De Leon v. Heller*, 77 Ga. 740; or as absconding. *Hines v. Kimball*, 47 Ga. 587.

It may be served with process. *Peel v. Bryson*, 72 Ga. 332.

It may be taxed; *Savannah v. Hines*, 53 Ga. 616; and see many provisions in the Session Laws imposing taxes. It may be insolvent. Code, § 1918; *Bennett v. Woolfolk*, 15 Ga. 213; *Daniel v. Townsend*, 21 Ga. 155; *Pullen v. Whitfield*, 55 Ga. 174; *Anderson v. Pollard*, 62 Ga. 51.

It may assign its property to pay its creditors; but whether by general law a single partner can make for it a general assignment seems open to question. Burrill, Assignments, § 67 *et seq.*; Story, Partn. §§ 101, 310; Parsons, Partn. 165, 166, 400.

As to restrictions on limited partnerships in the matter of assignments, see Code, §§ 1939, 1940.

According to Parsons (Partn. 449), there is a "general tendency of the law at this day to complete its recognition of a partnership as a body of itself, with its own means appropriated to its own debts." In view of this tendency, which is everywhere traceable and no less in our own local system than elsewhere, we may safely hold that, though a firm or partnership is impersonal or nonpersonal, it is, for some purposes, in contemplation of law, a quasi person, having powers and functions exercisable by one of the partners severally, or all of them jointly. That it may be a debtor or a creditor within the meaning of modern statutory enactments, we have no question.

2. In September of the present year (1888), A. L. Drucker & Bro., the plaintiffs in error, executed a deed of assignment to Malcolm Johnson, for the benefit of their creditors. The deed was executed in the firm name, and was also signed by the partners, each in his own name. The schedules annexed were sworn to by both partners. A bill was filed by Wellhouse & Sons, creditors of the firm, attacking the instrument for not embracing the individual assets or property of each of the partners as well as the assets of the partnership. The material question in the case is whether the assignment was valid, although it conveyed the partnership assets only.

Two statutes are applicable to the subject: first, the Act of 1881 (Acts 1880-81, p. 174; Code, Addenda, §§ 1953 *d*, 1953 *e*), which declares that "In all cases of voluntary assignment by insolvent debtors for the benefit of creditors, it shall be the duty of the person, firm or corporation making such assignment to prepare and attach to the deed or instrument

by which the assignment is made, at the time of executing the same, a full and complete inventory and schedule of all the assets of every kind, held, claimed or owned by such insolvent person, firm or corporation at the time of the execution of such deed, or other instrument of assignment, which inventory or schedule shall be sworn to by the person making the assignment; and, in case of assignments by firms, the oath may be made by any member of such firm, or, in cases of assignments by corporations, by the chief officer of the corporation, and no deed or other instrument of assignment by insolvent persons, firms or corporations shall be valid unless accompanied by the sworn schedule required."

The other Act is that of 1885 (Acts 1884-85, p. 100), which provides that "In all cases where voluntary assignments are made by failing or insolvent debtors for the benefit of creditors, it shall be the duty of the person, firm or corporation making such assignment to prepare and attach to the deed or instrument by which such assignment is made, at the time of executing the same, a full and complete inventory and schedule of all indebtedness of every kind of such insolvent person, firm or corporation at the time of the execution of such instrument or deed of assignment, which inventory or schedule shall set forth in detail the names of, the amounts due to, and the residence of, each of the creditors of such assignor, and which such inventory or schedule shall be sworn to by the person making the assignment; and, in case of assignments by firms, the oath may be made by any member of such firm, or, in cases of assignment by corporations, by the chief officer of the corporation. No deed or other instrument of assignment, by insolvent persons, firms or corporations, shall be valid unless accompanied by the sworn schedule required . . . No creditor of a person, firm, or corporation, making an assignment for the benefit of creditors, shall be required first to reduce his debts to judgment before he shall be entitled to ask the remedial aid of a court of equity."

We think each of these statutes plainly recognizes the right and power of a firm or partnership to make an assignment for the benefit of its creditors; that, in an assignment so made, the firm is the assignor, and the creditors spoken of are its creditors. Certain it is that only the assets and the creditors of the assignor are to be embraced in the schedules. The partners, as individuals, not being the assignors, neither their separate property nor their separate creditors are required to be set forth. The provision enabling any one of the partners to make the requisite oath to the schedules, respectively, effectively negates the theory that anything more than firm assets and creditors was in legislative contemplation. The law could not rationally trust a single partner to make a disclosure of the individual means and liabilities of his copartners. The chancellor manifestly erred in holding that the assignment was vitiated by reason of the schedule of assets not being sufficiently comprehensive, and in appointing a receiver preparatory to breaking up the assignment on that account. Although the partners as individuals may be perfectly solvent, the firm, as such, may

be insolvent; and, as our law now stands, every insolvent general partnership (as to special and limited partnerships we rule nothing) can make a voluntary assignment for the benefit of its creditors.

In *Auley v. Osterman*, 65 Wis. 118, it was ruled that an assignment by a firm, of all the partnership property, for the benefit of the creditors of the firm, is not invalid merely because the individual property of the partners was not also assigned. The opinion in that case makes reference to a Statute of Wisconsin, but we are not informed as to the terms and provisions of the statute. *Ex parte Hopkins*, 1 West. Rep. 208, 104 Ind. 157, was also cited to us in the argument, as ruling to the same effect; but the case was not produced, and we have had no access to it in preparing this opinion.

3. Two other grounds of attack are embraced in the bill, upon neither of which was any ruling made, or necessary to be made, by the chancellor, inasmuch as he regarded the assignment void for a reason which he supposed was decisive of all rights claimed under it. As these grounds, however, are involved in the litigation, and were thoroughly argued before us, and as we have attentively considered them, we will, although we might decline to do so, express our opinion touching their merits. One of them is that, taking the writings all together—the assignment, the schedules, and the affidavits thereto—it does not appear expressly and affirmatively on their face that the schedules were attached to the deed of assignment at the time the deed was executed. Inasmuch as the schedules were in fact attached at some time, and no circumstance appears out of which could arise the conclusion, or even a suspicion, that they were not duly attached at the time appointed by the statute, to wit: at the execution of the deed, there is, as we think, no weight to be given to the mere possibility that they may not have been attached until afterwards. As the documents appear in the record, there is every indication of regularity, and none whatever of irregularity.

4. The other ground taken and discussed is that one of the preferred debts is a due-note, payable to the attorney who drafted the assignment, and was given to him by the firm for services rendered in drawing the assignment, and counsel in reference thereto, and services hereafter to be rendered, for the purpose of protecting and upholding the instrument. The precise description of this liability is quoted in the head note. Whether this debt in full will be a charge upon the assets must depend upon facts extrinsic to the assignment. That it is fraudulent does not follow, as matter of inference, from anything which we observe in the record before us. If no actual fraud was intended, but the amount of the note is more than the services rendered and to be rendered are worth, or if the assignee should not choose to employ the attorney as his counsel in behalf of creditors, or should not need professional services at all in their behalf, a proper deduction from the amount of the note can be made and no injustice follow, either to the attorney or the other creditors. We do not recognize the right of the assignor to dictate to the assignee, either as to the attorney

whom he shall employ or the amount of compensation; but, even if an attempt to do so has been made, it may have been an innocent mistake on the part of all concerned in it, and in that event it should not operate, and could not operate, to defeat the assignment *per se*. We

were referred, on the one hand, to *Mattison v. Judd*, 59 Miss. 99, and, on the other, to *Hill v. Agnew*, 12 Fed. Rep. 230, neither of which cases is exactly in point.

*Judgment reversed.*

## UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF GEORGIA.

*Re J. C. CHAPMAN.*

(....Fed. Rep.....)

**The enlistment of a minor without the written consent of his parent or guardian, if he has one entitled to his services and control, is invalid and of no legal effect; and the invalidity may be claimed by the minor himself, either before or after attaining his majority.**

(January 24, 1889.)

**A** PPEAL by relator in *habeas corpus* from a judgment of the District Court refusing to discharge him from custody. *Reversed.*

The facts are stated in the opinion.

*Mr. Theo. W. Birney*, for relator:

A minor soldier must be discharged.

*Re Baker*, 23 Fed. Rep. 30.

A minor's contract of enlistment is void.

*Com. v. Fox*, 7 Pa. 386; *Com. v. Harrison*, 11 Mass. 63; *Com. v. Downes*, 24 Pick. 227.

A minor soldier was discharged on his own application.

*U. S. v. Hanchett*, 18 Fed. Rep. 26; *Re McNulty*, 2 Low. 270.

Where the statute inflicts a penalty for an act, that act is, by implication, prohibited and illegal.

*Roby v. West*, 4 N. H. 235.

Enlistment is a contract and, if without written consent of parents, may be avoided by a minor on arrival at full age.

*State v. Dimick*, 12 N. H. 194.

The statute prohibiting enlistment of a minor without written consent of parents or guardians, prohibits enlistment of a minor who has no parent or guardian; and his contract, if not void, is voidable at his request.

*Com. v. Cushing*, 11 Mass. 67.

That a minor may avoid his contract on arrival at full age, *see*—

4 Ops. U. S. Atty-Gen. p. 350; Vol. 5, p. 313.

*Pardee, J.*, delivered the following opinion:

The petitioner, J. C. Chapman, enlisted in the United States Army at Atlanta, Georgia, in 1886, when he was a minor of the age of twenty years and eight months. At the time he had a father living entitled to his custody and control, who did not consent to the enlistment. It does not appear whether Chapman represented himself at the time of enlistment as a major, or as a minor without parents or guardian; but the inference is that he did one or the other, as he says he signed all the papers presented to him, and it is difficult to believe, in the absence of evidence to that effect, that the recruiting officer would enlist an admitted

minor without inquiry as to his parents or guardian.

Soon after enlistment, about two months, Chapman deserted. The desertion continued until December last, when he was arrested in Atlanta. He is now about twenty-three years of age, and himself sues out the writ of *habeas corpus*, on the ground that his enlistment was illegal and void because without the consent of his father, and that therefore he cannot be held in custody as a deserter.

The Statutes of the United States governing the question of Chapman's enlistment are found in section 1117 of the Revised Statutes, to wit:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians; *Provided*, That such minor has such parents or guardians entitled to his custody and control;" and in the third Article of War, found in sec. 1842, Revised Statutes: "Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years, without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offense, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct."

By these statutes it appears that the enlistment of a minor into the Army of the United States without the written consent of parents or guardians, if he have any entitled to his control, is not only prohibited, but when knowingly done by an officer, is an offense punishable with a heavy penalty.

In the many adjudicated cases where the effect of a minor's enlistment into the army or navy without the consent of the parents or guardians has been considered, there is unanimity in holding that where the statute requires such consent, the enlistment without is illegal and invalid; but there has been some diversity of opinion as to whether the minor himself, so enlisted, could claim his release, either before or after becoming of age—some going to the extent that the enlistment, although illegal, was not absolutely void, but could be validated by ratification, either by the minor's continuing in the service, receiving pay and rations after he became of age, or by the consent of the parents or guardian, given after the enlistment. See *State v. Dimick*, 12 N. H. 194; *Com. v. Cushing*, 11 Mass. 67; *Com. v. Harrison*, 1d. 63; *Com. v. Fox*, 7 Pa. 386; *Com. v. Downes*, 24

Pick, 227; *Re McNulty*, 2 Low. 270; *Shorner's Case*, 1 Car. L. R. 55; *Re Davison*, 21 Fed. Rep. 618; 4 Ops. Atty-Gen. 350; 5 Ops. Atty-Gen. 313; *Com. v. Camac*, 1 Serg. & R. 87; *Seavey v. Seymour*, 3 Cliff. 439.

In the case in hand there is no question of ratification; for the minor deserted before majority, and the father did not consent, but actively opposed enlistment; and the question rather is whether Chapman himself can now take advantage of the illegality.

The District Judge in deciding the case followed the reasoning of the circuit court in the *Case of Davison*, *supra*, in which Judge Wallace, Circuit Judge, takes the position that in contracts of enlistment the minor over sixteen years is competent to contract, and that the provision in section 1117, requiring the written consent of parents or guardians, was not for the benefit of the minor, but rather for the benefit of the parents or guardian entitled to the custody and control of the minor; and the learned Judge proceeds to say: "The provision should not be extended to protect a party competent to contract against the consequences of his deliberate agreement, or of his own misrepresentations, unless the language plainly requires such a construction. The language is satisfied by a construction which permits the parents or guardians who are entitled to the services and custody of the minor, to intervene and assert their rights, if their consent to his enlistment has not been obtained. Several adjudications are to the effect that under section 1117, or former laws of Congress of similar purport, the contract of enlistment should be held invalid on the application of the parents or guardian of the minor. *Com. v. Blake*, 8 Phila. 523; *U. S. v. Wright*, 5 Phila. 296; *U. S. v. Wright*, Id. 299; *Seavey v. Seymour*, 3 Cliff. 439.

"None, however, are cited by the counsel, or have met the attention of the court, in which it has been decided that the minor, if over sixteen years of age, can assert the invalidity of his contract. The case of *Commonwealth v. Camac*, 1 Serg. & R. 87, arising under the Act of March 16, 1802, is directly in point. The statute in that case was similar in its provisions to section 1117, and the court held the minor bound by his contract—that the parent alone could assert its validity—and therefore refused to discharge the minor, upon *habeas corpus*, at his own application."

In 4 Atty-Gen. Opinions, *supra*, Mr. Nelson, in responding to a communication of the Secretary of the Navy, says: "An infant is not bound by the contract of enlistment after he attains his full age. He may repudiate it. The contract with regard to him is voidable, and may or may not be carried into full execution at his election. When made he had no will in legal contemplation. It was made, moreover, with the consent of his guardian, who had a right to enter into it for his benefit; but such

authority ceased with the expiration of his minority, and he was then fully competent to affirm or disaffirm the contract made on his behalf."

In 5 Atty-Gen. Opinions, *supra*, Mr. Crittenden, in response to inquiries from the Secretary of War with regard to the Secretary's duty in discharging minors enlisted without the consent of the parent or guardian, says: "That the enlistment of the soldier was without the consent of his parents or guardians is the cause stated in the statute for the discharge of the minor. The parents or guardian must make application and furnish the proof as to the age of the soldier at the time of the enlistment. If the person who was a minor at the time of enlistment has since attained his full age of twenty-one years, then he is capable to choose and act for himself—to apply for his discharge upon evidence that his enlistment was during his minority, and upon the allegation that such enlistment was without the consent of his parent or guardian, he proving the affirmative of infancy at the time of enlistment; and that his father was then living, or that he then had a guardian, would thereby put the burden of proof that the parent or guardian had consented to such enlistment upon the government."

In *Re McNulty*, *supra*, Judge Lowell held that the minor himself during minority might claim the invalidity of the contract. The case of *Commonwealth v. Camac*, *supra*, relied upon by Judge Wallace as a case in point, turned upon the question whether the parent's ratification, five or six days after, validated the enlistment.

In giving his opinion, Chief Justice Tilghman, in speaking of the required consent, says: "Before such consent given, the minor or parent may demand his discharge, and the law forbids holding him."

I have examined all the cases cited, and considered the reasoning of those judges holding that the enlistment binds the minor before and after attaining majority, and am unable to agree thereto. It is a well settled doctrine of every system of jurisprudence that whatever is done in contravention of prohibitory law is null and void. I think that in accordance with this principle the enlistment of a minor without the written consent of his parent or guardian, if he has one entitled to his services and control, is invalid and of no legal effect, and, on principle and authority, that the invalidity may be claimed by the minor himself before or after attaining majority, or by any person entitled to his control or services.

*A judgment will be entered in this case, reversing the judgment of the District Court, and adjudging the writ of habeas corpus absolute, and directing the petitioner's discharge from custody, and the cancellation of the bonds given for his appearance pending the appeal; costs to follow judgment.*

## ILLINOIS SUPREME COURT

David A. BARRY *et al.*, *Appts.*,

v.

Alexander E. GUILD, Jr.

(....III.....)

1. **Where one who has made a deed with covenants**, intending that an undivided part of the land should be held merely as security, obtains from a subsequent grantee a deed of such undivided part made, at his request, to a stranger to the former deed, the latter deed has the same legal effect as if made by the original grantor himself, and the vendee therein is not entitled to the benefit of any covenants contained in the original deed by the grantor.
2. **A vendee can claim the benefit of no covenants contained in the deed to his vendor except such as attach to and run with the land; namely, for quiet enjoyment and warranty.**
3. **To constitute a breach of a covenant for quiet enjoyment** (or warranty, which is in fact equivalent), there must be a union of acts of disturbance and lawful title.
4. **Testimony of a person that he "saw evidence of the possession of the third party in the shape of a derrick and tool house situated on the land operated by a stone company," where it does not show whether the stone company had, or claimed possession of, one acre or twenty, or that it claimed to hold under lawful title; and testimony of the vendee's agent "that he never could get possession," without stating what efforts were made, where it does not appear that any of the land is occupied, except by the derrick and tool house—is not sufficient to show a breach of covenant or quiet enjoyment of a tract of twenty acres of land.**
5. **A solicitor's fee**, on the foreclosure of a mortgage containing a provision for such fee, may be claimed by a party who signed the bill of complaint *pro se*, where it is not shown that he was not in fact represented by other solicitors.

(November 15, 1888.)

**A** PPEAL by defendants, from a decree of the Appellate Court, Second District, affirming

**NOTE.**—*Covenants in deed, for quiet enjoyment.* The covenant for quiet enjoyment is an assurance against a defective title, and any disturbance thereunder by the grantor or others. *Fowler v. Poling*, 6 Barb. (N. Y.) 170; *Connor v. Bernheimer*, 6 Daly (N. Y.) 295; *Rea v. Minkler*, 5 Lans. (N. Y.) 199; *Howell v. Richards*, 11 East, 633, 641; *Norman v. Foster*, 1 Mod. 101. In this covenant the guaranty extends to the possession merely, and not to the title of the land. *Fowler v. Poling*, 6 Barb. 170; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483. It only extends to the acts of the grantor, and of strangers asserting a paramount title, and not to the acts of strangers claiming no superior title. *Schilling v. Holmes*, 23 Cal. 230; *Branger v. Manciet*, 30 Cal. 626; *Wade v. Halligan*, 16 Ill. 507; *Dexter v. Manley*, 4 Cush. (Mass.) 24; *Morse v. Goddard*, 13 Met. (Mass.) 177; *Sherman v. Williams*, 113 Mass. 481; *Hamilton v. Wright*, 28 Mo. 199; *Lovering v. Lovering*, 13 N. H. 518; *Edgerton v. Paige*, 1 Hilt. 330, 333; *Mack v. Patchin*, 42 N. Y. 167; *Ross v. Dysart*, 33 Pa. 452; *Schuykill & D. R. Co. v. Schmoele*, 57 Pa. 273; *Moore v. Weber*, 71 Pa. 429. It is broken whenever there is an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title, whether that title be established by judgment or not. *McGary v. Hastings*, 39 Cal. 360; *Clark v. Lineberger*, 44 Ind. 223; *Smith v. Shepard*, 15 Pick. 147; *Stewart v. Drake*, 9 N. J. L. (4 Halst.) 141; *Adams v. Conover*, 22 Hun (N. Y.) 424; *Cowdrev v.*

a decree of the Du Page County Circuit Court in favor of the complainant in a suit to foreclose a mortgage. *Affirmed.*

The facts are stated in the opinion.

*Mr. E. S. Chesbrough* for appellants.

*Mr. James Lloyd* for appellee.

**Wilkin, J.**, delivered the opinion of the court:

To a bill to foreclose a purchase money mortgage filed by appellee, appellants set up in defense failure of title to a portion of the land conveyed. On a hearing in the Circuit Court of Du Page County, the *Honorable C. W. Upton*, Judge, presiding, a decree was rendered in favor of appellee for the full balance of unpaid purchase money, and \$100 solicitor's fee, which was also claimed in the bill.

Appellants appealed first to the Appellate Court of the Second District, where the decree of the circuit court was affirmed, and then to this court.

But two questions are presented by the record: *first*, on the facts, should appellants be allowed a reduction on the purchase price on account of failure of title?—and *second*, did the court below err in allowing the solicitor's fee? Formerly *Martin Sauber* and *Charles Frieauf* owned lot No. 2 in Witt's Subdivision of the W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 14, containing 48 acres, and the fraction in S.  $\frac{1}{4}$  of section 15, containing 96 acres, more or less, all in township 37 N., range 11 E., Du Page County, Ill. In August, 1868, they conveyed twenty acres of the ninety-six acre tract to *Charles Fitzsimmons*. On the 29th of the following March they executed and delivered to *John Atkinson* a warranty deed containing a description of the whole of both tracts; but following that of the ninety-six acres is the language, "excepting twenty-five acres heretofore conveyed by *Sauber* and *Frieauf*." June 25, 1884, *Atkinson* conveyed by and with full covenants the undivided half of both tracts (making no reservation) to appellee, who on the 30th of January following conveyed the same to *George E.*

*Coit*, 44 N. Y. 332; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Upton v. Townsend*, 17 C. B. 30. But voluntary surrender of possession by the vendee is not equivalent to an eviction by title paramount. *Smoot v. Coffin* (D. C.) 2 Cent. Rep. 662, 4 Mackey, 407.

**Action for breach of warranty.** A right of action for a breach of covenant of warranty against incumbrances arises upon the covenantee's payment of money to protect his title or right of possession. *Priest v. Deaver*, 4 West. Rep. 308, 22 Mo. App. 276; *Taylor v. Priest*, 4 West. Rep. 329, 21 Mo. App. 635. The Statute of Limitations does not begin to run until covenantee has made such payment. *Priest v. Deaver*, 4 West. Rep. 308, 22 Mo. App. 276; *Taylor v. Priest*, 4 West. Rep. 329, 21 Mo. App. 635. In an action on a warranty deed for a breach of the covenant for quiet enjoyment the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or of some part thereof, or has yielded the possession thereof to the paramount title. *Real v. Hollister*, 20 Neb. 112. On the covenants for quiet enjoyment, and a *fortiori* on the covenant of warranty, it is not necessary to state or prove a technical eviction, but the action may be maintained if the plaintiff is hindered and prevented, by anyone having a better right, from entering and enjoying the premises granted. *Park v. Bates*, 12 Vt. 381; *Smith v. Scribner*, 3 New Eng. Rep. 590, 59 Vt. 96. Where there

Gindele, by special warranty against his own acts only.

The last two deeds were intended to divest Atkinson of an individual one fourth interest only in the land, the other three fourths being conveyed as mere security, the equitable title to remain in Atkinson, who continued in possession. This undivided three fourths he sold to appellant Barry; and Gindele, at his request, on the 6th day of May, 1886, conveyed the same. This deed from Gindele to Barry contains only covenants against the acts of the grantor. Barry at the same time executed his four promissory notes for \$1,000 each, payable to Atkinson, secured by the mortgage in suit, which is in the form of a trust deed, appellee being named therein as trustee. Atkinson has since assigned all of said notes to appellee. Barry conveyed the land to his codefendant below, Rudolph Nunnemacher.

In this proceeding, any defense which could have been made against Atkinson is available against appellee, to whom he assigned the notes. The rights of Nunnemacher and Barry are identical. It is well settled that the defense of failure of title against suit for the purchase money is founded on the covenants in the deed of conveyance. Therefore, if the deed be but a quitclaim, or contain only covenants against the acts of the grantor, the defense is unavailing. 2 Jones, *Mortg.* § 1501, and cases cited in note; *Sandford v. Travers*, 40 N. Y. 140; *Niles v. Harmon*, 80 Ill. 396.

The answer of appellants does not set up the deed upon which they rely to maintain their defense, and for that reason is defective. It is clear, however, that the deed from Gindele to Barry contains no covenants upon which the defense can rest. Says *Justice Nelson* in *Patton v. Taylor*, 48 U. S. 7 How. 159 [12 L. ed. 637]: "If there is no fraud, and no covenants to secure the title, the vendee is without remedy, as the vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of his covenants in the deed."

Rawle on Covenants, 567, says: "It is one of the most settled principles of this branch of the law that a purchaser who has received no

covenants which cover the defect or incumbrance can neither detain the purchase money, nor recover it back if already paid. Unless there has been fraud, accident or mistake, he is absolutely without relief against his vendor, either at law or in equity." See also *Noonan v. Lee*, 67 U. S. 2 Black, 499 [17 L. ed. 278]; *Peters v. Bowman*, 98 U. S. 80 [25 L. ed. 92]; *Hill v. Butler*, 6 Ohio St. 207.

The argument of counsel for the appellants is based upon the theory that "When Atkinson procured Gindele to execute the deed to Barry, he thereby, in legal effect, himself conveyed and warranted with all the covenants with which he had originally conveyed to Guild."

It must be borne in mind that in this case there is neither allegation nor proof of fraud, accident or mistake. There is nothing whatever in the answer, nor is there a pretense of proof, that, when Atkinson sold to Barry, and procured Gindele to make him a deed of special warranty against the acts of Gindele only, and Barry accepted such a deed, the real, full and complete intent of the parties was not carried out. Then why say the legal effect is the same as though Atkinson had conveyed with full covenants? On the contrary, under the allegations and evidence, or, rather, in the absence of allegation and proof to the contrary, the deed from Gindele must have the same legal effect as if it had been made by Atkinson himself.

Had Gindele reconveyed to Atkinson, and the latter made this special warranty deed, no one would pretend, in the light of the authorities above cited, that this defense could be maintained. The same purpose was accomplished by Atkinson procuring Gindele to convey directly to his vendee, and, so far as this record shows, giving Barry just such a title as he sold him. It is not the province of courts to make contracts for parties, but to give effect to and enforce them as made.

In this view of the case, the right of appellants, as subsequent grantees of Atkinson, to avail themselves of his covenants to Guild, does not arise. They could, however, under no cir-

is an outstanding title to an easement in the premises conveyed, which materially impairs the value of the premises and interferes with the use and possession of some portion thereof, the covenant is broken, although there is not a technical physical ouster from the actual possession of any portion thereof. 1 Bouv. L. Dict. 648; *Rea v. Minkler*, 6 Lana. 196; *Adams v. Conover*, 87 N. Y. 422; *Clark v. Conroe's Estate*, 38 Vt. 469; *Russ v. Steele*, 40 Vt. 310; *Lamb v. Danforth*, 55 Maine, 322; *Scriven v. Smith*, 1 Cent. Rep. 763, 100 N. Y. 471. The fact that the vendee at the time of his purchase knew of the insufficiency or invalidity of complainant's title is not an available defense to the action on the covenants, either at law or in equity. *Van Wagner v. Van Nostrand*, 19 Iowa, 426; *Barlow v. McKinley*, 24 Iowa, 79; *Harlow v. Thomas*, 15 Pick. 86; *Suydam v. Jones*, 10 Wend. 180-185; *Hubbard v. Norton*, 10 Conn. 422-431; *Sparrow v. Smith*, 5 West. Rep. 765, 61 Mich. 209.

*Covenant running with the land.* The vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of the covenants in his deed. *Patton v. Taylor*, 48 U. S. 7 How. 159 [12 L. ed. 637]; *Smoot v. Coffin*, (D. C.) 2 Cent. Rep. 632, 4 Mackey, 407. The covenant to warrant and to defend is a covenant running with the land and is assignable. *Wilder v. Davenport's Estate*, 2 New Eng. Rep. 311, 58 Vt. 642. So the statutory covenant of seisin contained in the words "grant, bar-

gain and sell," is a covenant running with the land. *Chambers v. Smith*, 23 Mo. 174; *Wyatt v. Dunn*, 6 West. Rep. 865, 93 Mo. 459; *Magwire v. Riggan*, 44 Mo. 512; *Dickson v. Desira*, 23 Mo. 151. The defense of the Statute of Limitations does not avail as to the breach of such covenant. *Wilder v. Davenport's Estate*, 2 New Eng. Rep. 311, 58 Vt. 642. A covenant of warranty is to be construed with reference to the estate and interest which is described as conveyed, and which the *habendum* clause declares and limits. Second Universalist Society v. Dugan, 3 Cent. Rep. 375, 65 Md. 460. A general warranty of title in a deed against the claims "of all persons whatever" covers defects in the title, although known to the purchaser at the time of taking the deed. Nor can an intention to except defects known to the vendee be shown by parol. *Miller v. Desverges*, 75 Ga. 407.

*After acquired title inures to benefit of grantees.* If a man conveys, with full covenants of warranty, land to which he has no title, or an imperfect title, and if he afterwards acquires a good title, his after acquired title inures to the benefit of his grantees in the prior deed. This rule rests upon the ground that a man shall not be permitted to allege a fact to be different from what he has expressly asserted it to be in his own deed. *Somes v. Skinner*, 3 Pick. 52; *White v. Patten*, 24 Pick. 324; *Russ v. Alpaugh*, 118 Mass. 393; *Knight v. Thayer*, 125 Mass. 25; *Hussey v. Heffernan*, 3 New Eng. Rep. 327, 143 Mass. 232.

cumstances, claim the benefit of any of those covenants, except such as attach to and run with the land, viz.: for quiet enjoyment and warranty. To do so the burden is on them to prove a breach of such covenants, and consequent damage. The breach can only be shown by proof of an eviction. It is true, an actual eviction is no longer required, and there has been considerable discussion, and perhaps some conflict in the decisions of courts, as to what facts must be proved in order to show an eviction or its equivalent; but the rule deducible from all the authorities is that there must be a union of acts of disturbance and lawful title to constitute a breach of this covenant for quiet enjoyment (or warranty, which is in fact equivalent).

We have looked in vain for proof in this record that Fitzsimmons, or anyone claiming under him, has at any time been in the actual possession of the twenty acres to which it is claimed he has title. The only approach to it is the testimony of Gindele, who swears that he is agent of appellant Nunnemacher, and that he "saw evidence of the possession of a third party in the shape of a derrick and tool house situated on the land operated by a stone company." Whether this stone company had possession, or claimed possession, of one acre or twenty, does not appear, nor is it shown that it claims to hold under the title of Fitzsimmons. For aught that appears in proof it is a mere trespasser. He also swears that he never had possession of this tract, "either as owner or agent for Nunnemacher; that he never could get possession." What, if any, effort he made to do so is not stated. It is not even shown that any of the land is inclosed. For anything shown by the evidence it is all vacant and unoccupied, except by the derrick and tool house mentioned by Gindele.

There is no reason to suppose from this record that Barry or his grantees may not peaceably take possession of at least the greater part of the twenty acres at pleasure. Therefore the proof is insufficient to make out the defense, even if the covenants in the Atkinson deed to Guild could be availed of in this proceeding. The decree of the circuit court disallowing the defense of failure of title was right in any view of the case.

The answer is silent as to the allegation in the bill claiming a solicitor's fee. The mortgage contains a provision for a solicitor's fee of \$100. Appellants offered no evidence whatever as to the right of appellee to recover it. The only point now made against its allowance is that appellee appeared in the court below as his own solicitor, and therefore no fee can be legally allowed him. It is true that he signs the bill *pro se*, but there is no proof that in the litigation which followed he was not represented by other solicitors. On the contrary, there is evidence proving that he was. On the allegations and proofs there was no error in allowing the solicitor's fee.

*The decree must be affirmed.*

**Baker, J.**, took no part in the decision of the case in this court, he having participated in the decision made therein in the appellate court.

2 L. R. A.

PERIN, *Appx.*

v.

PARKER.

(.....Ill.....)

1. **It is not the duty of a broker, who is entitled to have a margin supplied by his principal on the sale of corn, to buy in the corn within a reasonable time after the principal's refusal to supply the margin, where such refusal is not absolute, but accompanied by a promise to pay the losses when differences were settled, and not before.**
2. **Under the rules of the Chicago Board of Trade, where a broker sells for future delivery under authority from his principal, the latter is under an implied contract to furnish margins when demanded; and if he fails to do so the broker is authorized, without waiting for the maturity of the contract, to buy produce to fill his contracts.**
3. **The sum paid by a broker for corn purchased by him to fill a contract, in conformity with rules and usages of the board of trade, whereby the principal is under an implied obligation to indemnify him, is a debt recoverable upon common money counts as money advanced to defendant's use.**
4. **Interest is recoverable, under section 2 of the Illinois Statute concerning interest, upon advances made by a broker for which his principal is under an implied obligation to repay him.**
5. **Error in instructions is immaterial as against the defendant, where there is no pretense of any defense except under the general issue requiring plaintiff to prove his case, and this is done by undisputed testimony showing a right to recovery.**

(November 15, 1888.)

**ERROR** to the Appellate Court, First District, brought by the defendant to review a judgment affirming a judgment of the Circuit Court in favor of the plaintiff in an action in assumpsit. *Affirmed.*

**Statement by Baker, J.:**

This is a writ of error to the Appellate Court of the First District. The facts of the case are sufficiently stated in the opinion (25 Ill. App. 465) which was filed in that court, and which is as follows:

"**McALLISTER, J.:** This was an action upon the common counts in assumpsit brought by Parker, a commission merchant of Chicago doing business on the Board of Trade, against Perin, a resident of Cincinnati, Ohio, to recover for money advanced by the former to the latter and commissions earned in the course of execution by Parker of the employment of him as such merchant by Perin, December 30, 1882, to sell for the latter upon the Chicago Board of Trade 50,000 bushels of corn, of which 25,000 bushels were to be delivered in January, and the same quantity in May, then next. Upon trial by jury, the plaintiff below had a verdict and judgment for \$6,114.23, and the defendant brings error to this court, assigning various errors, under which the most vital questions arise, upon the points made by counsel for plaintiff in error:



"(1) That, as respects the alleged advances of money the plaintiff below failed to make out a cause of action by his evidence.

"(2) That what plaintiff below claimed as advances of money for the defendant, at his implied request, were not such in legal contemplation; and, if any recovery could be had for what plaintiff below was compelled to pay out in taking care of the said contracts of sale for defendant, such recovery could only be upon a special, and not upon the common, counts.

"(3) That interest on the money so paid was not allowable.

"Other points for reversal were made which will be noticed as we proceed.

"The first question, then, is as to whether the plaintiff below established by his evidence a cause of action as respects the money so expended. It clearly appears from the evidence that, at the time Perin employed Parker to sell for him on the Chicago Board of Trade the corn in question, the former was well acquainted with the usages, customs and methods of doing business on that board; that no margins were asked for by Parker, or furnished by Perin; and it is not pretended that anything was said or done which could be construed into a waiver of Parker's right to have Perin furnish margins if the exigencies of the business made it expedient to do so. It appears that Parker made sale of the corn for future delivery immediately upon receiving the order of Perin, and in strict compliance therewith, and informed the latter that he had done so; that Parker did not have any of the corn at the time; and that from the usages of the business, with which Perin was familiar, it was to be presumed to have been within the contemplation of the parties that Parker should go upon the Board of Trade and buy on Perin's account the corn requisite to a delivery when the contracts of sale were closed up.

"It appears that from the time such sales were made the price of corn continually advanced in the market, so that by January 13, 1888, the deal was against Perin in the sum of \$3,000 and upward. Parker then demanded of Perin that he supply a margin in the sum of \$3,500. The latter refused, saying that he would pay losses when differences were settled or determined, and not before. He put such refusal solely upon the ground that Parker had been ordered, January 4, 1888, to buy in the corn for January delivery, and had violated his duty in that respect. That claim was shown to have been entirely without foundation.

"January 15 Parker made another demand on Perin for \$4,000 margins, by draft, which the latter refused to accept. Then Parker went to Cincinnati, and January 16 had two personal interviews with him, and there asked him again for margins, and Perin peremptorily refused, assigning for a reason the said baseless claim that Parker had violated his duty in failing to buy in the corn for January delivery. Then January 18, Parker, by telegraph from Chicago, demanded \$8,000 to be sent by telegram by 12:30 o'clock of that day, and gave him notice that, if this demand was not complied with, he should buy in the corn for Perin's account.

"That telegram was not received by Perin until 12.15, and then it was impracticable for  
2 L R A.

him to comply. He did not, and he does not pretend that he would if it had been received in time. On the contrary, the evidence tends to show that he, at no time afterwards, intended to retract the notice he gave Parker, January 18, that he should pay no losses until differences were settled or determined.

When this case was before us upon a former writ of error (*Perin v. Parker*, 17 Ill. App. 169) we held that, upon the undisputed facts, the notice and demand of January 18 were not reasonable; that such being the case, it should have been submitted to the jury to determine whether or not Parker, by his acts and words had waived his rights upon his previous demands for margins, and whether or not Perin had, before said last demand, retracted his notice to Parker that he would not supply any. The judgment in Parker's favor was reversed, and the cause went back for a second trial.

"Upon this last trial those questions were specifically submitted to the jury—as to the waiver, by requests to find specially; as to the retraction, by instruction asked on behalf of defendant. The jury found, by their special verdict, that there was no waiver; and, by their general verdict, that there was no retraction of said notice of refusal to put up margins. It is contended by counsel for Perin that the special finding of the jury that there was no waiver by Parker of any of the demands for margins made by him prior to that of January 18 is unsupported by the evidence; that they were respectively insufficient, if not waived.

"A waiver is the intentional relinquishment of a known right; and there must be both knowledge of the existence of the right, and an intention to relinquish it. *Hozie v. Home Ins. Co.* 32 Conn. 40; *Lewis v. Phoenix Mut. L. Ins. Co.* 44 Conn. 72; *West v. Platt*, 127 Mass. 372.

"A subsequent demand is not necessarily a waiver of a prior one. *Hill v. Hobart*, 16 Maine, 164.

"The fact that each successive demand made by Parker was for an amount larger than that of the next preceding one cannot be considered as of controlling effect, because such increase of amount was properly due to the fact that the market price of corn was advancing from day to day. In view of that circumstance, the successive demands were not so inconsistent as to require the jury to find, or this court to adjudge, that the last was a waiver of all the previous demands.

"But counsel for Perin now insist that the several notices or demands were not sufficiently definite, and that some of them were for a larger amount than he was entitled to ask for. Even if that were so, having decided that he would furnish no margins until differences were settled or determined, and having so notified Parker, he was precluded from taking advantage of such objections at the trial.

"It is also urged by counsel that it was the duty of Parker to buy in the corn within a reasonable time after receiving the notice of refusal by Perin, January 18, and thus prevent the subsequent increase of loss. We are inclined to the opinion that, if the notice had been absolute and unconditional, it would, upon settled principles of the law of principal and agent, have been the duty of Parker to use due dili-

igence to prevent such increase of loss to himself and his principal; but the notice, as given, cannot be so regarded.

"The next question is whether the money paid by Parker in buying the corn in question can be regarded as money advanced upon the implied request of Perin, and so become a debt recoverable under the common money counts. The rule applicable to such a case as this is the rule which pervades the whole law of principal and agent, viz.: that the principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him. *Taylor v. Stray*, 2 C. B. N. S. 195; *Leake*, Cont. 55.

"It is said by that excellent author, on the same page: 'Where a person has paid money under an indemnity from another person, it is, in general, equivalent to a payment made at his request, the indemnity operating as a request.' *Brittain v. Lloyd*, 14 Mees. & W. 762; *Lewis v. Campbell*, 8 C. B. 541; *Moule v. Garrett*, L. R. 5 Exch. 182, L. R. 7 Exch. 101, 39 L. J. N. S. Exch. 69.

"*Leake* (p. 56) further says: 'The employment of a broker to buy and sell shares operates as a request to make all payments required by the rules of the stock exchange, or other share market, in the course of the execution of the employment, with a promise of repayment.' In that statement the author is supported by the following cases: *Bayley v. Wilkins*, 7 C. B. 886; *Westropp v. Solomon*, 8 C. B. 845; *Taylor v. Stray*, *supra*; *Smith v. Lindo*, 5 C. B. N. S. 587.

"It surely needs no argument to prove that the same rules above adverted to are applicable to a case where a person employs a commission merchant to deal for him either in buying or selling grain or other products upon the Chicago Board of Trade. The case shows that the plaintiff below acted in buying the corn, under the circumstances shown, entirely in conformity with the rules and usages of said Board of Trade, with which the defendant was familiar when he employed him. What the plaintiff was compelled to pay out in doing so was, therefore, in consequence of the employment, in contemplation of the parties, and must be considered as in pursuance of the authority conferred by such employment, for which payment the defendant had impliedly promised to indemnify the plaintiff. The sums so paid out by the plaintiff, therefore, became a debt recoverable against the defendant upon the common money counts, as money advanced by the plaintiff to the use of the defendant at his request; and, that being so, the plaintiff was entitled to interest upon it, under section 2 of the statute concerning interest.

"Counsel for defendant below complain of error in the instructions to the jury. We do not deem it our duty to enter upon a discussion of the points specified by counsel; for in this case the plaintiff clearly established his right to recover the full amount which he did recover, not only by competent evidence, but by evidence which was wholly uncontradicted. The defendant made no pretense of any defense but that of standing upon the general issue, and requiring the plaintiff to prove his case. That was done by undisputed testimony, showing a right of recovery under settled rules of law. 3 L. R. A.

In such a case we think error in the instructions becomes entirely immaterial.

"We have considered the exception taken to the action of the court in sending the jury back to supplement what they had omitted in the verdict as first returned. Under the circumstances, as shown by the bill of exceptions, we think there was no error in such action of the court. The judgment should be affirmed."

**Messrs. Dexter, Herrick & Allen and Horace H. Martin** for plaintiff in error.

**Mr. H. S. Monroe** for defendant in error.

**Baker, J.**, delivered the opinion of the court:

We are entirely satisfied with the conclusion reached by the appellate court, and concur in and adopt the opinion filed in that court. In view, however, of the criticisms made upon that opinion in the additional brief and argument presented to this court, we will further notice some of the questions of law involved in the case.

The right of Parker to recover under the common counts for money paid and advanced is strenuously denied. It is evident that if Parker had carried the contracts until their maturity, he would then have been obliged to deliver the corn called for by them, and that then there would have been an implied request from Perin to him to settle the deals, and an implied promise to pay him. It is claimed, however, that Parker being under no legal obligation to buy corn and perform the contracts before they matured, no request by Perin to him to pay out money can be implied in law, and, consequently, there can be no implied promise by Perin to repay it, and an action for money paid will not lie.

Parker, as agent for Perin, and acting under his orders, sold the corn for Perin, and, under the rules of the Board of Trade and the custom of the Chicago market, he was personally bound to the purchasers on these contracts of sale. Parker and Perin were dealing with reference to such rules and such custom, with which they were both perfectly familiar. The rules of the Board of Trade provided that on time contracts purchasers should have the right to require of sellers 10 per cent margins, based upon the contract price of the property bought, and further security from time to time to the extent of any advance in the market value above said price. The price of corn had been rapidly advancing since the date of the sales. Parker either had deposited margins upon the contracts, or was liable to be called on for the 10 per cent and the additional margins by the persons to whom he had sold the corn. The evidence does not seem to disclose whether or not the purchasers had either received or called for margins. Even if they had not, yet there was an existing legal right in them to call on Parker for margins, and a legal liability upon the latter, within the next banking hour thereafter, to deposit the margins called for, and also, within that time, deposit with the secretary of the board, or the parties calling for such deposits, duplicate certificates of deposit signed by the treasurer of the board or an authorized bank.

We must assume the facts to be as found by

the jury in the trial court, and by the appellate court, that defendant in error had made proper demands for margins, which had never been waived, and that plaintiff in error had failed and refused to comply with these demands. After the failure of the principal to put up margins when called for, and his absolute refusal so to do, and the return, unpaid and protested, of the draft drawn therefor, it became the duty of the commission merchant to use diligence in order to prevent increase of loss to himself and his principal.

It is clear that the agent was not bound himself to bear the burden and the risk of the contracts made by the express order of his defaulting principal through the whole of the options, without power to relieve himself from the personal liability imposed upon him by the contracts. In view of the relation of principal and agent existing between the parties, the personal liability assumed by the agent upon the contracts made, the duty of the principal to indemnify his agent, and the rules of the Board of Trade, and the usage and the custom of the market in which they were dealing, we must hold that when Perin ordered his agent to make the contracts he not only impliedly agreed to furnish margins when demanded, but also impliedly agreed that if he failed and refused to put up margins when called for, then the agent should be authorized, without waiting for the maturity of the contracts, to buy corn for the purpose of filling such contracts. If there was such implied authority, then that authority, followed by the refusal of the principal to advance margins, was equivalent to a request to his agent to purchase immediately, or within a reasonable time, at the market price, the corn called for by the contracts, and necessarily implied a promise to pay the agent the difference in price between the corn sold and that purchased. This difference in price would properly be regarded as money paid by the agent for the use of the principal, and at his request.

This case is clearly distinguishable from *Lightfoot v. Creed*, 8 Taunt. 268. There the parties were the vendor and vendee of stock, which was not transferred in conformity with the contract. The point ruled was that the vendee had no implied authority from the vendor to purchase other stock to the same amount, and hold him for the difference as money paid to his use, and that the plaintiff should have declared specially on the contract. Here the parties were principal and agent, and the dealings were with reference to the custom and usage of a particular market; and the employment and the subsequent conduct of the principal had the effect of a request to the agent to make the purchases when he did, with a promise to pay him the difference in prices. The claim here recovered by defendant in error was within the contemplation of the parties at the time of the employment to make the contracts of sale.

We have carefully examined the record in respect to the rulings of the court upon the instructions, and will briefly state the result of such examination.

The court refused to give the third instruction asked by plaintiff in error, but the ground was substantially covered by the seventh instruction which was given.

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The refusal of the court to give the sixth instruction was justified by the fact that the legal principle involved in it was given to the jury in the fourth and fifth instructions; and also by the further fact that it, by necessary implication, excluded from the consideration of the jury, in considering the reasonableness of the demands for the margins made by defendant in error, his right to demand 10 per cent margins based upon the contract prices, and expressly limited his right to margins predicated upon the difference between contract price and market price.

The substance of the eleventh instruction submitted to the court had already been given in both the seventh and ninth instructions.

In the thirteenth instruction the court was asked to instruct the jury, as matter of law, that any statement by Parker in any letter or telegram to Perin, in evidence, that he (Parker) would draw a draft on Perin, was not a reasonable demand for margins, and was not a reasonable notice to him to put up margins. It was a question of fact for the jury to determine from such statements and their context, and from a consideration of all the surrounding circumstances, whether or not the demands were reasonable. It was not error to refuse the instruction.

The fourteenth and seventeenth instructions were properly refused, and for the reason that, under the statute, defendant in error was entitled to receive interest on the moneys he had advanced for the use of plaintiff in error.

Complaint is also made of the fourth and fifth instructions for defendant in error. It is objected that while there was evidence of waiver sufficient to go to the jury, yet said fourth instruction, in stating the hypothetical case of the plaintiff below, contained no qualification on the subject of waiver, and thereby took the question of waiver from the jury. The jury was not only very fully instructed on this question of waiver in numerous other instructions of the court, but they, in their answers to the special questions submitted to them, returned into court a special finding against plaintiff in error upon this question of waiver. The fact that they made this special finding renders it absolutely certain that they were not misled by the omission under consideration. The other objections urged to this fourth instruction are technical, and do not require particular notice.

The fifth instruction for defendant in error in order to have been entirely accurate should have contained the additional words: "And if the jury further believe from the evidence that Parker did sell the corn;" but the plain implication from the instruction, as given, was that the jury must believe that Parker sold the corn, and the undisputed evidence was that he did sell it. It is manifest, therefore, that the jury were not and could not have been misled by the instruction.

The eighth instruction for plaintiff in error was modified by the court before it was given. No complaint is made of the action of the court in refusing to give it in the form in which it was asked. Objection, however, is urged to the modification made by the court. This modification was clearly inaccurate, and was probably made through inadvertence. The in-

accuracy was fully cured by the fourth, seventh and ninth instructions given for plaintiff in error. In fact, these latter instructions rendered the modification wholly immaterial, as they excluded from the jury any right of recovery based upon the telegram of January 18, as a reasonable demand.

Our conclusion is that there was no manifest error in the rulings of the trial court upon the instructions, and that the jury was very fully and fairly instructed on behalf of plaintiff in error.

*In our opinion the Appellate Court properly affirmed the judgments of the Circuit Court.*

**Bailey, J.**, having heard this case in the appellate court, took no part in this decision.

**Shope, J.**: I do not concur in this opinion or conclusion reached.

PEOPLE of the State OF ILLINOIS, *Appts.*,

v.

PEOPLE'S INSURANCE EXCHANGE.

(...III....)

**1. A verdict may be directed by the court, when the evidence given, with all the inferences that the jury could justifiably draw from it, is so insufficient that a verdict based thereon must be set aside.**

**NOTE.**—*Directing a verdict for defendant; power of court.* The judge presiding at a trial may at any time direct a verdict when the facts are undisputed, as well as where plaintiff's counsel has made an admission of a fact fatal to a recovery. *Oscanyan v. Winchester Arms Co.*, 103 U. S. 261 (26 L. ed. 539), affirming 15 Blatchf. 79, 17 Am. L. Reg. N. S. 636; *Hendrick v. Lindsay*, 93 U. S. 143 (23 L. ed. 855); *Macon County v. Shores*, 97 U. S. 272 (24 L. ed. 889); *Jones v. Baltimore & O. R. Co.* (D. C.) 3 Cent. Rep. 290, 5 Mackey, 8. It is the settled law and practice in this State that where no evidence has been offered to prove any material allegation in the declaration put in issue by the pleadings, and not admitted for the purposes of the trial, or otherwise waived or dispensed with, the court should direct the jury to find for the defendant. *Frazer v. Howe*, 106 Ill. 563; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 232; *Continental L. Ins. Co. v. Rogers*, 8 West. Rep. 91, 119 Ill. 474; *Doty v. Burdick*, 83 Ill. 473; *Smith v. Gillett*, 60 Ill. 290; *Crowley v. Crowley*, 60 Ill. 469; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 232; *Ayers v. Chicago*, 111 Ill. 406; *Alexander v. Cunningham*, 111 Ill. 511; *Hynds v. Hayes*, 25 Ind. 31; *Dodge v. Gaylord*, 58 Ind. 377; *Chicago & A. R. Co. v. Carey*, 115 Ill. 115, 2 West. Rep. 73. Where upon plaintiff's own evidence it is clear that he has no right to recover, the court should sustain a motion to direct the jury to return a verdict for the defendant. *Nichols v. Chicago etc. R. Co.* 69 Iowa, 154. A verdict may be directed for defendant where all the evidence, with proper inferences therefrom, would be insufficient to support a verdict for the plaintiff, if rendered. *Goodlett v. Louisville & N. R. Co.* 125 U. S. 391 (30 L. ed. 1230). It is only when there is no evidence of a vital controlling link in the chain of facts necessary to make out the plaintiff's case, that a direction by the Judge to the jury to find for the defendant is permissible. *Battis v. McCord*, 70 Iowa, 46. Where a suit was brought for a breach of contract alleged to have been made by an agent, and there was no proof whatever of the agency, such a charge will not require a reversal. *Walker v. Vale Royal Mfg. Co.* 75 Ga. 20. Before a verdict can be properly directed for a defendant, all the testimony in favor of the plaintiff, bearing upon the issues given by him and his witnesses, and all making for him, given on the part of the defendant, if accepted as true, must fail to make out a *prima facie* case, after the most favorable construction which can be given to such testimony for the plaintiff. *Gibbons v. Farwell*, 6 West. Rep. 120, 63 Mich. 844. While it is usual for the defendant, in moving for a peremptory instruction, to do so upon the plaintiff's evidence alone, yet the court may, after all the evi-

**2. Under Illinois Act 1869, § 22, making it unlawful for any agent or agents, or any other person, in any manner to aid any insurance company not incorporated in the State in transacting insurance business within the State, without complying with certain prescribed conditions, a person or corporation, is liable for aiding such foreign insurance company in the transaction of insurance business in any manner, although not the agent of such company in the ordinary sense of the term, and although acting under a contract with the insured expressly stating that such person or corporation is his agent only.**

**3. It is a question of fact for the jury, whether a corporation acting under a contract which declares it to be the agent of the insured only in obtaining insurance from a foreign corporation, in any manner aids the foreign company in transacting its insurance business within the prohibition of the Illinois Act of 1869.**

(November 15, 1888.)

**A PPEAL** by plaintiffs, from a judgment of the Superior Court of Cook County (Altgeld, J.), entered on a verdict for the defendant, directed by the court. *Reversed.*

The case is stated in the opinion.

**Mr. E. B. Sherman**, with **Mr. George Hunt, Atty-Gen.**, for appellants:

The court erred in instructing the jury to find for the defendant. Defendant was, beyond doubt, the agent of the insurance companies if

dence has been heard on both sides, direct the jury to find for the defendant, if all of the evidence is in his favor. *Wilsey v. Louisville & N. R. Co.*, 83 Ky. 512. Where the uncontradicted evidence of the plaintiff fails to show such a compliance with the statute as would sustain a verdict in his favor, it is proper for the court to direct a verdict for the defendant. *Bassinger v. Spangler*, 9 Colo. 175. If the proof of a fact is so preponderating that a verdict against it would be set aside by the court, as contrary to the evidence, then it is the duty of the court to direct a verdict. *People v. Cook*, 8 N. Y. 67; *Wilds v. Hudson River R. Co.*, 24 N. Y. 433; *Chivington v. Colorado Springs Co.* 9 Colo. 597; *Appleby v. Astor F. Ins. Co.* 54 N. Y. 253; *Kelsey v. Northern Light Oil Co.* 45 N. Y. 509; *Cagger v. Lansing*, 64 N. Y. 427; *Neuendorf v. World Mut. L. Ins. Co.* 69 N. Y. 332; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 539, 103 N. Y. 341. If plaintiff's case, as exhibited by the testimony and the rejected offers of evidence, is fatally deficient in the requisite kind or degree of proof, there is no error in the court's directing a verdict for defendant. *Shank v. Simpson*, 4 Cent. Rep. 742, 114 Pa. 208.

*The scintilla doctrine.* Formerly it was held that if there was what was called a *scintilla* of evidence in support of a case, the Judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally any evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof rests. *Schuykill & D. Imp. Co. v. Munson*, 81 U. S. 14 Wall. 442 (20 L. ed. 867); *Pleasants v. Fant*, 80 U. S. 22 Wall. 120 (22 L. ed. 782); *Marion County v. Clark*, 94 U. S. 284 (24 L. ed. 61); *Griggs v. Houston*, 104 U. S. 533 (23 L. ed. 810); *Bagley v. Cleveland Rolling Mill*, 21 Fed. Rep. 159; *Wittkowsky v. Wesson*, 71 N. C. 451; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 539, 103 N. Y. 341; *Burke v. Witherbee*, 98 N. Y. 562; *Culhane v. N. Y. Cent. & H. R. Co.* 60 N. Y. 136; *McKeever v. N. Y. Cent. & H. R. Co.* 88 N. Y. 667. Since the *scintilla* doctrine is exploded both in England and this country, the preliminary question for the court is not, whether there is no evidence or a mere *scintilla*, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. *Hyatt v. Johnston*, 91 Pa. 200; *Ryder v. Wombwell*, L. R. 4 Exch. 39; *Coddling v. Wood*, 2 Cent. Rep. 838, 112 Pa. 371. See note to *Charon v. Geo. W. Roby Lumber Co.* (Mich.) 9 West. Rep. 591. Where there is anything to go to the jury the case

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it was not acting in good faith as agent for the insured, but was in fact acting on behalf of the insurance companies; and this was a question of fact peculiarly within the province of the jury to determine.

*Pierce v. People*, 106 Ill. 11; Ill. Rev. Stat. chap. 73, § 22; *Ford v. Buckeye State Ins. Co.*, 6 Bush, 133; *Lamb v. Lamb*, 6 Biss. 420; *List v. Com.* 10 Cent. Rep. 586, 118 Pa. 323; *Phoenix Ins. Co. v. Burdett*, 11 West. Rep. 239, 112 Ind. 204; *Moses v. State* (Miss.) 8 So. Rep. 140.

*Mr. E. H. Gary* for appellee.

**Craig, Ch. J.**, delivered the opinion of the court:

This was an action of debt, brought in the name of the People against the People's Insurance Exchange, to recover penalties provided by section 22 of the Act of March 11, 1869, entitled "An Act to Incorporate and to Govern Fire, Marine and Inland Navigation Insurance Companies." After the evidence had all been introduced, the court instructed the jury that under the evidence their verdict must be for the defendant; and the giving of this instruction is assigned as error.

It is conceded that in a proper case the jury may be instructed to find for the defendant; but in this case it is contended that there was

evidence introduced which tended to prove plaintiff's cause of action, and that it was the duty of the court to allow the jury to pass upon the evidence, under proper instructions from the court.

In *Simmons v. Chicago Railroad Company*, 110 Ill. 344, where the court excluded all of plaintiff's evidence, and directed the jury to find for the defendant, it is said: "There may be decisions to be found which hold that if there is any evidence, even a *scintilla*, tending to support the plaintiff's case, it must be submitted to the jury. But we think the more reasonable rule, which has now come to be established by the better authority, is that, when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

In *Fraser v. Howe*, 106 Ill. 573, in speaking with reference to the practice of withdrawing the evidence from the jury, or directing the jury to find for the defendant, it is said: "If there is no evidence before the jury on a material issue in favor of the party holding the affirmative of that issue, on which the jury

should be submitted (*Marcott v. Marquette*, H. & O. R. Co. 47 Mich. 1); so if different minds could draw from the evidence different conclusions. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657 (21 L. ed. 745).

**Practice; Instructions.** In civil cases where no evidence tending to support an issue has been given, the court is bound, if requested, to instruct the jury to that effect. *Greenleaf v. Birth*, 34 U. S. 9 Pet. 282 (9 L. ed. 132); *Merchants Bank v. State Bank*, 77 U. S. 10 Wall. 604 (19 L. ed. 1008); *Roundtree v. Smith*, 108 U. S. 269 (27 L. ed. 722); *U. S. v. One Still*, 6 Blatchf. 403; *Jones v. Baltimore & O. R. Co.* (D. C.) 3 Cent. Rep. 200, 5 Mackey, 8. Where the whole evidence goes to negative a fact relied on, and there is no ground for anything more than a mere surmise of the existence of such fact, it is proper to instruct the jury that there is no evidence legally sufficient to establish the issue. *Chase v. Breed*, 5 Gray, 441; *Fay v. Alliance Ins. Co.* 16 Gray, 461; *Denny v. Williams*, 5 Allen, 1; *Com. v. Fitchburg R. Co.* 10 Allen, 189; *Brightman v. Edly*, 97 Mass. 481; *Carter v. Goff*, 1 New Eng. Rep. 570, 141 Mass. 123. When there is an entire want of evidence tending to prove a fact material to the plaintiff's right of recovery, a general charge in favor of the defendant should be given, if requested. *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 323; *Conely v. McDonald*, 40 Mich. 158; *Mynning v. Detroit, L. & N. R. Co.* (Mich.) 7 West. Rep. 325. Instructing the jury to find the issues for defendant is, in effect, the same thing as sustaining a demurrer to the evidence. *Doane v. Lockwood*, 3 West. Rep. 76, 115 Ill. 490; *Bartlott v. International Bank*, 8 West. Rep. 341, 119 Ill. 259. In either case the court holds that, admitting all the evidence tends to prove, it is not sufficient in law to sustain the action. *Doane v. Lockwood*, 3 West. Rep. 76, 115 Ill. 490. A1 though a motion to instruct the jury to find for defendants is in the nature of a demurrer to evidence, yet this relates rather to the mode of viewing the evidence than to the time or mode of interposing such motion. *Bartlott v. International Bank*, 8 West. Rep. 339, 119 Ill. 259. A general charge in favor of the defendant should never be given, except when the plaintiff has failed to make out a *prima facie* case, or where, on the admitted facts, he is not entitled to recover; and where there is any conflict, however slight, in the testimony as to any fact material to the defense, such charge is properly refused. *Hall v. Posey*, 79 Ala. 81; *Tait v. Murphy*, 80 Ala. 440; *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 323. It would be proper, and, where the motion can rightly be sustained, convenient, to present it at the close of plaintiff's evidence, so as at once to terminate the trial; but there is no reason

or authority why it may not be made after evidence is heard on behalf of the defendant. *Birtlott v. International Bank*, 8 West. Rep. 339, 119 Ill. 259.

When the judge is clear of doubt that a verdict ought to be rendered either for plaintiff or defendant, and that it would be his duty to set a contrary one aside, he ought to instruct the jury so to find. Such a direction cannot properly be given to the jury unless the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly. *Finney v. Northern Pac. R. Co.* 3 Dak. 270. Upon the review of a case in which a binding instruction was given by the court to find for the plaintiff, the sole question to be considered is whether there was any evidence in the case from which the issue might fairly have been found for defendant. *Coddling v. Wood*, 2 Cent. Rep. 338, 119 Pa. 371. A motion by defendant for a verdict on plaintiff's evidence admits the truth of plaintiff's testimony; but the court is not required to make a special finding of the facts before a verdict may be directed. *Griffin v. Chicago etc. R. Co.* 68 Iowa, 638. Where there is evidence on the part of a plaintiff, sufficient to submit to the jury, it is not error to refuse binding instructions for the defendant. *Doyle v. Mays* (Pa.) 6 Cent. Rep. 185. It is error for the court to direct a verdict for the defendant, when the testimony, if believed, can warrant a verdict for plaintiff. *Abraham v. Mitchell*, 2 Cent. Rep. 784, 112 Pa. 230. Where the undisputed evidence shows a right of recovery by plaintiff, the court may properly direct the jury to return a verdict for him. *Poor v. Merrill*, 68 Iowa, 436. Where there is evidence tending to support the petition, on account of which the court overrules a motion to direct a verdict for the defendant, and the defendant stands upon the motion, the court may properly direct a verdict for the plaintiff. *Battis v. McCord*, 70 Iowa, 46. When the controlling facts are admitted, or are not controverted in any essential respect, it is not error for the court to instruct the jury as to what their verdict should be. *Carver v. Carver*, 97 Ind. 497; *Walsh R. Co. v. Williamson*, 2 West. Rep. 224, 104 Ind. 154. When plaintiff has made out a *prima facie* case, although the defendant may introduce evidence which entirely overthrows and disproves plaintiff's *prima facie* case, the trial court cannot say, as matter of law, that it is so overthrown, and direct a verdict for defendant. *Boone v. Walsh etc. R. Co.* 2 West. Rep. 525, 20 Mo. App. 251. Where, in an action on the case, the opening statement of counsel presents to the jury but an outline of his case, leaving the details to be supplied by the testimony, it is error to direct a verdict for the defendant. *Jones v. Baltimore & O. R. Co.* (D. C.) 3 Cent. Rep. 285, 5 Mackey, 8.

could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative; but when there is such evidence before the jury it must be left to them to determine its weight and effect."

Under the rule announced in the cases cited, if the evidence introduced on the trial reasonably tended to prove the plaintiff's cause of action, the instruction was erroneous. We are not here called upon to determine whether the evidence was sufficient to entitle plaintiff to recover, or the weight to be given to the evidence; but we will look to the evidence for the purpose of determining whether it fairly tended to establish plaintiff's cause of action, and, if it did, then the court erred in taking it from the jury by the instruction.

Section 22 of the Act of 1869 provides: "It shall not be lawful for any insurance company . . . organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this Act, directly or indirectly to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this Act; and any such company desiring to transact any such business as aforesaid, by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, and file in the office of the auditor of public accounts a written instrument, duly signed and sealed, certifying such appointment," etc.

"Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this State, without procuring from the auditor of public accounts a certificate of authority, stating that such company has complied with all the requirements of this Act which apply to such companies, and the name of the attorney appointed to act for the company . . . Any violation of any of the provisions of this Act shall subject the party violating the same to a penalty of \$500 for each violation . . . The term 'agent or agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State."

The appellee, the People's Insurance Exchange, is a corporation organized under the general law in relation to corporations, approved April 18, 1872. The objects of the corporation, as stated in the articles of association, are "To afford the public an 'exchange,' where the most reliable information can always be had on all matters relating to insurance of every kind—life, fire, marine, inland, accident or otherwise—and a responsible agency for parties seeking insurance or skill and experience necessary in the proper adjustment of losses, preparation of claims, or prosecution of suits at law in insurance cases."

The evidence shows that defendant had an office in the City of Chicago, and was engaged in soliciting and procuring insurance, delivering the policies, and collecting the premiums; 2 L. R. A.

that it secured insurance for James Turner in five different insurance companies organized in other States, which were not authorized to do business in the State of Illinois. The defendant also, as appeared from the evidence, procured insurance for various other parties in insurance companies doing business in other States, which were not allowed to transact the business of insurance in this State. But it is claimed as a defense to the action that the defendant corporation, in procuring the insurance, collecting the premiums, and delivering the policies, was acting as agent of the insured, and not as agent of the insurance companies, and that it is not liable for the penalties named in the statute, although the insurance companies issuing policies of insurance were not authorized to transact business in this State; and in support of this position attention is called to the fact that at the beginning of business with any one of the foreign insurance companies a circular was sent to such company as follows:

Dear Sir: The laws of the State are considered quite stringent, and provide pains and penalties quite severe for anyone acting directly or indirectly as agent for any insurance company not duly authorized to do business in this State. There is no question about the right of any individual to procure his own insurance where he pleases, and no law can be enacted by any State abridging that right; so in all cases where we send you application for insurance on property in Illinois, we wish to have it distinctly understood by you, as we have it understood by the assured, that we are the agents and representatives of the assured only, and we would request that in all cases you forward your bills for premiums to us, made out in the name of the assured, with the commission deducted by way of rebate to assured, namely: "John Jones, Dr., To—Insurance Company, of ——. Policy number, ——. Property ——. For ——. Premium, ——. Less Rebate, ——. Net balance due, ——" This will make the matter right at both ends of the line, and will clearly establish the fact between all parties concerned that we are acting only for the assured, as their agent and attorney in the matter.

Very Respectfully,  
W. L. Caldwell, Treasurer and Secretary.

In addition to the above, before procuring a policy of insurance, the defendant corporation required the insured to execute a power of attorney as follows: "*Know all Men, by these presents*, That the People's Insurance Exchange, of Chicago, Illinois, is hereby appointed our agent and attorney to procure for us insurance as follows, viz.: \$— on —, as per forms approved and authorized by us. And it is agreed that for all such insurance placed in companies duly authorized to do business in the State of Illinois, when the policies are accepted by us, premium at the rate of — per cent shall be paid; for all insurance placed in companies not duly authorized to do business in the State of Illinois, when policy is accepted by us, a premium at the rate of — per cent shall be paid. It is further agreed that all difference in premium by reduction of the above rate, or any rebate, brokerage or commission that said People's Insurance Ex-

change may be able to secure for us, shall be paid to them; and the same shall be in full for all compensation as services rendered as agents aforesaid. Witness our hands and seals," etc.

In the argument much importance is attached to these documents by counsel for appellee. He says: "The evidence in this case clearly shows that every act done by the appellee was under specific and definite authority, and instruction by written power of attorney to act for and in behalf of the assured."

If the decision of the question involved rested solely upon the two documents referred to, there might be much force in the argument, but such is not the case. The various acts of the defendant corporation in the procuring of the insurance were proper matters for the consideration of the jury, in connection with the power of attorney, for the purpose of determining whether the corporation was acting in good faith, as agent of the insured, solely under the power of attorney, or whether the execution of that paper was obtained as a mere cover to conceal the true relation in which the corporation was acting. It appears from the evidence that the insurance was solicited by the defendant corporation. The policies were issued upon the representation of its officers; the insurance companies relying solely upon their statements as to the condition and situation of the property to be insured. The policies were sent by mail to the defendant. It took charge of them, and delivered them to the insured, collected the premium, and remitted the same to the insurance companies, deducting commissions. In certain cases policies were sent to the defendant corporation, and its officers submitted them to the insured, for their examination and acceptance, or rejection. If

they should be accepted, the amount of insurance would be paid over to the defendant; if rejected, defendant returned the policies to the insurance companies. Were all these acts done as agent for the persons who desired insurance, or were they done in a different capacity? We think the question was one for the jury, upon due consideration of all the evidence.

In order to make out a case, the plaintiff was not required to establish the fact that the defendant was the agent for the foreign insurance companies, in the sense the term "agent" is ordinarily used, as seems to be supposed by counsel for appellee in his argument. The Act under which the action was instituted has an important bearing on this question. It says: "The term 'agent or agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State."

Suppose the defendant corporation was not the agent of the foreign insurance companies, in the ordinary sense of that term, still, if it in any manner aided these companies in the transaction of the business, it will, within the meaning of the Act, be liable. *Pierce v. People*, 106 Ill. 18.

Whether, therefore, the defendant corporation had in any manner aided in transacting the insurance business in which the foreign insurance companies were engaged, was a question for the jury, under all the evidence, and that question of fact should not have been taken from the jury by the instruction of the court.

*The judgment of the Superior Court will be reversed, and the cause remanded.*

## MICHIGAN SUPREME COURT.

ARTMAN *et al.*, Appts.,  
v.  
FERGUSON *et al.*

(.....Mich.....)

**A married woman is not empowered to make a contract of partnership with her husband, by**

the Michigan Statute (How. Stat. §§ 6285-6290) giving to a married woman the right to acquire and hold property separate from her husband and free from his influence and control.

(November 23, 1888.)

**ERROR** to the Circuit Court for Jackson County (Lane, J.), brought by the plaintiff

**NOTE.**—*Wife cannot enter into partnership contract.* A wife cannot become a partner in business either with her husband or anyone else. The profits to which the wife's right might be recognized by reason of her connection with the business became the common property of herself and husband, were entirely under the control of the husband, and could be disposed of by him only. *Miller v. Marx*, 65 Tex. 181; *Smith v. Bailey*, 66 Tex. 553. A married woman has not capacity to contract a partnership with her husband, even in those States where she may embark in another partnership. *Fairlee v. Bloomington*, 14 Abb. N. C. 341, 67 How. Pr. 222; *Wallace v. Finberg*, 46 Tex. 35; *Boyle's Estate*, *Tucker* (N. Y.) 4; *Brown v. Chancellor*, 61 Tex. 437, 445; *Miller v. Marx*, 65 Tex. 181; 1 Bates, Partn. § 130. A married woman who has no separate estate cannot, save in a few excepted cases, make a valid partnership contract. *Dunifer v. Jecko*, 2 West. Rep. 453, 87 Mo. 222; *Lindley*, Partn. 84. The protection and the disability of marriage have been linked together; and the wife, when deprived of the one, has been released from the other. *Cullers v. James*, 66 Tex. 494. Though she has no capacity to become a partner, and yet does so, her property still remains hers, and her husband cannot assign it. *Howard v. Stephens*, 52 Miss. 239. Nor can his creditors reach it. *Danforth v. Woods*, 11 Paige, 9; *Maghee v. Baker*, 15 Ind. 254; *Horneffer v. Dures*, 13 Wis. 606; *Dures v. Horneffer*, 15 Wis. 196. If her husband borrows her separate property and uses it in a firm of which he is a member, she becomes creditor of her husband (*Boyle's Estate*, 1 *Tucker* (N. Y.) 4; *Lord v. Davison*, 8 Allen, 181; *Huffman v. Copeland*, 86 Ind. 224; *Glidden v. Taylor*, 16 Ohio St. 509; *Danforth v. Woods*, 11 Paige, 9; *Fox v. Johnson*, 4 Del. Ch. 590; 1 Bates, Partn. § 140); and as her partnership is a nullity the other partner may be sued alone. *Carey v. Burrus*, 20 W. Va. 371. She may claim as creditor, in case of insolvency of the firm, for a loan to it (*Frank v. Anderson*, 13 Lea, 595); and the property still remains hers as against the husband's creditors. *Ploss v. Thomas*, 6 Mo. App. 157. Where a husband was in a firm with the wife's money, and she afterwards bought out the other partner, if a creditor of the firm make a levy she cannot reply on a claim that the assets are her individual property. *Clay v. Vanwinkle*, 75 Ind. 239; 1 Bates, Partn. § 140. See, further, as to wife's disability to contract, *Speler v. Opfer*, post, 345.

*Removal of disability by statute.* Since Revised Statutes 1881, coverture is no longer a legal disability, except in some special cases. *Bennett v. Mat-*



iffs to review a judgment in favor of the defendants in an action for goods sold and delivered. *Affirmed.*

The facts, and question presented, are stated in the opinion.

*Mr. Thomas A. Wilson*, for plaintiffs, appellants:

A married woman may contract with her husband in relation to her sole property when no consideration of public policy precludes it.

*Randall v. Randall*, 87 Mich. 563.

She may employ her husband as her agent to carry on her business for her, and will, when conducted entirely by him, be bound by his conduct and statements in relation thereto, and notice to him will be notice to her.

*Rankin v. West*, 25 Mich. 200; *Leland v. Colver*, 84 Mich. 418; *Carew v. Matheus*, 49 Mich. 302.

Partners are agents of each other, within the scope of the partnership business; and there is no reason why a married woman may not constitute her husband her agent in the capacity of a partner as well as in any other capacity.

See 1 Lindley, Partn. 78.

*Messrs. Richard Price and Austin Blair* for defendants, appellees.

*Long, J.*, delivered the opinion of the court:

This action is brought in the Circuit Court for the County of Jackson, on the common counts in assumpsit, to recover for goods sold and delivered to the defendants, doing business at Jackson as Peter Ferguson & Co.

The defendants are husband and wife, and the plaintiffs sought to show that, after their marriage, they formed a copartnership, and carried on the retail carpet business in the City of Jackson under the firm name of Peter Ferguson & Co., and that during such time the goods involved in this suit were sold to them; that Margaret W. Ferguson was, at the time of the formation of such copartnership, possessed of property in her own right, of the value of \$20,000, and furnished the entire capital for the business, and provided a place to carry on such business; that Peter Ferguson had no means, and was to and did manage the business; that the copartnership continued until after the last item of goods mentioned in the bill of particulars was sold.

This evidence was objected to by defendants'

counsel, on the ground that it was not competent for husband and wife to enter into a copartnership with each other. The circuit court sustained the objection, and directed a verdict for defendants. Plaintiffs bring the case to this court by writ of error.

The only question arising is whether the husband and wife can enter into a contract of partnership between themselves, and thus render themselves jointly liable for the contracts of the firm thus established. At the common law married women were incapable of forming a partnership, since they were disabled, generally, to contract or to engage in trade; and the husband and wife were wholly incapacitated to contract with each other. Whatever rights or powers the husband and wife have to contract with each other, or that the wife may have to enter into a copartnership to carry on trade or business, must be conferred by our Constitution and statutes.

There was never any impediment to the acquisition of property through purchase by a married woman. The difficulty was that at the common law the ownership passed immediately to the husband by virtue of the marriage relation. Our statute has not removed all the common law disabilities of a married woman. It has not conferred upon her the power of a *feme sole*, except in certain directions. It has only provided that her real and personal estate acquired before marriage, and all property real and personal to which she may afterwards become entitled, in any manner, shall be and remain her estate, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, and bequeathed by her as if she were unmarried; and she may sue and be sued in relation to her sole property as if she were unmarried. How. Stat. §§ 6295-6297.

In all other respects she is a *feme covert*, and subject to all the restraints and disabilities consequent upon that relation.

A partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some one or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions. That a married woman may, when she has her separate estate, be a copartner with a person other than her husband, is held in many States

tingly, 7 West. Rep. 912, 110 Ind. 197; *Boss v. Prather*, 1 West. Rep. 267, 108 Ind. 191; *Arnold v. Engleman*, 1 West. Rep. 483, 103 Ind. 512. A married woman has the same power to make executory contracts, and is as much bound thereby, as if she was unmarried, except that she cannot, without her husband joining her, enter into any executory contract to sell or convey or mortgage her real estate; nor can she convey or mortgage the same (Rev. Stat. 1881, § 5117); nor can she enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner (Rev. Stat. 1881, § 5119). *McLeod v. Anna L. Ins. Co.*, 5 West. Rep. 633, 107 Ind. 394; *Ward v. Berkshire L. Ins. Co.*, 6 West. Rep. 596, 108 Ind. 301; *Johnson v. Ewing*, 5 West. Rep. 542, 107 Ind. 313. Where statutes give a married woman power to sell and contract as to her separate property and to carry on business, she may invest it in a partnership. Her separate property is still hers, and does not become liable for her husband's debts. *Plumer v. Lord*, 5 Allen, 460; *Abbott v. Jackson*, 43 Ark. 212; *Dupuy v. Shuck*, 37 Iowa, 361; *Silveus v. Porter*, 74 Pa. 48; *Newman v. Morris*, 52 Miss. 402. And see *Edwards v. Thomas*, 66 Mo. 468, 481; 1 Bates, Partn. §§ 137, 138. But where the statutes give her no power, or only a limited power, to become a partner, the rule of the com-

mon law prevails and she cannot enter a firm. *Bradstreet v. Baer*, 41 Md. 19; *Frank v. Anderson*, 18 Lea, 695; *Carey v. Burriss*, 20 W. Va. 571; *Brown v. Jewett*, 18 N. H. 280; *Todd v. Clapp*, 118 Mass. 495; and *dicta* in *Haas v. Shaw*, 91 Ind. 384; *Brown v. Chancellor*, 61 Tex. 437, 445; *Miller v. Marx*, 65 Tex. 181; *Howard v. Stephens*, 52 Miss. 239. Nevertheless the question was raised whether a married woman could become liable as a partner by so holding herself out, in *Rittenhouse v. Leigh*, 57 Miss. 697. Where the statute allows her to carry on a trade separately from her husband, the employment of their husbands by a firm of wives is carrying on business separately from the husbands, since they are agents, and not owners. *Kutcher v. Williams*, 2 Cent. Rep. 173, 40 N. J. Eq. 493. When a married woman carries on a business under the assumed name of a partnership, she may be sued in the partnership name, and cannot plead her coverture in defense of the action. *Le Grand v. Bufaula Nat. Bank*, 51 Ala. 123. Her copartners cannot deny her capacity to sue alone for an accounting and dissolution. *Bitter v. Rathman*, 61 N. Y. 512. A married executrix of the estate of a deceased partner, the firm being continued by wife, is not a partner, for she receives profits as executrix and not from her own estate. *Bradfield v. French*, 50 Miss. 632.

2 L. R. A.

under the Married Woman's Statutes. But where the statute gives her no power, or only a limited power, to become a partner, the rule of the common law provides that she cannot enter a firm. It has been held by a great preponderance of authorities, even under the broadest statutes, that a married woman has no capacity to contract a partnership with her husband, or, in other words, to become a member of a firm in which her husband is a partner, even in those States in which she may embark in another partnership; and though she holds herself out as such partner, and her means give credit to the firm, she is held not liable for the debts, as she cannot, by acts or declarations, remove her own disabilities. *Lord v. Parker*, 3 Allen, 127; *Bowker v. Bradford*, 1 New Eng. Rep. 457, 140 Mass. 521; *Hans v. Shaw*, 91 Ind. 384; *Payne v. Thompson*, 8 West. Rep. 153, 44 Ohio St. 193; *Kaufman v. Schoeffel*, 87 Hun, 140; *Cor v. Miller*, 54 Tex. 16; *Mayer v. Soyester*, 30 Md. 402.

In this State a married woman was subject to the common-law disabilities of coverture until the passage of the Married Woman's Act of 1855, How. Stat. §§ 6295-6299.

This Act does not touch a wife's interests in her husband's property; and these remain under the restrictions of the common law, unless they are removed by some other statute. The wife's common-law disabilities are only partially removed by the Act, and one who relies on a wife's contract must show the facts in order that it may appear whether she had capacity to make it. *Edwards v. McEnhill*, 51 Mich. 161.

Under our statutes a wife has no power to contract except in regard to her separate property. The Constitution and statutes are clear against her right to make a mere personal obligation unconnected with property, and not charging it, so that she cannot become personally bound jointly with her husband, nor as a surety, by mere personal promise. *De Vries v. Conklin*, 22 Mich. 255; *West v. Laraway*, 28 Mich. 464; *Emery v. Lord*, 26 Mich. 431.

In *Jenne v. Marble*, 87 Mich. 325, *Mr. Justice Campbell*, speaking in reference to a lease, said: "The language of the statute is no broader than the equitable rules concerning separate property, laid down in the same words in most of the old decisions. The disabilities of testimony are entirely inconsistent with the idea that husband and wife may deal with each other as third persons can. This is impossible, if they cannot testify concerning these contracts; and when the law recognizes, as it always has done, the peculiar power of substantial coercion possessed by husbands over wives, it would not be proper to infer any legal intent to remove protection against such influence from any vague provisions which no one supposes were ever actually designed to reach such a result, and which can only be made to do it by an extended construction. Anyone can readily see the mischiefs of allowing persons thus related to put themselves habitually in business antagonism; and legislation which can be construed as permitting it is so radically opposed to the system which is found embodied in our statutes generally that it should be plain enough to admit of no other meaning.

It is the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free

from his influence and control; and if she might enter into a business partnership with her husband it would subject her property to his control in a manner wholly inconsistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. A contract of partnership with her husband is not included within the power granted by our statute to married women.

This doctrine was laid down in *Bassett v. Shepardon*, 52 Mich. 8, and we see no reason for departing from it. The important and sacred relations between man and wife, which lie at the very foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such a community of property and a joint power of disposal and a mutual liability for the contracts and obligations of each other.

*The judgment of the Court below must be affirmed, with costs.*

The other Justices concurred

Frederick SPEIER *et al*

v.

John OFFER and Augusta Opfer, his Wife, *Appls.*

(.....Mich.....)

**A married woman is not empowered to contract jointly with her husband in reference to property held by them jointly by entirety, by the Michigan Statute (How. Stat. §§ 6295-6299), empowering her to contract in reference to her separate property.**

(November 23, 1893.)

**NOTE.—Disability of married woman under common law.** At common law the contract of a married woman, even for necessities, was void. The only modification of this rule in Pennsylvania is by Act April 11, 1848. *Fell v. Brown*, 6 Cent. Rep. 554, 115 Pa. 218. The law disables the wife from making any personal contract, or incurring any debt to bind her husband without his express or implied authority. *Gibb. Law of Ev.* 183; *Earl of Derby's Case*, 4 Leon. 42; *Smith v. Plomer*, 15 East. 607; *Montague v. Benedict*, 3 Barn. & C. 65; *Emmett v. Norton*, 8 Car. & P. 506; *Harvie v. Grant*, 8 Car. & P. 516; *Etherington v. Parrot*, *Ld. Raym.* 1006; 2 Bright. *Husband & Wife*, p. 5. It disables her, without her husband, to suspend, alter or release any debt made payable to herself generally, or to give, indorse or assign a promissory note or other security. *Rawlinson v. Stone*, 3 Wils. 5; *Brown v. Benson*, 3 East. 331; 2 Bright. *Husband & Wife*, p. 41. But she has power to execute in her own name a release of all liability for damages for personal injuries, without joinder of husband. *Blair v. Chicago & A. R. Co.* 5 West. Rep. 449, 50 Mo. 283. At common law a married woman, though living apart from her husband, could not make a binding contract except for necessities or for the benefit of her separate estate. This rule was not changed by statute until 1872. *Farrand v. Bushor*, 9 Colo. 291. Her contract being void at common law, no debt ever existed under it, and hence it furnishes no consideration for a subsequent promise made during widowhood. *Kent v. Lund (N. H.)* 2 New Eng. Rep. 856; *Condon v. Barr*, 4 Cent. Rep. 556, 49 N. J. L. 53. If the wife acts as her husband's agent or attorney, and if he authorize her to receive and pay money, or if she be accustomed so to do with his permission, he will be bound by her such acts. *Tracy v. Dutton*, *Palm*, 206; *Scabourne v. Blackstone*, 2 Freem. 178; *Wynne v. Wynne*, 4 Man. & G. 251. On a plea of payment to the wife, her authority to receive should be stated. *Offery v. Clay*, 2 Man. & G. 173, 4 Jur. 123.

**Promissory note of married woman.** A married

**ERROR** to the Circuit Court for Wayne County (Speed, J.), brought by defendants, to review a judgment in favor of the plaintiffs in an action for work, labor and material. *Reversed.*

The facts, and question presented, are stated in the opinion.

**Mr. John G. Hawley** for defendants, appellants.

**Mr. John Ward**, for plaintiffs, appellees: Howell's Statutes, § 6295, providing that all property, real and personal, which a woman may acquire before or after marriage, shall be and remain the property of such female, and section 6297, providing that actions may be brought by and against a married woman in relation to her sole property in the same manner as if she was unmarried, have been construed liberally in the direction of conferring on married women the right to acquire and hold property and to contract regarding it.

*Tillman v. Shackleton*, 15 Mich. 447; *De Vries v. Conklin*, 22 Mich. 256; *West v. Laraway*, 28 Mich. 464.

Real and personal estate mentioned in section 6295, and sole property in section 6297, are coextensive and equivalent to property rights, and contracts pertaining to such rights are valid.

*Reed v. Buys*, 44 Mich. 80.

The wife had an entirety in the property, a right to occupy it during the joint lives of the defendants, and to the sole ownership of it if she should be the survivor of them.

*Fisher v. Provin*, 25 Mich. 347; *Jacobs v. Miller*, 50 Mich. 120.

Such a right is one regarding which, under the statute, she might contract.

**Long, J.**, delivered the opinion of the court:

This action was brought in the Circuit Court for the County of Wayne, to recover for work and labor and material furnished by plaintiffs in the erection of a building on premises owned jointly by defendants, who are husband and wife. Plaintiffs had verdict and judgment in the court below for \$297.67. Defendants bring error.

On the trial plaintiffs gave evidence tending to show that between the 23d day of October and the 7th day of December, 1888, they made a contract with the defendants jointly for furnishing the material and doing the work in building and repairing a dwelling-house and saloon upon premises owned jointly by the defendants in the City of Detroit; that the contract price was \$308, and the extra work done \$12.50. At the time the contract was first talked over the defendants were together, and agreed to let the plaintiffs know the next day whether they should go on with the job. The next day Mrs. Opfer called upon the plaintiffs and said they should go forward with the work. When the work was about half completed, plaintiffs called upon Mrs. Opfer for money, when she told them she had it in the bank, and the next day would pay them \$100. No part has ever been paid.

woman's promissory note executed prior to Vermont Acts 1884, No. 140, was void, both in law and equity, when given neither for the benefit of her separate estate nor for her benefit upon its credit. *Rood v. Willey*, 2 New Eng. Rep. 612, 53 Vt. 474. If a note signed by a married woman comes into the hands of an innocent holder, she may set up the defense of want of consideration, if not carrying on a separate business. *Linderman v. Farquharson*, 3 Cent. Rep. 494, 101 N. Y. 434. The note of a married woman given voluntarily for the debt of her husband, is without consideration. *Id.* A married woman signing a note as surety for her husband is not liable, not even had she declared an intention to bind her separate estate. *Habenicht v. Rawls*, 24 S. C. 461. When a married woman purchased a piano and gave a chattel mortgage, without joining her husband, for part of the purchase price, the mortgagee could not enforce his claim to possession in an action of replevin. Her note, without the concurrence of her husband, was void. *Kimball v. Silvers*, 5 West. Rep. 55, 22 Mo. App. 520. Where a married woman unites with her husband in executing a note, and judgment by default is rendered thereon against her, the judgment is not void, but voidable only. *McCurdy v. Baughman*, 1 West. Rep. 35, 43 Ohio St. 78. Prior to 1884 the joint note of the husband and wife was the valid obligation of the husband alone. *Payne v. Thompson*, 3 West. Rep. 158, 44 Ohio St. 192. Where a coverture is pleaded in defense in an action on a note, and the reply alleges that the consideration is the price of real estate sold to the wife, it is error to exclude evidence that the defendant was a married woman when she executed the note. *West v. Hayes*, 2 West. Rep. 257, 104 Ind. 30.

Wife cannot herself enlarge her legal capacity. A married woman cannot by her own act enlarge her legal capacity to convey or bind her separate estate. *Bank of America v. Banks*, 101 U. S. 240, 25 L. ed. 850. One under the disability of coverture or infancy has no power to remove the disability by a representation. *Rice v. Boyer*, 7 West. Rep. 60, 108 Ind. 472. A married woman cannot execute any valid release of her dower in the real estate of her husband in any other way than by joining with him in a conveyance to a third person. *Tompkins v. Fouda*, 4 Paige, 448; *Malony v. Horan*, 12 Abb. Pr. N. S. 295. The joining with the husband in his conveyance is but a release by the wife of a con-

tingent future right, and operates against her but by way of estoppel. *Malloney v. Horan*, 49 N. Y. 115, 10 Am. Rep. 330. At common law the promise of a *feme covert* could not be enforced against her, unless she had a separate estate. No personal decree could be made against her, but her contract operated as an appointment out of her separate estate. Authorities cited in *Condon v. Barr*, 4 Cent. Rep. 550, 49 N. J. L. 53. The contract of a married woman, unless for the benefit of herself or her separate estate, cannot be enforced against her estate. *Stowell v. Grider*, 48 Ark. 230. A verbal promise to make a mortgage for her husband's debts is not binding on the wife. *Felder v. Walker*, 24 S. C. 506. The law will not raise an implied promise against a married woman. *Southworth v. Kimball*, 1 New Eng. Rep. 350, 53 Vt. 337. But a contract by a married woman to pay her husband's surety, in consideration of his paying off a judgment against her husband, is enforceable by her. *Labyoteaux v. Swigart*, 1 West. Rep. 562, 103 Ind. 596.

*Statutes removing disability to contract.* Under the present law a married woman has the general capacity to enter into contracts. The only exceptions are those specified in the statute, and chief of these is that she may not enter into contracts of suretyship. *Ward v. Berkshire L. Ins. Co.* 6 West. Rep. 597, 108 Ind. 301; *Arnold v. Engleman*, 1 West. Rep. 482, 103 Ind. 512; *Rosa v. Prather*, 1 West. Rep. 267, 103 Ind. 191; *Vogel v. Leichner*, 102 Ind. 55; *Rothschild v. Raab*, 93 Ind. 488; *Wulschner v. Sells*, 87 Ind. 71. A married woman was incapable of making a contract, prior to Laws 1884, chap. 381, unless having separate estate or engaged in separate business. *Linderman v. Farquharson*, 2 Cent. Rep. 494, 101 N. Y. 434. Contracts outside of the limits prescribed in Civ. Code, 2446, are void. *Carroll v. Cockerham*, 38 La. Ann. 813. With respect to her personal property, a married woman has the power to contract. *Dunifer v. Jecko*, 2 West. Rep. 452, 87 Mo. 282. But the wife is disabled by law from contracting so as to bind her person; nor can she, with certain exceptions, sue or be impleaded without her husband. *Marshall v. Rutton*, 8 T. R. 545; *Bright, Husband & Wife*, p. 40. She can hold stock and transfer it, but the statute does not empower them to contract to pay for it. Their subscriptions for stock create no legal obligation on their part, but as to them are void. *Hahn's App.* (Pa.) 5 Cent. Rep. 187. Where it distinctly appears that the con-

The claim on the part of defendants is that the work was not done in accordance with the terms of the contract, but was so bad as to be practically worthless. Evidence was then given by plaintiffs that the work was done in accordance with the contract. The defendant, John Offer, also testified that the contract was made with himself alone, and that his wife was not a party to it.

It was shown on the trial, and not disputed, that the defendants were husband and wife, and that the premises on which the work was done had been deeded to them jointly, as husband and wife, about three months before the making of the contract, and that they occupied the premises at the time of the making of the contract, and had continued to occupy them ever since. But while the repairs were going on the defendants did not occupy exclusively the portion of the building undergoing repairs. The building was a saloon and dwelling-house together.

At the close of the testimony the counsel for defendants requested the court to instruct the jury: (1) that in this case no verdict can be rendered against Mrs. Offer; (2) that, under the pleadings and evidence, the plaintiffs cannot recover. These instructions the court refused to give, but submitted the questions to the jury upon the claims made by the respective parties under the contract, directing the jury that, if the contract was made with the two defendants and the work was done in sub-

stantial compliance with the contract, their verdict must be for the plaintiffs; if not so done, then the jury should allow what the work was reasonably worth. If, however, the contract was made with John Offer alone and not with the two jointly, then the plaintiffs could not recover.

Error is assigned upon the refusal of the court to give defendants' requests in charge to the jury, and upon the charge of the court directing the jury that if they found the work was not in substantial compliance with the contract, yet, if they found there had been an acceptance of the work—that is, if the defendants had the benefit of it, availed themselves of it—then the plaintiff should recover what the reasonable value of the work was, irrespective of the contract. Under this charge the jury found that the contract was a joint one between the husband and wife, but made some deductions by reason of the work not having been done in accordance with the contract, and undoubtedly undertook to allow what the work was worth.

The real point in controversy here is, however, whether the wife can be held liable upon a joint contract with her husband for improvements made upon real property owned by them jointly. By the rules of the common law, a married woman has no power to bind herself by contract, or to acquire to herself and for her exclusive benefit any right by a contract made with her. A married woman could not be

contract is for the benefit of a married woman or for the benefit of her estate, her rights and liabilities are the same as if she were *sui juris*. *Juchert v. Johnson*, 6 West. Rep. 380, 108 Ind. 436. A married woman's judgment note for the purchase money of land is valid, although it contains no recital of the consideration. *Hamilton v. Baum* (Pa.), 4 Cent. Rep. 708. Her contract by which she charges her separate estate, in equity, with the payment of a debt need not be in writing. *Elliott v. Lawhead*, 1 West. Rep. 123, 48 Ohio St. 171. A note given by her after having applied for the benefit of the Act of April 3, 1873, for money borrowed to enable her to engage in business, is valid as against her. *Zurn v. Noedel*, 4 Cent. Rep. 653, 118 Pa. 383. Under the Laws of Maine, a married woman may bind herself by her promissory note as if sole. *Hovew v. Bennett* (Maine), 2 New Eng. Rep. 71. Where the law of the State where she resides authorizes her to bind herself by a promissory note, such note is enforceable in this State. *Gibson v. Sublett*, 22 Ky. 553. While she may bind herself by an executory contract for personal property purchased by her for her own use, and the ownership and title to which vests in her, even though such property be contracted for and delivered to another in her behalf, she cannot so bind herself when property is purchased, the title to which is to vest in another. *Chandler v. Spencer*, 3 West. Rep. 399, 109 Ind. 553. See power of married woman to contract under statute removing disabilities. *Artman v. Ferguson*, ante, 843.

*Party not estopped where no legal capacity to contract.* Where there is no legal capacity to contract, a party will not be estopped by falsely representing that he has capacity. That is especially the case in respect to infants and married women laboring under the common-law disabilities, the law imposing the disqualification from motives of public policy; and for the safety of those regarded as weak, and needing this protection. *Keen v. Coleman*, 39 Pa. 293; *Lowell v. Daniels*, 2 Gray, 161; *Goulding v. Davidson*, 26 N. Y. 604; *Bodine v. Killeen*, 53 N. Y. 93. But, the reason of the rule ceasing with the removal of the incapacity, the rule falls. In the management and control of her separate property, when acting by agents, a *feme covert* is answerable for the frauds of her agent while acting within the scope of the authority, although the fraud may be without her knowledge or assent. *Baum v. Mullen*, 47 N. Y. 577; *Bodine v. Killeen*, 53 N. Y. 93. She

will not be estopped by a recital in the mortgage, if in fact the loan was to her husband, where the facts are known to the lender. *Orr v. White*, 4 West. Rep. 422, 106 Ind. 341. The mere signing of the paper and receiving and passing over the money to her husband does not give it even the semblance of a loan to the wife. The debt is her husband's notwithstanding. *Veal v. Hurt*, 68 Ga. 723; *Way v. Peck*, 47 Conn. 23; *Atthol Mach. Co. v. Fuller*, 107 Mass. 437. A married woman will not be estopped, by accepting extension of execution, from bringing ejectment to recover real estate sold under judgment on a mortgage bond made by her. *Van Dyke v. Wells* (Pa.), 2 Cent. Rep. 771; *Caldwell v. Walters*, 18 Pa. 79. The estate of a party who was incapable of conveying by deed cannot be barred by estoppel *in pais*. *Lowell v. Daniels*, 2 Gray, 170. A wife's common-law disability to make a contract for the purchase of real estate exists as fully as it did before the enactment of the Married Woman's Act of March 23, 1875. *McFerran v. Kinney*, 5 West. Rep. 44, 32 Mo. App. 554.

*Estoppel, doctrine applies to married women.* The tendency of modern authority is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. And where by fraud, misrepresentation or concealment she leads another into contracting with her, she will not be permitted to gainsay representations which may have induced another to act, who in good faith relied on them. *Cupp v. Campbell*, 1 West. Rep. 233, 108 Ind. 213; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Powell's App.*, 98 Pa. 406; *Bigelow, Estop.*, 513; *Cooley, Torts*, 117. Wherever statutes have gone further and enabled married women to enter into contracts as though single, there is, of course, no reason why the doctrine of estoppel should not apply to them without any limitation (see 2 Pom. Eq. Jur. 273, citing *Dingens v. Clancey*, 67 Barb. 538; *Fryer v. Rishell*, 84 Pa. 521; *Towles v. Fisher*, 17 N. C. 437; *Godfrey v. Thornton*, 48 Wis. 677; and even she may thus be estopped by the acts of her husband. *McCaa v. Woolf*, 42 Ala. 383; *Bodine v. Killeen*, 53 N. Y. 93; *Tremann v. Allen*, 15 Hun. 4; *Lyman v. Cessford*, 15 Iowa 229; *Schwartz v. Saunders*, 48 Ill. 138; *Grove v. Jeger*, 60 Ill. 249; *Upshaw v. Gibson*, 53 Miss. 344; *Hockett v. Hatley*, 86 Ill. 74; but see, for circumstances in which she has been held not estopped, *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Upshaw v.*



sued upon a mere personal contract made during coverture, although joined with her husband, as she had no general power to contract. Whatever power the wife has to contract is conferred by the Constitution and statutes. Our statute has not removed all the common law disabilities of married women. It has not conferred upon her the powers of a *feme sole*, except in certain directions. She has no power to contract except in regard to her separate property. How. Stat. §§ 6295-6297; *Jenne v. Marble*, 87 Mich. 819.

In this case the property to be improved and benefited was held by husband and wife jointly, and not as the separate property of the wife. Only at the death of the husband could the wife claim it as her separate property. During the lives of both neither has an absolute inheritable interest; neither can be said to hold an undivided half. They take by entireties. And at the death of the wife the whole passes at once to the husband. *Manwaring v. Powell*, 40 Mich. 871; *Allen v. Allen*, 47 Mich. 74; *Atna Ins. Co. v. Leah*, 40 Mich. 241.

Neither has such a separate interest that he or she can sell, incur or devise, or which his or her heir could inherit. *Vinton v. Beamer*, 55 Mich. 559; *Fisher v. Provin*, 25 Mich. 847.

It is an entirety in which both take the same and inseparable interest. Neither can affect the other's rights by a separate transfer, and what

ever will defeat the interest of one will defeat the other's. *Vinton v. Beamer*, *supra*. This is not such separate property of the wife as the statute gives her power to make contracts in relation to. She can neither sell, incur nor control it while living, nor devise it at her death. It is not like property which she inherits, which she may dispose of at will.

These common-law disabilities of a married woman being only partially removed by our statutes, one who relies upon a wife's contract must show that it relates to her separate property. The wife is liable to be sued upon contracts or engagements made by her in cases where her husband is not in law liable.

In *Bassett v. Sheperdson*, 52 Mich. 8, this court held that the wife could not become a partner in business with her husband. This ruling is followed in *Artman v. Ferguson*, *ante*, 843 (decided at the present term of this court). In *Russell v. People's Sav. Bank*, 39 Mich. 671, Mr. Justice Cooley, in speaking of a case in which a married woman had indorsed the note of a corporation, says: "Such a contract is therefore not within the words of the statute. Neither is it within the spirit of the statute, for that had in view the relieving of the wife of disabilities which operated unfairly and oppressively, and which hampered her in the control and disposition of her property for the benefit of herself and her family. It was not its purpose to give her a general power to

Gibson, 53 Miss. 841; *McBeth v. Trabue*, 69 Mo. 642. The law of estoppel can attach to a married woman only in respect to her separate estate, either directly or indirectly. Wood v. Terry, 30 Ark. 398. The operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct upon which the other party has relied. See 2 Pom. Eq. Jur. 279, citing *Lowell v. Daniels*, 2 Gray, 191; *Merriman v. Boston C. & F. R. Co.*, 117 Mass. 241; *Bemis v. Call*, 10 Allen, 512; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Kane County v. Herrington*, 50 Ill. 232; *Williams v. Baker*, 71 Pa. 478; *Gladden v. Strupler*, 52 Pa. 400; *Rumfelt v. Clemens*, 46 Pa. 455. Even independently of legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right, or to maintain a defense. *Stefford v. Stafford*, 1 De G. & J. 193; *Skottowe v. Williams*, 7 Jur. N. S. 118; *Jones v. Higgins*, L. R. 2 Eq. 538, 544; *Jones v. Frost*, L. R. 7 Ch. 773, 776; *Bigelow v. Foss*, 59 Maine, 162; *Frazier v. Gelston*, 35 Md. 298; *Brinkerhoff v. Brinkerhoff*, 23 N. J. Eq. 477, 483; *Carpenter v. Carpenter*, 25 N. J. Eq. 194; *Drake v. Glover*, 30 Ala. 382; *Connolly v. Branstler*, 3 Bush, 702; *Couch v. Sutton*, 1 Grant Cas. 114; *McCullough v. Wilson*, 21 Pa. 436.

*Wife estopped by her representations.* Under Indiana Revised Statutes 1881, § 5117, providing that a married woman may be bound "by an estoppel, like any other person," she is bound by representation as to the character of the contract which she seeks to enter into, and from which she asserts she will receive the benefit, where the person to whom the representations are made has exercised reasonable care and diligence to ascertain their truth, and relies upon them. *Ward v. Berkshire L. Ins. Co.*, 6 West. Rep. 506, 108 Ind. 801. By this legislation, a married woman is, as to her separate estate, relieved from all the restrictions imposed upon her by the common law, and is to be treated as if she was a *feme sole*. *Anslay v. Mead*, 3 Luns. 120. She is *qui juris* to the extent of the enlarged capacity to act, conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. *Sherman v. Elder*, 24 N. Y. 381; *Bodine v. Killeen*, 53 N. Y. 96. A married woman cannot be estopped by anything in the nature of a contract; but where it would amount to a fraud to allow her to repudiate her acts, she is estopped. *Hodges v. Powell*, 96 N. C. 64. The fraud consists in the denial of what was

previously affirmed. *Anderson v. Hubble*, 93 Ind. 670; *Pitchee v. Dove*, 99 Ind. 175; *Continental Nat. Bank v. Commonwealth Nat. Bank*, 50 N. Y. 575; *Blair v. Wait*, 69 N. Y. 113. A wife who is herself the instrument of deception, or who contributes to its success, by countenancing it, may, with justice, be charged with the consequences of her conduct. *Sexton v. Wheaton*, 21 U. S. 8 Wheat. 229 (5 L. ed. 603); *Besson v. Eveland*, 26 N. J. Eq. 468; *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 162. She will not be permitted to gainsay her representations by which she induced another to act, who, in good faith, relied upon such representations. *Cupp v. Campbell*, 1 West. Rep. 258, 103 Ind. 213. Her act in allowing her husband to take possession of all her money, coupled with a falsehood as to the purpose for which he took it, was to be deemed done with intent to defraud her creditors. *Anderson v. O'Reilly*, 54 Barb. 620.

*Acquiescence in husband's acts.* If a wife permits her husband to take title to her lands, and to hold himself out to the world as owner of them, and to contract debts upon the credit of such ownership, she cannot afterwards, by taking title to herself, withdraw them from the reach of his creditors, and thus defeat their claims. *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 162. Representations made by a debtor, in the presence of his wife, of the value of his property, which at the time, and for several years, had been in his wife's name, by voluntary conveyance from him, by which representations another is induced to suppose he is the owner of the property, estops the wife from setting up such title as against such creditor's demand. *Carpenter v. Carpenter*, 25 N. J. Eq. 194. So where the husband has taken title to property in his own name, with his wife's knowledge, and she has permitted him for years to represent the property to be his, equity will not protect the property from the husband's creditors, even if the design to create a trust in favor of the wife were clearly established by the evidence. *Budd v. Atkinson*, 30 N. J. Eq. 532; *Luers v. Brunjes*, 34 N. J. Eq. 21; *City Nat. Bank v. Hamilton*, Id. 162; *Besson v. Eveland*, 26 N. J. Eq. 468. The wife cannot stand by and hear him assert rights for her and in her behalf, or do wrong for her benefit, or refuse to do what her legal duty requires, and escape responsibility. *Lindner v. Sahler*, 51 Barb. 325. She is estopped by causing lender to believe a state of facts which does not exist, or that the transaction is one thing while in fact it is another. *Vogel v. Lechner*, 102 Ind. 55; *Cupp v. Campbell*, 1 West. Rep. 255, 103 Ind. 213.

render herself personally responsible upon engagements for any and every consideration which would support a promise at the common law . . . The test of competency is to be found in this: that it does or does not deal with the individual estate. Possible incidental benefits cannot support it."

There is no conflict of authority upon this question, that the contract of a married woman, to be enforced, must have relation to her separate estate. In the present case, the property

being held by husband and wife jointly, by entireties, it cannot be treated as her separate property so that she becomes liable under the contract, even if one was made as claimed by the plaintiffs. The action cannot be maintained against the defendants jointly. As this must dispose of the case, we need not discuss the other questions raised.

*The judgment of the Court below must be reversed, with costs, and a new trial ordered.*

The other Justices concurred.

## MINNESOTA SUPREME COURT.

Philip S. HARRIS, *Resp't.*,

v.

CORLIES, Chapman & Drake, *Appts.*

(....Minn.....)

"A lease of a building contained a provision that if at any time during the term the demised premises "should be rendered partially untenable by fire or the elements," but the business of the lessee could still be conducted therein while the same were being repaired, then the lessor should repair the same as soon as practicable, the occupancy of the lessee to continue during such repairs, and for such occupancy he should pay the fair value until the repairs were completed, and thereafter the rent stipulated in the lease, as if no such disturbance had occurred. During the time the basement of the building became so wet and unhealthy as to be untenable by reason of springs of water percolating and oozing through and under the basement walls.

*Held*, that the basement was not rendered untenable "by the elements," within the meaning of the lease. That it refers only to some sudden, unusual or unexpected action of the elements, as floods, tornadoes and the like, occurring during the term, and not to the natural and ordinary results of an efficient cause existing at the time of the demise, such as the manner of construction of the building or the nature of the soil upon which it was erected.

(January 30, 1889.)

**A** PPEAL by defendant, a corporation, from a judgment of the District Court of Ramsey County (Wilkin, J.), in favor of the plaintiffs in an action for rent. *Affirmed.*

The facts, and question presented, are stated in the opinion.

*Messrs. Young & Lightner* for appellants.

*Messrs. Warner & Lawrence* for respondent.

*Mitchell, J.*, delivered the opinion of the court:

The defendant leased from the plaintiff, for a term of years, the first story and basement of a brick building in the City of St. Paul. The lease contained the following provision, to wit: "If at any time during said term the demised premises shall be rendered partially untenable by fire or the elements, but so that the business then being done therein can be successfully conducted therein while the same are being repaired, then said party of the first part

(the lessor) shall properly repair the same as soon as practicable, after notice thereof in writing, and occupancy and use thereof shall be continued during said repairs, and for such occupancy and use the fair value thereof shall be paid instead of said rent, until such repairs shall have been completed; whereupon, and thereafter rent under and according to this lease shall be thereafter paid as if no such disturbance had occurred."

The court below found that during the term "The said basement became so damp and wet and unhealthy as to be untenable and unfit for use by the defendant in its business; that said premises were so rendered untenable by springs of water percolating and oozing through and under the walls of said basement from the exterior of said building."

The sole question is whether upon these facts the basement was rendered untenable "by the elements," within the meaning of the lease.

The terms "the elements" and "damages by the elements" are somewhat uncertain and indefinite expressions; and very little aid will be derived from resorting to any technical or scientific discussion of the meaning of the word *elements*. We should rather look to see whether the word has received any fixed and accepted meaning in the language of leases, and take the contract by its four corners and try to ascertain how such an expression would be ordinarily understood by conveyancers and business men. The expression "by fire or the elements" occurs twice elsewhere in this lease. Immediately preceding the provision quoted is one to the effect that if the premises shall at any time during the term be rendered wholly untenable "by fire or the elements," and the injured premises can be rebuilt or repaired within three months; then the lessor is to rebuild or repair, if the lessee shall so request, "within ten days after such occurrences;" otherwise such occurrences shall operate to terminate the lease.

It is apparent that the expression "by fire or the elements" is used in the same sense in both instances.

The lease also contains a covenant on part of the lessee to surrender the premises at the expiration of the term in as good condition as the same were in when occupation under the lease began, usual wear and tear of reasonable and careful use thereof "and destruction thereof or injury thereto by fire or the elements excepted." We think, with the defendant, that the expression is here used also in the same sense.

The lease contains no covenant on part of the

\*Head note by the COURT.

lessor to make repairs except those above quoted, and hence he was not bound to do so, much less to make improvements or betterments; the policy of the law being to require the tenant, before he takes a lease, to examine the premises and elect, once for all, whether they will suit his purpose.

While the finding is silent upon the subject, it is fair to assume that the percolation of water into the basement was not the result of any extraordinary or unusual occurrence, such as a flood or freshet, or of any cause originating subsequent to the demise, but was the natural result of a cause fully existing at and prior to the date of the lease, such as the wet or springy character of the soil on which the building is erected or that adjacent, or some inherent defect in the plan of its structure, as the lack of proper drains to carry off the water of the oozing springs.

In such a case although the existence of the cause or its effects may not have developed until subsequently during a wetter season of the year, yet the efficient cause existed at the date of the demise, and the results were but the natural and ordinary operations of the laws of nature. To remedy such a defect would not in any proper sense be repairs, but a betterment—putting the building in better condition than it in fact was when demised. It can hardly be said that the parties intended by these clauses of the lease literally to include every case of untenantableness or partial untenantableness “by the elements.” Every case of damage to or destruction of human structures, not caused by animal force, may, in one sense, be said to be caused by the elements, as, for example, ordinary gradual decay. But it would hardly be claimed that such a case would be within the meaning of the provisions of the lease. Or suppose because of the manner of its construction it should have proved, when winter arrived, that the basement was untenantable because of the cold, it would scarcely be urged that this came within the terms of the lease. We think that the language of the lease refers only to some sudden, unusual or unexpected action of the elements occurring during the term, such as floods, tornadoes or the like, ex-

traordinary disasters not anticipated by either party, the efficient cause of which originated after the term began, and which either destroyed the building or left it in a materially and essentially worse condition than it was in when leased. We think this is substantially the sense in which such expressions in leases have always been used and in which they would now be ordinarily understood by business men in executing such contracts.

Fire is one of the elements in the same sense as water and wind are such; but inasmuch as fires, not from lightning, are usually caused by the intervention of human agency, there might be a question whether such damages were caused “by the elements;” and hence the word *fire* was added to the phrase which has formed a part of the “surrender” and similar clauses in leases almost from time immemorial.

The effect of the intervention of human agency in producing the damage was the point upon which two courts differed in the cases of *Polack v. Pioche*, 35 Cal. 416, and *Van Wormer v. Crane*, 51 Mich. 372—a question upon the discussion of which we have no occasion to enter.

Defendant attempts to support its contention by arguing that if the untenantableness of the basement was not caused “by the elements,” within the meaning of the provisions of the lease, then it is not an injury by the elements, within the meaning of the exception in the “surrender” clause; and consequently it would be bound to repair or remedy the defect, which it is claimed would be unreasonable. But to our minds the force of the illustration is directly against the defendant. Under this covenant the tenant is not required to make betterments or to surrender the premises in better condition than when he entered, or to remedy defects then existing, which he clearly would if he was compelled to change the building so as to prevent the percolation of water into the basement.

Our conclusion is in accordance with the views of the court below, viz.: that the damage occasioned by the percolation of water through the side walls was not caused “by the elements,” within the meaning of the lease.

*Judgment affirmed.*

## NEW JERSEY SUPREME COURT.

STATE, DARCY, Prosecutrix,  
v.

DARCY *et al.*

(.....N. J. Law.....)

\*A mortgage owned by a resident of this State, although made upon land situate in another State, where a tax upon such land has been assessed and paid within the preceding twelve months, is taxable here.

(November 20, 1888.)

\*Head note by the COURT.

NOTE.—Taxation of mortgage, not double taxation. The Constitution does not prohibit a State from taxing one of its resident citizens for a debt held by him, due by a resident of another State, and evidenced by the bond of the debtor, secured by deed

ON *certiorari* to board of assessment and revision of taxes of the City of Newark.  
*Tax affirmed.*

This writ brings up an assessment for taxes made against Caroline M. Darcy, the prosecutrix, living in the City of Newark. It is an assessment for the amount of a mortgage for \$1,800, made by James A. Chambers on lands and premises in Greenwood County, in the State of Kansas.

The cause was argued upon the following statement of facts, agreed upon by the respective counsel for the purpose of the argument.

of trust or mortgage upon real estate situated in the State in which the debtor resides. *Kirtland v. Hotchkiss*, 100 U. S. 491 (25 L. ed. 558); *S. C.* 42 Conn. 426; *Nevada Bank v. Sedgwick*, 104 U. S. 111 (26 L. ed. 708); *Desty*, *Taxn.* 62. Although the *status* of real estate, by which debts are secured, is within the State, the trust deeds are mere incidents—chooses



(1) The prosecutrix is the owner of a mortgage on lands in Greenwood County, Kan., for \$1,300, on which interest is payable semi-annually at 6 per centum per annum.

(2) She claims before the defendants (making under oath according to law a statement of her taxable property) that the same was not taxable, on the ground that the mortgagor had paid a tax on the full value of the land in the State of Kansas, and within one year from the date of this assessment, the said mortgagor claiming no deduction from the taxable value of said land on account of said mortgage.

(3) Prosecutrix's said claim was disallowed, and an assessment made on all her personal property, including the said mortgage, on June 1, 1888, by the defendants.

(4) No deduction from the taxable value of the land covered by the said mortgage was claimed by or allowed to the mortgagor, or anyone for him, but the tax on the full value thereof was actually assessed and paid within one year from this date, and the date of commencing the assessment in New Jersey; nor did the mortgagor make any claim for deduction on account of the debt evidenced by the bond and mortgage of the prosecutrix.

(5) The Laws of the State of Kansas, relating to the taxation of property in that State, may be shown and referred to as if herein set out and made a part of this state of the case.

Argued before Scudder and Reed, JJ.

**Mr. Robert R. McCarter** for prosecutrix.

**Mr. Joseph Coult** for defendants.

**Reed, J.**, delivered the opinion of the court:

Section 61 of the General Act concerning taxes (Revision, 1150) provides that all real and personal estate within this State, whether owned by individuals or by corporations, shall be liable to taxation at the full and actual value thereof.

Section 68 of the same Act provides "That the term 'personal estate,' as used in this Act, shall be construed to include goods and chattels of every description, including steamboats

and other vessels, money, debts due or owing from solvent debtors, whether on contract, note, bond, mortgage, or book account, public stocks and stocks in a corporation, whether said personal estate be within or without this State."

Section 64 provides that "Stocks and other personal estate owned by citizens of this State, situate and being out of this State, upon which taxes shall have been actually assessed and paid within twelve months next before the day prescribed by law for commencing the assessment, shall be exempt from taxation."

The counsel for the prosecutrix claims that this mortgage is within the exemption words of the 64th section. The insistence is that this mortgage represents property situated within the State of Kansas, which property has been there assessed and the taxes paid within the required period. The mortgage is treated as representing an estate or interest in land, and as having a *situs* in the jurisdiction where the land lies.

In the case of *State, King, v. Reed*, 43 N. J. L. 186, a question arose as to whether one of the assessors appointed to make a special assessment of damages was disqualified by reason of his ownership of property in the Town of Union and the Township of West Hoboken. The statute disqualified him if he was the owner of property within either of those places. It was urged that he was the owner of property within the towns, because it appeared that he held a mortgage upon lands lying therein. It was held that a mortgage is a personal chattel, and has no *situs* but the domicile of the owner, and that the fact that the land upon which it was an incumbrance happened to lie in the prescribed territory did not bring the assessor within the disqualifying clause of the statute. This case was affirmed in the court of errors in 48 N. J. L. 370, 5 Cent. Rep. 92.

In the case of *Wade v. Miller*, 32 N. J. L. 296, the Chief Justice remarked: "Except in questions arising between him and the mortgagor, or his assigns, the interest of the mortgagee appears to have lost every quality of an estate. Such an interest will not make the mortgagee a freeholder. If he enters and holds

in action, attached to the owner. *Arapahoe Co. v. Cutter*, 3 Colo. 350. Solvent credits are property, and must be taxed as such to the party owning them. *People v. McCreery*, 34 Cal. 43; *People v. Gerke*, 35 Cal. 677; *People v. Black Diamond Coal Min. Co.*, 37 Cal. 54; *People v. Whartenby*, 38 Cal. 461; *People v. Hibernia Sav. & L. Society*, 51 Cal. 243; *Bank of Mendocino v. Chalfant*, 51 Cal. 369. A mortgage must be taxed to the owner where he lives, not where the land mortgaged is. *Latrobe v. Baltimore*, 19 Md. 13; *Appeal Tax Court v. Patterson*, 50 Md. 368; *Cooley, Taxn.*, 56. The fact that the debt is secured by mortgage on land which is also taxable can make no difference. *People v. Eddy*, 43 Cal. 331. See *McCoppin v. McCartney*, 60 Cal. 367; *Kirtland v. Hotchkiss*, 100 U. S. 491 (25 L. ed. 558; Compare *Lick v. Austin*, 43 Cal. 590; *Savings & L. Society v. Austin*, 46 Cal. 415. Real estate may be taxed to a mortgagor in possession while the mortgagee is taxed for the money secured by the mortgage; and these provisions are not considered as subjecting property to duplication taxation. *Augusta Bank v. Augusta*, 36 Maine, 259; *People v. Worthington*, 21 Ill. 171; *Kirby v. Shaw*, 19 Pa. 258; *St. Louis Mut. L. Ins. Co. v. St. Louis County Assessors*, 56 Mo. 503; 1 *Desty, Taxn.*, 203. In Florida the owner of notes secured by mortgage is not relieved from taxation thereon because of the mortgaged land being also taxed to the owners. *Lamar v. Palmer*, 18 Fla. 147. If a mortgage is not taxable when taken, the mortgagee has no vested right in the exemption, and it may be made taxable after-

2 L. R. A

wards. *McCoppin v. McCartney*, 60 Cal. 367; *Cooley, Taxn.*, 178.

The mortgage is but a security for the debt, and the right of the creditor to proceed against the property mortgaged, and upon a given contingency to enforce, by its sale, payment of his demand, has no locality independent of the party in whom it resides, and it may undoubtedly be taxed by the State when held by a resident therein. *Kirtland v. Hotchkiss*, 100 U. S. 499 (25 L. ed. 562). Except between the immediate parties the mortgagor before foreclosure is owner of the property; his interest is real estate, to be conveyed, attached, taxed and inherited only as such, while the interest of the mortgagee is mere personal estate. *Waterbury Sav. Bank v. Lawler*, 46 Conn. 245; *Lacon v. Davenport*, 16 Conn. 341; *Punderson v. Brown*, 1 Day, 98; *Gunn v. Scoovill*, 4 Day, 242; *Toby v. Reed*, 9 Conn. 224. In Maryland mortgages may be taxed in the hands of the mortgagees, though the land is taxed also (*Appeal Tax Court v. Rice*, 50 Md. 302); so in Minnesota (*State v. Jones*, 24 Minn. 251); so in Alabama (*Alabama Gold L. Ins. Co. v. Lott*, 54 Ala. 499); so in Nevada. *State v. Carson City Sav. Bank*, 17 Nev. 148. In New Jersey the assessor is to deduct from the valuation of land a mortgage upon it, if the owner of the land claims the deduction. It is competent to make this provision even as to mortgages previously given (*State v. Runyon*, 41 N. J. L. 98); but a mortgage which is not taxable is not to be deducted. *State v. Trenton*, 40 N. J. L. 89.

the property, he is obliged to account to the mortgagor, as owner, for rents and profits. If the money due on his bond is paid to him, his connection with the land is dissolved; for there is no necessity for a reconveyance, and at his death the mortgagee's interest passes to his representatives as personality. In these and in all other particulars the land seems to be a mere pledge in equity for the payment of a debt.

In the case of *State Tax on Foreign Held Bonds*, 82 U. S. 15 Wall. 800 [31 L. ed. 179], the Supreme Court of the United States held that the State of Pennsylvania had no power to tax the bonds held by a nonresident of that State, although the bonds were secured by a mortgage upon property situated in that State. It was held that the power of taxation in the State was limited to a person's property and business within the State, and that neither the person nor the property then taxed were so situated. Justice Field remarked that "It is undoubtedly true that the actual *situs* of personal property which has a visible or tangible existence, and not the domicile of its owner, will in many cases determine the State in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions. The former by general usage have acquired the character of and are treated as property in the place where they are found, though removed from the domicile of the owner. The latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners."

Among the cases cited by Mr. Justice Field in his opinion is that of *People v. Eastman*, 25 Cal. 603. The Statute of California requires all property to be taxed in the county where situated. "The mortgage," said the court, "has no existence independent of the thing secured by it. A payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may at the same time be secured by a mortgage upon land in every county in the State; and, if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

It is perceived that the purport of the above cited opinion is: *first*, that a mortgage has no *situs* but that of the owner for any purpose, including that of taxation; and *second*, that a State Legislature has no power to fix a *situs*, other than that of the owner, for the purpose of imposing a tax upon its owner, who is in a foreign jurisdiction, and it must be kept in mind that what is said in those cases is said in respect of mortgages where the holder of the

security and the owner of the land mortgaged are in different jurisdictions, or is said in respect of mortgages the owners of which and the land upon which they are secured are in the same State, and there has been no legislative provision relative to the place of their taxation.

While it is clear, under the rule enunciated by the federal courts, that a State Legislature cannot impose a tax upon a mortgage upon lands within this State if such mortgage is owned by the resident of another State, yet it is equally clear that the Legislature can exempt from taxation a mortgage held by its citizens upon land in another State, or can exempt land owned by a citizen subject to a mortgage held by a resident of another State. So, also, it seems clear that although, in the absence of legislative direction, all debts, including those secured by mortgages, are taxable to the owner and his domicile, yet the Legislature has the undoubted ability to provide for their taxation elsewhere, so long as such provision does not contravene the constitutional requirement that property shall be taxed under general laws, and by uniform rules, according to its true value. *State v. Brannin*, 28 N. J. L. 484-496.

The result deducible from these cases appears to be that the mortgage taxed in the present case had its *situs* in the City of Newark; that there was no legislative provision changing the rule in this respect; and that the taxation of the land upon which it was secured in the State of Kansas cannot be regarded as a taxation of the mortgage; for if so regarded, it would be clearly beyond the power of the Legislature of Kansas to accomplish. The attention of the court was called to the case of *State v. Runyon*, 41 N. J. L. 98.

It is insisted that the doctrine enunciated in that case is inimical to this conclusion. The only question, as I understand the decision in that case, was whether a debt secured by a mortgage was thereby so differentiated from other debts as to make a rule applicable to the former alone a general rule. The Legislature had expressly declared that mortgages should be taxed, either as mortgages or as land, at the place where the land was situated. The question in the cause was one of legislative power and not of legislative intention. The court held that a mortgage had such a character by reason of its representing a qualified interest in land that it could be localized with the Legislature, and taxed at the domicile of the mortgagor. The language used in the opinion was employed exclusively in respect to that question.

Again: it is claimed that the legislative policy in this State has been averse to the taxation of both the mortgage and the land upon which the mortgage is a lien. It is therefore urged that it must have been the legislative intent to regard a mortgage, and an interest in the land equal to the amount of the mortgage, as identical subjects of taxation in all cases where the statutes speak of property which has paid a tax within twelve months preceding; but, in the absence of expressed words, I do not regard this as a natural inference.

Because either the mortgage or the land is relieved from taxation when both are within this State, it does not follow that the Legislature intended to apply the same rule when the land is beyond our jurisdiction.

We must remember that the Legislature has recognized a difference between debts owing to domestic and those owing to foreign creditors. While legislative policy permits the former to be deducted from the ratables of the debtor, it takes no cognizance of the former. The policy which permits a reduction for debts is induced by a desire to avoid double taxation; for if the debtor pays taxes for all his property, and is permitted no deduction for the unpaid price of the same property, while the creditor is also taxed for such price, it is double taxation, as obviously as if the price was secured by a pledge or a mortgage upon chattels or a mortgage upon land. A mortgage, while it has features which will justify exceptional legislative treatment, is but a debt secured by a lien upon land; and, unless the legislative intent is plain to otherwise regard it, the credit is the thing which taxation reaches. 1 Deady, Taxn. 330.

I find no such legislative intention in the statutory clause invoked by the counsel of prosecutrix. In it mortgages are not mentioned, while in the statute concerning the taxation of mortgages upon land in this State the place of taxation is expressly fixed.

Our attention is again called to the condition of the law in respect to the taxation of stock in foreign corporations held by residents of this State. The cases are cited in which it is settled that a statute of this State exempting stocks in a corporation will exempt the property of the corporation, and a statute which exempts the property will exempt stock. *State v. Bentley*, 28 N. J. L. 532; *State v. Branin*, Id. 484; *State v. Jones*, 88 N. J. L. 89.

It is said that the theory upon which these cases go is that a taxation of the corporate property and of the stock of the corporation is identical.

It is also said that it has been the policy and practice since the enactment of the Statute of 1863, now embodied in the Revised Act (Re-

vision, p. 1151, § 64), to exempt from taxation the stock of foreign corporations held by resident taxpayers.

The exemption of such stock from taxation has, so far as I am aware, not been expressly decided in this State; but, assuming that such stock is exempt, I do not perceive how this fact leads to the conclusion that mortgages upon foreign land are also exempt. In the first place, the exemption clause of the Tax Act uses the words, "stocks situate and being out of this State." The word *mortgage*, as I have before observed, nowhere appears. *Secondly*, in the light of the several changes in the law upon this subject—in the successive Acts of 1857, p. 475; 1862, p. 844; 1863, p. 600; 1866, p. 1078—in which the word *stocks* appears, viewed in connection with the previous decision of our courts, holding that stock in a foreign corporation held here was taxable, it may with much reason be concluded that all stocks of foreign corporations should be exempt, and that this exemption should apply to all certificates of stock in such corporations, whether the certificates were within or without this State, but there is no legislative history appertaining to mortgages similar to this.

The character of stocks as property is dissimilar from that of mortgage. The sum total of the property of the stockholders, as has been pointed out in the cases already cited in this State, is the sum total of the property of the corporation. It is substantially the *indivisum* of all the property of the corporation. It is not a mere security for a debt which is the principal, but it is the thing itself; but, apart from this dissimilarity between stocks and mortgages, the use of the word *stocks* in addition to the words *personal property*, in the exemption clause of the statute, would seem to be an argument against including mortgages, which are unnamed, within the exemption.

*The tax will be affirmed.*

## UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

Bradley A. GRIFFIN

v.

MACON COUNTY.

(....Fed. Rep. ....)

**Overdue interest on bonds represented by negotiable coupons cannot be included in the recovery in an action on the bonds after an independent suit on the coupons has become barred by the Statute of Limitations.**

(December 5, 1888.)

**NOTE**—*Coupon bonds; past due coupons attached.* Negotiable bonds not due, with attached coupons past due and unpaid, do not thereby appear dishonored upon their face; but the presence of such unpaid coupons is a material circumstance bearing upon the question whether the purchaser acquired them in good faith, and without notice. *Morton v. New Orleans & S. R. Co.* 79 Ala. 500. Coupons past due, attached to a bond at the time of its transfer, do not affect the coupons which had not matured at that time, so that the equities good between the original parties will attach to them also. *Miller v. Berlin*, 13 Blatchf. 245; but compare *First Nat. Bank v. Scott County*, 14 Minn. 79; *Burr. Pub.* 2 L. R. A.

**O**N submission at law of the question whether interest installments due upon county bonds and represented by negotiable coupons, which fell due more than ten years before action was commenced upon the bonds, could be recovered in such action. *Judgment for defendant.*

The facts are sufficiently stated in the opinion.

*Messrs. Cunningham & Elliot* for plaintiff.

*Mr. R. G. Mitchell* for defendant.

*Secur. 582.* When separated from the bond, so far as the right of action is concerned, they cease to be an incident of the bond. *National Exch. Bank v. Hartford, P. & F. R. Co.* 8 R. I. 375. They do nothing more than represent, in a negotiable form, the payments of interest to become due on the bond, and the interest should be due and payable on the coupons at the same times at which it would be due and payable by the terms of the bond. *Arents v. Com.* 13 Gratt. 774. *Burr. Pub. Secur.* 573. They have the qualities of commercial paper, and are in this respect subject to the same rules as the bonds to which they are attached. *Spooner v. Holmes*, 109 Mass. 503; *Haven v. Grand Junction R. & Depot Co.*

**Thayer, J.**, delivered the following opinion:

Plaintiff brings suit on six bonds, executed by Macon county. They bear date January 1, 1870, and matured January 1, 1882. In the body of the bond it is recited that the county will pay interest "at 10 per cent per annum, which interest shall be payable semi-annually, or the presentation of the coupons hereto annexed."

All of the coupons originally attached to the bonds have been detached except those which matured on and after July 1, 1878. In the first count of the petition plaintiff demands judgment for the principal sum due on the six bonds, and also interest thereon at 10 per cent per annum, from January 1, 1870, to January 1, 1878, and from January 1, 1882, to the date of rendition of judgment. The coupons that matured after January 1, 1878, and up to the maturity of the bonds, are sued on in the second count of the petition.

This suit was filed on April 20, 1888. It will be observed, therefore, that all the coupons on the bonds in question which matured on and prior to January 1, 1878, were more than ten years overdue when the said suit was filed, and for that reason an action on the coupons is barred by limitation. By suing on the bonds, and demanding judgment for the principal sum, together with all interest that accrued thereon up to January 1, 1878, the plaintiff seeks to avoid a plea of the Statute of Limitations, which could have been successfully interposed if he had declared on the coupons. *Huey v. Macon County*, 85 Fed. Rep. 481, and cases cited.

The point to be determined is whether such overdue interest can be recovered by declaring for it in a suit on the bonds, notwithstanding the fact that it could not be recovered by a suit on the coupons. The point is novel, and, so far as I am advised, has never been expressly determined. In several well considered cases it has been held that when money due on a note or bond is made payable by installments, the Statute of Limitations begins to run against each installment from the time it matures. *Bush v. Stowell*, 71 Pa. 208; *Burnham v. Brown*, 28 Maine, 400; *Estabrook v. Moulton*, 9 Mass. 258; *Heywood v. Perrin*, 10 Pick. 228.

But Mr. Wood, in his work on Limitation of Actions says that, "with singular inconsistency" it has been held in some cases that interest made payable annually is not subject to the

same rule; that the statute does not run against interest installments payable annually, until the principal debt matures. *Wood, Lim. Ac. § 126, p. 296.*

In my opinion, there is no distinction in principle between a debt payable by installments and interest payable annually or semi-annually in installments. If the statute begins to run in the former case as soon as an installment of the debt matures, for equally good reasons it ought to run against interest installments as soon as they become payable. It is worthy of note that the few cases cited by Mr. Wood as holding that the Statute of Limitations will not run against interest installments until the principal matures, were suits upon notes or bonds to which no interest coupons were attached. Separate contracts to pay installments of interest at stated intervals were not annexed to the obligation to pay the debt. *Grafton Bank v. Doe*, 19 Vt. 468; *Henderson v. Hamilton*, 1 Hall, 814; *Ferry v. Ferry*, 2 Cush. 92.

The rulings made in the cases last mentioned appear to have been based on the ground that interest is a mere incident of a debt, and is so inseparably connected therewith that it may be recovered in connection with the debt when it matures; no matter for how long a period it has been overdue. By this was meant, I suppose, that the stipulation with reference to interest in the cases then under consideration formed an inseparable part of the promise or obligation to pay the principal debt. But if, as in the present case, the parties to a note or bond make independent stipulations as to interest, and put such stipulations in the form of negotiable coupons, which may be detached from the bond, and are intended to be detached and negotiated, no reason is perceived why the Statute of Limitations should not run, as soon as they mature, against all such installments of interest as are represented by such interest coupons.

It appears to me that it would be extremely technical, as well as illogical, to say that the Statute of Limitations runs against the promise contained in a coupon from the date of its maturity, but does not run against the same promise contained in the bond until the bond matures. In view of the fact that it has been held that the same period of limitation applies to a coupon that applies to a bond—that they are contracts of equal dignity—the true doctrine is, no doubt, that when an action to recover a given installment of interest cannot be main-

109 Mass. 68; *Mercer County v. Hackett*, 68 U. S. 1 Wall. 89 (17 L. ed. 548); *Thomson v. Lee County*, 70 U. S. 8 Wall. 327 (18 L. ed. 177); *Clark v. Iowa City*, 87 U. S. 20 Wall. 583 (22 L. ed. 427); *Ketchum v. Duncan*, 96 U. S. 662 (24 L. ed. 870); *Chesapeake & O. Canal Co. v. Blair*, 45 Md. 103; *Arents v. Com.* 18 Gratt. 750; *Gilbough v. Norfolk & P. R. Co.* 1 Hughes, 410; *Everson v. Newport Nat. Bank*, 96 N. Y. 14; *Miller v. Berlin*, 13 Blatchf. 245; *Hinckley v. Union Pac. R. Co.* 129 Mass. 53. While they are connected with and grow out of the bond, being only evidences of the amount of interest due, they are so far independent contracts when separated from the bonds, and they contain a promise to pay or an acknowledgment of the debt due, and an action of debt may be maintained on them. *Knox County v. Aspinwall*, 62 U. S. 21 How. 539 (16 L. ed. 206); *Thomson v. Lee County*, 70 U. S. 8 Wall. 327 (18 L. ed. 177); *Nashville v. Potomac Ins. Co.* 2 Baxt. 296; *Beaver County v. Armstrong*, 44 Pa. 63; *Spooner v. Holmes*, 102 Mass. 508; *Mercer County v. Hubbard*, 45 Ill. 142; *People v. Logan County*, 45 2 L. R. A.

TIL 162. In Connecticut it was held otherwise. *New London City Nat. Bank v. Ware River R. Co.* 41 Conn. 542. Where, however, they do not contain negotiable words, but are in the form of interest warrants, containing a mere statement of the amount of interest due and the time and place of its payment, they are not negotiable. *Everson v. Newport Nat. Bank*, 96 N. Y. 14; *Jackson v. York & C. R. Co.* 48 Maine, 147; *Crosby v. New London, W. & P. R. Co.* 33 Conn. 121. See also *Partridge v. Bank of England*, 9 Q. B. 353; but see, *contra*, *Smith v. Clark County*, 54 Mo. 58; *McCoy v. Washington County*, 8 Wall. Jr. 381. Explained in *Everson v. Newport Nat. Bank*, 96 N. Y. 21. The holder takes no better title than the transferrer had; and where the coupons have been obtained by fraud or theft, the holder is without title. *Gilbough v. Norfolk & P. R. Co.* 1 Hughes, 410; *Arents v. Com.* 18 Gratt. 750; *First Nat. Bank v. Scott County*, 14 Minn. 79; *Miller v. Berlin*, 13 Blatchf. 245, 250; *Cromwell v. Sac County*, 96 U. S. 57 (24 L. ed. 689); *Burr, Pub. Secur.* 574.

tained on a coupon by reason of lapse of time, such installment cannot be recovered by a suit on the bond. *Kenosha v. Lamson*, 76 U. S. 9 Wall. 482 [19 L. ed. 728]; *Lexington v. Butler*, 81 U. S. 14 Wall. 296 [20 L. ed. 812].

The views here expressed are incidentally confirmed by the decision in *Clark v. Iowa City*, 87 U. S. 20 Wall. 586 [22 L. ed. 428], although it is true that the precise question now before the court was not involved in that case. It was there held that coupons, when severed from municipal bonds, are negotiable, and pass by delivery, and that, when so severed, they cease to be mere incidents of the bonds, and become independent claims. It was further held that though bonds are canceled or paid before maturity, such coupons as are at the time outstanding in the hands of third parties do not lose their validity, but may be collected by the holder for value.

If outstanding unpaid coupons are not extinguished by the cancellation, payment, or surrender of the bonds to which they pertain, it is manifest that the interest which accrues from time to time on bonds with interest coupons annexed is not a mere incident of the debt, and is not so inseparably connected therewith that it may be recovered along with the principal debt in a suit on the bond, as distinguished from a suit on the coupon, regardless of the length of time such interest may have been overdue.

The question submitted to the court as to whether the interest installments which fell due more than ten years before the suit was filed may be recovered in an action on the bonds, is accordingly decided in the negative. Such interest installments are barred, unless the statute can be avoided by a plea of some of the exceptions which suspend its operation.

### PENNSYLVANIA SUPREME COURT.

BACON, Baldwin & Co., *Plffs. in Err.*,  
v.

Jos. HORNE & Co., Garnishees of Henry Schoenwald.

(.... Pa. ....)

**An assignment for creditors, made in New York in conformity with the laws of that State, passes the title to property in Pennsylvania as between residents of New York, although the assignment has never been recorded in Pennsylvania in accordance with the Pennsylvania Act of May 3, 1855 (Pub. Laws, 415).**

(January 7, 1889.)

**ERROR** to Common Pleas No. 2 of Allegheny County (White, J.), brought by the plaintiff below to review a judgment in favor

of garnishees in foreign attachment. *Affirmed.*

Action of foreign attachment in case, brought by the firm of Bacon, Baldwin & Co., against Henry Schoenwald, as defendant, and the firm of Joseph Horne & Co. as garnishees.

At the trial the jury found the following facts, in the form of a special verdict: (1) The foreign attachment in this case was issued September 15, 1886, and served on garnishees the same day. (2) Judgment was entered against defendant April 5, 1887, for \$1,419.15. (3) On August 11, 1886, Henry Schoenwald made a voluntary assignment for the benefit of creditors, under the Laws of New York, which was duly recorded in New York City that day, and the trust accepted by the assignee. Both plaintiff and defendant were at that time, and are still, residents of the City of New York. The assignment has not been recorded in this

**NOTE.—Law of place of contract governs its validity.** A contract valid at the place where it is entered into is valid in all other places, and this rule extends to all assignments of property; and it is a general principle, admitting of few exceptions, that in construing contracts made in a foreign country courts are to be governed by the *lex loci* as to the rights acquired and the obligations created by it. *Baltimore & O. R. Co. v. Glenn*, 28 Md. 387; *DeSobry v. DeLaistre*, 2 Har. & J. 191; *Hall v. Mullin*, 5 Har. & J. 193; *Trasher v. Everhart*, 3 Gill & J. 244; *Gullander v. Howell*, 35 N. Y. 657; *Moore v. Willett*, 35 Barb. 663; *Hanford v. Paine*, 32 Vt. 442. Yet a transfer giving preferences to local creditors is void as to foreign creditors with respect to property situated in another State [Zipcey v. Thompson, 1 Gray, 243; *Einer v. Beste*, 32 Mo. 240; *Varnum v. Camp*, 13 N. J. L. 326]; unless the property has been conveyed to another State by transferee or a third person. *Barker v. Staey*, 25 Miss. 477; *Ferguson v. Clifford*, 37 N. H. 87; *Jones v. Taylor*, 30 Vt. 42. The dominion of a State over personal property situated there, and over its transfer, is complete. *Green v. VanBuskirk*, 74 U. S. 7 Wall. 139 [19 L. ed. 109].

**Assignment for benefit of creditors; conflict of laws.**

**In Pennsylvania.** An assignment by a citizen of one State, of personal property located in another State, passes the title fully for all purposes. The law of the domicile regulates the transfer of personal property. *Smith's App.* 104 Pa. 381. When, therefore, a foreign attachment is issued in any county in this Commonwealth where the property of a nonresident is situated, after the execution of an assignment in another State, but prior to the recording thereof in the county where the property

is found, the attachment has priority over the assignment. *Philson v. Barnes*, 50 Pa. 230. Distribution of the personal property in Pennsylvania assigned by a citizen of New York, the assignment being recorded both in New York and Pennsylvania, must, except in the case of creditors within the saving clause of the Act of 1855, be made in accordance with the Laws of New York, although the effect of preferences valid there but invalid in Pennsylvania is to deprive a Pennsylvania creditor of any share in the proceeds. *Smith v. Clark*, 9 Cent. Rep. 595, 117 Pa. 30. The power of the State to regulate the transfer of all property within its territory is well established. *Story, Conf. L.* § 390; *Milne v. Moreton*, 6 Binn. 361; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 151 [19 L. ed. 113].

**In Louisiana.** Residents of other States may assign equitable interests in the stock of a corporation situated in Louisiana, so as to prevent attachment against them by creditors with notice. *Black v. Zacharie*, 44 U. S. 3 How. 483 [11 L. ed. 600].

**In New York.** An assignment by a nonresident of New York, valid by the law of his domicile, and not prohibited by the law of that State, is valid as to assets there. *Ockerman v. Cross*, 54 N. Y. 29; *Crapo v. Kelly*, 83 U. S. 16 Wall. 619 [21 L. ed. 430]; *Kelstadt v. Reilly*, 55 How. Pr. 373; *Moore v. Willett*, 35 Barb. 663. A question in a suit in New York, as to the liability of property to an Illinois attachment, is to be decided by the effect given to it by the Laws of Illinois. *Green v. Van Buskirk*, 72 U. S. 5 Wall. 307 [18 L. ed. 599]. A bank situated in Missouri made a general assignment of its effects to a resident of that State. Among those effects was a deposit in New York State, of a part of which a nonresident of both States claimed an equitable assignment. It was held that the validity of the

county; and further, we find for the plaintiffs \$226.18, subject to the opinion of the court, whether on the facts above stated, the plaintiffs are entitled to recover; if not, judgment to be entered for the garnishees *non obstante veredicto*.

The plaintiffs submitted the following point: "That under all the evidence in this cause, the verdict of the jury should be for the plaintiffs. The court refused to affirm this point.

Thereafter the court rendered an opinion on the reserved question, ruling in favor of the garnishees, and ordering judgment for them *non obstante veredicto*.

Judgment having been entered accordingly, plaintiffs took this writ, assigning as error the refusal of their point and the rendition of judgment *non obstante veredicto*.

**Mr. Jos. M. Friedman**, for plaintiffs in error:

The provision of the Act of May 3, 1855 (Pub. Laws, 415), requiring the recording of the assignment in this county in order to protect property therein from the liens of *bona fide* creditors of the nonresident assignor, is applicable to this case. The question of comity does not apply.

See *Philson v. Barnes*, 50 Pa. 230; *Steel v. Goodwin*, 4 Cent. Rep. 659, 113 Pa. 288; *Smith's App.* 9 Cent. Rep. 595, 117 Pa. 80; *Warner's App.* 13 W. N. C. 505.

As to the question of jurisdiction and what would constitute actual notice of the assignment, see:

*Chemical Nat. Bank v. Tuttle*, 17 W. N. C. 415.

**Mr. James F. Robb**, for defendants in error:

The Act of May 3, 1855, does not apply; because the plaintiffs and defendant are both citizens of the State of New York, where the assignment was made.

As against a citizen of other States, especially of the State where the assignment was made, an assignment valid by the laws of the State in

which it is made, is valid everywhere, and a subsequent attachment by a citizen of that State will not hold as against the assignee in such case.

*Mulliken v. Aughinbaugh*, 1 Penr. & W. 126; *Speed v. May*, 17 Pa. 91; *Law v. Mills*, 18 Pa. 187; *Bugby v. Atlantic etc. R. Co.* 86 Pa. 291; *High, Receivers*, 2d ed. § 241; *Burrill, Assignments*, p. 474, § 810; *Moore v. Bonnell*, 81 N. J. L. 97; *Bentley v. Whittemore*, 19 N. J. Eq. 466; *Burlock v. Taylor*, 16 Pick. 335; *Sanderson v. Bradford*, 10 N. H. 260; *Bholen v. Cleveland*, 5 Mason, 174.

If the plaintiffs should be successful in this suit, they would have to turn the fund over to the assignee in the State of New York.

*Van Buskirk v. Warren*, 13 Abb. Pr. 145. *Philson v. Barnes*, 50 Pa. 230, and *Steel v. Goodwin*, 4 Cent. Rep. 659, 113 Pa. 288, cited by plaintiff in error, were cases in which the attaching creditor was a resident of this State, and of course would be protected by the Act.

In the case of *Chemical Nat. Bank v. Tuttle*, 17 W. N. C. 415, the question of whether the doctrine of comity applied and the Act of 1855 did not apply, when the assignor and attaching creditor were both residents of another State, was not considered.

From the foregoing citations, it would seem to be a well settled doctrine of the comity between States that where two citizens of the same State are bound by the law of their domicile they will not be allowed to come into another State, where personal property of one may be situate, and invoke the aid of a law antagonistic to the law of their domicile.

See also *Murray v. The Charming Betsy*, 6 U. S. 2 Cranch, 118 (2 L. ed. 208).

**Paxson, J.**, delivered the opinion of the court:

We do not think the property in question was liable to the foreign attachment. Both the plaintiffs and the defendant in that writ re-

general assignment should be determined by the laws of the State where it was made. *Coates v. First Nat. Bank of Emporia*, 15 Jones & S. 322.

In *Kentucky*. A voluntary assignment made in another State will pass personal property in this State as against a subsequent attaching creditor resident here, if the assignment be such as would be upheld and enforced if made in this State. *Coffin v. Keeling*, 83 Ky. 649.

In *New Hampshire*. Comity does not require that protection from attachment be extended to property in this jurisdiction, which the assignee does not ask to have protected and which he has abandoned; and the parties to the suit will be left to determine their respective legal rights to such property as if the assignment had not been made. See generally, *Young v. Kimball*, 59 N. H. 446; *Lane v. Moore*, 59 N. H. 80; *Eddy v. Winchester*, 60 N. H. 64; *Harvey v. Watson*, 1 New Eng. Rep. 842, 63 N. H. 466; *Leonard v. Clinton*, 26 Hun. 283; *Burrill, Assignments*, 2d ed. 352.

In *New Jersey*. The title to property in one State cannot be passed by force of the laws of another State, except in virtue of the comity which prevails among the States. *State Bank Receiver v. Plainfield First Nat. Bank*, 34 N. J. Eq. 450. It is contrary to the policy of our law to recognize a foreign assignment as against the claims of persons domiciled here. *Varnum v. Camp*, 13 N. J. L. 323; *Moore v. Bonnell*, 31 N. J. L. 90; *Van Winkle v. Armstrong*, 4 Cent. Rep. 53, 41 N. J. Eq. 462. The title acquired by an assignee for the benefit of creditors, although good as to the property assigned, is (as to assets in other States, whose policy it is not to recognize, as against the claims of creditors of the assignor domiciled therein, the validity of general

assignments with preferences) liable to be defeated by attachments sued out of the courts of such other States by creditors domiciled therein, to recover their debts out of such assets. *Kimball v. Lee*, 4 Cent. Rep. 332, 40 N. J. Eq. 403.

In *Massachusetts*. It certainly would be unjust to creditors, residents of this State, if they were to be deprived of the benefit of an attachment they had lawfully made, or other lien they had lawfully acquired on the property of their debtors here situate, by an assignment which, if made here between citizens, would be inoperative for want of compliance with legal requisitions, even if such assignment was valid in the State where it was made, and sufficient to transfer property under its control. *Green v. Van Buskirk*, 72 U. S. 5 Wall. 308 (13 L. ed. 599); *S. C.* 74 U. S. 7 Wall. 140 (19 L. ed. 100); *Cunningham v. Butler*, 2 New Eng. Rep. 338, 142 Mass. 47; *Dehon v. Foster*, 4 Allen, 545; *Faulkner v. Hyman*, 2 New Eng. Rep. 183, 142 Mass. 53. Voluntary assignments in trust for the benefit of creditors, the only consideration of which is the acceptance of the trust by the assignee, are invalid against attachments, except so far as assented to by creditors; in which case, being good at common law, they will protect the property from the attachment to the extent of the amount due the creditors thus assenting. *Faulkner v. Hyman*, 2 New Eng. Rep. 183, 142 Mass. 53. Such assent is not to be presumed, but must be shown by some affirmative act, such as presenting claims, accepting a dividend, or distinctly becoming a party to the written assignment. *Swan v. Crafts*, 124 Mass. 453; *Pierce v. O'Brien*, 129 Mass. 314; *Widgery v. Haskell*, 5 Mass. 145; *Faulkner v. Hyman*, 2 New Eng. Rep. 183 note, 142 Mass.

sided in the City of New York. Before it issued the defendant had made an assignment for the benefit of his creditors. The assignment was made in New York and was in conformity to the laws of that State. Under all the authorities it passed the title to the property in this State. It is sufficient to refer to our last case, *Smith's Appeal*, 9 Cent. Rep. 595, 117 Pa. 30.

It was said, however, that inasmuch as the assignment was not recorded in this State in accordance with the Act of May 8, 1855 (Pub. Laws, 415), relating to foreign assignments, and the attaching creditor had no notice of the assignment, the property was liable to the attachment. The first section of the Act of 1855 is as follows: "That whenever any person making an assignment of his or her estate, situate within this Commonwealth, for the benefit of creditors, shall be resident out of this State, such assignment may be recorded within any county wherein such estate, real or personal, may be and take effect from its date; *Provided*, That no *bona fide* purchaser, mortgagee, or creditor, having a lien therefor before the recording in the same county, and not having had previous actual notice thereof, shall be affected or prejudiced; and the court of common pleas may dismiss or appoint trustees under such assignment, as in other cases."

The manifest object of this Act was to protect our own citizens; hence, it was held in *Steel v. Goodwin*, 4 Cent. Rep. 659, 118 Pa. 288, that where a foreign attachment had issued after an assignment in another State, but before it was recorded here, and the attaching creditor had no actual notice of such assignment, the attachment was good as against such assignment. To same effect see also *Philon v. Barnes*, 50 Pa. 230.

These cases were well decided, but they do not rule this one. The Act of 1855 is not invoked by any Pennsylvania creditor seeking its protection. As before observed, both of these parties, plaintiffs and defendant, are residents of New York. The plaintiffs come into this State to obtain an advantage by our law which they could not obtain by their own. They are seeking to nullify the law of their own State and ask the aid of our court to do so. This they cannot have. If for no other reason, it is forbidden by public policy and the comity which exists between the States. This comity will always be enforced when it does not conflict with the rights of our own citizens. *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291.

The same principle is recognized to a greater or less extent by many other authorities. It is sufficient to refer to *Mulliken v. Aughinbaugh*, 1 Penr. & W. 117; *Speed v. May*, 17 Pa. 91; *Lau v. Mills*, 18 Pa. 185; *Moore v. Bonnell*, 81 N. J. L. 97.

The case of *Chemical Nat. Bank v. Tuttle*, 17 W. N. C. 415, was cited as authority on the other side. We do not so regard it. While the facts of that case are upon all fours with this, the point now under consideration was not raised, and of course not decided. The case turned upon the question whether the attaching creditor had actual notice of the assignment. It was assumed that it came within the Act of 1855, and this court decided only what was then before it. The question of comity was left untouched.

The learned Judge below entered judgment upon the reserved point in favor of the garnishees, *non obstante veredicto*. In this there was no error.

*Judgment affirmed.*

## - UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF NEW YORK.

John T. UNDERWOOD *et al.*

v.

Henry GERBER *et al.*

(....Fed. Rep....)

**One who has taken out two patents, the first for a novel composition of matter, the second for a combination of this composition with another article, who brings suit for infringement on the second patent alone, in which it is held that the mere combination is not patentable, cannot be aided by the first patent, at least where it is not alleged or shown that he is still the owner thereof; but, on the contrary, such first patent may be set up as a prior patent to defeat his claim under the second.**

(January 13, 1889.)

**SUIT to restrain the infringement of a patent. Decree for defendant.**

The facts and questions presented are stated in the opinion.

**Mr. James A. Hudson**, for complainants, cited (to the point decided in opinion):

*Railway Register Mfg. Co. v. Broadway &*

**NOTE.**—There appears to be no case bearing directly upon the point in this case, as neither the court nor counsel have succeeded in finding such. The case appears to be of novel impression in patent law. [Rep.]

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*7th Ave. R. Co.* 22 Fed. Rep. 655; *McMillan v. Rees*, 1 Fed. Rep. 722.

**Mr. Arthur v. Briesen**, for defendants, cited (to the same point):

*Mahn v. Harwood*, 112 U. S. 354 (28 L. ed. 635); *Mosler Safe & Lock Co. v. Mosler*, 127 U. S. 354 (32 L. ed. 182); *Suffolk Mfg. Co. v. Hayden*, 70 U. S. 8 Wall. 815 (18 L. ed. 76); *Morris v. Huntington*, 1 Paine, 848; *Mathews v. Flower*, 25 Fed. Rep. 830.

**Lacombe**, Circuit Judge, delivered the opinion of the court:

This is a suit brought to restrain the defendants from infringing letters patent 848,073 granted to the complainants August 24, 1886, for "an improved reproducing surface for type-writing and manifolding."

The circumstances of the case are peculiar and present what seems to be a novel question.

On March 22, 1886, the complainants filed their application (known as serial number 196,200). The patent issued thereon and now sued on sets forth that the invention relates to an improved reproducing surface adapted to be employed for obtaining copies of type-writing, or other printed or written impressions,



by means of a type-writer or other printing device, or by the employment of a stylus or other writing means. That the transfer surface is spread upon a sheet or vehicle, and when so applied is adapted to be employed in place of the articles of trade commonly known and designated as "carbon papers" or "semi-carbon papers." The specification then proceeds as follows:

"('Carbon papers' or 'semi-carbon papers') are employed by type-writers and others to produce copies of impressions either obtained by a machine or by a stylus or other writing means.

"In carrying out our invention we employ in the manufacture of our improved transfer surface dyewood solutions or their active principles, which we filter and precipitate with alkalies and mineral salts, or with alkalies, acids and mineral salts, or with acids or alkalies alone. After the solution has been filtered the precipitate is removed from the filtering device and dried. The precipitate is then mixed with lard oil and wax, or their equivalents, and the mixture is then ground together in a warm state.

"The dye solutions we prefer to employ are obtained from logwood or hæmatoxylon, the active principle of logwood, Brazil wood, sapan wood, peach wood, madder, or its active principle—alizarine.

"The proportions we find to answer well in producing our improved surface are as follows: take one pound of extract of logwood and dissolve the same in one gallon of water, then add to the solution one pound of soda and one pound of mineral salt, using one of the salts of iron or copper, preferably sulphate of copper. The mixture thus obtained is then placed in a filter. After the solution has been filtered the precipitate is removed from the device employed for filtering and then dried, after which the precipitate is ready for use. To every two pounds of precipitate thus obtained we add one pound of oil and one pound of wax, and then grind the mixture in a warm state in what is commonly known as a 'paint' or other suitable grinding mill. The heated mixture thus obtained is then applied to tissue paper or other suitable paper or ... ric by means of a sponge or other suitable transferring device.

"The paper or fabric to which our improved surface is to be applied is placed upon a heated table, by preference formed of iron, and heated by steam; but this may be varied.

"In place of employing oil or wax, or both combined, we can employ any other suitable oleaginous matter or combination of oleaginous matter having equivalent, or approximately equivalent properties."

The invention having been thus described, the patentees claimed "A sheet of material or fabric coated with a composition composed of a precipitate of dye matter, obtained as described, in combination with oil, wax or oleaginous matter, substantially as and for the purposes set forth.

On the same day (March 22, 1886, Serial Number 196,199) complainants also applied for a patent for a "composition for transfer surfaces for producing copies of type-writing," and letters patent therefor (No. 848,072)

were issued to complainants on the same day as those sued on—August 24, 1886.

The specification sets forth that the invention relates to the process of producing a transfer surface adapted to be employed upon a sheet or vehicle to take the place of the articles of trade commonly known and designated as "carbon papers" or "semi-carbon papers." It then states that these papers are employed by type-writers or others to produce copies of impressions either obtained by a machine or by a stylus or other writing means, and proceeds to describe the invention in the identical words used in the other patent and quoted above.

Having thus described their invention, the patentees claimed "the coloring composition herein described for the manufacture of a substitute for carbon paper, composed of a precipitate of dye matter, in combination with oil, wax, or oleaginous matter, substantially as set forth."

This novel method of manifolding an invention was adopted, as complainants state, in order to comply with recent decisions of the Patent Office, interpreting Rule 41 of that office, and holding that where a person has "invented something in an art or as it is ordinarily called 'a process,' also a machine for carrying out the process, and also the manufacture or article which is produced in the operation or the process by the machine" he must take out three separate patents, one for the process, one for the machine, and one for the product. *Ex parte Blythe*, 30 Pat. Off. Gaz. 1821; *Ex parte Herr*, 41 Pat. Off. Gaz. 468.

Before those decisions the patent would have contained the common specification above quoted, with two separate claims, one for the process and resulting composition, the other for its combination with the paper. The complainants insist that their position is precisely the same whether their invention is covered by a single patent with a double claim or by two separate patents. Whether this is so, under the circumstances of the particular case here presented, must be now determined.

The defendants insist that no invention is set forth in either patent, and that they do not infringe. For the purposes of the argument upon the preliminary objection, however, the converse of these propositions will be accepted.

The present application is to restrain the defendants from continuing to infringe; and for some unexplained and unaccountable reason the complainants sue only on a single patent, and that, too, the one whose numbers would indicate that it was, in time of application and of issue, subsequent to the other. Having taken their stand solely upon this patent, what is their position towards defendants, who make the composition of matter described in both patents and combine paper with it as indicated in the one sued on?

When differentiated from each other it is found that the only step in advance which the higher numbered patent suggests is the spreading upon paper of the composition described in the lower numbered patent. In view of the earlier patents and publications which have been put in evidence—in fact considering only what is within the common knowledge of all who have, for upwards of a generation, mani-

folded writing by the use of a paper coated or impregnated with some pigment—it is difficult to see how even the Patent Office could detect novelty or invention in merely taking a coloring substance already known and applying it to paper. If the patent for the composition of matter forming the coloring substance had been granted to John Doe the day before complainants applied for their patent covering the application of that substance to paper, the latter would be clearly void for want of novelty or invention.

It follows that if the first numbered patent were held by an assignee of the complainants, near or remote, he could not be held an infringer of the second patent. Complainants conceded upon the argument that an assignee could not be so held, except for the combination of paper with the coloring substance for the purpose named, and such a combination is clearly old.

The complainants insist that their position is precisely the same as if they held a single patent with two claims, one for the process or composition of matter producing the coloring substance, the other for the combination of that substance with paper. This might be so, if they could be considered as holding both patents. But in this suit they have carefully abstained from declaring upon the first patent, or even in any way referring to it. Its issuance is only known to the court through the defendants, who set it up in defense. The complainants base their claim to a monopoly solely upon the second patent. As that single patent, tried by the usual tests, may stand or fall, the case which they make out upon their complaint must also stand or fall.

One who seeks to enforce the rights secured to him by a patent is an Ishmaelite—his hand against everyone and everyone's hand against him. His adversary may avail himself of every publication of the fruits of human invention—by letters patent, by printed books, by actual public use—as if they were his own. When offered in evidence they may prove not conflicting, not anticipatory, or be found otherwise immaterial; but for what they are worth,

they are the common property of all who are called upon to justify their acts in the face of a complainant patentee.

The holder of the patent sued upon in this case must submit it to comparison with the first patent as if that first patent were outstanding. By not declaring upon it as its present owner, he leaves it to the defendants to be availed of as if it were the property of a stranger.

What, then, is his position?

At the very time when his patent was issued the composition of matter which enters into his combination with paper was known, and the right to exclude all persons from making it was conferred upon the holder of another patent. Upon the holder of the patent sued upon was conferred the right to exclude all others from combining paper with this composition; but in view of the state of the art such a grant was void.

The cases cited by complainants (*Railway Register Mfg. Co. v. Broadway & 7th Ave. R. Co.*, 22 Fed. Rep. 655, and *McMillan v. Rees*, 1 Fed. Rep. 722) do not apply. There it was held that the additional combination which the original inventor sought to secure by his later patent was in fact a real step in advance. It was held that the description of his invention in the earlier patent would not preclude him from securing his additional claim, because that additional claim covered a patentable invention. "Whether two patents," says the court in the case last cited, "cover the same invention must be determined by the tenor and scope of their claims, not by the description in the specifications."

Here, as we have seen, the combination, which the second patent sought to cover, was not patentable. This suit, based upon it alone, must therefore fail. To the holder of the first patent, whoever he may be, alone, belongs the right to exclude all others from making the new composition of matter, the only invention which (if the other issues in the case be decided against the defendant) was sufficiently novel to warrant the granting of letters patent.

*Usual decree for defendant.*

## NEW YORK COURT OF APPEALS.

### Re Petition of UNION ELEVATED R. CO. OF BROOKLYN.

When the provision of the Rapid Transit Act (N. Y. Laws 1875, chap. 606) providing for the appointment of commissioners and their determination as to the propriety of constructing the proposed railroad in public streets, in lieu of the consents of abutting owners, has been complied with, and their determination that the road should be constructed has been confirmed by the supreme court, after the giving of public notice and an opportunity to abutting owners to be heard, such decision of the supreme court involves the determination of the validity of the incorporation of the company proposing to construct the road, and being the decision of a competent tribunal in a judicial proceeding in which the abutting owners had an opportunity to be heard on that question, will estop such owners

from thereafter attacking the validity of such incorporation collaterally.

(January 15, 1890.)

**A**PPPEALS by certain property owners from an order of the General Term of the Supreme Court, Second Department, affirming an order of the Kings Special Term appointing commissioners on the petition of the Union Elevated Railroad Company of Brooklyn, relative to acquiring title to certain real estate or interests therein in certain city streets. *Affirmed.*

The Mayor of Brooklyn, upon a petition in proper form under the Rapid Transit Act (Laws 1875, chap. 606), signed by fifty property owners, appointed a commission to determine the necessity of rapid transit and perform

all the other duties required of such a commission by that statute. The commission so appointed determined that there was a necessity for an elevated railroad, and located its routes and decided upon the plans for the construction thereof. Thereupon the corporation petitioner was formed and its stock subscribed for and the necessary amount paid in in cash, and thereafter, on July 16, 1886, the company obtained the consent of the local authorities to the construction of the road, but being unable to obtain the consent of a majority of the property holders, applied to the general term of the supreme court for the appointment of a commission in lieu of the consent of property holders, as authorized by the statute. This commission, after giving public notice and an opportunity for all interested to be heard, reported that all the routes, except one, ought to be constructed. This report was confirmed by the general term and from the order of confirmation no appeal was ever taken.

The company thereafter commenced the construction of its road and after parts of it had been completed and were in operation, commenced the present proceedings, by petition to the supreme court, for the appointment of commissioners to appraise the amount of compensation to be made by petitioner to the owner or owners interested in the streets and premises described therein.

**Mr. B. F. Tracy** for property owners, appellants.

**Messrs. George Hoadly and George W. Wingate** for petitioner, respondent.

**Gray, J.**, delivered the opinion of the court:

The parties who are affected by these proceedings to acquire title to their property, privileges and easements, to the extent necessary for the construction and operation of an elevated railroad, oppose the same on the ground that the petitioner never was duly incorporated; that it has no existence as a corporation, and has no right to construct and operate a railroad, on certain streets, etc.

There is a doubt as to the correctness of the proposition that the right of eminent domain cannot be exercised by a corporation to deprive a citizen of his property, or property rights, except it be a corporation *de jure*; but the question here is whether these parties may at this day question the legality of the corporate existence of the petitioner. If by the force or virtue of legal proceedings, they have heretofore been brought into court and have had the opportunity of contesting that very question before a competent tribunal, they should not be heard upon it now; for I consider it to be a well settled principle that the judgment of a court of competent jurisdiction, proceeding upon a matter of which it has cognizance, cannot be questioned collaterally. If it can be shown that upon a prior occasion these appellants, by proceedings competent to affect them with notice, were afforded a time and place for trying out the question they present now, their failure to avail themselves of the opportunity and a decree rendered therein, standing unreversed, must be held to preclude them from afterwards raising such question.

Chapter 606 of the Laws of 1875, commonly 3 L. R. A.

known and referred to as the Rapid Transit Act, which lies at the foundation of the proceedings for the construction and operation of steam railways within cities, contains the provision in its 4th section, "That the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railway or railways, be first obtained; or in case the consent of such property owners cannot be obtained, that the determination of three commissioners, appointed by the general term of the supreme court in the district of the proposed construction, given after a due hearing of all parties interested, and confirmed by the court, that such railway or railways ought to be constructed or operated, be taken in lieu of the consent of such property owners."

This proceeding to substitute for the consents of property owners the determination of the commissioners depends for its success upon the decree of the court named. With respect to the whole matter, it is a distinct and special proceeding; having its inception in the application by the company proposing to construct and operate a railroad, and thereafter depending within the jurisdiction and control of the tribunal which the Legislature has empowered to entertain it. By the 7th section of the Act it is provided that the commissioners appointed in the first instance by the mayor, upon the general application of taxpayers, to determine upon the necessity for steam railways and the location of their routes, are to prepare articles of association for the company to be formed, and shall embody therein, *inter alia*, the conditions and requirements of the 4th section we have mentioned. This mandatory provision of the 7th section, with respect to the articles of association, makes it perfectly clear that the proviso clause which we have quoted from the 4th section is referable to the company to be formed under the Act, and is to be construed in connection with the powers and corporate capacities conferred by the statute upon that new corporation. Unless regarded as one available to the corporation to be formed by the mayor's commissioners, the provision mentioned in the fourth section would be senseless.

We find, then, as part of the scheme, that after the mayor's commissioners have set upon its feet the new corporation, its first steps must be in the direction of obtaining the requisite consents of property owners and local authorities to the construction and operation of its railway along its designated routes. Failing to obtain the consents of the owners of property bounded on the proposed railway route, the company may set in motion a proceeding before the tribunal designated by the Legislature to secure, *in invitum* the nonassenting property owners, a decree allowing a construction of the railway.

It will be observed that the proceedings are hostile and that they must fail, unless in three essential features there is compliance with the Act: there must be a due hearing of all the parties interested; the commissioners must determine that the railway ought to be constructed; and, finally, the court itself must set the

seal of its confirmation upon the determination of its commissioners, by its decree. The creation of this tribunal, with the exclusive jurisdiction to hear and determine the question of whether the proposed railway should be constructed in the face of the opposition of property owners affected, is a part of a plan or system, devised by the Legislature and framed in the Act which it passed. To provide therein for such a tribunal, whose decision might be substituted for the consents of property owners, was perfectly competent for the legislative body; as a part of, or an incident to its delegation to the corporation of the power to exercise the right of eminent domain; by which right the corporation is empowered to obtain, *in invitum* the owners the possession of what is their property.

This delegation of sovereign power is based on the theory that as land is held subject to the right of government to resume its possession at any time for public use, the construction of a railway is a public use, in the interest or promotion of which the right of eminent domain possessed by the government may be exercised through the quasi public corporation which is chartered. We have held that the Rapid Transit Act embraces the whole law on the subject of the formation of corporations thereunder (*N. Y. Cable Co. v. New York*, 104 N. Y. 21, 6 Cent. Rep. 56); and we can add here that a system of procedure is provided for which is independent and complete, and which is capable of attaining the end sought, of securing to the corporation organized thereunder full scope for its legitimate action and for the acquisition of necessary properties.

The statute is not to be construed so literally as to balk the legislative purpose and to work injustice or a wrong; it should receive a construction which will permit of the accomplishment of the general purpose of the grant. An element of that purpose is the creation of a tribunal with original jurisdiction and with power to enforce the right of eminent domain when sought to be exercised by the corporation in the acquisition of the right or license to construct and operate its railway. It is altogether reasonable, as a construction of the grant, to find the intention of the Legislature to be that the determination of that tribunal, with respect to the opposition of property owners, being made in the inception of the enterprise, should be once and for all; as otherwise—as is the fact in the present case—when the company had gone ahead, expending its moneys and constructing its railway, an abutting owner, who had stood by while the work was progressing and perhaps the company then actively engaged in operating its franchises, might secure a judgment destructive of the corporate franchises upon questions which were equally open for assertion by him before any capital was expended or work undertaken. Any other conclusion would work a great wrong, and I do not think should receive the sanction of any court of justice.

In *Re Kings County Elevated Railway Company*, 82 N. Y. 95, it was held, with respect to the determination of the commissioners appointed by the general term of the supreme court under this very Act, that the railroad should be built; that the court, in confirming

that report, adjudged upon the reasons for and against the determination.

Folger, *Ch. J.*, says: "We cannot admit that the tribunal that has the power to appoint commissioners, whose duty it is to make report to the authority that created them, which report is of no effect until confirmed by that authority, is not a tribunal of original jurisdiction; so far as to have the function to review the action and conclusion of its commissioners in all the particulars that enter therein." It was there held that in providing for the substitution of a determination by commissioners confirmed by the court, for the consents of a fixed proportion of property owners, a grave provision of the fundamental law was dealt with—referring to the constitutional provision contained in section 18 of the third article of the Constitution. And it was considered not to be reasonable to hold that the supreme court at general term acted only a clerical or formal part, and was without the power to exercise a judgment upon the facts and circumstances of the case.

A tribunal of original jurisdiction, therefore, being established, having cognizance of all questions affecting the rights of property owners, have these parties or their properties been brought within its jurisdiction? Have these questions been adjudged upon by due process of law? It was conceded upon the hearing before the commissioners by the appellants that the proceedings of the general term were regular. The order appointing the commissioners was upon the company's petition and provided for notices to be given by the commissioners of the time and place of the hearing before them, by publication in several newspapers and for posting such notices conspicuously at a number of places along the proposed routes of the company.

The Act makes no provision as to how notice shall be given, but only provides for a hearing. The order also required the giving of a previous notice of the presentation of the report of the commissioners to the general term for confirmation, by publication in the daily papers and by service of a copy of the notice upon all who had formally appeared by attorneys.

Proof was made of the giving of the notices called for by this order and, indeed, I find no dispute raised as to the regularity of the formal proceedings leading up to the final order of confirmation of the report of the commissioners, which recites the proof of the publication and service of notices, etc.

In *N. Y. Cable Company v. New York*, 6 Cent. Rep. 56, 104 N. Y. 1, the appeal was from the order of the general term refusing to confirm the report of its commissioners. The refusal was based on the ground that the petitioner had not the legal right to construct or operate its railways. That declaration in the order authorized a review by this court of the questions of law involved in the decision of the general term, and we held that the company had never been validly legally organized, so as to have acquired the right to construct its road. That case decided the proposition that, unless validly organized in pursuance of the Rapid Transit Act, a company acquired no right to construct its road, and, consequently, could not demand that the supreme court confirm the

report of its commissioners as a substitute for the consent of property owners. I think it follows, logically, from the true construction of the Rapid Transit Act and from the decisions in the *Cable Company's* and the *Kings County Railroad Company's Cases*, *supra*, that the general term is a tribunal of original jurisdiction, whose functions are judicial, and whose determination is a judgment upon questions necessarily comprising within their scope that of the valid legal organization of the petitioning company. The proceedings before this tribunal are *in rem*, and, under well settled rules, should be conclusive upon all mankind. They are brought against certain property rights to condemn them for quasi public uses in the permitted exercise of the right of eminent domain. The propriety of taking private property for a public use is not a judicial question but one of political sovereignty.

Denio, *J.*, said in *People v. Smith*, 21 N. Y. 598: "In imposing a tax or in appropriating the property of a citizen, or of a class of citizens, for a public purpose, with a proper provision for compensation, the Legislative Act is itself due process of law . . . It is not necessary for the Legislature, in the exercise of the right of eminent domain, either directly or indirectly through public officers or agents, to invest the proceeding with the forms or substance of judicial process."

The case is cited from as an authority bearing upon the question of a power vested in the Legislature to exercise this right of eminent domain, which is without control as to the form or manner of the exercise; except that compensation must be made and the objects must be within the definition of a public use. As the power may be delegated to private corporations, established to carry on enterprises of a public nature, the Legislature may prescribe how the power shall be exercised by them; which it has done in the case of railway corporations organized under the Rapid Transit Act. The consent of the abutting owner on the street proposed to be occupied must be had and constitutes a species of property or muniment of title (*People v. O'Brien*, 19 N. Y. 8. Rep. 178, decided November, 1886), and a right is given to acquire it *in invitum* under the provisions of the Act, by proceedings before a tribunal especially authorized and empowered by the Legislature. The exercise of the right is placed under the control of that tribunal, and provision is made for a hearing of all parties interested; but the method of a giving notice of the hearing is left entirely with that tribunal.

The principles which govern in cases of assessment and taxation are applicable to the decision of the question suggested in this case, as to whether there has been due process of law. Whether the taking of private property be under the imposition of a tax, or in appropriating it for a public purpose, the right stands on the same basis and its exercise is purely a matter of legislative regulation and direction.

In *Stuart v. Palmer*, 74 N. Y. 183, which was a case involving the question of the constitutionality of a law imposing an assessment for local improvement, Earl, *J.*, discusses at some length what constitutes that due process of law which is guaranteed to each citizen by the Constitution. He says: "Generally that 2 L. R. A.

due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights." He reviews many authorities which fully sustain his proposition.

Judge Cooley, in his work on Constitutional Limitations (p. 355), says that "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

In *Philadelphia v. Miller*, 49 Pa. 440, it was said by Agnew, *J.*, in speaking of taxation, "Notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property."

This notice or means of knowledge, which all the authorities agree to be a necessary part of a proceeding by which the citizen may be deprived of property, was furnished in the present case. It was not a personal notice, perhaps, as to all or some; but that is not prescribed by the law, nor is necessary by implication. To hold otherwise would be to lay down a doctrine which has no support in principle or in authority. It might and probably would be practically impossible to personally notify all the property owners affected by the construction of the railroad; as it might be also in the cases of assessments or statutory proceedings, which include within their scope the deprivation to a citizen of his property.

In *Re Empire City Bank*, 18 N. Y. 199, the court says by Denio, *J.*: "We have not been referred to any adjudications holding that no man's right of property can be affected by a judicial proceeding unless he have personal notice." It was there held that the Constitution does not positively require personal notice in order to constitute legal proceeding due process of law. Consequently, the objection raised in that case, that there was not a personal notice to all the parties to be charged as stockholders of the Empire City Bank, was held untenable, and the proceeding was deemed not to lose the character of legal process, within the constitutional provision, by the omission to require personal notice to be given.

In *Campbell v. Evans*, 45 N. Y. 356, Allen, *J.*, said with respect to the requisites of a notice to the owner of animals seized by the local authorities on the public highways, that "It is no objection to the proceedings that personal notice to the owner, or other claimant of the property, is not made necessary by the Act or essential to the jurisdiction of the magistrate, or that the proceedings are to some extent summary. The proceedings are in the nature of proceedings *in rem*—the penalty of forfeiture attaching to and being a lien upon the offending animals. Under the statutes of this State there are various proceedings, both *in rem* and *in personam*, in which the party to be affected only has notice by a publication or posting of the summons or notice."

It is known that in the United States Courts jurisdiction may be acquired in admiralty proceedings by posting a citation under the rules of the practice of the court.

We hold, therefore, that the proceeding by

this company before the supreme court at general term to obtain the determination provided by the statute in lieu of the consents of property owners, was a judicial proceeding before a competent tribunal, constituted by the Legislature for the purpose, instituted and maintained against the property rights of citizens, of which they had notice and where they had an opportunity to come in and litigate the very matters now sought to be put in issue. There is an obvious propriety in so holding; for there was ample power to deal with all questions of right and of wrong; and to hold otherwise would be to permit the injustice of a single property owner being able to interfere with and perhaps destroy an important quasi public enterprise.

The distinguished counsel, who argued for the property owners, suggests that the absence from the record of the petition precludes the point as to the bar of the decree of the supreme court at general term from being insisted upon. While, to that extent, the record before us may be imperfect, yet the decree of that court, taken in connection with all the other proceedings, which appear to have been taken by or before the commissioners and the court, and with the concession as to the regularity of the proceedings of the general term, render the absence from the record of the petition itself not a material defect. Nor does what we have decided in the *Cable Company's Case* conflict with the proposition that the proceeding in the supreme court at general term constituted an estoppel upon these appellants. We did hold that unless validly organized the company acquired no right to construct the road, and consequently could not demand that the supreme court confirm the report of its commissioners, as a substitute for the consents of owners; and that there was no basis for the petitioner's application in the refusal by the property owners of their consents under the circumstances disclosed. These views were expressed upon the appeal from the order of the supreme court, which denied a motion to confirm the report of the commissioners. It was because the legal questions were raised in that form and at that

stage of the petitioner's existence, that they were discussed and were reviewable.

In this case, had the parties now opposing the petitioner's efforts to carry on its enterprise raised their objections on a like occasion and before the same forum, they could and would have been heard and disposed of, and on appeal the judgment would have been reviewable on the legal propositions involved. The judicial discretion of the supreme court at general term, as to whether the road ought to be built, would not be reviewable; because it was discretionary and a question of policy; but, if the petitioner was alleged not to be a corporation *de jure*, and to have no standing in court to demand anything, or to exercise any right of eminent domain, a denial of its application on any such ground, or the granting thereof in the face of such an objection, would have rendered the judgment reviewable upon that question.

We conclude, therefore, that in the proceedings had in the supreme court at general term, upon the occasion of the proceeding to substitute for the consents of property owners the determination of its commissioners, the property owners had notice of the same and were afforded an opportunity to be heard upon the questions now sought to be raised. The judgment of that court constructively involves the establishment of the facts of legal incorporation and of legal capacity, and in that respect judicially estopped the abutting owners from ever afterward raising the question. That judgment is no longer open to collateral attack. We cannot give our approval to the doctrine that these appellants, having had an opportunity in the first instance to secure a judgment establishing their rights, could stand by and see the company going on with its work, upon a subsequent occasion of their own choosing, claim that no day in court was necessary, and that the question may be raised whenever it is sought to divest them of their property rights.

*The order appealed from should be affirmed, with costs.*

All concur.

## DAKOTA SUPREME COURT.

Harman YERKES, *Appt.*,

v.

Kate Irene HADLEY (Impleaded with Lafayette Hadley, Her Husband), *Respnt.*

(....Dak.....)

**A married woman** who, with her husband, has executed a mortgage containing covenants of seisin, quiet possession and warranty, on her separate property, is, in Dakota (where by statute a married woman is empowered to make any engagement respecting property which she might if unmarried), estopped from setting up against the purchaser on foreclosure any title subsequently acquired by her, even though it is acquired after the foreclosure, and although the

mortgage is a mere lien, and does not convey an estate in the land.

(Oct. 5, 1888; Rehearing denied Feb. 11, 1889.)

**APPEAL** by plaintiff, from a judgment of the District Court for Cass County (McConnell, J.), in an action for the possession of land. *Reversed.*

The facts are stated in the opinion.

*Messrs. Stone & Newman* for appellant.  
*Mr. Taylor Crum* for respondent.

**Carland, J.**, delivered the opinion of the court:

The record in this action discloses that on and prior to December 8, 1881, Lafayette Hadley and Kate Irene Hadley, his wife, were in possession of and lived upon lot 17, in block 4, of the City of Fargo, in this Territory; that on

**NOTE.**—As to estoppel of married woman, see *Speier v. Opfer*, ante, 345, and *Artman v. Ferguson*, ante, 343, and notes.

said date they executed to Harman Yerkes their joint and several promissory note for \$500, with interest at 10 per cent per annum, payable annually, which note was to be payable in five years from the date thereof. The interest to become due was evidenced by joint and several interest coupon notes, attached to said original note and signed by the makers thereof. To secure the payment of this note, and the interest to become due thereon, said Lafayette Hadley and Kate Irene Hadley made and executed to said Harman Yerkes their mortgage on the premises hereinbefore mentioned, which mortgage was duly recorded on the said 8th day of December, 1881, as provided by law.

The mortgage in form was what is termed a mortgage deed, being an absolute deed of bargain and sale, with joint covenants of seisin, quiet possession, and warranty. It also contained the usual defeasance common to such instruments.

Default having been made in the conditions of said mortgage, it was duly and legally foreclosed, and the land in dispute was purchased by Harman Yerkes on the 11th day of March, 1884. No question was raised as to the regularity of the foreclosure proceedings. A sheriff's deed was duly issued to the purchaser on March 20, 1885. Claiming title through said foreclosure, Harman Yerkes commenced this action to obtain possession of said lot 17.

The defendants, by their answer, averred, and such was the proof on the trial, that on the 10th day of June, 1878, the Northern Pacific Railroad conveyed said lot 17 to one A. H. Moore, which conveyance was duly recorded May 31, 1880; that said A. H. Moore conveyed said lot by quitclaim deed to Robert Hadwin, on March 11, 1879, which quitclaim deed was duly recorded August 17, 1883; that on the 12th day of June, 1885, said Robert Hadwin granted and conveyed said lot to said Kate Irene Hadley, which conveyance was duly recorded on August 15, 1885.

At the trial the court found for the said defendant Kate Irene Hadley, and adjudged that she was the owner of said lot. From this judgment appellant appealed to this court.

It will be seen that the facts thus stated raise the single question as to whether the title acquired by Kate Irene Hadley subsequent to the execution and foreclosure of the mortgage given by her on the 8th day of December, 1881, inured to the benefit of the appellant, Harman Yerkes. In considering this question we must bear in mind that Kate Irene Hadley was a joint debtor with her husband, so far as the record discloses. She signed the note, and the mortgage contained the following condition: "Provided, nevertheless, that if the parties of the first part, their heirs, executors or administrators, shall pay or cause to be paid to the said party of the second part, his heirs, executors, administrators or assigns, the sum of \$746, according to the conditions of six promissory notes of even date herewith."

From all that appears from the record, Kate Irene Hadley may have received all of the consideration for the mortgage. This being so, she had the authority, under the laws of this Territory, to execute a mortgage to secure said indebtedness, in the same manner as if she were unmarried. Section 661, Civil Code, as

amended by § 2, chap. 2, Laws 1881; § 79, Civil Code.

We cannot presume that she was executing a mortgage on her husband's property, for the reason that it appears that her husband never had any ownership in the property mortgaged. Having the same rights as an unmarried woman in regard to the granting or incumbering of her property, Kate Irene Hadley could make the mortgage to Harman Yerkes, and could bind herself by any lawful covenant inserted therein, the same as any other person.

The authorities which hold that a married woman may set up an after acquired title as against her deed and mortgage, and which also hold that she is not estopped by the covenants of warranty in a deed of her husband's lands to set up an after acquired title as against the deed which she has signed, place the rule upon the ground that she is not *sui juris*, and hence cannot be considered as authority in jurisdictions where married women may "make any engagement or transaction with any other person respecting property, which she might if unmarried." Civil Code, § 79.

It must be conceded, therefore, that Kate Irene Hadley had the power to bind herself by the covenants contained in the mortgage to Yerkes. This being so, what effect would the covenants have upon title to said lot, acquired by her at any time subsequent to the execution of the mortgage? There can be no doubt that the covenants of warranty would forever estop Kate Irene Hadley from asserting an after acquired title to the premises in question. It would estop any other person; why not her?

But it is claimed that, she having acquired the title that she sets up subsequent to the foreclosure of the mortgage, the estoppel does not apply; that in order to have the after acquired title inure to the benefit of the purchaser at foreclosure sale, it must have been acquired while the relation of mortgagor and mortgagee existed; and our attention is called to the case of *Jackson v. Littell*, 56 N. Y. 108.

In that case the mortgage did not contain covenants of warranty, and it was decided that title acquired by the mortgagor subsequent to the foreclosure of the mortgage did not inure to the purchaser at the foreclosure sale; but the court further says: "Different considerations would apply when the mortgage contained covenants of warranty. In that case the consideration paid would represent the value of the land as warranted, and the mortgagor would be estopped from setting up an after acquired title against which he covenanted in the mortgage."

If we once admit that Kate Irene Hadley had the power to bind herself by the covenant of warranty in the mortgage, then the result naturally and necessarily follows that she never afterwards could say that she did not create a lien on the premises mentioned.

The respondent, however, insists that as a mortgage in this Territory does not convey any estate in the premises mortgaged, but creates only a lien, the covenants of warranty in the mortgage in question are mere surplusage. We think that the words in the mortgage purporting to grant an estate in the premises are unnecessary, under the laws of this Territory; but we cannot see why, if a mortgagor desires



merely to create a lien on his estate, he may not warrant the title to the estate upon which he proposes to create the lien. It certainly would oftentimes be an inducement to a person to loan him money.

When these covenants are inserted in a mortgage it must be presumed that they form part of the consideration for which the loan was made, and for that reason the mortgagor may never say that he did not create a lien upon the premises mortgaged. Why may not the mortgagor in a mortgage which merely creates a lien covenant that he is seised in fee, and that he will forever warrant and defend the title to the premises mortgaged against the lawful claims of all persons whomsoever? Are they not covenants for the breach of which a personal liability is incurred?—and, if so, has not Kate Irene Hadley broken her covenant?—and, if she has broken the covenant, has not the very circumstance arisen upon which the doctrine of estoppel in these cases rests?

In *Van Rensselaer v. Kearney*, 52 U. S. 11 How. 297 [13 L. ed. 708], the court, after reviewing all authorities, English and American, as to what words in a grant of real property would operate as an estoppel so as to prevent the grantors from setting up after acquired title, said: "The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication—the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after acquired title as between parties and privies. The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him in good faith and fair dealing should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of everyone. And, although it debars the truth in the particular case, and therefore is not infrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood—would be the denial of a previous affirmation upon the faith of which persons had dealt and pledged their credit, or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak."

Adopting the reasoning of the learned court, let us look at the facts in the case at bar. Kate

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Irene Hadley covenanted with Harman Yerkes that she and her husband were seised in fee of the premises, and that she would warrant and defend that title against all lawful claims of any person whomsoever. She said to Harman Yerkes, and to whoever should become the purchaser at the foreclosure sale: "We are seised in fee of the land mortgaged. I will warrant and defend any title you may obtain through this mortgage." Harman Yerkes parted with his money on the strength of such representation. To now say that she could set up a title hostile to Yerkes would be to convict her of a previous falsehood, and deny an affirmation upon the faith of which Yerkes had dealt and expended his money. It is the fact that the covenant or affirmation was made, not that an estate in the premises was conveyed, that creates the estoppel. By what sort of reasoning can it be argued that the covenant is destroyed by foreclosure and sale? What destroys it? The covenant says she will forever warrant and defend; and when Kate Irene Hadley made the covenant in the mortgage in question, she forever put herself in a position in which every principle of law, reason and morality will compel her to stand.

We do not think the fact that mortgages in this Territory are mere liens, and do not convey an estate in the land, makes any difference with the operation of the covenant of warranty, when inserted in the mortgage. The mortgage operates on the estate concerning which the representations are made for the purpose of security, and the mortgage which only creates a lien may result in an absolute conveyance of the property, just as much as if the mortgage had conveyed a conditional estate in the first instance. *Clark v. Baker*, 14 Cal. 688; *Clark v. Boyreau*, Id. 686.

In the case last cited the court said, referring to the case of *Clark v. Baker*, *supra*: "We there held that it was immaterial whether the mortgage was regarded as a conditional estate, as at common law, or as containing a mere lien or incumbrance, as by the law of this State; that though by our law the title does not pass, yet the lien created operates upon the property in a way precisely equivalent to that which would follow if the instrument transferred the legal title; that whatever in the instrument treating it as a conveyance would operate to transfer a subsequently acquired title to the grantee, must equally operate, treating the instrument as a lien or incumbrance, to subject such acquired interest to the purposes of the original security."

The view we have taken as to the effect of the covenants contained in the mortgage in question renders it unnecessary to determine the force and effect of section 1727, subd. 2, of our Civil Code, upon property acquired by the mortgagor subsequently to the execution of the mortgage.

We are clearly of the opinion that—certainly as against Harman Yerkes—Kate Irene Hadley is estopped from setting up an after acquired title to the premises in controversy, irrespective of the time when said title was acquired by her, and that judgment ought to have gone for the plaintiff at the trial.

All concur.

## WISCONSIN SUPREME COURT.

Ada H. ROBINSON, *Appt.*,

v.

William H. ROHR *et al.*, Impleaded with  
the City of Watertown, *Respts.*

(.... Wis. ....)

1. **A board of street commissioners**, although in adopting plans and specifications they exercise judicial and legislative powers, and are not amenable to anyone except the public for any errors, negligence or misfeasance in the matters within their jurisdiction, become liable to third persons for their negligence or misfeasance when, after adopting plans and specifications they undertake to carry them out practically and do the work themselves through agents and servants: as in so doing, if they are acting as officers at all, they are merely ministerial officers.
2. **A board of street commissioners** who, after advertising for proposals for building a bridge and accepting a proposal therefor, fail to enter into any contract, but in accordance with the recommendation of a committee undertake to perform the work themselves and to carry it on through their superintendent and other persons employed by them, and under the supervision of their committee, are individually liable for injuries sustained by a person through the falling of a derrick in consequence of the negligence of their servants.
3. **A city is not liable for injuries or damages** caused by neglect of its officers in the performance of their duties.

(December 4, 1888.)

**A** PPEAL by plaintiff, from a judgment of the Circuit Court for Jefferson County, entered on a verdict for defendants directed by the court in an action for damages for a personal injury, brought against certain individuals, who were street commissioners of the City of Watertown. *Reversed.*

The action was originally brought against the said individual defendants, the present respondents, together with the City of Watertown.

Upon the trial in the circuit court, after the testimony was closed, the court directed the jury to render a verdict in favor of the respondents and against the plaintiff; but as between the plaintiff and the City of Watertown, the case was submitted to the jury and a verdict was rendered in favor of the plaintiff and against the city, for \$7,000. The judgment against the city on this verdict was reversed by this court, on the ground that the court had acquired no jurisdiction over the city. See *Watertown v. Robinson*, 69 Wis. 280.

The case is further stated in the following opinion.

**NOTE.—Liability for negligence of city officials.** When a municipal corporation undertakes to execute its own prescribed regulations in constructing improvements, it is to be treated as a mere individual, subject to all the liabilities that pertain to individual citizens. To this class belong the construction, repair and maintaining of streets. *Dayton v. Pease*, 4 Ohio St. 80. The acts of a street commissioner within the scope of the trust committed to him are *prima facie* the acts of the city; but whether they are within the general authority conferred upon him is a question of fact for the jury to determine. *Gilpatrick v. Biddeford*, 51 Maine, 182. See *Hines v. City of Charlotte*, 1 L. R. A. 844.

2 L. R. A.

**Mr. Harlow Pease** for appellant.  
**Messrs. Gregory, Bird & Gregory** and  
**Charles H. Gardner** for respondents.

**Orton, J.**, delivered the opinion of the court:

The above defendant and six other are charged in the complaint as follows: they were constructing and repairing stone piers and abutments under the Main Street bridge over the Rock River, in the City of Watertown, and there was standing in an upright position on said bridge a large and heavy hoisting machine, known as a "derrick," which was placed there by them, and before that day had been used by them in repairing and constructing said piers and abutments. The plaintiff was walking along upon that portion of the bridge which was set apart for persons traveling on foot, and through the carelessness and negligence of the defendants, their agents, servants and employes, said derrick was allowed to fall across and upon said bridge, and upon the plaintiff, while she was walking along as a traveler on said highway bridge, and without fault on her part; whereby she was greatly hurt, bruised and injured.

The defendants by answer admit that the piers and abutments of said bridge were being constructed and repaired, but deny that they were constructing or repairing the same, and deny that it was through their fault, or that of their agents, servants or employes, that the derrick fell upon the plaintiff, and that she was greatly injured thereby, or that she received any injuries by reason of their negligence, or that of their agents, servants and employes, and deny that the plaintiff was without fault, and aver that her own negligence contributed to her injury. They allege that said bridge had been out of repair for some time, and needed repair and reconstruction; and that the board of street commissioners of said city, in its collective and legislative capacity, had duly let the work of repairing and constructing said piers and abutments to competent persons to do that work, and the said persons were then engaged in the due prosecution of said work, exercising due and proper caution in operating the said derrick.

The facts in respect to said mason work on the piers and abutments, stated in respondents' brief and proved on the trial, were as follows: the clerk of the city was directed by the defendants, in accordance with the requirement of section 8 of subchapter 9 of the City Charter, in respect to all such work, to advertise for proposals for doing the mason work, and furnishing materials for the bridge according to the plans and specifications adopted by them as the board of street commissioners, to be received up to a certain date; and on that day the proposal of one Charles Baxter for doing said work, and furnishing materials, was accepted by them, and they directed a contract to be entered into with him according to said proposal, and that the said work be let to him, he being the lowest bidder for the same. But before any contract was entered into with him, and before, as they ascertained, he had acquired any rights in the same, by resolution of the de-

defendants as such board the whole matter was left open and undisposed of for their future action. Their committee, to whom the matter had been referred, reported plans and specifications of said mason work and materials, and recommended that said work and furnishing materials be done by themselves, under the supervision of their committee on streets and bridges, and that a superintendent be appointed, and said resolution was accordingly adopted by them.

In this manner the work upon said bridge commenced, and was carried on by the defendants, through their superintendent, and other persons employed by them, and under the supervision of their committee, up to the time the plaintiff was injured by the falling of the derrick by the negligence of their servants. No contract was ever let to anyone to do the said work, or to furnish materials for the same, but the defendants did the work, instead of a contractor, obtained according to the requirement of the charter as the lowest bidder for the same.

On these facts the circuit court directed a verdict for the defendants, except the City of Watertown.

It will be seen that the facts proved do not support the answer as to letting the work to other persons. It may be said here that all the authorities cited by the learned counsel of the respondents have application only to the case made by the answer, and in no respect to that made by the facts proved. The same elementary authorities cited by them make the very distinction which here exists between the answer and the proofs. The board of street commissioners, when they determined upon the work, and adopted the plans and specifications of it, acted as public officers, exercising judicial and legislative power; and they are not amenable to anyone except the public for any errors, negligence or mere misfeasance in the matters within their jurisdiction. In this case they are not charged with any dereliction in these respects. But when, after adopting the plans and specifications, they undertake to carry them out practically, and do the work themselves, and employ agents and servants to execute the plans and specifications manually, then, if they are acting as officers at all, they are merely ministerial officers, and not judicial or legislative, and, according to the same authorities, are liable to third persons for their negligence or misfeasance, or, as the authorities say, as public officers they acted in a ministerial capacity, and are therefore liable. Cooley, Torts, 389-376.

If, as public officers, they owe only a duty to the public, and are not liable to persons, yet, if they so act as to owe a duty to individuals, then their negligence therein is an individual wrong, which may be redressed by private action.

In this case the defendants owed a duty to the traveling public, and to the plaintiff while traveling over the bridge, to look out for her personal safety, while they were managing the work through their servants. This is not a public but a private duty, which they must discharge properly, or be liable to those injured by their negligence. As public officers, acting for the public alone, they are exempt from per-

sonal liability. The doctrine of *respondet superior* does not apply to such. But if, as the authors say, they engage in some special employment, and their duties are of a more private character, and concern individuals as well as the public, they are amenable to private actions. Whart. Neg. § 284; Shearm. & Redf. Neg. §§ 166, 167.

This distinction is plainly marked and easily applied. The authorities cited by the learned counsel of the respondents apply only to the first class, and therefore are not applicable to this case; such as *Squires v. Neenah*, 24 Wis. 588; *Hurley v. Texas*, 20 Wis. 637; *Hamilton v. Fond du Lac*, 40 Wis. 47; *Smith v. Gould*, 61 Wis. 81.

Special attention is called to *Alvord v. Barrett*, 16 Wis. 175, as illustrating the rule contended for by the learned counsel. But in that case the court said: "If the town clerk had been guilty of any neglect of duty or misconduct, whereby the appellant had sustained damages, the case would have been different."

So in *Harris v. Baker*, 4 Maule & S. 27, the trustees for lighting streets were not liable to a person injured by falling over a heap of dust deposited in the highway, because, the court said: "They were too far removed from the cause of it." But suppose the trustees had deposited the heap in the highway wrongfully or negligently, they would not have been too far removed from the cause of the injury.

In *New Clyde Shipping Company v. River Clyde Trustees*, Hay, Dec. 79, 14 Scot. Jur. 586, it is conceded that the remedy would be against the persons who committed the wrong. The defendants rejected the contractor, who would have been liable for such injury, and took his place to do the work, and thereby assumed the liabilities of a contractor to those injured by the negligence of their servants. The board planned the ditch, and are not liable for their plan; but if the commissioners dug the ditch, and negligently left it unguarded, and a person falls into it in the dark, are they not liable? By personally and practically undertaking to do the work, through servants of their own employment, they are brought into contact and relation with the traveling public and the plaintiff, and assume corresponding duties and obligations.

This is sufficient as to the principle which governs this case, treating the defendants as officers as well as operatives. In such case it follows as of course, if they are liable, the city is not so; and that cases in which it is held that the municipality is not liable for such a personal injury, caused by negligence or wrong, are authorities that the persons or officers who did the wrong or were guilty of the negligence are liable.

In *Wallace v. Menasha*, 48 Wis. 79, the city treasurer sold the property of one person for the tax of another. It was held that the city was not liable for such a tort. His acting *colore officii* made no difference. In that case the doctrine and distinction, as above stated, together with the above and other authorities, are fully and ably reviewed by *Mr. Justice Lyon*, and it is a case in point with this, in principle.

In *Uren v. Walsh*, 57 Wis. 98, it was held that the defendants were liable to personal action for unlawfully tearing down a fence to

open a highway, and it made no difference that they pretended to act as public officers. This class of cases is distinguished from the cases cited by the learned counsel of the respondent by the Chief Justice, in an able review of the doctrine. It was a personal wrong for which the town was not liable, and is distinguished from those cases where the municipality is held liable, because in such cases it directed the act, or ratified it, or it was within its general powers. In that class of cases the damages are the natural and proximate consequence of the illegal act, and not the result, as in this and similar cases, of some incidental and independent act of negligence or of wrong, not necessary to the work, and committed while doing it, to the injury of third persons.

For such an act of negligence or wrong as that complained of the municipality was never held liable. The City of Watertown had nothing to do with it, never authorized or ratified it, and it was not within its general powers or for its benefit. The city might as well be held liable for an assault and battery committed by these commissioners while prosecuting this work.

But treating the defendants as officers, and lawfully doing the work, they would be liable, and the city would not be. A city is not liable for injuries or damages caused by the neglect of its officers in the performance of their duties (*Schultz v. Milwaukee*, 49 Wis. 254); or for their misfeasance or malfeasance, or omission to per-

form their duties, or for negligence in its performance. *Little v. Madison*, 49 Wis. 605. When an officer of a corporation performs an illegal act resulting in an injury to another, he is liable. *Peck v. Cooper*, 112 Ill. 192.

Whenever a person sued sets up a defense that he was an officer of the government acting under color of law, it plainly devolves upon him to show that the law which he invokes authorized the particular act in question to be done, and that he acted in good faith. *Flanders v. Tweed*, 83 U. S. 16 Wall. 504 [21 L. ed. 389].

But where the issue is negligence, motives or good faith are immaterial. *Hover v. Barkhoof*, 44 N. Y. 118.

Where an officer injures another while performing ministerial duties, he is liable. *Mills v. Brooklyn*, 82 N. Y. 489.

For a personal injury caused by the negligence of several persons they are severally or jointly liable. *Creed v. Hartmann*, 29 N. Y. 591; *Peoria v. Simpson*, 110 Ill. 294; *Wright v. Compton*, 58 Ind. 337; *State v. Babcock*, 43 Wis. 138.

These general propositions are indisputable, and with the authorities are taken from the brief of the learned counsel of the appellant.

We conclude, therefore, that the plaintiff had a right to recover against the defendants, except the City of Watertown, and that the court erred in directing a verdict in their favor.

*The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.*

## WEST VIRGINIA SUPREME COURT OF APPEALS.

Thomas MEDFORD *et ux.*

v.

Joseph LEVY *et ux.*, Appts.

(.... West Va. ....)

**\*1. While the doing of certain acts by a person in the use of his premises as a dwelling house might not in themselves amount to a private nuisance, yet when the same acts are done wantonly and maliciously, for the mere purpose of annoying his neighbor, and to destroy**

the peace and quiet of his home, and they have such effect, they may amount to a nuisance which a court of equity will restrain.

**2. Where two families are occupying rooms in the same house, using in common the halls and stairways, a court of equity will not restrain the one from committing a nuisance against the other, unless the proof of the existence of such nuisance is clear and strong. A court of equity will, as far as it can, discourage a resort to its aid for the purpose of interfering in mere domestic broils.**

**3. He who comes into a court of equity**

**\*Head notes by the COURT.**

**NOTE.**—*He who comes into equity must come with clean hands.* This maxim sometimes expressed in the form "He that committeth iniquity shall not have equity" (*Hershey v. Weiting*, 50 Pa. 244; *Odessa Tramways Co. v. Mendel*, L. R. 8 Ch. Div. 236) is a fundamental principle of equity jurisprudence, and governs the "discretion" or discretionary powers of equity courts in the exercise of their jurisdiction and remedial functions, and furnishes a universal rule affecting their entire administration as to remedies and remedial rights. See *Faine v. Lake Erie & L. R. Co.*, 31 Ind. 233; *Meyer v. Fesser*, 32 Ind. 204; *Musselman v. Kent*, 23 Ind. 452; *Atwood v. Fisk*, 101 Mass. 363; *Marcy v. Dunlap*, 5 La. 385; *Walker v. Hill*, 22 N. J. Eq. 513; *Wilson v. Bird*, 23 N. J. Eq. 352; *Bleakley's App.*, 66 Pa. 137; *Lewis v. App.*, 67 Pa. 166; *Hunt v. Rowland*, 23 Iowa, 349; *Weakley v. Watkins*, 7 Humph. 373; *Overton v. Barrister*, 3 Har. 503; *Hibernia Sav. & L. Soc. v. Ordway*, 68 Cal. 679; 1 Pom. Eq. Jur. 434. The maxim is invoked in cases of fraudulent contracts. Equity will not, at suit of one of the fraudulent parties while the agreement is executory, compel its execution or decree its cancellation, nor after it is executed set it aside and restore plaintiff to the property or other interests which he

has fraudulently transferred. *Wheeler v. Sage*, 68 U. S. 1 Wall. 518 (17 L. ed. 646); *White v. Crew*, 16 Ga. 416; *Reynell v. Sprye*, 1 DeG. M. & G. 660. So where a debtor transfers his property to defraud his creditors, and afterwards seeks to set aside the transfer and recover back the property, the door of a court of equity is closed against him. *Bolt v. Rogers*, 3 Paige, 156; *Freeman v. Sedwick*, 6 Gill, 28; *Stewart v. Iglehart*, 7 Gill & J. 133; *Starke v. Littlepage*, 4 Rand. 372; *James v. Bird*, 8 Leigh, 510.

*Instances of application of the maxim.* The meaning of the familiar maxim, *In part delicto, potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. *Atwood v. Fisk*, 101, Mass. 364. If the plaintiff is himself a party to the fraud, *particeps delicti*, to such an extent that he is *in part delicto* with the defendant, he can obtain no relief. Equity does not in general relieve a person from the consequences of his own actual fraud. *Dunaway v. Robertson*, 95 Ill. 419; *Roman v. Malt*, 42 Md. 513; 2 Pom. Eq. Jur. 414. The complainant, after permitting a judgment on the note, without attempting a defense at law, and after execution was levied upon the judgment, voluntarily united in withdrawing

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must come in with clean hands; therefore when there appears to be an unfortunate quarrel between two women, which involves the families of each, and both are in fault, a court of equity will not interfere to protect one against the other, and enjoin as a nuisance what one does against the other.

(December 8, 1888.)

**A**PPEAL by defendants, from a decree of the Circuit Court of Cabell County, perpetuating an injunction. *Reversed.*

The case is stated in the opinion.

*Messrs. Gibson & Michie* for appellants.

*Messrs. Simms & Enslow* for appellees.

**Johnson, P.**, delivered the opinion of the court:

This is a bill of injunction to restrain a private nuisance. The plaintiffs in February, 1887, presented their bill, in vacation, to the Judge of the Circuit Court of Cabell County, in which Thomas Medford alleged that he is the owner in fee of a three story brick and stone building in the City of Huntington; that the lower story is used as a business room, and the second story for dwelling purposes, and the third has not been used for any special purpose; that on or about the first day of November, 1885, the plaintiff, who had occupied the first floor with a stock of queensware, determined to sell or rent the same; that on the 20th of that month he rented Joseph Levy the store and three rooms on the second floor for a dwelling for one year, with the privilege of three years; that he has been occupying the second floor of said building since 1884, and there is a front and rear stairway leading to the second floor, and a large hall at the top of the stairways; that himself and wife, a little girl, and a house girl occupy a portion of the said second story rooms, and the said defendants occupy the others; the stairs and hall are used in common; the front room on the east side is used by the plaintiff as a parlor, and three rooms adjoining on the same side are used by them as bedrooms, and they use a building in the rear of the main building as kitchen and diningroom; that defendants use a room in front, on the west side

of the building, as a parlor, and two rooms—one in the rear, on the west side, as a bedroom, and the other rear room on said floor as a kitchen and diningroom—which last rooms were constructed with two sets of doors, to keep offensive smells from the kitchen from the other part of the house, and also a partition and door across the hallway to assist in avoiding smells from the kitchen; that when said doors of the kitchen and hall are kept properly closed no offensive smells can pass from the kitchen on the second floor into the rooms in front, but all such offensive odors pass out the corridor in the kitchen; that plaintiff's wife had been a great sufferer from neuralgia, is in feeble health and very nervous and excitable, and is now and almost constantly subject to severe attacks of neuralgia, and any unusual noise or confusion produces upon her severe nervous attacks, which require the continual care and attention of the doctor to alleviate her suffering; that during the past two months the defendants have maliciously and willfully inaugurated a system of conduct, in the use of their rooms, for the avowed purpose and object of driving the plaintiff from the rooms which he and his family occupy, and make living in them impossible; and the defendants threatened to continue their willful and malicious annoyance, and make the living in said rooms so disagreeable and uncomfortable that, to preserve their health and comfort, they will have to abandon their dwelling rooms aforesaid, unless defendants are restrained from continuing their malicious and offensive conduct and doings, which are unnecessary and uncalled for in domestic life.

The bill then proceeds to specify the offensive conduct, among them impolite hailing of Mrs. Medford by Mrs. Levy, as, "Good-bye, Sal!" "Hello, Sal!" "Chestnut!" and like sayings; that such remarks are made and persisted in for the purpose of annoying, exciting and maligning the wife of plaintiff, and without any provocation on the part of Mrs. Medford, and that she is thereby annoyed and excited to such an extent as to interfere with their enjoyment of their rooms; that defendants, while their meals are being prepared, instead of keeping the doors closed, and allowing the kitchen

the effects of his associate from the operation of that process, and by this very act bound himself with the force of a second judgment for the validity and for the satisfaction of the demand. If he addresses himself to a court of equity, praying that court to undo all that he has voluntarily and deliberately performed, and, in order to accomplish this end, he seeks to stamp his own acts with illegality from their very inception, for such purposes he surely would have no standing and receive no countenance in a court of equity, upon any of its known principles. *Creath v. Sims*, 46 U. S. 5 How. 307 (12 L. ed. 119). If the contract has been voluntarily executed and performed, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid or property delivered, or a cancellation of the conveyance or transfer; and as long as the contract is executory, it cannot be enforced in any kind of action brought directly upon it. The illegality constitutes an absolute defense. *Solinger v. Earle*, 82 N. Y. 303, 307, 309; *Shaw v. Carlie*, 9 Halsk. 594; *York v. Merritt*, 77 N. C. 213; 2 Pom. Eq. Jur. 457.

A party to a fraud, and who was to receive the whole benefit of the fraud, cannot come into equity for relief against a confederate in the fraudulent act. *Johns v. Norris*, 22 N. J. Eq. 110. One who comes into a court of conscience to enforce a forfeiture, must come with skirts free from blame in the trans-

action. *Wilson v. Bird*, 28 N. J. Eq. 352. A bill in equity will not lie to compel the surrender or cancellation of an overdue promissory note and a mortgage given to secure its payment, on the ground that the consideration for the note and mortgage was a promise of the payee to forbear to prosecute for an embezzlement. *Atwood v. Fisk*, 101 Mass. 383. If an alteration has been made without the consent of the party against whom the instrument is sought to be enforced, either by the plaintiff who brings his action upon it, or by some other person while the instrument was in the possession or custody of the plaintiffs, such alteration will discharge the original instrument, without substituting any new contract or obligation in its place; and no action can be maintained to enforce it by the plaintiffs. *Marcy v. Dunlap*, 5 Lans. 369. An illegal contract will not in any way be enforced or aided (*Sykes v. Beadon*, L. R. 11 Ch. Div. 197; *Rigby v. Connol*, L. R. 14 Ch. Div. 482); so where both parties had been engaged in transactions violating the statutes concerning banking. *Carey v. Smith*, 11 Ga. 547; *Johnson v. Shrewsbury & B. R. Co.* 3 DeG. M. & G. 914; *Aubin v. Holt*, 2 Kay & J. 70. Instances of cases where the agreement or transfer was made upon the consideration of compounding a felony or of a promise not to prosecute for some crime, are *Swartz v. Gillett*, 1 Chand. (Wis.) 207; *Atwood v. Fisk*, 101 Mass. 383; *Harrington v. Bigelow*, 11 Paige, 349.

odors to escape into the outside air—an arrangement which is amply provided for in the construction of the house—throw open the doors leading from the kitchen to the hall, and filling the whole house with objectionable odors, owing to the frequent cooking of cabbage, onions and other things, the odor of which is particularly nauseating to the wife of plaintiff in her present enfeebled and excited condition, and has the effect of making her sick, and rendering her said rooms unfit for the reception of company, and in many other ways interfering with her free and perfect enjoyment of her said rooms; and that the said defendants, although knowing that this can be avoided, persist in these things, for the purpose of annoying plaintiff and his wife; that said defendants are in the habit of throwing old boots and shoes and socks and other objectionable things into the yard, sweeping dirt out of the rooms which defendants occupy into the halls and stairways, and allowing it to remain there a long time, cleaning shoes, shaking clothes, carpets and rugs in the hall, thereby filling it with dust, and the floors with dirt, which they do not sweep up and carry away, but allow it to remain, thereby adding to the dirt already accumulated; that all these things are very disagreeable, annoying and insufferable to your said plaintiff, and especially to his wife, whose habits are those of a neat and tidy housewife, and that they are a matter of great embarrassment to her in the presence of visitors; disagreeable smells make plaintiff's wife nervous, bring on attacks of neuralgia, and thereby affect her health, and thereby destroy the peace and comfort of plaintiff's home; that all these acts are wholly unnecessary on the part of the defendants, but that they persist in them on account of their untidy habits, of which plaintiff and his wife were both ignorant before renting the property to said Levy, and also for the purpose of annoying plaintiff and his wife, of making their rooms as uncomfortable as possible, and of causing them finally to vacate the rooms, which they will be compelled to do unless the defendants are restrained; that instead of passing through the halls quietly, and not making any more noise than necessary, the defendants engage in loud talking, singing and whistling, stamping and dancing in the halls and rooms; that they make excessive and unnecessary noise with coal buckets, and by slamming doors; that these noises are not made from any necessity, or even thoughtlessly, but for the express purpose of exciting, annoying, and vexing and reviling the plaintiff and wife, and, owing to her nervous organization and feeble health, they do annoy, excite and vex plaintiff's wife, and at times completely prostrate her with nervous attacks, and impair her peace of mind, and completely unfit her for her duties, and interfere with plaintiffs' enjoyment of domestic life; that they have thrown dirty water out of the windows, purposely spilled water on the stairs, leaving it there, annoying the plaintiff and his wife, and damaging his property; that they are in the habit of leaving doors open when they ought to be closed, and closing them when they ought to be open, wiping their feet on the newspapers of plaintiff left at the door, sweeping dirt under doors, and throwing it through transoms over

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which they have no control, and thereby excessively annoying and irritating plaintiff and his wife, and seriously interfering with their happiness, and the perfect enjoyment and comfort of their home.

The prayer of the bill is that defendants, etc., be enjoined "from doing the acts above mentioned and enumerated, or any one or more of them, or from doing anything else done for the purpose of annoying, exasperating, or reviling your said complainants, or either of them, or in any other manner calculated to disturb them in the full and perfect and quiet enjoyment and comfort of their said home," etc.

The injunction was granted in vacation, and was as follows: "An injunction is granted the complainants against Joseph Levy and C. Levy, his wife, as prayed for in the within bill, enjoining, restraining and inhibiting the said Levys, their servants or agents, from making loud, boisterous and unnecessary noises in the use of the rooms and halls of the tenement now occupied by them on the same floor of the building with the complainants, on the south side of Third Avenue, between Ninth and Tenth Streets, in the City of Huntington, and which building is No. 985 Third Avenue; and from using scurrilous and offensive language in the presence or hearing of the female complainant, intended or calculated to annoy, disturb or fret the female complainant; and from leaving open the hall doors during the cooking of meals in the kitchen; and from leaving in the halls and stairways sweepings, dirt, old clothes or other objectionable matter, calculated to offend the sight or smell of the complainants, occupants; and from generally so conducting themselves in the use of the rooms as to unnecessarily annoy and make the other occupants on the said floor uncomfortable, as complained of in the said bill, until the further order of the court," etc. The injunction was not to take effect until a bond in the penalty of \$200 was given. The bond was given as required.

On the 28th day of March, 1887, the defendants appeared, and demurred to the bill for want of equity. The complainants joined in the demurrer, and it was set down for argument. The defendants answered, denying the allegations and charges of the bill. A great number of depositions were taken on both sides, and on the 10th day of January, 1888, the cause was heard on the bill, answer, replication and depositions, and the court perpetuated the injunction, with costs. From this decree the defendants appealed.

The first error assigned is that the court did not act on the demurrer; second, that the court erred in not sustaining the demurrer to the bill; and third, that the court erred in perpetuating the injunction.

The court did act on the demurrer by its final decree, because it held the bill sufficient, and necessarily overruled the demurrer. Ought the demurrer to have been sustained? It is charged in the bill "That the defendants have willfully and maliciously inaugurated a system of conduct in the use of their rooms . . . for the avowed purpose and object of driving the complainants from their rooms, and make the use thereof impossible," and threaten to con-

tinue the same; and then proceeds to set forth the grievances of complainants.

The current of the authorities seems to be that if anyone does a lawful act on his own property the motive by which the act is done is in law a matter of indifference. *Frazier v. Brown*, 12 Ohio St. 294; *Walker v. Cronin*, 107 Mass. 564; *Panton v. Holland*, 17 Johns. 92; *Mahan v. Brown*, 13 Wend. 261; *Phelps v. Nowlen*, 72 N. Y. 39; *Chatfield v. Wilson*, 28 Vt. 49.

In *Carrington v. Taylor*, 11 East, 571, it was held that firing at wild fowl, to kill and make profit of them, by one who was at the time in a boat on a public river or open creek, where the tide ebbs and flows, so near to the ancient decoy on the shore (about 200 yards) as to make the birds there take flight, the defendant having before fired at a greater distance from the decoy, which brought out some of the birds from thence, though he did not fire into the decoy pond, is evidence of a willful disturbance of and of damage to the decoy, for which an action on the case is maintainable by the owner.

In *Greenleaf v. Francis*, 18 Pick. 117, it was held that, in the absence of all rights acquired by grant or adverse use for twenty years, the owner of land may dig a well on any part thereof, notwithstanding he thereby diminishes the water in his neighbor's well, unless in so doing he is actuated by a mere malicious intent to deprive his neighbor of water.

In *Delhi v. Youmans*, 50 Barb. 316, it was held that no action will lie for injuries caused by cutting off subterranean waters, percolating the soil, or running through unknown channels, and without a distinct or defined course; but it was further held that an exception exists in case of an injury done by cutting off such waters with malice; that no person can wantonly and maliciously cut off on his own land the underground supply of a neighbor's spring or well without any purpose of usefulness to himself. To the same effect is *Hakleman v. Bruckhart*, 45 Pa. 514; *Wheatley v. Baugh*, 25 Pa. 528.

In the well considered case of *Chesley v. King*, 74 Maine, 164, it was held that if an owner of ground dig a well thereon, for the sole purpose of inflicting damage upon a party who had rights in a spring, he would be liable in damages. The court in that case said: "In view of the numerous cases where the commission of a lawful act does become actionable by the mere carelessness of him who does it, when it results in damage to innocent parties, it sounds strangely to say that its commission for the sole purpose of inflicting damage upon another, and without any design to secure a benefit to its doer or others, is not actionable, when the damage intended is thereby actually caused. We rather incline to the view that there may be cases where an act, otherwise lawful, when thus done, may combine the necessary elements of an actual or legal damage to the plaintiff, and a wrongful act committed by the defendant; or, in other words, may be an invasion of the legal rights of another, accompanied by damages. One of the legal rights of everyone, in a civilized community, would seem to be security in the possession of his property and privileges against purely wanton and needless

attacks from those whose hostility he may have in some way incurred."

Every family possesses under the law the legal right to security in their home; to have peace, quiet and comfort against purely wanton and needless attacks from those whose hostility they may have in some way incurred. Other families, even those whose hostility they may have incurred, have also the right to the privileges of a home, the right to talk, even loudly, and to sing loudly, and dance; to open and shut doors; and it may be that they would not always be expected to use great care in the manner of opening and closing doors; to cook their food, and, for their comfort, to even keep the door of the kitchen open while the food was being cooked and prepared for the table; but they have no right, wantonly and needlessly, to do any or all these things, in an unusual manner, for the mere purpose of annoying and rendering uncomfortable their neighbors; and while under other circumstances the doing of these things in the manner indicated would not amount to a private nuisance, yet, when done for the malicious or willful purpose of annoying their neighbors, and it does have such effect, and makes their home uncomfortable, it would amount to a nuisance.

While there are some things alleged in the bill, as sweeping the dirt into the hall, and talking offensively to their neighbors, which would not amount to a nuisance, yet the charge that, for the mere willful and malicious purpose of annoying and making uncomfortable the plaintiffs, they, by loud talking, singing and dancing, and permitting offensive odors to escape from the kitchen through doors left open for the purpose, did render the home of the plaintiff materially uncomfortable, presents a proper case for the interposition of a court of equity. The bill was sufficient.

Was the decree proper, under the pleadings and proof? The case presented here is happily of rare occurrence. No case like it has been cited in the argument of counsel. It is the first case I have ever seen where there was trouble between two private families, originating between the mothers, respectively, and a court of equity asked to interfere with its strong arm to protect one against the other. It is to be hoped no such case will again occur; and while, as we have held, the bill presents a case of which the court, under the established principles of equity, must take cognizance, yet it would not perpetuate the injunction unless the proof was clear and strong. The court will discourage, as far as it can, a resort to its power for the purpose of interfering in mere domestic broils. We do not wish the idea to obtain that if there is a quarrel between two women, and both become excited and nervous, and things are done and said which are unseemly, and their domestic peace and happiness is thus destroyed, that either can, with ease and dispatch, prevail upon a court of equity, that is busy over more weighty matters, to interfere, and preserve the peace and quiet of the home of either.

The proof here shows that these two women had for ten months lived together, using the same stairs and halls, without trouble, when one wanted to exchange kitchens with the other, which was declined. Then the trouble



commenced, and was endured for about two months, when the bill was filed, and the injunction obtained. The plaintiffs were both examined in their own behalf, together with a Miss Worten and a Miss Roberts, girls who had lived with them, and these give evidence which substantially sustains the allegations of the bill; also a Mr. McDowell, who testified to loud singing in the hall, and the doors shut hard, could smell onions cooking, and the smell was disagreeable (he was there on two occasions); and Drs. Aldrich, Mayo and Buffington, who attended Mrs. Medford at different times. Dr. Aldrich was called in but once. Found her nervous, and in mental distress. Did not know the cause. Dr. Mayo saw her once. Found her in considerable excitement, and she had a severe headache. Did not know the cause. Dr. Buffington went to see her twice. Found her in a very nervous state. Is subject to shortness of breath and palpitation of the heart. Not one of these physicians was asked as to noises and odors in the house. A Miss Via also testified she heard some loud singing by Mrs. Levy. Mrs. Levy was in her own kitchen while singing. Mrs. Burdick, the only other witness for plaintiffs, testified to being at Mrs. Medford's on one occasion, and there was a very offensive odor in the hall. Said she could not tell what it smelled like, but thought it was caused by the cooking of kraut.

On cross examination, Mrs. Medford and Mr. Medford both admit they said nothing to the Levys about their annoying them by the noise or odors. Mrs. Levy in her deposition says that she said to Mrs. Medford, before they went there: "Mrs. Medford, consider what you are doing when you give up your kitchen. Remember you are giving up your best and most useful room, and don't repent of it when it is too late." She further said that, in December, Mrs. Medford came to her, and said: "Mrs. Levy, how would you like to have the rooms down stairs" (a small frame building in the yard, which they were using as diningroom and kitchen)? "I asked her what she meant. She said: 'If you will give me your kitchen, I will give you the two rooms down stairs.' Mrs. Levy says she afterwards informed her Mr. Levy was not willing to make the change. At this she became very angry, and said it was very inconvenient the way she was situated, and if she had the room she could dispense with a girl, and do her own work."

The evidence for the defense shows that after the trouble about the kitchen the trouble

grew worse, until it culminated in an encounter between the two women. The Levys in their depositions say Mrs. Medford swept dirt into the hall, and slammed doors; that they cooked as other people, and ate what other people ate; that Mrs. Medford cooked upstairs, with the door open; that it was of no avail to close the kitchen door, for the transom was broken, and could not be shut. They are corroborated by Miss Lavine. Dr. Mayo says he was called to see Mrs. Levy, and found her suffering from nervous prostration. The women had much trouble about who should clean the halls, etc. John Ran says he is a barber and lives next door to the Medfords. Said he had heard a little singing, but it was not loud and boisterous. Dr. Buffington, who was also sworn for plaintiff, says, at the time he visited Mrs. Medford he heard no unusual noises coming from Levy's apartments, such as loud singing, whistling, dancing, stamping or slamming doors, as he recollects; that he did not recollect smelling any bad odors. A. M. Thomas was a hotel keeper within thirty feet of the Medfords. Said he had heard no unusual noises coming from the apartment of the Levys, such as loud singing, dancing, stamping or slamming of doors, and that none of his guests had ever complained to him of such noises. W. A. Gibson said he did business within twenty feet of the Levys, and that he could recall no unusual noises coming from their apartments.

I have referred to this much of the evidence to show the character of this unseemly controversy. There is an old maxim that He who comes into a court of equity must come with clean hands. Therefore, when there appears to be an unfortunate quarrel between two women, which involves the families of each, and both are in fault, a court of equity will not interfere to protect one against the other, and enjoin as a nuisance what one does against the other.

*The decree of the Circuit Court is reversed, with costs, and the injunction is dissolved, and the bill dismissed.*

**Green and Woods, JJ.**, concurred.

**Snyder, J.**, concurring:

If the plaintiff had any right which he was entitled to enforce in law, he had an adequate and complete remedy in a common-law court, and therefore the demurrer to the bill should have been sustained. I concur in the conclusion reached.

## INDIANA SUPREME COURT.

**Eva McNUTT, App't**  
v.

**James S. McNUTT et al.**

(....Ind.....)

**1. A contract in consideration of marriage**, where each party releases all interest in

**NOTE.**—Antenuptial contract, consideration of marriage. Marriage is, at the common law, an adequate consideration for a promise. 1 Bishop, Mar-  
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the other's property, is upon a sufficient consideration as to both parties, at least where each is possessed of property before marriage.

**2. A valid antenuptial contract**, founded on the consideration of marriage alone, may be executed by a woman who has an estate of her own.

**3. No particular form of words is necessary**, to constitute a valid antenuptial contract.

**ried Women, 54 775, 778: Wright v. Wright, 54 N. Y. 437; Wall v. Scales, 1 Dev. Eq. 474.** A release from a contract to marry is a valuable consideration.

However informal the instrument may be it will be given effect if the intention of the parties is manifested and it is such as can in law or in equity be executed.

4. That a promise to marry was made six years before the writing was drawn and signed does not impeach the consideration of the contract, as the written instrument merges mere oral negotiations.
5. The word "heirs" in a marriage contract, providing that neither party shall take any interest in the property of the other, but that it shall descend to their heirs, as if they had not married, is not restricted to the children of the parties, but includes any legal heirs. And such provision excludes any claim of either party as heir by virtue of marriage.
6. Where the parties agree before marriage that after their marriage each shall hold his or her antenuptial property to his or her own separate use, and on the death of one of them neither shall have any marital claim on the estate of the other—this is, at least in a court of equity, generally esteemed to be a good bar to dower.

(December 11, 1883.)

**A** PPEAL by defendant, from a judgment of the Circuit Court of Clinton County (Paige, J.), in favor of the plaintiffs in an action to recover the possession of land and to quiet the title thereto. *Affirmed.*

The facts, and questions presented, are stated in the opinion.

*Messrs. J. C. Suit, R. P. Davidson, S.*

Snell v. Bray, 56 Wis. 156; Bishop, Cont. § 1267. It is a valuable consideration as between the parties. Whelan v. Whelan, 3 Cow. 337; Wright v. Wright, 54 N. Y. 437; Whitehill v. Lousey, 2 Yeates, 103; Frank's App. 59 Pa. 190; Derry v. Derry, 74 Ind. 533; Huston v. Cantril, 11 Leigh, 136; Whart. Cont. § 357. A promise by a third party, to either the intended husband or the intended wife, will be sustained by the consideration of the proposed marriage (Shadwell v. Shadwell, 9 C. B. N. S. 159); and hence a settlement by a man on his wife, or by the wife on her husband, in consideration of marriage, is as valid and binding, even against subsequent *bona fide* purchasers for value, as would be a sale of the same property for a full price. Richardson v. Horton, 7 Beav. 112; Clarke v. Wright, 6 Hurl. & N. 849; Price v. Jenkins, L. R. 5 Ch. Div. 619; Kevan v. Crawford, L. R. 6 Ch. Div. 23; Gale v. Gale, L. R. 6 Ch. Div. 144; Tomlinson v. Matthews, 98 Ill. 173; Latimer v. Glenn, 2 Bush, 535; Miller v. Edwards, 7 Bush, 387; Wall v. Scales, 1 Dev. Eq. 476; Ploss v. Thomas, 6 Mo. App. 157; Magniac v. Thompson, 32 U. S. 7 Pet. 348 (8 L. ed. 709). If a man settles property on a woman, upon the mutual understanding that thereupon she will marry him, which she does, this "consideration of marriage" renders the settlement valid as against his creditors. 1 Bishop, Married Women, §§ 777-784; Mountague v. Maxwell, 1 Strange, 236; Potts v. Merrit, 14 B. Mon. 406; Finch v. Finch, 10 Ohio St. 501; Andrews v. Jones, 10 Ala. 400; Nail v. Maurer, 26 Md. 532; Pratt v. Wright, 5 Mo. 192; Woodward v. Woodward, 5 Sneed (Tenn.) 49; Bishop, Cont. § 1268.

*Contract within Statute of Frauds.* Most antenuptial contracts are founded on the consideration of marriage; but such a contract not on this consideration, if it directs how property shall be disposed of to heirs, is not forbidden to be oral—since the parties may marry and die within a year. Houghton v. Houghton, 14 Ind. 505. Within the same principle, see Hill v. Jamieson, 16 Ind. 125; Richardson v. Pierce, 7 R. I. 330; Lyon v. King, 11 Met. 411; Worthy v. Jones, 11 Gray, 168; Doyle v. Dixon, 97 Mass. 208; Bishop, Cont. § 1276. That marriage itself is not a sufficient consideration to take the contract out of the Statute of Frauds, see McNulty v. McNulty, 8 West. Rep. 630, 120 Ill. 26. See also Deahon v. Wood, 1 L. R. A. 618.

*Contract a bar to dower.* An antenuptial agreement, executed by a proposed husband and wife in consideration of intermarriage where each party

**O. Bayless, W. H. Russell and F. F. Moore** for appellant.

**Messrs. Samuel H. Doyal, Perry W. Gard, James V. Kent and John W. Merritt** for appellees.

**Elliott, J.**, delivered the opinion of the court:

There is evidence that a written antenuptial contract was executed between the appellant and her husband, Henry G. McNutt, since deceased, and that the writing was destroyed by her. This is the evidence upon which the trial court acted, and we cannot disregard its decision upon this question of fact. There is also evidence that the contract was in these words:

"Article of agreement this day entered into by and between the said Henry G. McNutt and Eva McBride, both of Clinton County, State of Indiana. Whereas, The said Henry G. McNutt and Eva McBride contemplate marrying each other, and have both been married before, and have separate estates, and have children by such former marriages, it is therefore contracted and agreed by the said Henry G. McNutt and Eva McBride that the survivor of either shall take and hold no interest, or part of interest, by descent or otherwise; but the estate, both real and personal, shall descend to the heirs, the same as it would if they had not married."

We must take as conclusive the finding of the trial court upon questions of fact wherever it is supported by the evidence; and it is only a waste of time to argue in this court that the decision of

thereto released to the other all claims against their separate estates respectively, in equity bars the wife's right to dower although wanting in the requisites of a legal or statutory jointure. Barth v. Lines, 7 West. Rep. 217, 118 Ill. 374; McGee v. McGee, 61 Ill. 648; Wentworth v. Wentworth, 69 Maine, 247; Andrews v. Andrews, 8 Conn. 79; Brooks v. Austin, 95 N. C. 474. An equitable jointure, or a competent and certain provision for the wife in lieu of dower, if assented to by the father or guardian of the infant before marriage, is an equitable bar of dower. McCarter v. Teller, 3 Paige, 511; Wetmore v. Kinsam, 3 Bosw. 327. An antenuptial contract of a woman that she will not claim her dower in the event of her intended marriage, unless founded upon the consideration of some provision for her in lieu of dower, will be ineffectual both in law and equity. Curry v. Curry, 10 Hun, 308. The pecuniary provision which is provided must be something that she can take and enjoy, after the death of her husband, to take effect in possession or profit immediately on his death. Crain v. Cavana, 36 Barb. 412, 65 Barb. 109.

*Enforcement of contract in equity.* Executory agreements made between a man and a woman who afterwards marry and which then become void at common law, in the application of the conscientious principles of equity, will be specifically enforced against either husband or wife at the suit of the other. Gould v. Womack, 2 Ala. 33; Crostwaite v. Hutchinson, 2 Bibb, 407; Cannel v. Buckle, 2 P. Wms. 248; Acton v. Acton, Prec. in Ch. 237. Where an antenuptial contract is just and reasonable, and was fairly made by the parties competent to contract, it should be upheld and enforced as to all the property of the parties, including the homestead when the same becomes subject to partition. Hafer v. Hafer, 36 Kan. 524. Marriage contracts in writing are to be liberally construed, to carry into effect the intention of the parties; and no want of form or technical expression will invalidate them. Brown v. Ransey, 74 Ga. 210. Where the parties evidently intended to make a final complete settlement, it will be so regarded, although it be headed "Articles of Agreement," etc. To effectuate their intent one part may be taken as a complete settlement and another part as mere articles. Neves v. Scott, 50 U. S. 9 How. 196 (13 L. ed. 102). When the instrument provides for future acquired property, such property follows the limitations of the settlement. Neves v. Scott, 50 U. S. 9 How. 196 (13 L. ed. 102).

the trial court is wrong because the weight of evidence is against it.

Eva McNutt was a widow, and Henry G. McNutt a widower, when this contract was executed. Both were of mature age, and both had children by their former marriages. The former was the owner of 173 acres of land, which came to her from her first husband, and Henry G. McNutt was also the owner of real property. What personal property the appellant had does not appear. The contract does not, in formal terms, recite that a consideration moved from the prospective husband to the intended wife; but it does show that it was made in contemplation of marriage, and that each released to the other all interest in each other's property.

Here there were two elements of consideration—marriage, and the release of a right which, but for the release, would flow from the consummated marriage. These elements of consideration were both of the class valuable. If the contract is to be judged by the ordinary rules of law, then there can be no possible doubt that on its face it imports a sufficient consideration, since a consideration fixed by the parties is, by the courts, deemed a sufficient one; for the courts will not, in the absence of fraud or mistake, substitute their judgment for that of the contracting parties. *Wolford v. Powers*, 85 Ind. 294.

If this contract could be regarded as within the general rule, there would be no difficulty in disposing of the case, for there are two distinct elements of consideration embodied in it; but the difficulty arises upon the point made by the appellant, that a contract of this character requires a consideration which the court can affirm is equal to the dower right of a wife. In support of their position counsel refer us to the cases of *Curry v. Curry*, 10 Hun, 868; *Gould v. Womack*, 2 Ala. 88; *Power v. Sheil*, 1 Moll. 266; and to 4 Kent, Com. 12th ed. 56, note a; 1 Bishop, Married Women, § 247; and 3 Redf. Wills, 881.

There is, however, much conflict in the authorities. The weight is strongly against the appellant. Many of the modern cases hold that, even where the wife has no estate of her own, the marriage is of itself a consideration sufficient to support the contract of the prospective wife not to claim any interest in the lands of the husband. Mr. Schouler clearly marks and defines the distinction—a distinction lost sight of in some of the cases—between a postnuptial and an antenuptial agreement, shows that both classes are included within the general term "marriage settlements," and says: "In antenuptial marriage settlements, or what are called 'marriage settlements,' the marriage affords a sufficient consideration." Schouler, Dom. Rel. pt. 2, chap. 12.

This is a just deduction from what Mr. Bishop calls "the better authorities."

But we are not dealing with a case in which the prospective wife was without property of her own. She was the owner of 172 acres of land, acquired from her first husband. It is true that she did not own the fee, since, by force of our statute, the second marriage cut down her estate to one for life. *Mathers v. Scott*, 37 Ind. 808; *Teter v. Clayton*, 71 Ind. 237.

But, while she did not have a fee in the land

acquired from her first husband, she did have an estate for life. Indeed, she had something more; she had an estate for life, with a qualified right of alienation and a possible fee. Rev. Stat. 1881, § 2484; *Bryan v. Uland*, 101 Ind. 477.

It cannot, therefore, be said that she was not the owner of property, since she had at least a freehold estate. We know that the prospective husband yielded nothing, except the right that might have grown out of a possible fee; and we concur to a great extent in the view of appellant's counsel that he yielded no then present right in the property of his wife. *Prima facie*, at least, he could not have taken any estate in her land at her death, since, upon the happening of that event, the children by the first husband would take by descent. While the argument of counsel establishes the proposition that the husband parted with no present and vested rights in the land of the wife, it does not prove that the appellant had not property of her own.

The question therefore is not, What is the rule where the prospective wife is without an estate of her own in land? but, What is the rule where she is the owner of at least a freehold estate?

Our judgment is that where the prospective wife is the owner of land in her own right, and there is no fraud, and nothing making the contract unconscionable, the courts will not strike it down. Here there was no fraud. The parties were of mature years. The subject had been long under consideration. There was deliberation, not haste. There is nothing unconscionable in the contract. It was no more than equitable that the prospective husband should, at the time he made the contract, provide that his estate should go to his children by a former wife.

It is indeed difficult to find any principle upon which courts can set aside contracts made in good faith, with due deliberation, and by persons of mature age, even though that contract be one between a man and a woman contemplating marriage. It is stretching, as many of the authorities suggest, the power of the courts a great ways to declare that a man and a woman may not, even though the latter has no estate of her own, make their own contracts. In earlier ages there was, perhaps, some reason for the old English law rule, for women were not educated then as now, and were far more under the dominion of men than in these ages. The reason for the rule has failed, and where the "reason faileth the rule faileth."

But whatever may be the rule where the woman has no estate of her own, it is different, and it ought to be different, where she has, in her own right, a freehold interest in land. An illustration will, we believe, prove our conclusion: suppose the woman's freehold estate to be of great value, yielding an annual income of \$10,000, why should courts in such a case interfere, and annul an antenuptial contract made and acted upon in good faith? Upon what imaginable ground of public policy could such an interference be justified? If she does own an estate in land, and if there is no fraud, and nothing unconscionable, she should be allowed to judge for herself whether the marriage is of itself a sufficient consideration and courts

should not, after the husband's death, substitute their judgment for hers. The truth is, it is exceedingly difficult to imagine why, in any case where there is no fraud, courts should displace the judgment of contracting parties and substitute their own. No persons in the world can so well and so justly judge as the contracting parties themselves; and it is only in the strongest and clearest cases that courts should disregard their judgment, and never where there is neither positive wrong nor fraud. The authorities sustain our conclusion.

The case of *Jacobs v. Jacobs*, 42 Iowa, 600, is very like the present, and we quote from the opinion in that case: "It is claimed, however, that the contract is unreasonable, and without sufficient consideration, and therefore ought not, in a court of equity, to be enforced. The law always looks upon marriage as a civil contract, and this marriage seems to have been purely a business transaction. So far as appears, the contract was freely and voluntarily entered into, without any fraud or imposition. One of the parties was a crippled widower, sixty-two years old, with eleven children, and real estate worth \$12,000; and the other a widow, with three children, forty acres of land, and \$700 or \$800 in money. They were willing to marry, but each wanted the sole control of his or her own property, and to transmit it to his or her children." In concluding its observations on this point, the court said: "We cannot say but that the advantages are about equal, and the contract fair and reasonable. We know of no reason why it should not be enforced."

In *Wentworth v. Wentworth*, 69 Maine, 247, the court held an antenuptial contract valid, although it made no provision at all for the woman, except that the husband should not intermeddle with her property. The court, in the course of the opinion, said, in speaking of the contract: "It was made in consideration of marriage, although it is not so declared in terms. *Naill v. Maurer*, 25 Md. 582. Marriage is the highest consideration known to the law. *Ford v. Stuart*, 15 Beav. 499; *Magniac v. Thompson*, 32 U. S. 7 Pet. 348 [8 L. ed. 709]; *Vance v. Vance*, 21 Maine, 370. Even if it were otherwise, the reciprocal character of the stipulation might well constitute a sufficient consideration. *Naill v. Maurer*, *supra*."

The conclusion of the court in the well considered case of *Forwood v. Forwood* (Ky.) 5 S. W. Rep. 361, is thus expressed: "There is another class of cases that hold (and with which we agree) that an antenuptial contract is a legal contract, the consideration of which may be: *first*, that of the intended marriage alone; or *second*, that of a jointure or settlement upon the intended wife in lieu of her dower or distributable share in her intended husband's estate; and that either of these considerations, if both parties are *sui juris*, is sufficient to uphold the antenuptial agreement on the part of the woman to relinquish her right of dower and distributable share in her husband's estate."

In a similar case the Supreme Court of Maryland said: "The contract was made in contemplation of marriage, and, as clearly appears, was intended to bar or prevent the acquisition of any right by either in the property of the other, in order that the marriage proposed might take place. The main object in view

was the consummation of the marriage, and it was to that end that the contract was executed. It seems almost impossible to view the contract as founded on any other consideration, although the reciprocal character of the stipulations might be held to constitute one sufficient to make the contract binding and effective. But whether the marriage they proposed be expressly mentioned as a consideration or not, we think it must be regarded as such, within the purview and meaning of the contract; and we accordingly hold that the contract cannot be avoided on that ground." *Naill v. Maurer*, 25 Md. 588.

The court, in deciding the case of *McGee v. McGee*, 91 Ill. 548, thus expressed its view of the law: "The contract, in our judgment, is a reasonable one. It is one that persons advanced in life could, with great propriety, make, and especially where the parties have previously been married, and where there may be children by both marriages, among whom controversies as to property may arise after the death of the parents. Such agreements are forbidden by no considerations of public policy, and there can be no reason why equity will not lend its aid to compel the surviving party to abide by the contract. Our opinion is, the fair construction of the antenuptial agreement is that it intercepts dower of the widow, and may be set up as an effectual bar to her demand for dower in the lands of which her husband died seised."

This doctrine was reaffirmed in *Barth v. Lines*, 7 West. Rep. 217, 118 Ill. 374; and the cases of *Wentworth v. Wentworth*, *supra*, and *Andrews v. Andrews*, 8 Conn. 79, were cited with approval.

It was said in *Johnston v. Spicer*, 9 Cent. Rep. 566, 107 N. Y. 185, that "Antenuptial contracts, by which it is attempted to control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, like dower, are favored by the courts, and will be enforced in equity according to the intention of the parties, whenever the contingency provided by the contract arises." 2 Kent, Com. 165; *Re Young*, 27 Hun, 54, affirmed, 92 N. Y. 235.

In the case of *Andrews v. Andrews*, 8 Conn. 79, the judge who spoke for the court said: "I see no reason why such an agreement, deliberately made, and upon a sufficient consideration, should not be enforced in chancery. Such contracts, especially in late marriages, are not unusual. They are opposed to no rule of law, nor to any principle of sound policy. On the contrary, they are, in my judgment, highly beneficial, and are eminently entitled to the aid of a court of chancery, where such aid is necessary to carry them into effect; and especially is this true where the contract has been executed in good faith by one of the parties."

It was said in the case of *Pierce v. Pierce*, 71 N. Y. 154, that "Antenuptial contracts, whereby the future wife releases her claim to the right of dower and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made, and executed without fraud and imposition, they will be enforced by the courts."

Nearer to the case under discussion than those last cited but in line with them, is the

case of *Goleer v. Goleer*, 1 Bailey, Eq. 387. In that case, the court said: "The complainant was of full age, and under no legal disability to contract. The subject matter was legitimate, and the consideration of marriage is sometimes said to be the highest known to the law, and I confess that I have not been able to discover any rule or principle which discharges her from the obligation which the agreement imposes. She had an ample fortune of her own so tied up that she could not confer it upon her husband, and in consideration that he would take her in marriage she agreed not to claim her dower, or any right of inheritance in his estate. It is a contract without fraud, and apparently of perfect equality. Both Atherly and Roper treat this question as one admitting of no controversy. A jointure, to operate as a bar to dower under the statute, must consist of a freehold estate; but a woman under no legal disability may stipulate to substitute anything she pleases in place of it. Ath. Mar. Sett. 511; 1 Roper, Husb. & Wife, 480."

We pause in our examination of the authorities to say of the case just cited that the woman's property was entailed, and that the husband could by no possibility take any estate in it, so that he released no right in the woman's property. It is true that in the case cited the woman's fortune was ample; but the extent of her estate, if at all considerable, cannot affect the principle involved, since she should be allowed to judge of its sufficiency, and there is no reason why the courts should interfere.

The opinion in *Hafer v. Hafer*, 38 Kan. 449, is an elaborate one, gathering and grouping many authorities. It was there said of an antenuptial contract not unlike the present that "It was held in the court below that the contract was without consideration. Clearly, this is not so. In addition to the reciprocal agreements therein, it has for its support the consideration of marriage, which is not only a valuable consideration, but has been held to be the highest consideration known in law, and is indisputably sufficient to sustain an antenuptial contract."

We cannot add to the length of our opinion by further discussion of the decision of other courts, and turn to some of the decisions of our own court. These decisions do not, indeed, directly decide that a woman who has an estate of her own may execute a valid antenuptial contract, founded on the consideration of marriage alone; but we think they do implicitly assert this doctrine.

In *Richards v. Richards*, 17 Ind. 636, the provision made by the antenuptial contract was not the equivalent, by any means, of the estate the statute would, but for the contract, have vested in the wife; yet the agreement was held valid.

Substantially the same ruling was made in *Houghton v. Houghton*, 14 Ind. 506. That we are not in error in asserting that these cases impliedly approve the rule we have stated is clear; for, if they did not, then the conclusion declared could not have been reached, for the provision for the wife was not in either case equal to the right substituted by our statute for that of dower.

We cannot, in detail, speak of all the authorities cited by appellant's counsel, but will briefly L. R. A.

ly notice such as are most earnestly urged in argument.

First in importance of these authorities, in the estimation of counsel, seems to be the case of *Mouser v. Mouser*, 4 West. Rep. 390, 87 Mo. 487; but we think it not at all in point, because it is rested entirely on a Statute of Missouri, and the contract was by parol, and not in writing.

In *Hollowell v. Simonson*, 21 Ind. 398, no question concerning the validity of an antenuptial contract was considered or decided.

*Craig v. Craig*, 90 Ind. 215, decides that an antenuptial contract cannot be revoked by parol after marriage.

And *Cory v. Cory*, 81 Ind. 469, simply decides that an antenuptial contract may so provide for the wife as to make it proper to deny her alimony.

The point affirmed in *Camden Mutual Insurance Association v. Jones*, 23 N. J. Eq. 173, is that, where the annuity provided by the antenuptial contract fails, so does the contract.

*Gibson v. Gibson*, 15 Mass. 110, and *Hastings v. Dickinson*, 7 Mass. 158, are placed solely on the Statute of Henry VIII., and were decided as strictly common-law cases, without reference to the equity rule, which, both in England and America, has long been different from the rigid rule of the common law.

*Curry v. Curry*, 10 Hun, 366, is repudiated by the later cases in the same court and in the court of appeals. It is deservedly and strongly criticised in *Wentworth v. Wentworth*, *supra*.

In the case of *Young v. Hicks*, 27 Hun, 56, it was said: "The agreement in the present case is a good antenuptial agreement, even under the case of *Curry v. Curry*, 10 Hun, 366. It makes a provision in lieu of dower, and of the rights of the widow in the husband's estate. The principle decided in that case, that such a consideration must be proven to uphold an agreement made in contemplation of marriage, does not seem to be supported by any good reason."

The disapproval of *Curry v. Curry* is repeated in *Clark v. Clark*, 23 Hun, 508, where it was said: "But we cannot concur in the observations of the learned judge in that case that antenuptial contracts are against public policy. On the contrary, we think that the current of decisions respecting marriage settlements shows that when such contracts are freely and fairly entered into, they are generally conducive to the welfare of the parties thereto, and subserve the best purposes of the marriage relation." The Supreme Court of New York, judged by its latest utterances, may therefore be regarded as strongly against the appellant, and in line with the great majority of the modern courts.

The case of *Grogan v. Garrison*, 27 Ohio St. 50, confuses postnuptial with antenuptial contracts, and applies to the latter class of contracts the rules applicable to the former. This error led to a wrong conclusion, for it led the court to apply a statute applicable only to conveyances and contracts made after marriage to contracts made before marriage. That this is true is apparent from what is said on pages 59 and 62 of the opinion.

But if it were conceded that the case cited is rightly decided, still it would not be applicable

here, for in that case there was absent an important element which is here present. This element is the fact that the wife had a separate estate of her own.

The later case of *Mintier v. Mintier*, 28 Ohio St. 307, lays down an essentially different rule from that laid down in the former case, for it was there said: "If the antenuptial agreement in this case was intended by the parties to operate as an equitable jointure, and, as such, to bar all claims of the wife to dower in the real estate of the husband; if the parties were of mature age, and capable of judging in respect to their interests; if the agreement was fairly entered into in good faith, and without any fraud or imposition; if it was reasonable in its terms, and was in good faith acted upon and carried into effect by Robert Mintier during his life—no good reason is perceived why full effect should not be given to it according to the intention of the parties."

In the earlier case of *Stilley v. Folger*, 14 Ohio, 610, the court said: "Antenuptial contracts have long been within the policy of the law both at Westminster and in the United States. They are in favor of marriage, and tend to promote domestic happiness by removing one of the causes of family disputes—contentions about property, and especially allowances to the wife. Indeed, we think it may be considered as well settled at this day that almost any *bona fide* and reasonable agreement made before marriage to secure the wife in the enjoyment either of her own separate property or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery."

It is evident that in Ohio the rule, as laid down by the well considered cases, is not very different from what we have embodied in our own conclusion, and stated as the rule applicable to this particular case. We have restricted our statement of the rule because it is not here necessary for us to make our statement broader; but we may appropriately say that the cases go very far to support the rule as thus stated by Mr. Freeman in his note to the case of *Morritt v. Scott*, 6 Ga. 568, 60 Am. Dec. 873: "The marriage itself is the consideration of the settlement, and it is the highest consideration known to the law." Mr. Bishop employs even stronger language: "To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth. What this utterance lacks is in our books not infrequently expressed by the adjective 'highest,' as marriage is the highest consideration known in law." 1 Bishop, Married Women, § 775.

No particular form of words is necessary to constitute a valid antenuptial contract. However informal the instrument may be, it will be given effect if the intention of the parties is manifested, and it is such as can, in law or in equity, be executed. "This sort of agreement," says an eminent text writer, "will, of course, vary in its terms according to the inclination of the parties; but without regard to such variations it should be held alike, on the better authorities, to exclude dower, where such is the plain intent of the parties." *Id.* § 423.

In truth, not only do the authorities affirm

that no formality is required, but they go further, and declare that such contracts are to be construed with liberality and favor. They will be upheld if possible, and not overthrown unless the necessity leading to that result is imperious. As Mr. Schouler says: "Equity pays no attention to the externals, but considers only the substantial intention of the parties." Schouler, Dom. Rel. § 176.

The cases enforce and illustrate this rule in many forms. *Nees v. Scott*, 50 U. S. 9 How. 196 [18 L. ed. 102]; *Hooks v. Lee*, 8 Ired. Eq. 157; *Smith v. Moore*, 4 N. J. Eq. 485; *Johnston v. Spicer*, *supra*, and cases cited; *Hafer v. Hafer*, *supra*.

It has even been held that letters between the parties, although informal, will be sufficient evidence of the contract. *Logan v. Wienholt*, 1 Clark & F. 611; *Hammersley v. De Biel*, 12 Clark & F. 45; *Kinnard v. Daniel*, 18 B. Mon. 496; *Peck v. Vandemark*, 99 N. Y. 20.

Reason and authority are both in favor of a liberal construction of these contracts, for their purpose is to prevent strife, secure peace, adjust rights and settle the question of marital rights in property. From the earliest years of the law, the courts of chancery, respecting the iron rules of the common law, have favored contracts of this character, and this rule of equity has been grafted into the body of American jurisprudence. *Andrews v. Andrews*, *supra*; *Pierce v. Pierce*, 71 N. Y. 154; *Barth v. Lines*, 7 West. Rep. 217, 118 Ill. 874; *Jacobs v. Jacobs*, *supra*; *Beard v. Beard*, 22 W. Va. 180; *Shuee v. Shuee*, 100 Ind. 477; *Wright v. Jones*, 2 West. Rep. 850, 105 Ind. 17-27.

Measuring this contract by the rules of law, reading it by the light of the attendant circumstances, and looking to the object the parties intended to accomplish, there can be no doubt as to the effect that should be given its provisions. Those provisions were intended to constitute a valid marriage settlement, and they do constitute such a settlement, vesting the wife of all interest in the husband's property, and freeing hers from any possible claim that he might otherwise have. The contract not only freed the wife's land from a claim upon the interest held by her at the time the contract was made, but it frees it from all interests which she might subsequently acquire. *Cole v. Am. Baptist H. M. Society* (N. H.) 6 New Eng. Rep. 406.

It not only governs as to her fixed interest, but also as to the possible or contingent interest which she had in the land when she entered into the contract. It is a mistake, therefore, to assert that there was no interest released except that fixed and vested when the contract was made; for the contract operated upon possible and contingent interests, as well as upon the then present and vested estate. To remove all claims to each other's property was, it is very plain, the leading purpose of the parties, and the court would do wrong to frustrate that purpose. The contract has long existed, has been acted upon; one of the parties is dead; and the courts cannot do otherwise than read the contract as the parties wrote it, and as they intended it should be read.

Turning from the main path to a point which counsel make, and which leads us aside, we affirm that the fact that a promise to marry was

made six years before the writing was drawn and signed does not impeach the consideration of the contract. The written instrument, as the authorities agree, merges mere oral negotiations, expresses the matured agreement of the parties, and supplies the best evidence upon the subject of property rights. If parties put in writing their agreement concerning their property, and subsequently marry, the agreement, as written, is the source of evidence, and furnishes conclusive proof of the matured and final contract.

But if there were doubt as to our statement and application of this elementary principle, still the extraneous evidence is strongly against the appellant upon this question, for it shows that she made the final agreement to marry only upon terms such as those expressed in the writing. Her declarations, expressed in language much more emphatic than elegant, show that she exacted the contract, and that without it she would not have taken McNutt as her husband. Both the parol and the written evidence show that the contract was made in consideration of marriage, and that not only that consideration, but the further consideration that each should release all rights in the other's property, entered into the contract, and gives support to the agreement.

The child of Henry G. McNutt by his first marriage died before he did, leaving no children. The appellees are the brothers and sisters and nephews and nieces of Henry G. McNutt. The appellant's counsel insist that even if the validity of the antenuptial contract be affirmed, still the appellees cannot take to the exclusion of the appellant, because the marital rights of the widow are barred only in favor of the lineal descendants of the husband. Counsel thus state their propositions:

"The appellees, being only collateral relations of Henry G. McNutt, and there being no limitation in the contract for their benefit, they are not within the consideration of the antenuptial contract, but are mere volunteers, and cannot enforce the provisions of that contract against appellant. The term 'heirs,' as used in the antenuptial contract, relates to the then living children of Henry G. McNutt and of Eva McBride, who are specifically mentioned in the contract, and is not used in its technical sense at all. It follows that, the contract having been made for the benefit of Lawrence McNutt only, the appellees cannot have it specifically performed for their benefit."

The position of counsel is untenable. The word "heirs" is one of the strongest and most expressive terms in the law. *Allen v. Craft*, 7 West. Rep. 512, 109 Ind. 476; *Shimer v. Mann*, 99 Ind. 190; *Hochstetler v. Hochstetler*, 7 West. Rep. 75, 108 Ind. 506.

Where this word is employed it will be given its settled, legal meaning, unless the context shows in the clearest and most decisive manner that the parties who used it intended that it should have some other meaning. *Allen v. Craft* and *Shimer v. Mann*, *supra*; *Jesson v. Wright*, 2 Bligh, 1, 56; *Doe v. Gallini*, 5 Barn. & Ad. 621; *Lees v. Mosley*, 1 Younge & C. (Exch.) 539; *Powell v. Board of Domestic Missions*, 49 Pa. 46-53; *Robins v. Quintinen*, 79 Pa. 333; *Evans v. Evans*, 3 Am. L. J. \*231, 4 Pa. L. J. Rep. 478.

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Where there is doubt, say the authorities, the word will be taken in its accepted legal signification. Heirs are lineal and collateral, but the genuine term includes both classes. Children in the lifetime of the parents may be heirs presumptive, but they are not heirs. *Schoonmaker v. Sheely*, 3 Denio, 485; 1 Prest. Est. 367.

It is an ancient maxim that "No one can be an heir during the lifetime of his ancestor." But in this instance the context of the instrument, and the attendant facts, very satisfactorily show that the parties intended to bar the rights of each in the property of the other, and to secure it to their respective descendants. The appellees are the heirs of Henry G. McNutt, and, as heirs, entitled to the real property of which he died seised. *Cole v. Am. Baptist H. M. Society*, *supra*.

Another proposition of counsel is thus stated: "But even if the term 'heirs' be given its strict, technical meaning, it does not avail appellees; because by operation of law which she cannot prevent, appellant is the only 'heir' of Henry G. McNutt, and appellees are not his heirs at all. She could not, by contract, change her legal status." There is a fallacy in this statement, for it contains covert assumptions which are not only unproved, but which are incapable of proof. It is not true that an antenuptial contract changes the status of the woman. This is evident because: (1) when it was made she was not a *feme covert*; (2) it does not affect the status of the wife when the marriage takes place, but simply the property of the husband and the wife respectively. 1 Bishop, Married Women, § 427.

It is unduly affirmed that the law absolutely casts upon the wife an estate in the lands of the husband, whereas it does not undertake to do so where, by agreement, the parties have fixed the rule which shall govern. The law operates in cases where there is no contract, but does not operate where the parties have for themselves agreed upon the mode in which marital rights shall attach. The law does not assume to override the agreement of the parties, but to furnish a rule where there is no agreement. To be sure, there must be an effective agreement or conveyance. If there is not, the law will prevail. There is little, if any, diversity of opinion upon the general proposition that parties may, by contract, intercept the line of descent, although there is some conflict as to what must be shown to support the contract. The rule long has been that dower and kindred rights may be excluded by the contract of the parties. *Id.*

Speaking of contracts of this class, Mr. Bishop says: "It is doing what is done every day in other things, namely: providing a rule by agreement to be applied instead of the rule which the law would furnish in the absence of an agreement." 1 Bishop, Married Women, § 418.

The rule, as we have stated it, is affirmed by the text writers, and has been declared and enforced by many courts. *Naill v. Maurer*, *Wentworth v. Wentworth*, and *Pierce v. Pierce*, *supra*; *De Barante v. Gott*, 6 Barb. 492; *Beard v. Beard*, 22 W. Va. 130; *Charles v. Charles*, 8 Gratt. 486; *Spioa v. Jeter*, 9 Rich. Eq. 434; *Merritt v. Scott*, 6 Ga. 563.

The decision in the case of *Wiseman v. Wise*



man, 78 Ind. 112, does not lend any support to the argument of appellant's counsel, but, on the contrary, is in direct hostility to it.

"Under our statute," said the court in that case, "a surviving wife who has not conveyed or relinquished her interest in the property of the husband, or accepted a jointure, or received a valid antenuptial settlement, can be deprived of her rights in the land of her deceased husband for one cause, and one cause only." There is, it is obvious, a full recognition of the validity of the antenuptial contract, and not a denial, in the decision from which we have quoted.

We conclude this phase of the subject by a quotation from one of our approved text books, and here assert it as the rule of decision. The author, after commenting on the decided cases, says: "It is but a step from such a case as this to another one, of which there are several in the books, where the parties agree beforehand that, after marriage, each shall hold his or her antenuptial property to his or her own separate use, and on the death of one of them neither shall have any marital claim on the estate of the other. This is, at least in a court of equity, generally esteemed to be a good bar to dower." 1 Bishop, Married Women, § 428.

Counsel state an argument in the form of a question thus: "Was not the agreement not to claim marital rights an agreement not to claim a future demand not then in existence? If so, it was void."

This is substantially nothing more than a restatement of an argument of which we have already disposed; but, as it will serve to put our position in a stronger and clearer light, we will give Mr. Bishop's refutation of such argument: "The principle governing these cases," says he, "it should be remembered, is not that the antenuptial contract constitutes a release of dower, for a thing not existing cannot be released; but it is an undertaking not to claim dower—an introduction of a rule by agreement differing from the one which the law provides in the absence of an agreement. For the principle is well settled that, though parties marrying must take the status as the law established it, and cannot vary it by an antenuptial contract, yet, within certain legal limits, and proceeding by a legal rule, they may, by such contracts, vary any or all of those property rights which the status superinduces." 1 Bishop, Married Women, § 427.

The argument that the appellant is an heir of Henry G. McNutt, and therefore entitled to the lands, is fallacious. It is very clear that the agreement was meant to exclude her, and that it does exclude her, from the inheritance. The object of the agreement was to bar her rights in the land of her husband. This was the plain intention of the parties, and that intention must prevail. To award her an interest would be to give her what the contract plainly denies her, and thus thwart the intention of the parties and defeat their agreement. But counsel are in error in assuming that a widow is an heir of her deceased husband in the legal sense of the term.

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As said in *Unfried v. Heberer*, 68 Ind. 67: "A widow is an heir of her husband only in a special and limited sense, and not in the general sense in which that word is usually used and understood."

In *Brown v. Harmon*, 78 Ind. 412, and *Wood v. Beasley*, 5 West. Rep. 246, 107 Ind. 87, it was held that where a testator devised land to his widow as long as she should remain his widow, and directed that upon her marriage it should go to his heirs, the widow could not claim as heir. These cases rule here. They simply announce that courts will give effect to the manifest purpose of testators and contracting parties, and that where it appears that a widow was not intended to be dealt with as an heir she can acquire no rights in that capacity.

It is argued by counsel that the complaint asserts that the appellees have a legal title, and that they cannot recover upon the title proved because it is an equitable one. In support of this contention we are referred to the cases of *Stout v. McPheeters*, 84 Ind. 585; *Burt v. Bowles*, 69 Ind. 1; *Brown v. Freed*, 48 Ind. 253; *Nichol v. Thomas*, 58 Ind. 42; *Rouse v. Beckett*, 80 Ind. 154; and *Stelman v. Crull*, 26 Ind. 436.

We think that the only case that applies here is *Burt v. Bowles*, and that the decision in that case is adverse to the appellant. This we say, because the second paragraph of the complaint specifically sets forth the title of the appellees, and the evidence establishes the substance of the issue tendered by that paragraph. Under the ruling in *Burt v. Bowles*, this entitles the appellees to a recovery.

The facts alleged in that paragraph entitled the appellees to recover possession of the real estate, and it is the facts, and not the prayer, that control. But if it were conceded that the form of the judgment was not correct, still, as the appellant did not move to modify it, he cannot now present that question. Many cases hold that objections to a judgment must be presented by the proper motion to the trial court, or they will not be regarded on appeal. There is still another reason why there can be no reversal, and that is furnished by section 658 of the Code, which provides that no judgment "shall be reversed where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

There was no error in admitting parol evidence of the contents of the antenuptial contract. There was evidence tending to show that it had been destroyed by the appellant; and this, combined with the evidence that it once existed, was sufficient to let in secondary evidence.

It was within the discretion of the trial court to hear the testimony of a witness, although it was not offered until after the evidence had been closed. We can only interfere where there is a clear abuse of discretion, resulting in injustice, and we cannot hold that there was such an abuse of discretion in this instance.

*Judgment affirmed.*

## UNITED STATES DISTRICT COURT, DISTRICT OF OREGON.

THE CITY OF SALEM—A. F. REED,  
Libellant.

(.....Sawy.....Fed. Rep.....)

- \*1. **The power to regulate commerce among the several States** comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried; and to this end Congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the waterway; which regulations are so far applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce.
- \*2. **The regulation contained in § 4465 of U. S. Rev. Stat.**, forbidding a steamboat to carry more passengers than allowed in her certificate of inspection, held, to apply to such boats engaged in carrying passengers on a navigable water of the United States between ports of the same State only.

(February 12, 1899.)

**L**IBEL against a steamboat and owner for penalties under section 4465, U. S. Rev. Stat. *Exception to libel disallowed.*

The case is fully stated in the opinion.

**Mr. W. Scott Beebe**, for libellant, cited—*Pollock v. The Sea Bird*, 3 Fed. Rep. 573; *Hatch v. The Boston*, 8 Fed. Rep. 807; *The Laura M. Starin*, 11 Fed. Rep. 177; *United States v. Ferry Co.* 21 Fed. Rep. 831; *U. S. v. McLane*, 31 Fed. Rep. 763; *Same v. Same*, 34 U. S. 6 Pet. 404 (8 L. ed. 448); *Lord v. Steamship Co.* 103 U. S. 541 (26 L. ed. 224).

**Mr. Charles J. Macdougall** for owner and claimant.

## \*Head notes by DEADY, J.

**NOTE.—Regulation of steam vessels.** U. S. Rev. Stat. title 53. By title 52 of the Revised Statutes, prescribing the regulation for steam vessels, masters, chief mates, engineers and pilots are required to be licensed as officers, and penalties are attached for their serving without proper license. U. S. v. Huff, 13 Fed. Rep. 632. The object of the Act is to protect the health and lives of passengers from becoming a prey to the avarice of ship owners. U. S. v. The Neurea, 60 U. S. 19 How. 94 (15 L. ed. 532). By section 4399 of the Revised Statutes every vessel propelled by steam in whole or in part is a steam vessel within the meaning of this title. *Joslyn v. Nickerson*, 1 Fed. Rep. 137. The application for and use of the certificate of inspection, required by another section of the same statute here sought to be enforced against such a steamboat, is sufficient to require the conclusion that the steamboat is subject to such provisions of statute, and liable for a violation of them. *The Hazel Kirke* (N. Y.) 25 Fed. Rep. 601. The statute gives a separate penalty for every violation of the Act (*Pollock v. The Sea Bird*, 3 Fed. Rep. 573), and a direct remedy in admiralty against the vessel for the recovery of the penalty (*Pollock v. The Sea Bird*, 3 Fed. Rep. 573, citing *The Missouri*, 3 Ben. 508, 9 Blatchf. 433; U. S. v. The Queen, 4 Ben. 237, 11 Blatchf. 416; and any admiralty court in which the vessel may be has jurisdiction. *Pollock v. The Sea Bird*, 3 Fed. Rep. 573.

**Navigable waters.** The waters of Jamaica Bay, New York, are public navigable waters of the United States, within the meaning of section 4400 of the Revised Statutes. *The Hazel Kirke* (N. Y.) 25 Fed. Rep. 601. The Fox River and also the Grand River, a small navigable stream wholly within the State of Michigan, flowing into Lake Michigan, is a "navigable water" of the United States. See *The Montello*, 78 U. S. 11 Wall. 411 (20 L. ed. 191) and particularly the same case, 87 U. S. 20 Wall. 430 (22 L. R. A.

**Deady, J.**, delivered the following opinion:

This suit is brought by the libellant, A. F. Reed, against the steamboat City of Salem and Robert Thompson, her owner, to recover sundry penalties for carrying more passengers than is allowed by the vessel's certificate of inspection.

An exception is filed to the libel, to the effect that the transportation of passengers in question was wholly within the State, and was therefore not within the grant of power to Congress to regulate commerce nor the jurisdiction of this court.

Section 4399 of the Revised Statutes declares: "Every vessel propelled in whole or in part by steam shall be deemed a steam vessel within the meaning of this title" (52); and section 4400 of the same provides: "All steam vessels navigating any of the waters of the United States, which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats . . . for navigating canals, shall be subject to the provisions of this title" (52).

It is also provided in this title that there shall be an inspector of hulls and one of boilers in each district who shall inspect all steam vessels, and when they "approve a vessel and her equipment" they shall make a certificate to the collector to that effect. Rev. Stat. § 4421.

In case of a steamer "carrying passengers, other than ferry boats, the number of passengers of each class that any such steamer has accommodation for, and can carry with prudence and safety," shall be stated in said certificate (Rev. Stat. § 4466); and if any steamer shall "take on board" any more passengers

L. ed. 391); U. S. v. Burlington & H. Co. Ferry Co. (Iowa) 21 Fed. Rep. 832.

**Regulations of supervising inspectors.** The rules of navigation established by the supervising inspectors under section 4412 of the Revised Statutes are valid and binding, in so far as they do not conflict with the statutory rules of navigation in section 4233. *The Milwaukee*, 1 Brown, Adm. 313; *The Grand Republic* (N. Y.) 16 Fed. Rep. 424. The manifest object of section 4405 is, as its very language imports, to secure, "in the most effective manner," a compliance with the various general provisions of title 52; and for that purpose it authorizes the board to establish all necessary regulations to carry out those specific provisions. "Regulations to be observed by all steam vessels in passing each other." These regulations, when not inconsistent with the specific statutory rules, are held valid and enforced. *The Grand Republic*, 16 Fed. Rep. 424, 427; *The B. B. Saunders*, 19 Fed. Rep. 118, 121. So far as they may be in conflict with the statutory provisions, they are null and void. *The Atlas*, 4 Ben. 23, 30; *The Milwaukee*, 1 Brown, Adm. 313, 321; *The American Eagle*, 1 Low. 425, 427; U. S. v. Miller, 26 Fed. Rep. 97. In proceedings to recover a penalty for violations of the navigation laws, the burden of proof is on the prosecution. *The Pope Catlin* (Georgia) 31 Fed. Rep. 408.

**Inspection.** Under sections 4436 and 4470, Revised Statutes, the steamboat inspectors may require ferryboats to be provided with the same precautions against fire, so far as applicable, that are expressly provided in reference to any other steam vessels carrying passengers; and when the boat passes inspection on the basis of having a steam pump provided in accordance with section 4471, the boat is bound to maintain it in the condition required by that section. *The Garden City* (N. Y.) 23 Fed. Rep. 766.

**Examination of applicants for license.** A system of examinations is provided for, and an oath must

than the number stated in the certificate of inspection, the owner shall be liable to any person who may sue for the same, in the penalty of \$10 for each such passenger (Rev. Stat. § 4466), and such penalties shall be a lien on the vessel. Id. § 4469.

It appears from the libel that on July 4, 1888, the City of Salem was a vessel wholly propelled by steam and engaged in navigating the Wallamet River, and was duly enrolled and licensed therefor; that by her certificate of inspection she was only entitled to carry sixty passengers; that on said day this vessel was engaged in carrying passengers from the Port of Portland to other points and places on said river and within this district, and did on four such trips carry in the aggregate, 2910 more passengers than allowed by her certificate.

The precise question raised in this case has never been passed on by the supreme court. In the district courts there have been apparently conflicting decisions on the point.

In *The Gretna Green*, 20 Fed. Rep. 901, it was held that a steamboat "regularly enrolled and licensed" for the navigation of the Ohio River, "and subject to the Laws of Congress," was not liable, under § 4492 of the Revised Statutes, for carrying passengers in barges in tow, the same not being equipped as prescribed by the supervising inspectors, between different ports of the same State. But the opinion leaves it in doubt whether the steamboat would be liable for carrying passengers on her own decks between the same points, contrary to the Laws of the United States on the subject.

After substantially admitting that Congress has the power to prescribe the law of the highway, so far as may be necessary to protect interstate commerce, the court says: "The steamer which had these barges in tow, being subject

to the navigation Laws of the United States, the mere fact that she took in tow the barges had nothing to do with any interference with the proper navigation of the Ohio River."

In *United States v. Burlington Ferry Company*, 21 Fed. Rep. 831, it was held that the owners of the vessel engaged in navigating the waters of the Mississippi, carrying passengers between two ports in the State of Iowa, in excess of the number authorized by a permit issued under section 4466 of the Revised Statutes, are liable for the penalties prescribed in section 4500 of the same.

The court held that Congress has power to regulate the navigation of vessels on the navigable waters of the United States, when engaged exclusively in interstate commerce, and that when a steam ferryboat, contrary to section 4466 of the Revised Statutes, carries passengers between ports of the same State, in excess of the number allowed in her permit, she is guilty of a marine tort, and a District Court of the United States has jurisdiction of a suit in admiralty against her owners to recover the penalty prescribed by section 4500 of the Revised Statutes for the same.

In *The Seneca*, 1 Biss. 871, it was held that a steamboat employed in carrying passengers between two ports of the State of Wisconsin was not liable to a penalty for not having her hull and boilers inspected under the Steamboat Act of 1852.

In the case of *The Oyster Police Steamers of Maryland*, 81 Fed. Rep. 763, it was held that three steam vessels belonging to the State of Maryland not engaged in carrying freight or passengers, but used to enforce the State Fishery Laws in the Chesapeake Bay, are liable to the penalties prescribed by § 4499 of the Revised Statutes, for failing to have their hulls and

be taken before the granting of the license; and boards of inspectors are given power to investigate acts of incompetence and misconduct of these licensed officers. Rev. Stat. § 4438, 4439. But these and similar provisions do not create any new or other officers on shipboard than existed before the passage of the Acts. U. S. v. Huff (Tenn.) 13 Fed. Rep. 323, 324. An indictment under Revised Statutes, 4438, which provides that it shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors, need not charge that the employment was with knowledge that the employe had not been licensed as the statute required. U. S. v. Sims (Ohio) 9 Fed. Rep. 442. Section 4441 provides that the inspector shall examine the applicant for license as an engineer, and also requires the engineer, when employed on a vessel, to place his certificate of license in some conspicuous place in such vessel, where it can be seen by passengers at all times. U. S. v. Sims (Ohio) 9 Fed. Rep. 444. Inspectors of the United States have authority to issue a license to the master of a steamship to act as pilot between Boston and Havana. Rev. Stat. § 4442; *Joelyn v. Nickerson* (Mass.) 1 Fed. Rep. 133.

*Interstate commerce.* A steamboat employed by a railroad company to transport passengers on Jamaica Bay, Long Island (which is an inlet of the Atlantic Ocean entirely within the State of New York), in connection with a railroad forming a part of the railroad system of the whole country, is engaged in interstate commerce to an extent sufficient to bring her within the provisions of sections 4466 and 4469 of the Revised Statutes, prescribing penalties for steamers carrying more passengers than allowed by their certificates of inspection. *The Hazel Kirke* (N. Y.) 25 Fed. Rep. 601.

*Provisions against carrying excess of passengers.* A steamboat, having obtained a certificate as a general passenger boat, and not as a ferryboat, does not come within the exception in section 4464.

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*The Hazel Kirke* (N. Y.) 25 Fed. Rep. 601. An oral permission to carry an excess of passengers is not admissible as a defense. *Pollock v. The Laura*, 5 Fed. Rep. 133. In estimating the number of passengers on a steamer no deduction is to be made for children or persons not paying, but those employed in managing the vessel are not to be included; and in estimating the tonnage the measurement of the custom house at the port of arrival is to be taken. U. S. v. The *Louisa Barbara*, Gilp. 332. When a steam ferry boat, contrary to the provision of Revised Statutes, § 4466, carries passengers on an excursion, largely in excess of the number allowed by her permit, and fails to carry the required number of life preservers, she is guilty of a marine tort, and a United States District Court has jurisdiction of a libel *in personam* against her owners and master to recover the penalty prescribed by section 4500. U. S. v. *Burlington & H. C. Ferry Co.* (Iowa) 21 Fed. Rep. 332. Under section 4466 of the Revised Statutes, where a passenger steamer does not carry, or purpose to carry, a number of passengers additional to the number authorized by its certificate, and does not go or purpose to go out of the waters where it is authorized by its certificate to ply, it is not an "excursion" in the meaning of the statute, and no special permit in writing is necessary. *The Pope Catlin*, 81 Fed. Rep. 408.

*Remedy by action for penalty.* An action for the penalty need not be prosecuted in the name of the United States. *Hatch v. The Boston* (Pa.) 3 Fed. Rep. 807. In an action for the penalty, under section 4466 of the Revised Statutes, the United States is not a necessary party. *The Laura M. Starin*, 11 Fed. Rep. 177; *Pollock v. The Sea Bird* (N. Y.) 3 Fed. Rep. 573. The secretary of the treasury may remit claims of informers (Rev. Stat. § 5294), and of the United States, its penalties and forfeitures incurred, under sections 4465 and 4469 of the Revised Statutes, for carrying a greater number of passengers than the certificate of inspection permits; and such remission will operate as a full discharge.

boiler inspected by the United States inspectors, under sections 4417 and 4418 of the Revised Statutes.

The court held that the "supreme and exclusive control" of Congress of the navigable waters of the United States "might be defeated or rendered less effective for its objects, if there were to be recognized a class of vessels privileged to use them, without being subject to those provisions which Congress determines are required for the safety of all. I am, therefore, unable to assent to the contention that the fact that the vessels in the present case are not used in commerce, but solely for the police purposes of the fishery force, prevents Congress from having the constitutional power to legislate with regard to them. It is not their use, but the fact that they navigate the highways of commerce, which brings them within the constitutional grant of power, and within the language of section 4400 of the Act of Congress.

In *Lord v. Goodall Steamship Company*, 102 U. S. 541 [26 L. ed. 224], it was held by the supreme court, in the language of the syllabus, that "While navigating the high seas, between ports of the same State, a vessel of the United States is, together with the business in which she is engaged, subject to the regulative power of Congress." *Mr. Chief Justice Waite*, in speaking for the court said, in substance, that *The Ventura*, while navigating the Pacific Ocean, although bound from and to ports in the State of California, was without the State and on a highway of Nations, and therefore "engaged in commerce with foreign Nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."

This case falls within the language of the statute (§§ 4399, 4400, Rev. Stat.), defining what vessels shall be subject to the provisions of title 52.

The City of Salem is a vessel propelled by steam. On the occasion in question she was navigating the Willamette River, a navigable water of the United States (*Hatch v. Willamette Iron Bridge Co.* 7 Sawy. 136; *Willamette Iron Bridge Co. v. Hatch*, 9 Sawy. 648), which "is a common highway of commerce and open to general and competitive navigation."

Unless the Act of Congress, so far as the carriage of the passengers in question is concerned, is unconstitutional, the vessel is liable for the penalties prescribed for carrying more passengers than the law allows.

In my judgment, the solution of this question depends wholly on whether the regulation limiting the number of passengers which a steamboat may carry over a navigable water of the United States, between ports of the same State, is necessary to maintain this highway of foreign and interstate commerce in a safe and desirable condition, for the use of vessels and persons engaged in the same.

The power to make this regulation cannot, in my judgment, be derived from the grant of admiralty jurisdiction. The admiralty jurisdiction of the United States is a part of its judicial power and not its legislative. It extends "to all cases of admiralty and maritime jurisdiction." U. S. Const. art. 3, § 2.

And while it does not authorize Congress to create admiralty cases, yet if in the exercise of its power derived from other clauses of the Constitution it should do so (as the power to regulate commerce), the grant of judicial power would extend to them and include them; because of their nature and constituents they would be cases of admiralty and maritime jurisdiction.

Take this case as an illustration: The City of Salem is alleged to have violated a Law of the United States, to which a penalty is affixed and made a lien on the vessel. The act was

*The Laura*, 5 Fed. Rep. 612. It is not, however, a power to pardon. *Pollock v. The Laura*, 5 Fed. Rep. 131. The general proposition that the power to pardon is subject to such a limitation is well supported by authorities. *Howell v. James*, 2 Strange, 1272; 3 Coke, Inst. 236, 237, 238; U. S. v. Harris, 1 Abb. U. S. 119; U. S. v. Lancaster, 4 Wash. C. C. 66; *Shoop v. Com.* 3 Pa. 126; *Rowe v. State*, 2 Bay. L. (S. C.) 535; *Pollock v. The Laura* (N. Y.) 5 Fed. Rep. 136.

*Proceedings in rem.* Proceedings in rem may be maintained in the district court for the penalty provided by section 4465, Revised Statutes of the United States, for taking on board a steamer a greater number of passengers than that stated in the certificate of inspection. Section 4469 of the Revised Statutes has provided that the penalty imposed by section 4465 shall be a lien upon the vessel, and authorizes a bond to be given to secure the judgment as in other cases. *The Laura M. Starin* (N. Y.) 11 Fed. Rep. 177. Nor will the bringing of an action of debt against the master and owners of the boat, and prosecuting the same to judgment, release the lien given by section 4469, Revised Statutes. *Hatch v. The Boston* (Pa.) 3 Fed. Rep. 807. Such lien was not divested by a sale to a bona fide purchaser. Id. It is not necessary that the vessel should have been attached, before the filing of the libel, to enforce the statutory lien. Id. That the libellant did not proceed against the vessel until the recovery of the judgment, in the personal action against the master and owners, did not constitute laches. Id. Where the claimant pleaded, in his answer to a libel filed under the Revised Statutes, section 4465, an oral permission to carry additional passengers on excursions, under Revised Statutes, section 4466, which requires that the permission should be in writing: this defense could not avail the claimant, and that part of the answer must be stricken out upon exception as immaterial. *Pollock v. The Laura* (N. Y.) 5 Fed. Rep. 131.

*lock v. The Laura* (N. Y.) 5 Fed. Rep. 131. In an suit for carrying an unlawful number of passengers, it appearing that the persons were intruders against the will of the officers of the boat, and that the boat moved from her landing to another convenient place to avoid a crowd of people who it was feared might force their way upon her and endanger her, the penalties were not incurred. *Poor v. The Geneva* (Pa.) 26 Fed. Rep. 647. The libel need not allege that the libellant was a passenger on such steamer, or that he was an informer, or that he used as such; nor need it set out the names of the passengers. *Pollock v. The Sea Bird*, 3 Fed. Rep. 573. It is sufficient if it sets forth the offense in the words of the statute which creates it, with sufficient certainty as to the time and place of its commission. *U. S. v. The Neurea*, 60 U. S. 19 How. 94 (15 L. ed. 532).

*Prohibition of petroleum on passenger vessels.* In an action to recover penalties for the violation of section 4472, Revised Statutes, which prohibits the carrying of petroleum and other dangerous articles upon passenger vessels, although there was an all-rail route over which the petroleum might have been transported, yet, if the rates charged for transportation by rail were so high as to amount to a prohibition of the traffic in that article, it was held that it was not a practicable mode of transportation within the meaning of the section. *United States v. Wise* (Ohio) 7 Fed. Rep. 190. Same case, 6 Fed. Rep. 41. The word practicable in that section, is used in a commercial or business, and not in a mechanical, sense. Id. 191.

*Injury to employees.* The remedy given by section 4493 for an injury to an employe on a steam vessel is merely cumulative, and does not exclude the right to any other remedy for such injury which may be given by the general admiralty law. *The Clatsop Chief* (Or.) 8 Fed. Rep. 767.

committed on a navigable water of the United States and the admiralty had jurisdiction of the case—to hear and determine it. But if Congress had not the power to pass the law in question, the suit must fail, because no wrong was in fact committed.

The power to make this regulation must be derived, if at all, from the power granted to Congress “to regulate commerce with foreign nations and among the several States.” U. S. Const. art. 1, § 8.

In *Gilman v. Philadelphia*, 70 U. S. 8 Wall. 724 [18 L. ed. 99], *Mr. Justice* Swayne, speaking for the court, said: “The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States, which are accessible from a State, other than those in which they lie. For this purpose they are the public property of the Nation and subject to all the requisite legislation of Congress.”

And in the case of *The Daniel Ball*, 77 U. S. 10 Wall. 564 [19 L. ed. 1001], *Mr. Justice* Field, speaking for the court, said: The power to regulate commerce “authorizes appropriate legislation for the protection of either interstate or foreign commerce; and for that purpose such legislation as will insure the convenient or safe navigation of all navigable waters of the United States, whether that legislation consists in regulating the removal of obstructions to their use, in prescribing the form and size of vessels employed upon them, or in subjecting the vessels to inspection and license in order to insure their proper construction and equipment.”

That in the case of steamboats, the inspections of their hulls and boilers, the licensing of their pilots and engineers, the carrying of prescribed lights, and the giving and answering of prearranged signals when meeting and passing, do materially increase the safety and convenience of navigable water, considered as a highway of commerce, there is no doubt, and therefore there is no question that Congress may make regulations on these subjects, which are applicable to vessels engaged in intrastate commerce as well as foreign or interstate commerce.

The power to regulate the navigation of the waters of the United States being comprehended in the grant of power to regulate commerce, not merely as an incident but a part of it, Congress has power “to make all laws which shall be necessary and proper for carrying into execution” such power. U. S. Const. art. 1, § 8.

In *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 421 [4 L. ed. 579], *Chief Justice* Marshall said: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, are plainly adapted to that end which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.” And again (*Id.* 423): “But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.”

Upon this exposition of the law, is this regulation, limiting the right of steamboats to carry passengers on a navigable water of the

United States, to the number prescribed by the certificate of inspection of the local inspectors, a necessary and proper regulation of navigation, when such boat is engaged in carrying passengers on such water between different ports of the same State, only?

That it is so, is at least not so apparent as in the instances mentioned, in which it appears there is no doubt on the subject.

In what particular a boat carrying more passengers than allowed by her certificate of inspection or special permit affects the safety or convenience of the highway has not been suggested by counsel. That the passengers so carried are inconvenienced, and it may be endangered, is likely. But the question is, How is the safety and convenience of the highway thereby unfavorably affected as to other vessels engaged in interstate or foreign commerce thereon? If it was shown that an overloaded boat was more difficult to handle or more likely to become unmanageable or burst her boiler or steam chest, the danger resulting to other vessels on the highway would be apparent. But there is no proof on this subject, and I am not satisfied that it is within the limits of judicial knowledge.

One thing is probable: If a steamboat is allowed to carry passengers between the ports of any State, over the navigable waters of the United States, in excess of the number prescribed in its certificate of inspection, the boats running between said ports, and from or beyond, to ports of another State, will be compelled to do the same thing or substantially abandon what may be called their way business. For anyone can understand that a vessel can carry 200 passengers much cheaper per head than another one of the same character and dimensions can carry half the number. The result would be to nullify the regulation or make its enforcement difficult in cases where it is admitted to be legal and presumably beneficial.

It may be said that when it is determined that the carrying of passengers between different ports of the same State is not within the power of Congress to regulate, the State will make proper regulations on the subject. But it is not probable that any state regulation on this subject would be either effective or well enforced.

Congress has expressly declared (§§ 4399, 4400, Rev. Stat.) that this regulation shall apply to steamboats carrying passengers over any part of a navigable water of the United States. The regulation, when applied to the carriage of passengers between ports of the same State, is a beneficial one, and its enforcement tends to the safety of human life. Without it, the excursion boats, which on festive occasions ply between ports of the same State, would often become floating coffins. If this regulation, as applied to vessels engaged in intrastate commerce, is really calculated to promote the safety and convenience of interstate and foreign commerce, in any appreciable degree, the enactment of it is within the discretion of Congress. And while I am not as clear in my mind on this point as I would like to be, I have an impression, which I feel more certainly than I can express, that the regulation in its effect and operation does materially tend to maintain the

safety and convenience of this highway of interstate and foreign commerce—the Wallamet River.

On this view of the matter I do not feel

warranted, sitting here in the district court, in declaring this Act of Congress unconstitutional. It is a proper case to go to the supreme court. *The exception is disallowed.*

## NEW YORK COURT OF APPEALS.

BUFFALO EAST SIDE STREET R.  
CO., *Appl.*,

BUFFALO STREET R. CO., *Respt.*

(...N. Y....)

1. A contract between street railroad companies to make no change in rates of fare so long as the rates allowed by law upon a certain date shall be received will terminate by force of its own limitation when a statute is passed reducing such rates—since it cannot be supposed, without the clearest language indicating such an intention, that parties to a contract anticipated the enactment of an unconstitutional law or contracted upon such an assumption.

2. A statute making it unlawful for street railroad companies in a certain city to charge the rates of fare then received does not impair the obligation of a contract between two of the companies operating street railroads in that city by which each has agreed not to change the rates without the consent of the other.

(November 27, 1888.)

**A** PPEAL by plaintiff from a judgment of the General Term of the Superior Court of Buffalo, sustaining a demurrer to the complaint in an action for liquidated damages for alleged breach of contract. *Affirmed.*

The case is stated in the opinion.

*Mr. James O. Carter*, for appellant:

A contract, whether between natural persons or corporate bodies, valid at the time it was made, continues valid and binding, notwithstanding any state legislation, until its full performance.

The property of a corporation is secured to it by the same constitutional guaranties; and its contracts are just as obligatory and inviolable as in the case of natural persons.

1 *Morawetz, Corp.* §§ 1-8; *Chicago etc. R. Co. v. Iowa*, 94 U. S. 155, 161 (24 L. ed. 94, 95); *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518 (4 L. ed. 629).

There is no difference, so far as the principle in question is concerned, between contracts between individuals and those to which the State is a party.

See 3 *Hamilton's Works* (Lodge's ed.), p. 29; *Angell & A. Corp.* § 767; *Seibert v. Lewis*, 123 U. S. 284 (30 L. ed. 1161).

The Legislature may dictate what contracts corporate bodies may in the future make, but it cannot absolve them from the obligation to perform contracts already made.

*Sinking Fund Cases*, 99 U. S. 700 (25 L. ed. 496).

A Legislature cannot by any action under the reserved power take away any property or right, or affect any obligation, acquired or assumed by a legitimate exercise of the powers granted to a corporate body.

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*Sage v. Dillard*, 15 B. Mon. 840; *Com. v. Essex Corp.* 13 Gray, 239; *Oldtown & L. R. Co. v. Veazie*, 39 Maine, 571; *Blake v. Portsmouth & C. R. Co.* 39 N. H. 435; *Holyoke Co. v. Lyman* 82 U. S. 15 Wall. 500 (21 L. ed. 188); *New Jersey v. Yard*, 95 U. S. 104 (24 L. ed. 352).

The obligation of a contract begins at its date, depends on the laws in existence when it was made, and continues until the debt is paid, or the acts agreed to be done performed.

*Blair v. Williams*, 4 Litt. 84; *Robinson v. Magee*, 9 Cal. 84; *Johnson v. Duncan*, 3 Mart. O. S. 531; *Western Sav. Fund Society v. Phila.* 31 Pa. 175; *Wood v. Wood*, 14 Rich. L. 148; *Smith v. Cleveland*, 17 Wis. 556; *Baily v. Gentry*, 1 Mo. 164; *Forsyth v. Marbury*, 1 R. M. Charl. 324; *Edwards v. Kearney*, 96 U. S. 595 (24 L. ed. 798); *Wak v. Jefferson Police Jury*, 116 U. S. 131 (29 L. ed. 587).

*Mr. E. C. Sprague*, also for appellant:

The companies are private corporations, although existing for public uses, and contracts made by them with their creditors, with each other or by the State with them, are as inviolable as if they were private individuals.

*Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 526, 566 (4 L. ed. 629); *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 420 (9 L. ed. 713); *Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 187; *Atty-Gen. v. Chicago & N. W. R. Co.* 85 Wis. 425, and cases cited; *People v. Batchelor*, 53 N. Y. 128, and cases cited under the next proposition.

The Act of May 8, 1872, was (so far as this point is concerned), in legal effect, an express and inviolable contract between the State and the companies, by which, for a valuable consideration, the State agreed with them that, during their corporate existence, they should have the right to charge the rates of fare which they were permitted to charge on that day, unless changed by their mutual consent; and the Act of June 18, 1875, is unconstitutional because it impaired that contract.

*Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518-538 (4 L. ed. 629); *Jefferson Branch Bank v. Skelly*, 66 U. S. 1 Black, 436 (17 L. ed. 178); *Com. v. New Bedford Bridge Co.* 2 Gray, 389; *Com. v. Essex Corp.* 13 Gray, 239; *Humphrey v. Pegues*, 33 U. S. 16 Wall. 244 (21 L. ed. 326); *Wilmington & W. R. Co. v. Reid*, 80 U. S. 18 Wall. 264 (20 L. ed. 565); *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87 (3 L. ed. 162); *Chenango Bridge Co. v. Binghamton Bridge Co.* 30 How. Pr. 346; *S. O. 70 U. S. 3 Wall. 51* (18 L. ed. 137), reversing 27 N. Y. 87.

The reserved power of the Legislature to alter and repeal corporation charters is not unlimited.

See *White v. Syracuse & U. R. Co.* 14 Barb. 561; *Hyatt v. McMahon*, 25 Barb. 468; *Buffalo & N. Y. O. R. Co. v. Dudley*, 14 N. Y. 348; *Re Oliver Lee & Co's Bank*, 21 N. Y. 9; *Sher-*

*man v. Smith*, 66 U. S. 1 Black, 537 (17 L. ed. 163); *Bailey v. Hollister*, 26 N. Y. 112; *Poughkeepsie Plank Road Co. v. Griffin*, 24 N. Y. 150; *Miller v. New York & E. R. Co.* 21 Barb. 513; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 579; *Holyoke Co. v. Lyman*, 82 U. S. 15 Wall. 500 (21 L. ed. 183); *Conant v. VanSchaick*, 24 Barb. 87; approved in *Story v. Furman*, 25 N. Y. 214; *Home of the Friendless v. Rouse*, 75 U. S. 8 Wall. 420 (19 L. ed. 495); *Benson v. New York*, 10 Barb. 223.

In *Cooley* on Constitutional Limitations, 3d ed. p. 126, the rule is stated to be that under the reserved power any charter may be altered or repealed, "except it assume the form and substance of a contract," citing:

*Bloomer v. Stolley*, 5 McLean, 161. And see also *Com. v. Essex Co.* 13 Gray, 289; *Durfee v. Old Colony & F. R. R. Co.* 5 Allen, 280; *Allen v. McKeen*, 1 Sumn. 299; *Cash, Appellant*, 6 Mich. 193; *Ervin's App.* 16 Pa. 256; *State v. Noyes*, 47 Maine, 189; *Parker v. Metropolitan R. Co.* 109 Mass. 506; *Thornton v. Marginal Freight R. Co.* 123 Mass. 32, 34; *Coast Line R. Co. v. Savannah*, 80 Fed. Rep. 646; *State Board of Assessors v. Morris & E. R. Co.* 6 Cent. Rep. 801, 49 N. J. L. 193; *Tammany Water Works Co. v. N. O. Water Works Co.* 120 U. S. 64 (30 L. ed. 563); *Citizens Water Co. v. Bridgeport Hydraulic Co.* 8 New Eng. Rep. 809, 55 Conn. 1; *Shields v. Ohio*, 95 U. S. 324 (24 L. ed. 859); *Old Town & L. R. Co. v. Veazie*, 39 Maine, 571, 580, 581; *Sinking Fund Cases*, 99 U. S. 700, 721, 740-742, 743, 749, 757, 758 (25 L. ed. 496, 502, 509, 512, 515); *N. O. Gas Light Co. v. La. Light & Heat Co.* 115 U. S. 650, 660, 672 (29 L. ed. 516, 520, 524); *N. O. Water Works Co. v. Rivers*, 115 U. S. 674 (29 L. ed. 525); *Louisville Gas Co. v. Citizens Gaslight Co.* 115 U. S. 683 (29 L. ed. 510); *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 234; *Morawetz, Priv. Corp.* §§ 473, 474, 478.

**Mr. Sherman S. Rogers**, for respondent: The power of the Legislature to diminish fares, to be charged by a railroad company incorporated under the laws of this State, cannot now be questioned.

*Re Oliver Lee & Co's Bank*, 21 N. Y. 9; *Its Receiprocity Bank*, 22 N. Y. 11; *People v. Boston & A. R. Co.* 70 N. Y. 589; *Shields v. Ohio*, 95 U. S. 319 (24 L. ed. 857); *Greenwood v. Union Freight R. Co.* 105 U. S. 18, 21 (26 L. ed. 961, 965).

When the plaintiff took defendant's promise not to change its fares, it did so knowing that the franchise to change any fare was within the control of the Legislature, and that no one Legislature could take away this power, directly or indirectly, from its successor. So contracting, it impliedly consented that this should be so; and the subsequent legislative action, therefore, in no manner impaired the obligation of the contract which had been made with it.

*People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174, 179; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24 L. ed. 97).

**Ruger, Ch. J.**, delivered the opinion of the court:

The plaintiff and defendant are respectively incorporated street railroad companies, located in the City of Buffalo, and the action was 2 L. R. A.

brought upon a contract to recover a sum stipulated to be paid, as liquidated damages, upon a breach thereof by either party that should reduce its rates of fare below the prices authorized to be charged under the statutes in force on May 3, 1872; each party thereby agreeing to make no change therein without the consent of the other.

Subsequently to this contract the Legislature, by chapter 600 of the Laws of 1875, enacted, in substance, that it should be unlawful for any street railroad companies in Buffalo to charge more than five cents for each passenger carried on their respective roads without regard to the distance traveled. This price was considerably less than the amount authorized to be charged by the former statute. Immediately thereafter the defendant reduced its rates of fare to the price authorized by the Act of 1875; and this reduction constitutes the breach of the contract relied upon for a recovery.

No question is made but that if the Act of 1875 was a valid enactment, the defendant was required to conform to it, and would have a good defense to the action. It is, however, claimed by the plaintiff that the Act was unconstitutional and void, inasmuch as it impaired the obligation of contracts. The only contract claimed to have been impaired is the one sued upon. Among the defenses made to the action is the claim that the agreement had terminated, before the alleged breach, by virtue of its own limitation; and it is also urged that a reasonable construction of the language of the agreement shows that its obligations were not intended to survive any statutory reduction of the rates of fare chargeable upon such railroads.

There is no express provision in the contract providing for the period of its duration, but there are several which furnish strong grounds for the inference that the parties did not intend that it should continue after an unfavorable change in the rates of fare. Among these provisions, it is only necessary to refer to one providing that "the said party of the first part, so long as it receives for the transportation of passengers the fare allowed by law on the third day of May, 1872, and no longer," will make connections with roads to be built by the party of the second part, and run a sufficient number of cars to accommodate all passengers applying for transportation, etc.; and another contained in the fifth paragraph, which provides that the party of the first part agrees that it will, during the continuance of the contract, charge the same rates for the transportation of passengers over its railroads, or any part thereof, that it is "permitted to charge by the statutes in force regulating the same on the third day of May, 1872, and that it will not make any change in such rates without the consent of the party of the second part."

Similar provisions were contained in the contract relating to the obligations of the party of the second part, and contemplating the termination of the contract upon the same contingency.

It is quite clear that the parties had in view a condition of affairs under which they would not be permitted to charge and receive the rates of fare authorized by former Acts, and in that event expressly provided for the termination of



the contract. But the plaintiff contends that the rates authorized on May 8, 1873, still continue, so far as these two companies are concerned, by force of the obligations of their contract, and that the State was precluded by the constitutional inhibition from passing any law impairing its effect. We are not impressed with the soundness of this contention. It was competent for the parties to agree upon any period as the duration of their contract, and they might, if they chose to do so, provide that it should cease upon the passage of even an unconstitutional law. It is difficult to explain what is meant by the expressions that the contract should continue so long as the companies receive and were permitted to charge the rates authorized on May 8, 1873, and no longer, if there was no constitutional power to effect such change. Settled rules of construction require us to give some meaning and effect to all of the language employed in the contract, provided it can be done without doing violence to the plain object and intent of the parties in making their agreement.

It is quite clear that the parties assumed the existence of the power of the Legislature to change the rates, and contracted with reference to such a contingency. A fair and reasonable construction of the contract would seem to be that the parties intended a change effected by the voluntary action of the parties alone, and not one made in obedience to paramount authority. It would be unreasonable to say that either party intended to run the hazard and danger of disobedience to a statute of the State, and there is nothing, we think, in the contract which required it to do so. Every exercise of legislative power is presumed to be constitutional, and it cannot, without the clearest language indicating such an intention, be supposed that parties anticipated the enactment of an unconstitutional law, or contracted upon such an assumption. We are therefore of the opinion that the contract, so far as this provision was concerned, had terminated by force of its own limitation when the Act of 1875 was enacted. Construed in this way, the legislation of 1873,\* incidentally referring to this contract, and providing that its validity should not be affected thereby, is intelligible, and perhaps sustainable; but upon any other theory it is difficult to see its object or design. We cannot ascribe to the Legislature an intention by that Act to hamper and restrain its successors in the exercise of legitimate constitutional power over the subject of railroad fares—*Railroad Commission Cases*, 116 U. S. 307 [29 L. ed. 686]—and if it was an effort to pass upon the validity of the contract, that subject was a judicial one, and beyond the province of legislative authority to act upon.

But we are further of the opinion that the Act of 1875 was a valid exercise of legislative power, and did not impair the obligations of any contract with the meaning of the constitutional provision. The inability of one Legislature to limit or control the legislative action of its successors is a familiar principle which

needs no citation to support it. *Brick Presby. Church v. New York*, 5 Cow. 538.

The same authority which confers upon one body the power of legislation authorizes its successors, in the exercise of their duty, to change, alter and annul existing laws when, in their judgment, the public interest requires it. In the performance of their duty of legislating for the public welfare, each successive body must, from necessity, be left untrammelled, except by the restraints of the fundamental law; and when called upon to act upon subjects which concern the health, morals or interests of the people, as affected by a public use of property for which compensation is exacted by its owners, they are unlimited by any constitutional restraint.

It is unnecessary to discuss this proposition with much fullness, as it was conceded by the appellant upon the argument, and is repeated in its printed brief, that the authority of the Legislature, in the exercise of its police powers, could not be limited or restricted by the provisions of contracts between individuals or corporations. *Pacta privata publico juri derogare non possunt*. This proposition is also abundantly established by authority. *Brick Presby. Church v. New York*, *supra*; *Coates v. New York*, 7 Cow. 535; *Vanderbilt v. Adams*, Id. 349; *New York v. Second Ave. R. Co.* 82 N. Y. 241; *People v. Boston & A. R. Co.* 70 N. Y. 569; *Stone v. Farmers Loan & Trust Co.* 116 U. S. 807 [29 L. ed. 636]; *Barbier v. Connolly*, 118 U. S. 27 [28 L. ed. 923].

It was said in *People v. Boston Railroad Company*, *supra*, that "Railroad corporations hold their property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The Legislature which has created them may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, etc. . . . It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads, or passing upon highways crossed by railroads. All this is within the domain of legislative power, although the power to alter and amend the charters of such corporations has not been reserved . . . Such legislation violates no contract, takes away no property, and interferes with no vested right."

In *Munn v. Illinois*, 94 U. S. 134 [24 L. ed. 88], Chief Justice Waite, in speaking of the implied powers which social organization confers upon its government over the conduct and property of members, says that "It does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not necessarily to injure another. This is the very essence of government, and has found expression in the maxim, *Sic utere tuo ut alienum non laedas*. From this source came the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 46 U. S. 5 How. 538 [12 L. ed. 256], 'are nothing more or less than the powers of government inherent in every sovereignty . . .

\*The "legislation of 1873" referred to is chapter 512 of the Laws of that year, passed May 15, 1873, amending the Act incorporating the Buffalo East Side Railway Company. Said Act of 1873 provides that "Nothing in this Act contained shall be con-

strued so as to impair the validity of any contract now existing between said company and the Buffalo Street Railroad Company; but the same shall remain valid and binding according to the terms thereof." [Rep.]

that is to say . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

*Judge Bradley, in the Sinking Fund Cases, 99 U. S. 747 [25 L. ed. 511], referring to the Munn Case, says: "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community—it is subject to regulation by the legislative power."*

We think it unnecessary to discuss the question as to how far the Legislature were authorized to go in regulating the affairs of corporations under the power of amendment and repeal imposed by the Revised and other Statutes. Section 8, tit. 8, chap. 18, pt. 1, p. 1581 (7th ed.). It seems to be conceded by all of the authorities that such reservations confer upon them power to regulate, to a certain extent, the general management and control of the internal affairs of such corporations; but the grounds already referred to are sufficient to dispose of the case without considering questions not essential to that end. We think the authorities cited are decisive of the question, and lead to an affirmance of the judgment.

*The judgment of the Court below is therefore affirmed.*

All concur; Earl and Gray, JJ., in result.

#### Re ESTATE OF John McGRAW, Deceased.

Re ESTATE OF Jennie McGraw FISKE, Deceased.

(.... N. Y. ....)

#### 1. The provisions of the New York Revised Statutes as to the incorporation

**NOTE.**—*Devise, and legacy to corporations; statutory restriction.* Restraining statutes were introduced into the Colony of New York and became operative as a part of the common law of the Colony. *Reformed Church v. Schoolcraft*, 65 N. Y. 156; *Bogardus v. Trinity Church*, 4 Paige, 178; *DeRuyter v. St. Peter's Church*, 8 Barb. Ch. 119, 3 N. Y. 239. Land forfeited, under the Mortmain Acts in New England, for being conveyed to a corporation without license, may, nevertheless, when so alienated, be held until the heir or the Crown enters for the forfeiture. The question of title is between the corporation and the owner of the forfeit right; and no stranger can take advantage of the defeasibility of the title. *Cromie v. Louisville Orphans Home Society*, 3 Bush, 384. See *Starkeweather v. American Bible Society*, 73 Ill. 80. Where the terms of

of colleges are not restricted to colleges incorporated by the regents of the university of the State, but apply also, except as otherwise provided, to colleges created by special charters.

2. **The provision of the Charter of Cornell University**, that "The corporation hereby created may hold real and personal property not exceeding \$3,000,000 in the aggregate," gives the measure of the power of the university to take as well as to hold real property. It cannot be held that while the power of a college, given by 1 New York Revised Statutes, 460, "to take and hold by gift, grant or devise, any real or personal property the income or revenue of which shall not exceed the value of \$25,000," is enlarged in respect to the power to hold property the power to take is thereby left unlimited.

3. **A devise or bequest to a corporation**, of property which will exceed the amount or value which the corporation is by law permitted to take, will be void for the excess; and as to that excess no title will vest for a single moment in the corporation, but will vest instantly in the heir or next of kin. The power to raise the question of the right of the corporation to take the property is not confined to the State, but the question may be raised by the heirs or next of kin.

4. **Where a testator gives a university** certain sums of money in trust for various purposes, to the fund of one of which the residue of the estate is given, and directs the estate to be converted into money or available securities as soon as it can be done, having in view the best interest of the estate, it operates as an equitable conversion of the estate, and no real estate owned by the testator is thereby devised.

5. **An agreement made August 4, 1863, between the State of New York, through the commissioners of the land office acting under and by virtue of Laws of 1863, chap. 481, and Ezra Cornell, for the sale to the latter of the agricultural land scrip held by the State, must be construed to make such sale at thirty cents per acre, with an additional thirty cents if so much should be thereafter realized on the sale by the vendee; and the fact that he agreed to pay his profits, if any were realized, into the treasury of the State as the property of Cornell University, does not make such profits any portion of the purchase price of the scrip. These profits which he hoped to realize, and which were entirely speculative, were paid over, not as a debt to the State, but as a gift of his own to the university.**

(November 27, 1888.)

**A PPEAL** from a judgment of the General Term of the Supreme Court, Fourth Department, reversing a decree of the Surrogate of Tompkins County. *Affirmed.*

John McGraw, a resident of Ithaca, New

the statute which has received judicial construction are used in a later statute, whenever passed by the Legislature of the same State or country or by that of another that construction is to be given to the later statute. *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. 554; *Com. v. Hartnett*, 3 Gray, 450; *Ruckmaboye v. Mottelchund*, 32 Eng. L. & Eq. 84; *Rigg v. Wilton*, 13 Ill. 15; *Adams v. Field*, 21 Vt. 256. While restrictions imposed by the charter of a corporation upon the amount of property which it may hold can be enforced only by a direct proceeding by the State which created the corporation (*Jones v. Haborsham*, 107 U. S. 174, 27 L. ed. 401; *Chamberlain v. Chamberlain*, 8 Lana. 301); yet where the interest of an individual will be affected by a transgression of the rule, he may assert and trust upon the restriction or limitation upon the power

York, died May 4, 1877, leaving a last will and testament, by which he left \$500,000 in trust for his daughter, Jennie McGraw, and made her his residuary legatee, with full power to dispose of all the property left by him, by her will; but in case she made no will and died childless, it was his desire that two sevenths of the property so remaining should go to his nephew Thomas H. McGraw, and the remainder to the other five children of the testator's brother Joseph.

Jennie McGraw married Willard Fiske in July, 1880, and died September 30, 1881, leaving property to the amount of \$2,000,000, exclusive of a trust fund of \$250,000, being part of the \$500,000 trust created by the will of her father, John McGraw, as above stated. She left a last will and testament by which she bequeathed to Cornell University, an educational corporation located at Ithaca, certain specific legacies amounting to \$200,000, and by which, after certain legacies to others, the university was made residuary legatee.

Cornell University was incorporated by a Special Act of the Legislature of the State of New York (chap. 585, Laws of 1865), section 5 of which provides that the corporation thereby created "may hold real and personal property not exceeding \$3,000,000 in the aggregate."

In the proceedings before the Surrogate of Tompkins County for the settlement of the accounts of Douglass Boardman, executor of the will of Jennie McGraw Fiske, Thomas H. McGraw and others, devisees and legatees under the will of John McGraw, and Joseph McGraw and others, heirs and next of kin of Jennie McGraw Fiske, contended that the said legacies to Cornell University were void, for the reason that the university, at the time of the testatrix's death, held the full amount of property limited by its charter, and therefore could not take the legacies in question.

The surrogate decided that the property then held by the university did not equal the limited amount of \$3,000,000, and decreed that the executor should pay to it the amounts of the legacies bequeathed to it.

An appeal from this decree was taken to the general term, where it was reversed; and from the judgment of reversal the present appeal was thereupon taken by Cornell University and Douglass Boardman, executor, the respondents

being Thomas H. McGraw and others, devisees and legatees under the will of John McGraw, deceased; Joseph McGraw and others, heirs and next of kin of Jennie McGraw Fiske; Willard Fiske, husband of Jennie McGraw Fiske. Other facts are stated in the opinion.

*Mr. Edwin Countryman, with Mr. S. D. Halliday, for appellants.*

*Mr. George F. Comstock for respondents.*

**Peckham, J.**, delivered the opinion of the court:

The question to be decided in this case is whether Cornell University or some other parties, being the residuary legatees, or else the heirs at law or next of kin of John McGraw, deceased, or of Jennie McGraw Fiske, deceased, or her husband, shall have the property, or any portion of it, bequeathed to the university by the will of Mrs. Fiske.

In case the university should be held not to be a competent legatee, the question as to where the property shall go is, as we understand, a matter in which the various parties to the litigation have agreed; and hence the only question we need consider is, first, in regard to the capacity of the corporation to take the legacy. If that should be decided in the affirmative, it would be necessary to discuss no other question. If, however, it should be held that the corporation had no power to take and hold more than \$3,000,000, the second question would be as to whether it was the owner and holder of such an amount at the time of the decease of Mrs. Fiske.

Both of these questions are important and worthy of the most careful and deliberate consideration. The case involves a very large amount of property, and involves, also, the decision of a question as to the effect of the general statutes relating to the acquisition and holding of property by corporations of the class of this university, as the same have been affected by the terms of the special charter granted to it.

The case has been most elaborately and ably argued by counsel on both sides, and the written briefs submitted to the court by them bear conclusive evidence of the thoroughness and extent of their researches into the English Law on the subject of mortmain and its results, as

of the corporation to take. *Re Estate of McGraw v. Cornell University*, 45 Hun, 371.

By the Statute of Wills no devise of real estate to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise. *Theological Seminary of Auburn v. Childs*, 4 Paige, 419; *Leslie v. Marshall*, 31 Barb. 562. Having no power to take by devise for any purpose, the church or society in question acquired no right. The devise, and the trust founded upon it, are therefore entirely void, and the estate descended to the heirs at law, subject to the life estate of the widow, at the death of the testator. *Goddard v. Pomeroy*, 36 Barb. 554. See *Ayres v. Methodist E. Church*, 3 Sandf. 351; *King v. Rundle*, 15 Barb. 130. Heirs, devisees and next of kin have been held competent to question gifts to corporations unable to take and hold such gifts. *Goddard v. Pomeroy*, 36 Barb. 546; *Harris v. Slaght*, 46 Barb. 470, 2 Abb. App. Dec. 316; *Ayres v. Methodist E. Church*, 3 Sandf. 351; *State v. Wiltbank*, 2 Harr. (Del.) 18; *Darton v. King*, 41 Miss. 233; *Quaker Society v. Dickenson*, 1 Dev. L. 189; *Ruth v. Oberbrunner*, 40 Wis. 238.

*Distinction between power to hold property, and to take by devise.* There is a distinction between an incapacity to hold property beyond a certain amount, 2 L. R. A.

and that of a corporation to take by devise under a will. In the latter case there is an entire want of power both to devise and take, the prohibition being in the Statute of Wills. The sole authority to devise being derived from the Statute of Wills, a devise not authorized by that statute is absolutely void. *Bogardus v. Trinity Church*, 4 Paige, 178; *Atty-Gen. v. Reformed Dutch Church*, 33 Barb. 312. See *McCartee v. Orphan Asylum Society*, 9 Cow. 437; *Jackson v. Hammond*, 2 Cal. Cas. 337; *Ayres v. Methodist E. Church*, 3 Sandf. 351. Where there is an absolute devise to the corporation, which by law was incapable of taking, nothing can be claimed by reason of such devise by a residuary devisee on the ground of a contingent interest given by the residuary clause, based upon the possibility of a reversion of the estate by dissolution of the corporation, or by a forfeiture of its rights in consequence of nonperformance of its condition. *Van Kleeck v. Reformed Dutch Church*, 20 Wend. 481. Not only the special clause of prohibition contained in the charter of the respondents, which of itself avoided this devise in fact, but a public statute known to the testator, is to be read as a part of his will, arresting and nullifying his attempt upon the principles of social policy. *Van Kleeck v. Reformed Dutch Church*, 20 Wend. 481.

well as that of our own and of the other States of the Union.

To examine and comment upon each argument advanced, and to go through the long list of cases cited in this and other States and in England, would render this opinion of immoderate length and probably would not be of any great service. We must be content to give the conclusion at which we have arrived, together with the reasons which seem to us controlling, in as short a space as it reasonably may be done.

I. Coming to a discussion of the first question, it may be assumed that a corporation, by the common law, had power to take property by devise. *Sherwood v. American Bible Society*, 4 Abb. App. Dec. 281; 1 Kyd, Corp. 74-78; Grant, Corp. 98.

Our Revised Statutes provided that every corporation as such has power, among other things (§ 1, subd. 4), to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter. By section 2 of the same title of the statutes the powers enumerated in section 1 "Shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter or in the Act under which it shall be incorporated."

Section 3 provides that "In addition to the powers enumerated in the first section, and to those expressly given in its charter or in the Act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given. 1 Rev. Stat. 599-600, §§ 1, 2, 3.

Under this power to hold, purchase and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in its charter, the corporation could take property by devise, for the word "purchase" includes all means of acquiring property not coming to one by descent or the mere act or operation of the law. The same Revised Statutes, however, in providing for the transmission of real property by will, stated that "Every estate and interest in real property descendible to heirs" might be devised. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." 2 Rev. Stat. 57, §§ 1, 2, 3.

There are other provisions in the Revised Statutes relating to corporations incorporated for purposes of education. It is enacted therein that "The trustees of every college to which a charter shall be granted by the State shall be a corporation." Section 31.

"Sec. 36. The trustees of every such college, besides the general powers and privileges of a corporation, shall have power . . .

"4. To take and hold, by gift, grant or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of \$25,000." 1 Rev. Stat. 460, §§ 81-87.

At the adoption of the Revised Statutes, therefore, the law in this State was that a corporation could hold, purchase and convey such real and personal estate as the purposes of the

corporation should require, not exceeding the amount limited in its charter; but it could not take any real property by devise unless it was expressly authorized by its charter, or by statute, to take by devise. And there was power in the trustees of a college to which a charter was granted by the State to take and hold real or personal property by gift or devise provided the income did not exceed \$25,000 annually.

Some time subsequent to the adoption of these statutes, and in the years 1840 and 1841 (chaps. 318 of 1840 and 281 of 1841), the Legislature passed Acts (the latter being an amendment of the earlier one) by which trusts were authorized to be created by grants, devises and bequests of property to incorporated colleges or other literary incorporated institutions in the State to be held in trust for specific purposes comprehended in the general objects authorized by their charters. The Acts contained no limitation as to the amount or value of property which could be thus taken in trust by the corporation.

It was held, however, by this court in *Chamberlain v. Chamberlain*, 48 N. Y. 424, that these Acts did not repeal or affect the general law of the State limiting and restricting the amount and value of property which could be taken and held by literary and educational corporations; and it was therein said that the general laws of the State are in harmony with its policy, which has been uniform and consistent, so far as such policy is indicated by legislation in relation to gifts in mortmain and the powers of corporations to take and hold property. It was further said that these statutes (those of 1840-41) authorized the creation of special trusts, in furtherance of the objects of the corporations named, but that such trusts could be created and full effect given to the Acts within the limits imposed by the general laws upon the power of the corporations to acquire and hold property. There being no express repeal of the general provisions of law or repudiation of the uniform policy of the State, the intent of the Legislature to do either, it was said, could not be implied.

Thus the several provisions of law relating to the property of corporations stood at the time of the granting of its charter to Cornell University by the State in 1865. By chapter 585 of the laws of that year, the Legislature incorporated and established the Cornell University. In the first section of the Act the following language is to be found: "The corporation hereby created shall have the rights and privileges necessary to the object of its creation as declared in this Act, and in the performance of its duties shall be subject to the provisions and may exercise the powers enumerated and set forth in the second article of the fifteenth chapter, title 1, of the Revised Statutes of the State of New York."

The second article, above alluded to, is entitled "Of the Powers and Duties of the Trustees of Colleges," and is to be found already referred to (*supra*) as 1 Revised Statutes (460, §§ 81-87). It is subdivision 4 of section 86, which authorizes the trustees to take and hold real or personal property by gift or devise not exceeding the value therein stated.

Section 5 of the charter reads as follows:

"Sec. 5. The corporation hereby created

may hold real and personal property not exceeding \$3,000,000 in the aggregate."

These provisions in the charter, together with the statutes above alluded to, must be examined for the purpose of discovering, if possible, what was the legislative intent towards this corporation regarding property.

The learned counsel for the appellant claims, at the threshold, that the provisions of the Revised Statutes as to the incorporation of colleges (*supra*), with a single exception, were merely intended to apply to institutions of learning incorporated by the regents of the university of the State under the general laws of the State. He argues that the regents had power to incorporate a college by virtue of the provisions of the Act (chapter 82) of 1787, the provisions of which were re-enacted in 1813 and incorporated subsequently into the Revised Statutes, and at that time, and for many years thereafter, there was no other way of incorporating a college unless by a special Act of the Legislature; hence, he says these provisions of law, general in their nature, applied to corporations which were incorporated by the regents, and were never supposed to apply to corporations incorporated by special Act, unless expressly made applicable in the special Act.

The counsel is right in his statement as to the fact when the Act was passed. At that time there was no general law for the incorporation of colleges or other institutions of learning, other than by the regents; and when they granted a charter there can be no doubt that its provisions were affected by the Act as contained in the Revised Statutes. But the language therein used (§ 81), that the trustees of every college to which a charter shall be granted by the State shall be a corporation, is general in its nature, and it would seem to include all cases embraced within its language. That it is superfluous to apply it to the case of a corporation which becomes such by virtue of the very Act which incorporates it, is not a conclusive answer. It is an argument from the point of view that it was unnecessary; but because it was unnecessary is not always, perhaps even generally, an argument against the applicability of a statute to a certain condition of things. It is alike unnecessary with regard to colleges or academies which were incorporated by the regents under the power granted them in the Acts of 1787 and 1813, both of which Acts expressly granted them power to incorporate colleges and academies by giving them a charter. When they did so the college or academy became a corporation by virtue of those Acts which empowered the regents to incorporate it. The section (81) was, therefore, unnecessary in both cases; and yet it was adopted, and in its language it embraces all colleges to which a charter is granted by the State.

The thirty-sixth section provides that the trustees of every such college shall have power, among other things (subdivision 4), "to take and hold . . . any real and personal . . . property, the yearly income," etc.

I think it plain, therefore, that the provisions contained in that title would be applicable to the Cornell University, although specially chartered by the State, unless inconsistent provisions were to be found therein. The charter, however, in so many words, makes this title 2 L. R. A.

applicable to the university. (See section 1 of the charter, part of the language of which is quoted *supra*.)

It is true that it states, the corporation, in the performance of its duties, shall be subject to the provisions and may exercise the powers enumerated in the title mentioned, among which is the right to take and hold real and personal property. But the title itself is headed, "Of the Powers and Duties of the Trustees of Colleges;" and among those powers and duties is the right above mentioned. I do not think that the use of the words, "in the performance of its duties," would in any wise exclude the application of this fourth subdivision of section 86, and we must look elsewhere for such exclusion if it is to be excluded. That it is to be excluded all admit; but the exclusion is founded upon a special provision in the charter itself which is wholly inconsistent with its continued applicability. The subdivision confines the taking and holding, by gift, etc., of real or personal property to a yearly income not exceeding in value \$25,000, while the charter permits it to hold real and personal property to an amount not exceeding \$3,000,000 in the aggregate.

Both sides admit that this subdivision in question is not applicable—the respondents, because an inconsistent provision in the charter expunges it; while the appellant claims that even if there were no inconsistent provision in the charter, it would still be inapplicable because the statute only applies to corporations incorporated by the regents. The provisions of the charter are inconsistent, and still we must look at all the other statutes above cited for the purpose of discovering what the legislative intent is. Looking at the General Statutes we find corporations have power to purchase and hold property necessary for the purposes of their incorporation, not exceeding the amount limited in their charter, but they cannot take by devise unless expressly authorized by their charter or by statute so to take.

Then the Revised Statutes prohibit corporations from possessing or exercising any corporate powers, except such as are enumerated or are expressly given to them by their charters, or such as shall be necessary to the exercise of the powers so enumerated and given. The statutes also allow the trustees of a college to take property by gift or devise not exceeding a certain annual income; and then come the Acts of 1840-41, and then the charter of this university. The argument of the learned counsel for the appellant is, as I have said, based upon the theory of the utter inapplicability of the Act of the Revised Statutes as to colleges; and then he claims that the Acts of 1840 and 1841 bestow a capacity to take property by will not exceeding the amount limited in the charter of the corporation; and he claims, also, that in this case there is no limitation of the power in the charter of the university to take real or personal property to any amount, and the only limitation there is consists of a limitation upon the power of holding more than \$3,000,000 in the aggregate. It thus obtains the power to take an unlimited amount of property by virtue of one Act, and a limitation is only placed upon its power to hold by another Act, and that is the organic Act of incorporation itself.

I do not think such an interpretation of the statutes can be sustained. I think the fifth section of the charter gives the measure of the power of the university to take as well as to hold property. The language is an authority as well as a limitation. It is an authority to hold more than the Revised Statutes permitted, but it shall not be permitted to hold more than a certain specified amount. And if there were nothing said on the subject of property in the charter, I think the Revised Statutes as to the limitation for colleges would apply.

Reading the language in the charter, it is difficult to imagine a holding without a previous taking of property; and the counsel for the appellant admits that if there were no other statute providing for a taking of property, the language of the fifth section of the charter would necessarily imply a right to take in order to hold. I do not think that his claim to derive an unlimited capacity to take by virtue of the Laws of 1840 and 1841, when construed with the other statutes and with the provisions in the charter, can be upheld as a fair exposition of the legislative intent upon the subject. The Statutes of 1840 and 1841 were passed for the purpose of authorizing the creation of certain special trusts in connection with these educational institutions, which could not have been legally created prior to their passage, and their object did not in the least infringe upon the general laws of the State or its policy. As has been said, their passage did not repeal those general laws limiting the amount or value of property which corporations might take and hold.

Because a special statute contained provisions upon the subject of the property of the corporation thereby incorporated, which were inconsistent with the general provisions contained in the Revised Statutes relating to the same subject, I do not think the effect was not only to render the general law inapplicable, but also to twist the provisions of the Law of 1841 in relation to the special trusts spoken of into a permission outside of and beyond the language of the charter to take property without any limitation as to amount or value. That might have been the effect if the charter had repealed those general provisions as to this corporation, and had made no other provisions regarding it. Under such circumstances, the Act of 1841 could have been referred to as permitting the corporation to take property by devise and in trust to an extent unlimited; but when the same language which renders the general law inapplicable also gives a power to hold property to a certain limited extent, it seems to me that such a power includes the power to take up to that sum, and limits it accordingly.

It is said that if the power to take an unlimited amount of property and to hold but a certain sum were contained in the same law, there could be no doubt upon the question of the power to take. That may be so, for in that case the legislative will would have been announced in terms which could not be misunderstood. But there is a great difference between the two cases. The question is always one of legislative intent; and the inquiry is whether the Statute of 1841, providing for the creation of trusts, really applies in this instance to this university, so far as an unlimited capac-

ity to take property is concerned. For the reasons already stated, I think it does not.

Looking for a moment outside of and beyond the statute laws of the State, and in order to strengthen his position regarding the true construction to be given that law as to the material distinction, in the case at least of a corporation between the power to take and the power to hold property, the counsel for the appellant has made a most able and learned argument. Its outlines are, in substance, as follows: a corporation at common law could take and hold property by devise. At an early stage in the history of the Law of England, relating to the power of corporations to hold real property, and while the feudal system still prevailed, it was enacted that no man should alien his feud to a corporation under penalty of a forfeiture thereof to his next superior, of whom he held the land; and in default of such superior insisting upon the forfeiture, then his superior might do so, and thus on until the King, as the general superior and lord of all, was reached. But in case the forfeiture was not insisted upon, the corporation, which had taken a defeasible title to the land, could hold it as against all the world.

He therefore insists that this distinction between taking and holding strengthens his claim that the use of the word "hold" in the charter was intentional and for the specific purpose of permitting the corporation to take an unlimited amount of property and to hold only the amount specified. No sound reason for giving such unlimited power to take, while limiting the power to hold, can, as it seems to me, be stated. And if such were the intent, I think it would have been plainly stated in the charter instead of trusting to such a conjectural application to be given to another statute.

The counsel cites about all the writers upon the subject of corporations, and they have all adverted to this distinction, as existing in relation to the English corporations subject to the Mortmain Statutes; and they state that licenses to hold in mortmain were granted to such bodies, but without such licenses they took the title to the real property aliened, subject only to the right of the superior lord to enter and take the land under the power of forfeiture.

The only penalty, therefore, which a corporation risked when it took lands without a license in mortmain was that of a forfeiture of the land to the next superior of the grantor, and so on up to the King; and the counsel claims that in this State, in the case of a corporation with unlimited power to take, but not to hold more than a certain amount, the penalty for holding more is that the State, representing the whole people and standing in this respect in lieu of the King (there being no mesne lords), can forfeit the charter of the corporation and thus prevent the further holding. And assuming this to be the fact, he uses it as strengthening his argument as to the existence of this clear and material distinction between taking and holding property.

The further claim is then made that, as title to the property has vested in the corporation, which, in holding it, has become subject to the forfeiture of its charter, the heirs or next of kin of the testator have no more right to raise the question than any other third parties who

have no interest therein. It is said that it is a matter for the State alone to take cognizance of, and until it does, the corporation holds the property, however much it may transcend the limitation prescribed in its charter.

The counsel states accurately the Law of Mortmain in England and its consequences of possible forfeiture of the estate granted, and until forfeiture, the vesting of the title in the corporation indefeasible, except by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early Mortmain Acts were enacted, render any argument in regard to those Acts and their effect totally inapplicable to the case of a corporation of this State.

Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein, limiting the holding of property, is, as I have said, a restriction also upon the power to take in excess of the specified amount. As, at common law, a corporation could take real property in the same way as an individual, the consequence was that, in England, large landed possessions were held by religious corporations, and by reason of alienations of real estate to them, the services due by the vassal to the lord were partially, if not totally, paralyzed, and the chief lords lost their escheats. This was a constantly growing and alarming evil. To remedy the difficulty, the first Mortmain Act was placed in *Magna Charta*, which declared all such alienations to corporations entirely void, and that the lands should revert to the lord of the fee. It was held, however, that the reversion must be accomplished by an entry, and then and from that time there was a forfeiture, the corporation having taken the title and held the property until such forfeiture by re-entry. Shelford, Mortmain, 8, 84; 1 Kyd, Corp. 81; Grant, Corp. 106.

Other statutes upon the subject were subsequently enacted, all for the purpose of preventing the great accumulation of real property in the hands of corporations; and they all provided substantially for a re-entry on the part of the next superior lord whenever lands had been aliened in mortmain, and, until such entry enforcing the forfeiture, the corporation held the lands. There was one law, directed against superstitious uses (38 Henry VIII., chap. 10), which provided that the grant to such uses for more than twenty years was absolutely void, and the estates thus aliened would have gone to the grantor or his heirs, excepting for a provision, subsequently made, giving such estates to the King. Wilmot's Opinions, 9, 10, in *Atty-Gen. v. Bouvier*, variously reported: Ambl. 550, 571; 1 Dick. 414; 3 Ves. Jr. 714; 5 Ves. Jr. 300; 8 Ves. Jr. 256.

The Mortmain Statute (9 Geo. II, chap. 36) renders all devises to charitable uses void. Shelford, Mortmain, 118-120.

The nature of the tenure of real property at the time of the passage of the early Mortmain Acts in England bears no resemblance to the tenure by which a citizen of this State holds lands. Here there is no vassal and superior,  
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but the title is absolute in the owner, and subject only to the liability to escheat. N. Y. Const. art. 1, § 18. The escheat takes place when the title to lands fails through defect of heirs. N. Y. Const. art. 1, § 11.

A devise to a corporation which is forbidden to take (or forbidden to hold, if the word, under the circumstances of the case, is construed to include a taking also), does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but if it be in violation of a statute, I think the devise is void, and the land descends to the heir or residuary devisee.

We have not in this State re-enacted the Statutes of Mortmain or generally assumed them to be in force; and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the Acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects. 2 Kent, Com. 282.

Of course the restrictions contained in any general law, if applicable, must also be referred to.

There is, by reference to our laws, no such necessary and universal distinction between taking and holding property by corporations, as is seen in the Laws of England relating to alienations in mortmain. Whether the Legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount.

As is said in the *Chamberlain Case*, this is in accordance with the policy of the State, a policy which has been recognized as existing for many years, and which the courts have concurred in approving and carrying out. I do not think the statute (Laws 1779, chap. 25, § 13) touches this case. It provides that the absolute property of the lands, etc., and all rents, franchises, debts, dues, duties and services, escheats and forfeitures, which before the 9th of July, 1776, vested in or belonged or were due to the Crown of Great Britain, were and forever after the 9th day of July, 1776, shall be vested in the people of the State, in whom the sovereignty and seignory thereof are and were united and vested.

The counsel for the appellant does not claim that this property was itself forfeited to the State, if the State should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and that in enforcing such forfeiture, after the payment of the debts of the corporation, the rest of the property would (as he insists) probably go to the State, because there would be no living claimant to it who would have any right to acquire it. A forfeiture the State may claim and may enforce at pleasure, when the occasion arises; but it is a forfeiture of the charter and not a forfeiture of the property held by the corporation.



It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the Courts of England, of this State and of the other States of the Union for a long number of years; and that there is no reason why effect to such a distinction should not be given in this case, the result being, as is stated, that the corporation has an unlimited right to take property, and also an unlimited right to hold it as against anyone but the State in its capacity of Sovereign.

There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances, the only question being whether the Legislature had such distinction in mind and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he cannot hold it as against the State. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by escheat. *Wright v. Sadtler*, 20 N. Y. 320.

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but cannot hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he cannot hold, as against the claim of the State, where properly made and enforced. The same expression is used in the case of a corporation under the Mortmain Laws, that it can take but not hold, the meaning being that it cannot hold as against the claim for forfeiture when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which they were used, and applied to corporations existing by virtue of the laws of this State, seems to me a plain proposition.

The counsel has, however, with great industry and research, cited a number of cases from our own courts and those in other States, where this distinction, he claims, has been admitted, and in cases, too, where the principles involved were similar to the case at bar (one or two being, he says, precisely like it), and where it has been held that in such cases, although the corporation has violated the law of its being, yet no one but the State could take advantage thereof.

I think that, with the exception of one case, they were all entirely different from this one, and the decisions were based upon a totally different and perfectly unassailable ground.

The principal case, or at least one of the early ones, is that of *Leazure v. Hillegas*, 7 Serg. & R. 818, which arose in Pennsylvania and was decided in 1821. The restriction in the Charter of the Bank of North America was that the bank should not purchase and hold property excepting under circumstances therein stated. The directors of the bank accepted from their grantor, William Henry, a conveyance of his land (not within their specified powers) at a fair price, in payment of a debt, *bona fide*, due. The question was whether the corporation could hold and convey a title. Tilghman, Ch. J., said: "The restriction is that the bank shall not purchase and hold. Pur-

chasing and holding are very different things, and the consequences of each are very different. To purchase and hold might have been thought dangerous, but to purchase, subject to the Statutes of Mortmain, which authorized the State to appropriate the land to its own use, could be attended with no danger."

The court there held that some portions of the Mortmain Laws of England were in force in Pennsylvania, to the extent of permitting the State, as the sovereign lord, there being no mesne lords, to enter and claim the forfeiture, and that until the State did so the title of the corporation was good, and it could convey such a title to its grantees. No such laws have been in force in this State.

Under the modern acceptance of the law regarding corporations, this case could probably be supported on an entirely different ground, viz.: that it was an executed contract or conveyance, upon a good consideration, and that the grantor could not be heard to dispute his own grant under the circumstances; and that no one could take advantage of this violation of its charter by the corporation excepting the State, which could proceed to forfeit the charter because thereof. The case is no authority in this State for the proposition that none but the State can interfere; nor is it of any importance upon the question as to how material it is to note the absence of an express limitation in words upon the power to take property under the charter of the university.

*Baird v. Bank of Washington*, 11 Serg. & R. 411, is a somewhat similar case, and decided also upon the authority of *Leazure v. Hillegas*, *supra*. *Gouldie v. Northampton Water Company*, 7 Pa. 233, decided in 1847, refers to the *Leazure Case*. It was also a case where the contract was on a good consideration, and the company had the right to contract for the land and pay for it, and a deed for value would vest in it a good title, subject to the right of the State to interfere, etc.

The case of *Runyan v. Coaster*, 89 U. S. 14 Pet. 122 [10 L. ed. 382], decided in 1840, upon appeal from the Circuit Court in Pennsylvania, was decided with express reference to the statute of that State, passed April 6, 1833, relative to escheats, which permitted the corporation to retain the title, subject to be divested at any time by the Commonwealth. The decision was put upon the ground of the Act of 1833 and the doctrine of the Supreme Court of Pennsylvania in the *Leazure Case*. These are the cases cited from the Pennsylvania Courts; and it is plain they furnish no support for the contention in this case, in the absence of those Laws of Mortmain upon which they were founded.

There is one case, however, which has been decided by the Supreme Court of the United States upon the question of who may take advantage of a violation of the charter in relation to the power to hold property, which comes very near the case at bar. The decision of that court goes quite a distance towards sustaining the contention of the appellant's counsel, although there was another ground upon which the decision could rest. The very great respect which we all feel for any decision of the federal court of last resort, and for any opinion given by its learned and able judges,

even in cases where it is not binding upon us, renders it necessary to examine the case with some care. The case is *Jones v. Habersham*, 107 U. S. 174 [27 L. ed. 401]. The head note is: "Restrictions imposed by the charter of a corporation upon the amount of property it may hold cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the State."

The testatrix, a resident of the State of Georgia at the time of her death, devised and bequeathed to the Georgia Historical Society certain land for the purposes of maintaining a historical society, etc. The corporation was incorporated in 1839, and had power to purchase, take, hold, etc., lands and tenements, provided the clear annual income of such real and personal estate should not exceed the sum of \$5,000. It was admitted that the net income of the corporation from property held by it at the time of the death of the testatrix was between \$3,000 and \$4,000, and that the income of the property bequeathed to it by her will would add \$7,000 to that income. The appellants, who were the heirs at law and next of kin of the testatrix, claimed that the gift was void *in toto*, as it gave more than the corporation was allowed to take or hold. The court, per Gray, J., stated the answer to such proposition in the language of the head note above quoted, and, without argument, referred in support of such doctrine to five cases viz.: *Runyan v. Coster*, 89 U. S. 14 Pet. 122, 131 [10 L. ed. 382]; *Smith v. Sheeley*, 79 U. S. 13 Wall. 358, 361 [20 L. ed. 430, 431]; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, 758; *DeCamp v. Dobbins*, 29 N. J. Eq. 36; *Davis v. Old Colony R. Co.* 181 Mass. 258, 278.

Upon looking at those cases I have been unable to find that they decide the principle they are cited to sustain. It seems to me that the question was not really and fully presented, discussed or decided in any of them.

The first case, *Runyan v. Coster*, *supra*, has already been cited and sufficiently discussed. It was decided upon the express Statute of Pennsylvania, and can be no authority for the general doctrine stated by Mr. Justice Gray in his opinion.

The next case is *Smith v. Sheeley*, 79 U. S. 13 Wall. 358-361 [20 L. ed. 430, 431]. The bank in that case had been incorporated by an Act of a Territorial Legislature, where a law of Congress was in force providing that no Act of such a Legislature, incorporating a bank, should have any force until approved by Congress. The bank had power, under the Territorial Act, "to buy and possess property of every kind." Land was sold to it for a money consideration paid by it. Mr. Justice Davis, in his opinion, said:

"It is insisted, however, as an additional ground of objection to this deed, that the bank was not a competent grantee to receive title. . . . It could not legally exercise its powers until the approval of Congress was obtained; but this defect in its constitution cannot be taken advantage of collaterally. . . . Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto* exercising at least one of the functions which the Legislature attempted to confer upon it; and in such a case the party who makes a sale of real estate

to it is not in a position to question its capacity to take the title after it has paid the consideration for the purchase."

This, as it seems to me, is also very far from authority for the proposition for which it is cited. The grantor dealt with it as a corporation, received its money, and should not be heard to deny or question its existence.

The next case cited by the learned Judge is *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633, vice-chancellor's opinion, 720-758, as to the point in question. It was provided that the church could not hold more than an income of £500. The fact was that when the grant in question was made it did not hold, with the grant, nearly as much as it was allowed. Then the vice-chancellor said, if it did, it was a question between the corporation and the sovereign power in which individuals have no concern, and of which they cannot avail themselves in any mode against the corporation. This was mere *obiter*. The question was not involved nor decided. It was not a case of a devise to a corporation holding at the time of the devise more property than the law permitted, and where the question was whether such devise was good, and, if bad, whether the property (not devised by a valid devise) passed to the heirs.

The defense of the defendant was, among others, adverse possession, and that defense prevailed. The case referred to by the vice-chancellor (*Humbert v. Trinity Church*, 24 Wend. 587, 604, 629) did not decide the question either. The ground of the decision was that the plaintiff's claim was barred by the Statute of Limitations. Cowen, J., says (p. 605): Admit that the law will cast no title on the corporation, the answer, in the words of the statute, is equally fatal. You have been out of possession for more than twenty years, and are thus disqualified to maintain an action to recover your land against me or any other." It was a decision upon a question of adverse possession.

Senator Furman (page 629) in his opinion, assumes from the evidence that the real estate, when received, counting all defendant ever had, did not amount to the limitation of £500. He adds, in giving another view of the case, that the "Restriction is a mere question of governmental policy, and individuals as such have nothing to do with it, and no control over it. That it is only voidable at the instance of the supreme power." He cited no authorities and the question was not before him.

The case is only authority for the proposition that a corporation can insist upon a title to property by adverse possession which, when proved, is as potent to close the mouth of a claimant to the property in the case of a corporation as in that of an individual. To same effect, *Harpending v. Reformed Protestant Dutch Church*, 41 U. S. 16 Pet. 455 [10 L. ed. 1020]; *Bogardus v. Trinity Church*, 4 Paige, 178.

Then comes the case of *DeCamp v. Dobbins*, 29 N. J. Eq. 36, which was a devise to a charitable corporation claimed to have been restricted to a holding of property to the amount of \$2,000 annual value. The chancellor found that by a later statute the restriction did not exist. He then gave a dictum that if a corporation takes land by grant or devise, in trust or

otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the State alone can interfere.

This dictum is opposed by another distinguished judge of New Jersey (*Chief Justice Beasley*), who, on appeal to the court of errors and appeals in the same case, took occasion, in delivering the unanimous opinion of the court, while affirming the judgment below, to dissent from any such view of the law. I shall have occasion to refer to the case again. *De Camp v. Dobbins* (on appeal), 31 N. J. Eq. 671, 690. The *New Jersey Case* cannot, therefore, be regarded as the least authority for the main proposition under discussion.

The last case cited by the learned Justice is that of *Davis v. Old Colony Railroad Company*, 131 Mass. 258-273. The case decides that a railroad company had no power to guaranty the payment of the expenses of a musical festival, although it was expected that profits would result to the railroad company therefrom.

Incidentally, and as part of the general argument, the court, in the opinion, at page 273, mentions the doctrine contained in the *Leazure Case*, *supra*, and in *Old Colony R. Company v. Evans*, 6 Gray, 25. Neither case decides the question, and it was not involved in either.

This completes the examination of the cases cited in the opinion in *Jones v. Habersham*; and I think that it cannot be said that they really furnish any very secure foundation for the doctrine contained in that case; and I think the doctrine is opposed to the principle of the *Chamberlain Case*, *supra*, decided by this court. The other cases cited in the printed argument of the counsel for the appellant are mostly cases where a corporation has contracted with parties on a valid consideration, and where a conveyance has been made and then it is sought to raise the question as to the power of the corporation to take or convey a title; and it has been held that in such cases of an executed contract, if the corporation has violated the statute, the parties seeking to set up such violation would not be heard, and in such case none but the State would be. That one who contracts with a corporation shall not, under such circumstances, be heard to raise the question, is, in substance, the principle decided.

Such are the cases, in substance and principle, of *Onwell v. Colorado Springs Co.* 100 U. S. 55 [25 L. ed. 547]; *Hough v. Cook County Land Co.* 73 Ill. 23; *Alexander v. Tolleston Club*, 110 Ill. 65; *Barnes v. Suddard*, 4 West. Rep. 184, 117 Ill. 237; *Cal. State Teleg. Co. v. Alta Teleg. Co.* 22 Cal. 398; *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544; *Hayward v. Davidson*, 41 Ind. 212; *Baker v. Neff*, 73 Ind. 68; *Chicago, E. & Q. R. Co. v. Lewis*, 53 Iowa, 101; *Land v. Coffman*, 50 Mo. 243; *Chambers v. St. Louis*, 29 Mo. 576; *Barrow v. Nashville & C. Turp. Co.* 9 Humph. 304; *Baker v. Northwestern Guaranty Loan Co.* 36 Minn. 185; *Mo. Valley Land Co. v. Bushnell*, 11 Neb. 192.

I have examined all of these cases, and while the facts are, of course, not precisely similar, yet in not one of them does the fact exist of a devise of property to a corporation, which it cannot hold because the limitation has been reached provided for by statute; and, of course, no doctrine that in such a case the heirs cannot

claim the property is advanced. In most of them the court looks upon the question as one of a forfeiture of the charter on account of a violation of some limitation therein contained; and in such case, it is said, none but the Sovereign can raise such question.

The case of *Hayward v. Davidson*, 41 Ind. 212, was that of a devise of real estate to county commissioners for the use of the county. The court held that the county was authorized to acquire and hold title to real property for some purposes, and it could not be made a question by anyone except the State whether or not real estate acquired by such county has been thus acquired for authorized purposes or not. That the title passed under the power of the county to take real estate for some purposes; but the court also said if the charter or the law has forbidden a corporation to take, then a deed or devise passes no title.

In the case at bar, where the statute authorizes the corporation to hold not exceeding a limited amount, is it not the same thing in substance as a prohibition against holding and, therefore, a prohibition against taking, any more? And when the limit is reached, is it not the same as an original prohibition against taking any?

In *Chambers v. St. Louis*, *supra*, the court held also that there was a right in the city to take and hold lands; and if there were a capacity in the vendor to convey, so soon as there was a conveyance there was a complete sale; and if the corporation in purchasing violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the State and the city. This case rests upon the same principle above alluded to.

In the case of *Vidal v. Girard*, 43 U. S. 2 How. 127 [11 L. ed. 205], the trusts created by the will of Stephen Girard were held valid, and the court said that in such a case, if the corporation were incompetent to execute them, the heirs could not take advantage of such fact, as that could only be done by the State by *quo warranto* or other judicial proceeding. This is upon the ground that the trust was a valid trust, and if so, and the corporation as such had no power to execute it, the trust did not for that reason fail; but upon the failure of the corporation for lack of power to execute it, a court of equity would appoint a new trustee. Of course the heirs had no interest in the question when once the trust was declared valid, whether the corporation was exceeding its power in taking upon itself the execution of the trust or not. They had no title to or any further interest in the property. They stood, therefore, in respect to the corporation, as any other strangers. The case does not aid the appellant upon the matter under review.

I have not yet referred to all the cases cited by the indefatigable counsel for the appellants, but I have read them all, and in not one is the question fairly up and decided in the way he asks the court to decide this case.

The cases decided by the Supreme Court of the United States, known as the *National Bank Mortgaging Cases*, are cited to sustain the view of counsel. *Genesee Nat. Bank v. Whitney*, 103 U. S. 99 [26 L. ed. 443]; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439 [28 L. ed. 764].

They were cases where the bank took a mortgage from a party to secure future advances (against the Act of Congress), which advances it subsequently made, and for the nonpayment of which it attempted to foreclose the mortgage, when the mortgagor set up the violation of the Act. The court held that the Act did not make the security void, and that the government meant that the only penalty should be the right of the government to proceed against the bank for a judgment of ouster and dissolution. Certainly the party who had contracted with the bank, and had obtained its money on the faith of the security, had no equity in his claim. It is not, however, in the least analogous to the subject under discussion. Yet even in that case this court held that the mortgage was void because taken in violation of the National Banking Act (*Crocker v. Whitney*, 71 N. Y. 161); and it was stated as the undoubted law of this State that a contract made in violation of a statute is void, and it is immaterial that it is not so declared in the statute itself, and that a security taken in violation of a statute is void.

As the case involved the construction of an Act of Congress, an appeal was taken to the federal supreme court, where the judgment was reversed and the penalty for a violation of the Act was held to consist in the right of the government to proceed against the bank for a forfeiture of its charter, and the security was held valid.

The counsel refers to the general doctrine of *ultra vires* in respect to corporations, and shows that, as matter of fact, corporations have power to violate the law of their existence, or, in other words, to do wrong; and he cites *Bissell v. Michigan Southern R. Co.* 23 N. Y. 259; *Whitney Arms Co. v. Barlow*, 68 N. Y. 68; *Atlantic State Bank v. Soverly*, 83 N. Y. 292; *Rider Life Raft Co. v. Roach*, 97 N. Y. 878.

The theory upon which the plea of *ultra vires* is examined is that it will not, as a general rule, prevail, whether interposed for or against a corporation, when it will not advance justice, but will accomplish a legal wrong. See *above cases*.

I do not perceive that any assistance accrues to the appellant from a presentation of this doctrine. There is no question between these parties of a contract nature, nor any fact which ought to preclude the respondents from setting up any legal bar to the right of the corporation to take title to property which they claim either as heirs at law or as legatees or devisees.

The cases of *Re N. Y. Elevated Railroad Company*, 70 N. Y. 337, 338, and *Moore v. Brooklyn City Railroad Company*, 10 Cent. Rep. 497, 108 N. Y. 98, 104, 18 N. Y. State Rep. 97, are cited to show that none but the Sovereign can take advantage of a forfeiture of the charter, and that must be in a direct proceeding against the corporation. The principle is undenied. But in a case like this it is no forfeiture that is being insisted upon. It is simply a question of title to the property; and, provided it has not been legally devised or bequeathed, it necessarily vests in the heir or next of kin.

But it is said that where property is given to a corporation which has power to take or hold under some circumstances, the title vests in the 2 L. R. A.

corporation, for otherwise the State would never obtain the right to forfeit even the charter for a violation thereof. The argument is, the corporation would answer a claim to forfeit the charter by the fact that the charter precluded it from taking such property, and, therefore, as it could not, it had not done so. I do not see the force of the argument. The charter may preclude the rightful taking of the property by the corporation, and may prevent the legal title from vesting in it; but that has nothing to do with the fact that nevertheless the corporation has, as a physical act, taken the property and may be insisting upon its right to keep it as matter of law. In such case can there be any doubt that the corporation has taken and is holding the property as its own and in defiance of the charter, and that it may be punished by having its charter forfeited, although the rightful owner of the property may thereafter obtain his own? The fact that he does obtain it is no answer to the other fact that the corporation had taken it, nor is it any legal answer to the claim of forfeiture of the charter on the part of the State that it was unsuccessful in continuing to hold the property against the charter provisions.

Although we never adopted or enacted the English Statutes of Mortmain, yet in this as in other States we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

"It is a Statute of Mortmain, resting on a mortmain policy as distinctly as any Act of the British Parliament. . . . The necessity is recognized of forbidding the acquisition by will, unless the Legislature, in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms. . . . Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interest of charity and religion. But in the last hours of life exaggerated impressions of charitable or religious duty often obscure the judgment of men and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorporated for pious and benevolent purposes that the sentiments of men in such situations are most generally appealed to. The enactment is, therefore, prohibitory, and it ought to be expounded and applied in that sense." Per Comstock, *Ch. J.*, in *Douvening v. Marshall*, 28 N. Y. 366, 367.

"Judges have given the widest possible scope to statutes in restraint of the disposal of property in mortmain, and have been astute in their arguments for the application of such statutes to cases as they arose." Per Gibson, *Ch. J.*, *Hillyard v. Miller*, 10 Pa. 326.

The courts ought not to impute an intent to the Legislature not clearly expressed, in direct hostility to the traditions and policy of the past. . . . Claiming property and seeking the aid of the courts to reach it, the corporation can rely only on the warrant and authority conferred by law, and cannot claim in transgression or excess of that authority. . . . Doubtless, the restriction upon corporations is a governmental regulation, and one of policy, and to be enforced

by the government; but an individual whose interests will be affected by a transgression of the rule may assert and insist upon the limitation as a restriction upon the power of the corporation to take." Per Allen, J., in *Chamberlain v. Chamberlain*, 48 N. Y. 424-439.

Under our General Statutes upon the subject of the right to take or hold property by corporations, and reading them in connection with the provisions of the charter of the university, we should be astute in our arguments against the application of the Mortmain Statutes instead of in favor of them, if we should decide that the language of the charter did not apply as well to a taking as to a holding of property beyond the expressed limit.

There can be no doubt that it is the law, in this State at least, that if there be a prohibition against the taking of property beyond a certain amount or value, a devise or bequest to a corporation of property which will exceed the amount or value which the corporation is permitted to take, will be void for the excess. This is expressly decided in the *Chamberlain Case*, and we think it was rightly decided. Nor is there any doubt that in such a case the heirs or next of kin can raise the question. This was also decided in the same case. See also *White v. Howard*, 46 N. Y. 144.

When we come to the conclusion, therefore, that this university is by law precluded (or was precluded at the time of the death of Mrs. Fiske) from taking more than the amount of property limited in its charter, we bring the case precisely within the rules laid down in the cases just cited.

The language of Chief Justice Beasley, in the case of *De Camp v. Dobbins*, 81 N. J. Eq. 690, is very appropriate here. He says: "Nor can I assent to the other proposition that if, as the contention assumes, this bequest is violative of the law if carried into effect, none but the State can intervene. I find no warrant for such a doctrine, either in the legal principles belonging to the subject or in the adjudications. There can be no doubt that there are cases in which, when a corporation has acquired rights of property to an extent or in a manner unwarranted by its charter, no one but the public can have the right to complain. A grantor making title to a corporation might be estopped from questioning the effect of his own conveyance. So a mere stranger could not question such a corporate title. But I have not observed any decision that asserts, when a title is created by devise which vests in a corporation, for its own use, a larger quantity of property than the laws authorize, that the heir at law has no right to make objection. The authorities referred to do not lend countenance to such a doctrine."

The learned Judge refers to the cases of *Bogardus v. Trinity Church* and *Leasure v. Hillegas* (both cited *supra*), and continues: "These cases rest on the obvious principle that the capacity of the corporate body to become the grantee in the given case cannot be challenged by a party who does not stand in a position to raise the question. In such a position it would be true that the State alone could object to such corporate Act. But such instances are to be discriminated from that other class, where the corporation claims to take and hold by de-

vise, in contravention of law, and the heir of the devisor is the party complaining. In this latter situation the doctrine enforced in the cases cited does not apply . . . I have no doubt that the heir at law has a standing in court to raise such a contention, and that in a court of equity he would be entitled to prevail if he could succeed in establishing the proposition on which such defense rests." The court affirmed the judgment below, on the ground that the corporation was not prohibited from taking the property.

The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence, he says that the cases of sales above cited are decisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of *ultra vires*, as set forth in the modern cases, comes in play; and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor or his heirs, because it would be against justice and would accomplish a legal wrong. *Whitney Arms Co. v. Barlow*, 68 N. Y. 62.

The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced; and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back; and if it does, the counsel asks: Where is the difference in the two cases? It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made *inter vivos* by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that he stands in no position to ask the aid of the court to get him out of a situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his heirs it could be said that their ancestor had made a disposition of property which was absolutely his own in his lifetime, and in such a way that he could not question its validity, and that as he could not, they, succeeding only to his rights, were alike disabled.

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death; and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And if there were only a prohibition in words against holding the property, would the law not be doing a vain thing in handing it over to a corporation which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also?

Is not this an argument against the right of the corporation to take, if by holding it is thus

rendered liable to such a penalty? And is it not an agreement in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold?

One more statement must be noticed. It is said that as the Legislature, subsequently to the death of Mrs. Fiske, passed an Act which took away any limitation on the power of the university to hold property, this action of the legislative department of the government throws a strong light upon what is the policy of the State regarding institutions of learning, and, in the view of appellants' counsel, waives the right which might have existed on the part of the State to claim a forfeiture of the charter of the corporation. But the policy of the State in relation to what may be called its Mortmain Laws is to be gathered from its statutes of general application on that subject, and cannot be said to be altered by the passage of special Acts regarding particular corporations.

Nor do I think the counsel for appellants show any change in the general policy of the State by referring to the Acts of 1840 and 1841, already cited, as indicating a purpose to open the door to an unlimited accumulation of property by educational institutions in general. Those Acts, as has been said, did not enlarge the capacity of corporations to take property more than they could take under the General Laws. The Act of 1864, as to union and high schools, by which the board of education has power to take and hold property for educational purposes, and where permission was given to bequeath property to the State or to the superintendent of public instruction for the support or benefit of common schools, or to any county or district school commissioner, for such support, does not betray any change in the policy of the State upon this subject. The bequests spoken of are to the political subdivisions of the State or to the State itself as a corporation, but in its political capacity; and the property remains to be administered by the State officials or the officers of such political subdivisions, for the purposes of education in the common or high schools which the people are taxed to support. This is an entirely different thing from gifts to what may be termed a private educational establishment. Our courts have been quite unanimous in their opinions as to what the policy of the State was and is on this matter; and the extracts I have made regarding it, from the opinions of two very eminent former judges of this court, could be added to very largely by citing opinions of other judges in our own State, but it is not necessary.

However perfect may be the waiver in the Act alluded to, of the right of the State to forfeit the charter of this university on account of any alleged violation thereof, such Act can, of course, have no possible effect upon rights of property which vested at the death of Mrs. Fiske, and before the passage of the Act in question. *White v. Howard*, 46 N. Y. 144.

The counsel asks, What is to be done in regard to the real property in other States, if we hold this corporation has no power to take any more property? It is said the surrogate has found, as a fact, that the university had legal

capacity to take and did take by devise all the real property the title to which was in Mrs. Fiske at the time of her death, in those States. He says the title to real estate is governed by the laws of the States where the real property is situated, and that in the States in question it is held that a corporation can take under such circumstances as this case. This will devise no real estate to Cornell University.

It gives to the university \$40,000, in trust for the erection and furnishing and support and maintenance of a hospital; \$50,000, in trust for completing and perfecting the McGraw building; \$200,000, in trust for the McGraw library fund; and it gives and devises the residue of the property of the testatrix, if any, to be added to the last mentioned fund. It then directs that the estate of the testatrix shall be converted into money or available securities by her executor, as soon as it can be done, having in view the best interests of the estate. This direction to convert operated as an equitable conversion of the estate of the testatrix into money or available securities; and hence no real estate in other States has been devised by her to the university. It is needless to inquire what would have been the rule in case real estate in other States had been specifically devised to the university, while this court should at the same time decide that it held property up to its charter limit, and that it had no capacity to take or hold any more real or personal property than the amount specified in its charter.

Upon a review of the whole question as to the proper construction of the legislation, general and special, affecting this university, I am of the opinion that it had no power to take or hold any more real and personal property than \$8,000,000 in the aggregate.

II. Coming to the conclusion I have, on the first branch of the case, it becomes necessary to examine the second and only remaining question, viz.: Does this property, if taken and held by the university, exceed the amount which by law it can hold?

The decision of such question depends partly upon the view which should be taken of the character of the holding under which the university now possesses certain property, which is described in the finding of the surrogate, as property derived from the nation or State, and which he finds amounted to \$2,068,012.78, and which was made up, as he also finds, of western land contracts, \$439,884.22, and of western lands to the amount of \$1,648,178.56; and he states, as part of his finding, that this total of \$2,068,012.78, was due or payable by the university to the State, or, in other words, that the university owed the State that sum, and consequently it should not be regarded as any part of its property. This finding has not been concurred in by the general term, which has modified it by holding that the same is to be taken into account as part of the property of the university.

The state of facts under which the question arises is undisputed, and it becomes a question of law as to what is the proper legal inference to be drawn from the undisputed facts; and the decision of that question is reviewable in this court.

Stated as briefly as may be, the facts are these: In July, 1862, the Congress of the United States

passed "An Act Donating Public Lands to the Several States and Territories Which May Provide Colleges for the Benefit of Agriculture and the Mechanic Arts." A certain proportion of the public lands was in and by this Act donated to the different States for the purposes above expressed, but to such donation or grant there were attached several conditions, among which were these:

(a) The lands should be selected in the State making the selection, if there were public lands enough within it to permit it; if not, the secretary of the interior was directed to issue to each of the States land scrip to the amount in acres for the deficiency, which scrip was to be sold by the State and the proceeds thereof to be applied to the uses and purposes prescribed in the Act, and for no other use or purpose whatever.

(b) In no case should any State, to which land scrip was issued, be allowed to locate the same within the limits of any other State or Territory in the United States, but their assignees might locate it upon any of the unappropriated lands of the United States.

(c) All expenses of management, superintendence and taxes from the date of the selection of lands previous to their sale, and all expenses for the management, etc., of the moneys received from such sales, were to be paid by the State, so that the entire proceeds of the sales of the lands should be applied to the purposes named.

(d) All moneys derived from the sale of the lands by the States to which they were apportioned, and from the sales of land scrip, were to be invested by the State in stocks of the United States or of the States, or some other safe stocks, yielding not less than 5 per cent upon the par value of such stocks; and the moneys so invested were to constitute a perpetual fund, the capital of which should remain forever undiminished, and the interest of which should be inviolably appropriated by each State to the endowment and maintenance of at least one college where, among others, agriculture and the mechanic arts should be taught.

(e) If any portion of the invested fund, or any portion of the interest thereon, should by any action or contingency be lost or diminished it was to be replaced by the State to which it belonged, so that the capital of the fund should remain forever undiminished; and the annual interest should be regularly applied, without diminution, to the purposes mentioned in the Act. To these conditions the State was required to give its assent by legislative Act, and the grant was only authorized upon the acceptance of them by the State.

Any State taking the benefit of the provisions of the Act was required to provide, within five years, at least not less than one college, as provided in the Act. This State, by an Act passed May 5, 1863, duly accepted the grant and gave its assent to the conditions thereof. The comptroller was authorized to receive the land scrip (as the State had no public lands of the United States unappropriated within its borders), and to sell the same and to make all necessary arrangements, employ agents, etc., as he deemed expedient for effecting a judicious sale of such scrip. Land scrip representing 989,920 acres of land was then issued by the secretary of the interior to the comptroller, and

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was embraced in 6,178 pieces of scrip for 160 acres each. The comptroller sold about 76,000 acres at the rate of eighty-five cents.

In 1865 the Legislature chartered Cornell University, as a compliance on the part of the State with one of the conditions upon which it received the land scrip; and in the charter the income, revenue and avails which should be received from the investment of the proceeds of the sale of the land scrip were appropriated to the university, and were to be paid over to the trustees thereof for its use and for the purposes defined in the Act of Congress. This gift, however, was upon the condition that Ezra Cornell should give \$500,000 to the university and \$25,000 to the trustees of Genesee College, at Lima, in this State. Both gifts were made by Mr. Cornell.

Congress having donated this immense amount of land upon the conditions named in the Act, and the State having accepted such gift upon the conditions named, and having received the scrip and incorporated the university, and appropriated to it the income arising from the interest on the proceeds of the sales of such scrip, and the university having received the gift of half a million from Mr. Cornell, the great question then arising was in regard to the best means of disposing of such scrip for the best possible price, so that the income for the university should be increased to the greatest possible extent therefrom. The result of throwing into market such an enormous amount of the public lands as had been donated by Congress to the several States was a fall in the market value of the land, and, of course, of the scrip which represented it. In the fall of 1865 Mr. Cornell had purchased some scrip of the comptroller, representing 100,000 acres, for \$50,000, and had given his bond for that sum upon condition that all the profits which should accrue from the sale of the land should be paid to the Cornell University. In this condition of matters the Legislature passed an Act (April 10, 1866) which is as follows:

"Sec. 1. The comptroller is hereby authorized to fix the price at which he will sell and dispose of any or of all the lands or land scrips donated to this State by the United States of America, by Act of Congress approved July 2, 1862, and entitled 'An Act Donating Public Lands to the Several States and Territories, Which may provide Colleges for Instruction in Agriculture and the Mechanic Arts.' Such price shall not be less than at the rate of thirty cents per acre for said lands. He may contract for the sale thereof and sell the same to the trustees of the Cornell University.

"If the said trustees shall not agree with the said comptroller for the purchase thereof, then the commissioners of the land office may receive from any person or persons an application for the purchase of the whole or any part thereof at the price so fixed by the said comptroller, and may, if they are satisfied that the said person or persons will fully carry out and perform the agreement hereinafter mentioned, sell the same, or any part thereof, to the said person or persons. But said trustees, or such person or persons, shall at the same time make an agreement and give security for the performance thereof to the satisfaction of the comptroller, to the effect that the whole net avails and profits



from the sale of scrip, or the location and use by said trustees, person or persons, of the said lands, or of the lands located under said scrip, shall from time to time, as such net avails or profits are received, be paid over and devoted to the purposes of such institution or institutions as have been or shall be created by the Act, chapter 585 of the Laws of 1865 of the State of New York, in accordance with the provisions of the Act of Congress hereinbefore mentioned. And the said trustees, person or persons to whom the said lands or scrip shall be sold shall report to the comptroller, annually, under such oath and in such form as the comptroller shall direct, the amount of land or scrip sold, the prices at which the same have been sold, and the amount of money received therefor, and the amount of expenses incurred in the location and sale thereof.

"Sec. 2. The comptroller is authorized, from time to time as he shall see fit, to make such examination into the actions and doings of his vendees of said lands or scrip therewith as he shall deem necessary to ascertain and determine what are the net avails of said lands or scrip from the sale or from the location and use thereof by his said vendees.

"Sec. 3. This Act shall take effect immediately."

Under this Act the comptroller fixed the price of the land at fifty cents per acre, which, under all the circumstances, was considered a fair amount.

The trustees of the university did not apply to purchase the scrip under the Act of 1866; and on the 4th of August, 1866, the commissioners of the land office made an agreement with Ezra Cornell for the sale to him of all the remaining scrip undisposed of, represented by 5,087 certificates of 160 acres each.

The agreement was entered into between the commissioners and Mr. Cornell, under the authority of the above quoted Act of 1866; and as the decision of the question turns to a large extent upon the proper construction and meaning of this agreement, it is thought better, although the agreement is quite long, to insert it in full so the whole force and effect of the same may be observed. It is as follows:

"*This agreement.* Made this 4th day of August, 1866, between the People of the State of New York, through their commissioners of the land office, acting under and by virtue of chapter 481 of the Laws of 1866, of the first part, and Ezra Cornell, of Ithaca, New York, of the second part;—*Witnesseth,* That the said party of the first part hereby agrees to sell and assign and deliver to the party of the second part all of the agricultural land scrip now in the possession or ownership of the State of New York, consisting of 5,087 certificates, each representing 160 acres, on the following terms and conditions:

"*First.* That said party of the second part shall receive said scrip from time to time, as the same can be judiciously located, in parcels representing not less than 25,000 acres, paying therefor into the treasury of the State, on its assignment and delivery to him by the comptroller, at the rate of thirty cents per acre, in lawful money of the United States, or of the State of New York, or in other good and safe stocks or bonds, to be approved by the comptroller, and

drawing not less than 5 per cent interest per annum, and at the same time depositing with the comptroller stocks or bonds to be approved by him, to an amount equal to an additional thirty cents per acre, as security for the fulfillment by the party of the second part of the conditions of this agreement, so far as they relate to the execution of a mortgage to the State on the land to be entered and located with said scrip, on the fulfillment of which, said stock or bonds so deposited as security, shall be returned to said party of the second part.

"*Second.* That whenever any parcel of scrip sold and delivered to the said party of the second part, under and by virtue of this agreement, shall have been located by him or his agents, the said party of the second part hereby agrees that he will, without delay, furnish to the commissioners of the land office of this State, or to some member thereof, to be designated by a resolution of the board, a full and complete list and description of the land so located. And the said board of commissioners shall, within at least sixty days thereafter, and from time to time subsequently as may be found expedient, fix a minimum valuation by quarter sections, at which the same may be sold by said party of the second part. And said party of the second part further agrees that he will annually, and from time to time whenever required by the commissioners of the land office, render for their information to the comptroller, a full, just and true account of all sales and leases made by him, said report to be made in such form and under such oath as the comptroller shall direct, and will pay into the treasury of the State the whole of the net profits arising therefrom, which shall be ascertained by deducting from the gross receipts on sales the original cost of thirty cents per acre, the cost and expenses attending the location, management and sale of said lands, the taxes assessed and paid on the same by the party of the second part, and the interest at the rate of 7 per cent per annum on the several amounts actually expended and liabilities incurred for such purposes. But it is expressly agreed by the party of the second part that he will not sell any portion of said lands at a price below the minimum valuation thereon, which may, from time to time, be fixed by the commissioners of the land office, without first obtaining their consent to do so in writing.

"*Third.* That the stipulations and conditions of this agreement shall apply to each and every parcel of scrip assigned and delivered to said party of the second part under this agreement, and the comptroller shall defer or suspend further assignments and deliveries of scrip whenever the party of the second part fails to perform such stipulations and conditions in respect to any scrip sold and delivered to him under this agreement until they have been complied with. Except, nevertheless, that stocks or bonds as security for the return and mortgage of lands located under scrip to the party of the second part, shall in no case be required when there shall remain in the hands of the comptroller, by virtue of this agreement, mortgaged lands not released, equal in quantity to the scrip which may be issued to the party of the second part, and remain not located and mortgaged as provided by this agreement.

"*Fourth.* That as often as and whenever the party of the second part shall furnish a description of any of the lands selected and located by him under and by virtue of said scrip, he shall immediately execute a mortgage thereon to the people of this State to be approved by the Attorney-General, conditioned that the said party of the second part will fully keep and perform each and every of the terms and conditions he is required to do, keep and perform. And this agreement is declared to be a continuing agreement, and a suit or suits at law or in equity may be from time to time instituted and maintained thereon, and upon any or all of said mortgages, for any violation of such terms and conditions, whenever such violation may occur. Said mortgages shall be delivered to the comptroller or to the commissioners of the land office.

"*Fifth.* Whenever the party of the second part shall sell or dispose of any section of the lands acquired by him under this agreement and pay into the treasury of the State the net profits resulting from such sale, after the deductions hereinbefore mentioned and provided for, the party of the first part shall execute and deliver to the party of the second part a full and sufficient release of the portion sold from the lien of the mortgage, so that a clear title can be vested in the purchaser or purchasers.

"*Sixth.* That of the moneys arising from sales or leases made by the party of the second part, and paid into the state treasury as herein provided, a proportion equal to thirty cents per acre shall be added to and form a part of the fund known and designated on the records of the comptroller's office as the "College Land Scrip Fund," and the remainder shall constitute a separate and distinct fund, which shall be the property of the "Cornell University," to be known as the "Cornell Endowment Fund," the principal of which shall forever remain unimpaired, the income to be annually appropriated by the Legislature, and paid over from time to time to the trustees of the Cornell University, to be by them devoted to the purposes of the institution.

"*Seventh.* That the said party of the second part further agrees to purchase the whole of the aforesaid scrip, and select and locate lands under and by virtue thereof, and execute mortgages thereon, as hereinbefore provided, within four years from the date hereof, and that he will sell the lands within twenty years from date, and pay the net profits arising from such sales into the treasury of the State, and that until the same shall be sold and the net profits so paid, he will pay all taxes which may be assessed thereon, and preserve and maintain a title thereto unimpaired, to which the liens created by said mortgages shall attach.

"And if any event shall occur making it needful for the people of this State to incur any expense to preserve the lien of said mortgages, the same shall be paid out of the proceeds of said lands. And if, after the expiration of the period of four years hereinbefore fixed, any of said scrip shall remain with this State, and not have been paid for by the party of the second part, the same shall be released thereafter from the conditions and stipulations of this agreement."

There was no sum provided in the Act of 2 L. R. A.

Congress for the sale of the scrip. It was in the discretion of the State to sell it at any price it could obtain either at public or private sale; and it could sell the whole or any part of such scrip at any time, but the proceeds of such sale were to be invested under the Act of Congress and the income applied as therein provided for. If there be any ambiguity in the meaning of the agreement as a whole, it is not improper to see what meaning was attached to it by the persons who executed it, if possible, and also to look at the surrounding facts so that we may place ourselves in the same position as the contracting parties and thus learn what was in contemplation.

It is known that at the time of the passage of the Act of April 10, 1866, sales of the scrip had almost ceased. It was thought that there was a good chance that the land which might be located under this scrip would, in the future, greatly appreciate in value, and it was the wish of those interested in its welfare that the university should, in some way, reap the benefit of this increase. But it had no funds to purchase the scrip, and it needed ready money as an income to aid it in the discharge of its duties as an educational institution. Hence the problem was to find some one who would purchase the scrip and pay for it and then locate and sell the lands at the higher prices which it was hoped they would attain and give the profits to the university. A glance at the correspondence between Mr. Cornell and the comptroller, and at the minutes of the proceedings of the land commissioners, and the other evidence in the case, shows that there was no one else than Mr. Cornell who was ever thought of as a person who would take upon himself such burdens, troubles, labors and responsibilities for the purpose of giving away all the profits which might, in the future, arise from such sales. It is seen by reference to that correspondence that Mr. Cornell and the comptroller differed in regard to the construction of the Act, the comptroller holding that the Act really meant that the net avails of the scrip should be placed under the custody of the State, while it may be inferred that the idea of Mr. Cornell was that the profits, after paying the original thirty cents, and the additional thirty cents (if realized), as the purchase price of the scrip, might be placed as he should choose, provided the university should receive the benefit of the whole income arising from such profits. Under date of June 9, 1866, Mr. Cornell, in his letter to the comptroller, speaks of his differing with the comptroller in his construction of the law, but adds: "Appreciating, as I do, most fully your motives for desiring to give the utmost possible security and permanency to the funds which are, in a great degree, to constitute the endowment of the Cornell University, I shall most cheerfully accept your views so far as to consent to place the entire profits to be derived from the sale of the lands to be located with the college land scrip in the treasury of the State, if the State will receive the money as a separate fund from that which may be derived from the sale of scrip, and will keep it permanently invested and appropriate the proceeds from the income thereof annually to the Cornell University, subject to the direction of the trustees thereof, for the general purposes of the

institution, and not to hold it subject to the restrictions which the Act of Congress places upon the fund derivable from the sale of the college land scrip, or as a donation from the government of the United States, but as a donation from Ezra Cornell to the Cornell University."

Mr. Cornell thus plainly understood that the purchase price of the scrip from the State was thirty cents an acre, with a possible thirty cents more if he should realize that sum on the sale of the land, and that any sum beyond that came to him as profits on his sale of the scrip or land to third parties, and that sum being his own profits, he was willing to donate to the university, and for that purpose to pay the same into the treasury of the State, the same to be invested and the income therefrom to be paid by the State to the university for the general purposes of the institution, and not as part of the purchase price of the scrip, to be invested under the Act of Congress. It was after the receipt of this letter that the agreement was made, the subdivision (six) containing, in substance, the provision asked for by Mr. Cornell.

While in some portions of this agreement, if read alone and laying aside all knowledge of the contemporary history of the events surrounding it, there might arise some doubt as to the meaning of such portion, yet when read as a whole, and in the light of those events, I think no real and grave doubt can exist as to the meaning of this instrument. It seems clear to my mind that the State sold this land scrip at thirty cents per acre, with an additional thirty cents if so much should thereafter be realized upon the sale by the vendee of the State, and that this constitutes the purchase price of such scrip, which, when assigned to Mr. Cornell by the State, in accordance with the terms of the contract, he became the legal owner of. He, it is true, also agreed that his profits should be paid into the treasury of the State, but they were to be paid therein as profits, and not as any portion of the purchase price of the scrip, and they were to be paid, and were in fact paid, as profits of Mr. Cornell, and they were received under the agreement as the property of the Cornell University, the income of which was to be paid to it for its general purposes, and the principal was to constitute the Cornell endowment fund. I cannot see that in all this there was nothing but an agency created in behalf of the State, and that Mr. Cornell was such agent, and that the whole profits realized were really nothing but the proceeds of the sale of the lands by the State. The State on the contrary, by the very terms of the agreement, sold the scrip; and the legal title, by patents from the government of the United States, was vested in Mr. Cornell when he located the lands under the scrip which he had purchased, and took out his patents upon such location.

Neither can I see that the purchaser of the scrip gave, or intended to give, or was supposed to give, his profits as part of such purchase price. His agreement is plain, and in it he stated what such purchase price was, and what he would give for the scrip; and the fact that he agreed to pay his profits, if any were realized, into the treasury of the State, as the property of the university, which was to have the income thereof paid over to it for its general purposes

poses, does not, to my mind, render such profits any portion of the purchase price of the scrip. They were profits which he hoped to be able to realize in the future, but were entirely speculative in character and amount, dependent largely upon the judgment with which the lands were located, and the time and manner of their sale. All this Mr. Cornell was willing to do for this university; but the agreement shows that he was to do it as a gift of his own, and not as a mere agent of the State or of the United States; and that all the compensation he sought for his services, his trouble and his responsibilities, great and onerous as they were, was the fact that all should go to the university as his gift; and the State became the custodian of the profits under a duty to appropriate the income to the trustees for the general purposes of the university.

The counsel for the institution may be entirely right in his statements as to the law regarding this branch of the question, if he is right in the fundamental proposition as to the profits being a part of the purchase price or the avails of the sale of the scrip by the State; but until he can maintain the correctness of that proposition, I do not think his argument reaches the trouble. I do not think the proposition is correct. The profits were the avails of the sale of the scrip by Mr. Cornell, not in any sense the avails of the sale of the scrip by the State.

I think, also, that the agreement is fully authorized by the Act of April 10, 1866. It gives the right to the commissioners of the land office to sell the scrip or any part thereof for the price which was to be fixed by the comptroller, and not less than thirty cents per acre. The right to sell the scrip at the price fixed by the comptroller was based upon the fact that the persons who purchased at such price should also agree to pay over the net avails or profits from the sale by them of the scrip or lands located under it, as they should be received, and that they should be "devoted to the purposes of such institution or institutions as have been or shall be created by the Act, chapter 585 of the Laws of 1866" (the Charter of Cornell University), in accordance with the provisions of the Act of Congress before mentioned. This does not mean that all these possible profits are to be deposited in the state treasury, subject to the same rules that would obtain in the case of the purchase price of the scrip, but only that they shall be devoted to the institution created by the Act of 1866, in accordance with the provisions of the Act of Congress already mentioned. Of course the purchase price—that which was fixed by the comptroller—was to go into the treasury and be invested as provided for by the Act of Congress.

The reference in the above section of the Act of 1866 to such institution or institutions as have been or shall be created by the Act, chapter 585 of the Laws of 1866, can, of course, be to none but the Cornell University; and hence the provision in the agreement, that the profits shall all be devoted to that institution, was proper. As that university had complied with all the conditions imposed upon it by the State as a condition to its right to receive all the income from this fund, the right to it could not be taken from it. This the commissioners of the land office stated in their report to the con-

stitutional convention in answer to a request from that body for information as to this land scrip. And in this report, under date of July 22, 1867, the comptroller, as a member of the board of commissioners of the land office, and one of the officers who executed the contract with Mr. Cornell in August, 1866, stated as follows:

"In deciding what portion of the income of the money paid into the treasury under the agreement with Mr. Cornell would be subject to this limitation" (set forth in the Act of Congress) "as to its use and application, the commissioners of the land office assumed that the prohibition applied only to the purchase money received by the State on a sale of the scrip, and that the ultimate profits to be derived from the location and sale of the lands by the purchaser formed no part of the purchase money, and need not, therefore, be included. The nominal price which was fixed on the scrip by the Act of 1866, and for which it was sold, in consideration of the stipulation to pay over the net profits, being less than the market rates, it was stipulated in the sixth section of the agreement that an additional thirty cents per acre from the net profits should be added to the purchase money, thus increasing the price to sixty cents per acre, the current rate for the scrip at the date of the transaction, and limiting the purposes to which it may be applied in conformity with the terms of the grant by Congress."

Here, then, in addition to the language as used in the agreement itself, which, when read as a whole, seems to me quite plain, we find what Mr. Cornell was willing to do as set forth in his letter to the comptroller, above quoted from, in which he claims the Act permitted it, and he would donate the profits as a gift from himself to the university; and we find in an official report of one of the officers executing the contract, speaking for himself and associates, what was their understanding of this agreement. From all sources, the agreement itself, and the separate views of the parties to it, it appears the construction should be, and was, that the profits formed no part of the purchase price or the avails of the sale of the scrip by the State (over the thirty cents per acre if realized), and that such profits belonged to the university by the gift of Mr. Cornell, the vendee of the scrip from the State, the income to be paid to the trustees of the university for the general purposes of the same.

In 1868, by chapter 554, the Legislature authorized the comptroller to invest the moneys comprising the Cornell endowment fund in securities which were not authorized by the Act of Congress, provided such moneys formed any part of the purchase price or avails of the sale of the scrip by the State.

This must be taken as a legislative recognition of the fact that the agreement of sale to Mr. Cornell was for thirty (possibly sixty) cents an acre, and that all profits belonged to Mr. Cornell, but that by an agreement he had agreed to give them to the university for the general purposes thereof. We cannot assume that the State would have run counter to the express provisions of the Act of Congress by enacting that the purchase price of the scrip

might be invested in a manner forbidden by that Act.

The commissioners appointed under a joint resolution of the Legislature of 1878 reported (two out of three), that the profits formed part of the purchase price of the scrip, the third commissioner, Horatio Seymour, not concurring and being of the contrary opinion.

The Legislature took no action then upon the subject, but by the Act (chap. 817 of the Laws of 1880), it directed the comptroller, upon the request of the Cornell University, to transfer to it all moneys, securities, etc., constituting a part of the Cornell endowment fund, pursuant to which Act the fund was transferred to it. This was done because the university, under an agreement made with Mr. Cornell in 1874, with the consent of the comptroller and the commissioners of the land fund, had placed itself in the shoes of Mr. Cornell, so far as the contract with the State was concerned, and Mr. Cornell had conveyed to it all his right and title to the scrip, the lands located under it, and all land contracts existing. This was done at the wish of Mr. Cornell, who desired the university to take the further work under the contract, and the responsibility arising therefrom, and the university has paid to the State a portion of the amount coming to it as the purchase price (the additional thirty cents realized) for the sale of some of the lands.

These are the material facts upon which the question discussed arises, and thus the two bodies, the State and the university, stood at the date of the commencement of these proceedings, and thus they stand now. The State has made and makes no claim that any portion of these profits over the thirty cents an acre forms any portion of the purchase price of the sale of the scrip by it. The university, by its agreement with Mr. Cornell and by taking exactly his position, and by receiving the moneys and securities of the Cornell endowment fund by virtue of the Act of 1880, clearly has taken the position that it was the owner of this fund, and was not indebted to the State therefor. Its reports show that they (the trustees of the university) claimed that it had no debts, and they acknowledged none to the State on account of this fund.

If it existed, it would certainly be a somewhat onerous position for the State to be in. It must have all the proceeds of the sale of this scrip including in such case all the profits of the past and what may hereafter arise; it must pay all expenses, etc., after location, in the way of taxes, and all incurred in the management and disbursement of the moneys, and must invest in stocks of the kind described in the Act of Congress, and must forever guaranty the whole amount, so that if any of the principal is lost, it must be supplied by the State; and it must pay over the 5 per cent interest on the whole of this fund to the university. This, of course, does not weigh in case the decision were that the law is in that condition. For the reasons already given, I do not think it is.

Interpreted as we have interpreted the agreement and the Act of the Legislature of New York, the remaining inquiry is, Does the New York Statute, or the agreement under it, run counter to the Act of Congress creating this

land scrip trust? I think not. It provides that all moneys derived from the sale of the land scrip by the State shall be invested, etc., as therein prescribed. The scrip is to be sold by the State, which could not itself locate the land, and the avails of such sale are to be invested. The avails of the sale of the scrip by the State were the purchase price thereof; and if I am right, that the profits formed no part of such purchase price, but were the property of the vendee of the State, which he agreed to give to the university for general purposes, as his gift and to form the property of the university, then the Act of Congress has no concern with it.

Another consideration may be adverted to.

It is exceedingly doubtful, in my mind, whether the university can be heard to claim the existence of this alleged debt under the facts of this case. The State has made, and makes, no claim upon the university for the property or any portion of it. It was placed in its possession by virtue of the consent of the State, evidenced by the passage of an Act authorizing and directing it. The university has claimed to be the owner of it, and no one has drawn its rightful title in question. Can it now, while enjoying, without hostile claim from any source, the full control of the property, as its absolute owner, set up, as a reason why it should be allowed to take other property, that perhaps hereafter some one may make a claim that the property does not belong to the university, but that it is a trust fund originating in the Act of Congress? If the State or United States were to commence some proceeding, based on the counsel's argument, to reclaim possession of the property, there is nothing in the present attitude of the university which would necessarily estop or in any way conclude it from denying that any such trust exists, or that any case had been made for taking the possession of the property out of its hands. So far as appears, it seems that this assumed indebtedness is entirely gratuitous on its part, and that there is no creditor who makes the claim, no one who questions its title. It is going a good ways, under such circumstances, to lay much weight on a liability which, up to this proceeding, was never admitted by the university, and is not now asserted by anyone else. It would seem as if property, which was thus in the possession of a corporation, unclaimed by anyone else, was held by it within the meaning of its charter, and that the question in regard to the character of its holding was merely an abstract one, with which courts would not deal, at least so far as this proceeding is concerned.

In all these matters it must be borne in mind, the parties have all been acting in the most entire and perfect good faith. This was no scheme to avoid or evade the provisions of the 3 L. R. A.

Act of Congress. The price of sixty cents an acre, which the State got for the land, was all it was worth at that time. Its future value depended upon many contingencies. The State had the right to sell the scrip for such price as it might agree on with a purchaser. This it did. The university wanted money to pay its expenses. It could not very well wait for twenty or even five years for the purpose of seeing how the value of this scrip would appreciate, if at all. The Legislature was equally in earnest in its desire for the prosperity of the institution; so were the state officers, and, above and beyond all, so was Mr. Cornell, its generous founder and already the donor of such a large amount of money. Taking all the circumstances into consideration, the plan carried out was hit upon, and the amount of the Cornell endowment fund and the property arising therefrom must be regarded as a gift of the donor and founder, and not as a violation of either the Act of Congress, or of the Act of our own Legislature.

The agreement being valid and authorized by our state law, which was not in conflict with the law of Congress, the position of the university with regard to property must now be adverted to.

The university stands in this position, counting the two items of western lands and land contracts as its property:

Funds from individuals.....	\$ 598,588 65
Western lands.....	1,848,178 56
Western land contracts.....	439,334 22
	<u>\$2,686,101 43</u>

In the first item, however, is included the university buildings, farm, grounds, etc., as fixed by the surrogate, at \$69,683.88. The general term advances those figures by \$315,316.67, making the valuation \$385,000. Adding \$315,316.67 to the \$2,686,101.43, we have a total of \$3,001,418.10, without counting the college land scrip fund in the hands of the State as property.

We agree with the general term in the modifications made by it in the value of the university buildings and grounds, although we are probably bound by its findings, as there was contradictory evidence in regard to it.

This brings the property of the university above set forth, up to more than its permitted aggregate at the time of the decease of Mrs. Fiske, and no debts to be deducted therefrom.

Under such circumstances, the university could not take the various legacies bequeathed to it by her will.

*The judgment of the General Term must, therefore, be affirmed, with costs:*

All concur, except Finch, J., taking no part.

## TEXAS SUPREME COURT.

BRADSTREET COMPANY, *Appt.*,

v.

Robert GILL.

(....Texas....)

1. **The question of agency** should be left to the jury, where a party's letters, coupled with testimony that he had made reports to a commercial agency of the status of merchants, would support a finding that he was an agent of such agency, but there is other evidence from which the jury might conclude that he was not such agent.
2. **An agency is created** if relations exist which will constitute an agency, although the parties may not so intend. The effect of such relations cannot be affected by the private intention of the parties.
3. **If a libel consisted in reporting plaintiff's standing as a merchant, "in blank,"** the complaint should inform the court and the defendant of that fact, with such explanations as to what was meant by the report as may be necessary to show that it was injurious and defamatory. A complaint in such case which undertakes to state the substance of the language used, or its meaning, is bad on general demurrer.
4. **In an action against a foreign corporation** it is not necessary under the Texas Act of March 31, 1885, to allege that it had an agent or representative in the county, and that its principal office was also in the county; but it is enough to allege either that it had an agent or representative in the county, or that its principal office was there.
5. **A witness in possession of a key to the reports of a commercial agency** may be allowed, in an action for libel, to explain what was indicated by reporting a merchant's standing "in blank," which constitutes the alleged libel.
6. **Testimony of witnesses as to the general effect in commercial circles upon the credit of a person of a rating by a commercial agency** is inadmissible, being only the opinion of the witnesses about a matter that the jury were capable of judging.
7. **Publications of commercial agencies, issued to their subscribers generally, are not privileged communications.** They are only privileged when made in confidence to a subscriber who is interested in the pecuniary standing of the merchant reported.

(November 27, 1888.)

**A PPEAL** by defendant, from a judgment of the District Court of Bastrop County (Terchmueller, J.), in favor of the plaintiff in an action of libel. *Reversed.*  
(Commissioners' decision.)

**NOTE.—Privileged communications.** Where the defendant kept a mercantile agency, whose business it was to obtain information respecting the credit and responsibility of persons in business, and to furnish the same to subscribers to his agency, it was held that a communication made in good faith to a subscriber to such agency was privileged. "The business in which the defendant was engaged is sanctioned by the usages of commercial communities." *Ormsby v. Douglass*, 37 N. Y. 477; *Sherwood v. Gilbert*, 2 Alb. L. J. 323; *Townshend, Libel & S. 456*. The privilege accorded to a mercantile agency, as laid down in *Ormsby v. Douglass*, does not extend to the country correspondents of the

3 L. R. A.

The action was based upon an alleged false report concerning plaintiff's commercial standing, made in January, 1885, by the Bradstreet Company, an incorporated commercial agency. Plaintiff testified that he was cramped in business by the report complained of and that he had been compelled to refuse business on that account. Defendant contended that there was no evidence of damage to go to the jury.

The letters of the defendant company to John M. Finney, referred to in the opinion as tending to show that he was an agent of the defendant, asked him to correct certain reports furnished him, and evidence was given that he had done so.

By the twelfth assignment of error, referred to in the opinion, the appellant contended that if there was any evidence of damage it was caused by prior reports, and not by the report of January, 1885, complained of; and that the claim for damage for such prior reports was barred.

*Messrs. Labatt & Noble and Fowler & Maynard* for appellant.

No counsel appeared for appellee.

**Collard, J.**, delivered the following opinion:

The appellant, the Bradstreet Company, being a foreign corporation, was sued in Bastrop County, of this State, for damages for an alleged libel upon plaintiff, Robert Gill, a merchant in the Town of Bastrop. The business of the Bradstreet Company is that of a commercial agency. It is a foreign corporation, and does business in the United States and in Texas. It is alleged in the petition that the company is a foreign corporation, and that John M. Finney is its local agent in Bastrop County. Defendant denied that it had any agent in the county, and pleaded in abatement to the jurisdiction of the court. The court instructed the jury "that the evidence shows that defendant has an agent in Bastrop County, and that the court has jurisdiction of the case." It is insisted that this charge is error, because there was evidence tending to show that defendant had no agent in the county, and that the charge was upon the weight of evidence.

We think it was error to so charge the jury. The court should have instructed the jury that if Finney was employed or engaged by the company as its correspondent at the time the suit was brought, to furnish it with information as to the commercial standing of merchants and business men in Bastrop County, to be used by the company in its reports to its customers and subscribers in conducting the

agency. The circular of a mercantile agency, issued to subscribers generally, is not privileged; although a publication by such an agency, to persons having dealings with plaintiff, would be privileged. *Com. v. Stacey*, 8 Phila. 617. A communication by the proprietor of a mercantile agency, through his clerks, to his customers and their clerks, was not privileged. *Beardsley v. Tappan*, 5 Blatchf. 497; *Billings v. Russell*, 8 Boston L. Rep. N. S. 609, was the first reported case for libel against a mercantile agency. See *Townshend, Libel & S. 456, 457*; as to privileged communications, *Byam v. Collins, ante*, 129.

business of the company, then he would be its agent; and, he being a resident of the county, the court had jurisdiction in the case. The letters of the company to Finney, coupled with the testimony that he made reports to it of the status of merchants in Bastrop, would support a finding that he was such agent; but there was other evidence which the jury might have considered, and from which they may have concluded that he was not engaged by defendant as its agent at the time the suit was brought. The question of agency or not should have been left to the jury. It would have been error to instruct the jury, as requested by defendant, that Finney was not its agent. It was error to instruct them that he was such agent.

The court refused a charge asked by defendant to the effect that if it was not the intention of defendant to make Finney its agent, and if it was not the intention of Finney to become its agent, to find for defendant on the plea in abatement. The refusal to give the charge is assigned as error.

The intention of the parties, it is true, must control; but that intention is gathered from what was actually done or agreed by the parties, not from what they may have privately meant or supposed they meant. Agency or not is a question of law, to be determined by the relations of the parties as they in fact exist under their agreements or acts. If relations exist which will constitute an agency, it will be an agency, whether the parties understood it to be or not. Their private intention will not affect it. It was not error to refuse the charge.

The court overruled defendant's general demurrer to the petition. This ruling is assigned as error, because the petition does not set forth with sufficient certainty the alleged false reports; because it does not set forth with sufficient certainty the actual damages sustained by plaintiff; because it does not show whether plaintiff's suit is for libel or slander, and it does not show whether the suit is for actual or exemplary damages, nor how much is claimed as actual, and how much as exemplary, damages; and because "it fails to show that the defendant has an agency or representation, and principal office in Bastrop County."

The petition does not set out *in hac verba* the very language of the libel, but pretends to give its substance and meaning. Our rules of pleading require that the petition shall set forth "a full and clear statement of the cause of action, and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain his suit," etc. It has been many times decided by our courts that the common-law distinctions as to pleading, and its technicalities, do not prevail with us, but that a clear and logical statement of the cause of action is all that is necessary.

A clear statement of the facts constituting the cause of action cannot, however, be dispensed with. The character of the suit must be the guide to the pleader, and enough must be stated to constitute a cause of action. In a suit on a note it will be sufficient to state the substance and legal effect of the note. Not so in a suit for libel. A libel suit is based on language or its equivalent. The complainant in a libel suit should put the court in possession of

the libelous matter published—the language used, with such innuendoes as are necessary to explain what was meant by the language—and to whom it applied, so as to enable the court to determine whether the words are actionable.

In this case the complaint attempts to give the meaning of the words or libel only, without stating what the libel was. If the libel consisted in reporting plaintiff's standing as a merchant, "in blank" the complaint should have informed the court and the defendant of the fact, with such explanations as to what was meant by the report as were necessary to show that the report was injurious and defamatory. This is not a case where the pleader must, from the nature of the publication, resort to a verbal description of the slanderous matter, as it would be when movements, postures or pictures are used. Plaintiff could have stated his cause of action as it was, in clear terms. He has not done so. It is not sufficient, in this kind of a suit, to state the substance of the language used, or its meaning. We believe the general demurrer ought to have been sustained. See *Townshend, Libel & S.* §§ 829-835, inclusive.

The damages claimed by plaintiff are compensatory only. He suffered great damage in the conduct of his business and in his commercial standing. He does not ask for vindictive damages. The allegations of the petition were sufficient upon this subject. This is a suit for libel; it was unnecessary for plaintiff to so characterize it by averment.

In order to maintain the suit in Bastrop County, it was not necessary, as appellant seems to think, for plaintiff to allege that defendant had an agent or representative in the county, and that its principal office was also in the county. It was enough to allege that it had, at the time suit was brought, an agent or representative in the county, or that the principal office was in the county. Either allegation was sufficient.

The statute (Act of March 31, 1885) in force at the time the suit was brought provides that foreign private or public corporations, doing business in this State, may be sued "in any county where the cause of action, or a part thereof, accrued, or in any county where such company may have an agency or representation in the county in which the principal office may be situated, or," etc. There is no comma after the word "representation" in the Act, but to so read it would render it utterly senseless. Reading it with a comma, it becomes perfectly clear and intelligible, and means that "suit may be brought in any county where the company has an agency or representative, in the county where its principal office is situated, or," etc. The rules of construction demand that the Act should be read so as to give it sense and meaning—the meaning it was evidently intended to have. The seeming confusion in the language and punctuation was corrected by amendment, April 4, 1887.

We think there was no error, as insisted by appellant, in permitting witnesses, in possession of the key to defendant's reports, to explain what was indicated by reporting a merchant's standing "in blank." Plaintiff was reported in blank, and it was proper to explain by testimony what the blank represented. The petition should have contained allegations of the



fact as published, with the proper innuendo, as a predicate for the testimony. The testimony showing the effect of such a rating upon the credit of plaintiff—that is, the general effect in commercial circles—was inadmissible. It was only the opinion of the witnesses about a matter of which the jury were capable of judging, and which it was their duty to determine. If the rating meant that plaintiff had no credit and no capital, and such rating was false, it was libelous and actionable *per se*; and the jury should have been left to estimate its effect without the influence of the opinions of the witnesses, however competent to judge of such matters. Townshend, Libel & S. 297. If plaintiff suffered special damage by loss of credit, the injury and the cause of it were susceptible of proof—direct proof—by the persons with whom his credit suffered. If there was a general loss of credit, or breaking down of commercial character, and it was susceptible of proof, it was a matter of opinion for the jury only, unaided by the opinions of outsiders.

There was some evidence, though slight, tending to show that plaintiff's credit was injured by the publication, and that he suffered some damage. It was not the province of the court to judge of the weight of the evidence, any more than it was to direct the jury as to the amount of damages they should find for the injury. Besides this, it was the privilege of the jury to decide upon the general effect of the libel upon the plaintiff's character and credit as a merchant. We cannot, therefore, agree with appellant that the charge upon this subject was unauthorized by the evidence. The assignment of error on this point is untenable.

The twelfth assignment of error is also untenable. It does not appear from the evidence that, if plaintiff was damaged at all, it was by the publication made prior to January, 1885. On the contrary, it does appear that if he was injured it was by the publication of January, 1885. The jury expressly found their verdict on that publication, and we think correctly. Limitation did not bar the publication of January, 1885.

There are several assignments of error predicated upon the refusal of the court to give requested charges of defendant to the effect that the publication complained of was a privileged communication, and that, such being the case, malice in fact must be established to entitle to a recovery. These assignments may all be considered together. We cannot accede to the proposition that the publications of commercial agencies, issued to their subscribers generally, are privileged communications. They are only privileged when made in confidence to a subscriber who is interested in the pecuniary standing of the merchant reported.

In *Erber v. Dun*, tried in the United States Circuit Court, of Arkansas, Caldwell, J., expressed the correct doctrine, as we understand it. He said: "It is indisputable, under the evidence, that whatever was said orally by defendants about plaintiffs and their business was said in good faith, and in confidence to their subscribers, who were by reason of their business relations with the plaintiffs interested in knowing their financial and business standing, and in answer to requests made by their subscribers in relation thereto. This being so, the

statements thus made by defendants are privileged communications." 13 Fed. Rep. 580.

A case more nearly in point is that of *Sunderlin v. Bradstreet*, decided by the Court of Appeals of New York. In that case plaintiffs were merchants. Defendants were proprietors of a mercantile agency, and published a semi-annual volume, giving the standing and financial credit of merchants in the United States and Canada, and also weekly sheets to their subscribers in the City of New York. In the weekly sheet they published that plaintiffs had failed. The statement was false. Plaintiffs called on defendants for the names of the persons furnishing the information, which defendants refused to give, but published a retraction of the report the next week. It was held that "The defendants, in making the communication, assumed the legal responsibility which rests upon all who without cause publish defamatory matter of others; that is, proving the truth of the publication, or responding in damages to the injured party." It was further said that "The communication of the libel to those not interested in the information was officious and unauthorized, and therefore not protected, although made in the belief of its truth, if it were in point of fact false." 46 N. Y. 188.

The very question under consideration was recently, in 1887, before the Court of Errors and Appeals of New Jersey. *King v. Patterson*, 8 Cent. Rep. 357, 49 N. J. L. 417. The court was divided, but a majority of the court held to the doctrine announced in *Sunderlin v. Bradstreet*. Both sides of the question were fully discussed in the case by the disagreeing judges, and such authorities as bear upon the subject were cited and reviewed. We think the conclusion reached by a majority of the court a correct one.

A commercial agency is a lawful business, and, when conducted lawfully, is a benefit to society and trade; but no just reason can be given for a rule that would exempt it from liability for false and defamatory publications, when other citizens would not be exempt. If an individual voluntarily or for profit give false and injurious information to persons interested in the trade and commercial standing of another at the time the information is given, such communications would be privileged; but if he furnish the same information to others not so interested—to traders and merchants as a class—the communication would not be privileged. A commercial agency organized for the purpose of furnishing such information, keeping an intelligence office for profit, should, it seems to us, be held to the same accountability as the ordinary citizen. The acts of the agency properly done are no more meritorious or beneficial than when done by an individual, except that they may be more extended, and cover more transactions.

Impartial justice cannot imagine a sound reason for a distinction in favor of an agency. It amounts to this, at last, and no more: the business of a commercial agency is lawful when conducted lawfully. It will be protected so long as it does not transgress the rights of others. It is not entitled to any privileges denied the ordinary citizen. If it is a greater benefit to trade than the occasional acts of

the individual, because more extended and continuous in its operation, it is for the same reason capable of doing more harm by its false reports. Its wrong doing is more difficult to remedy. Because it has a monopoly of such intelligence is no reason for giving it a privilege to do a wrong by an improper publication of false statements, though the publication may be in the usual course of business it has adopted. It has the right, then, to the protection of a privileged communication, when made to persons at the time interested in the information, even though the information may be false; but when communicated to its general subscribers it has no such right.

If the publication is privileged, no suit can be maintained against it, unless express malice is shown to have instigated it, or such gross disregard of the rights of the person published as will be equivalent to malice in fact. Even when the communication is not privileged, malice must be shown to authorize a recovery; but in such case negative facts may indicate the malice, as that the publication was false, and was made without legal excuse. The malice may be inferred from the fact of a false publication of libelous matter. When the publication is privileged, the malice so implied from the false and defamatory publication is deemed to have been met and rebutted—in which case as before stated, malice in fact must be shown to warrant a recovery; and such malice is defined to be ill-will, bad or evil motive, or such gross indifference to the right

of others as will amount to a willful or wanton act. *Holt v. Parsons*, 28 Tex. 9; *Behee v. Mo. Pac. R. Co.* (Tex.) 9 S. W. 449, decided by the commission of appeals, Tyler Term, 1883, and authorities there cited.

It was shown in this case that the alleged libellous matter was issued to defendant's general subscribers in the United States. If the fact published was false and libelous, malice could be inferred from the fact (though it would not be proper to point out to the jury in the charge the facts from which the malice could be inferred); and, if it is shown that plaintiff's credit and reputation were injured by such publication, he could recover damages therefor—besides any other special damages he may have sustained in his business by reason of such publication.

There are a great number of assignments of error presented and apparently relied on in appellant's brief, some of which we may not have more than incidentally noticed; but we believe we have given our views of every material question raised on the trial, so that there need be no difficulty, in the law of the case as we understand it, upon another trial. Because of the errors above pointed out in the rulings of the court, we are of opinion the judgment should be reversed, and the cause remanded for a new trial.

**Stayton, Ch. J.:**

Report of Commissioners of Appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

## IOWA SUPREME COURT.

STATE OF IOWA, *App't.*,

*v.*

INTOXICATING LIQUORS,—P. C. CUMMINGS, Claimant.

(...Iowa....)

Under the Iowa Statute providing that the words "intoxicating liquors" as used therein shall be construed to mean "alcohol, wine, beer, spirituous, vinous and malt liquors and all intoxicating liquors whatever," liquor containing alcohol is, as a matter of law, intoxicating, however much it may be diluted, and regardless of the fact that the quantity drunk at any one time would not produce intoxication.

(December 20, 1883.)

**A**PPEAL by the State, from a judgment of the District Court of Buchanan County (Ney, J.), in favor of the claimant in a proceeding against intoxicating liquors. *Reversed.*

**NOTE.**—*Intoxicating liquors.* Courts will take judicial notice that lager beer, ale, porter and any other liquor made of malt is a malt liquor. *Netso v. St. te* (Fla.) 1 L. R. A. 825. In New York, the courts take judicial notice that whiskey, brandy, gin, ale or strong beer are intoxicating liquors. *Rau v. People*, 63 N. Y. 279; *Excise Comrs. v. Taylor*, 21 N. Y. 173; *People v. Zeiger*, 6 Park. Cr. Rep. 355; *People v. Hart*, 24 How. Pr. 289; *Josephdaffer v. State*, 82 Ind. 402. In order to show the intoxicating properties of beer sold, evidence may be given of a chemical analysis of a similar article. *Com. v. Goodman*, 2 L. R. A.

**Statement by SeEVERS, Ch. J.:**

Certain liquors claimed to be intoxicating were duly seized under legal process. P. C. Cummings appeared and claimed to be the owner of such liquor. A trial was had before a justice of the peace, who found that the liquors were not intoxicating, and ordered that they be returned to the claimant. An appeal to the district court was taken, and judgment was rendered for the defendant. The State appeals.

**Mr. H. W. Holman** for appellant.

**Mr. E. E. Hasner** for appellee.

**SeEVERS, Ch. J.**, delivered the opinion of the court:

It is contended that the court erred in finding the liquors were not intoxicating. The case was submitted to the court upon the evidence of a single witness as to whether the liquors were intoxicating. Such evidence is before us.

The witness is a chemist, and made an anal-

97 Mass. 119. Medicated bitters "producing intoxication" are "intoxicating liquors" within the legal meaning of a statute making the sale of such liquors illegal. *James v. State*, 21 Tex. App. 358. Cider, which is an alcoholic beverage, cannot be sold in a State whose statute prohibits the sale of alcohol or fermented liquors. *Eureka Vin. Co. v. Gazette Print. Co.* 35 Fed. Rep. 570. Whether "peach cider" is an intoxicating beverage, is a question of fact to be determined by the jury under proper instructions. *Topeka v. Zufall* (Kan.) 1 L. R. A. 387.

ysis of the liquor, and he testifies that one portion thereof contained "2.42 per cent of alcohol by weight, and 8.03 per cent by volume; and the other portion contained 2.58 per cent by weight, and 8.23 per cent by volume." The witness, in response to questions asked him, testified as follows:

"Now what do you say to this . . . being an intoxicating liquor?"

"I do not think it would intoxicate the average drinker."

"Well, what do you say in regard to people who are not in the habit of using it?"

"I think it would intoxicate the larger portion."

"What per cent—how many out of a hundred—would become intoxicated on these goods that contain  $2\frac{1}{2}$  per cent of alcohol?"

"I think a fair proportion of them would."

"Of men generally?"

"Yes sir; if they would take a fairly large quantity."

"What do you say as to the  $2\frac{1}{2}$  per cent beverages producing the second effect of intoxication on the ordinary man?"

"I think it would produce that effect."

"On all who use it?"

"Nearly all."

The court must have found, under the foregoing evidence, that the liquors were not intoxicating. This finding has the force and effect of a verdict of a jury, and cannot be disturbed if more than one conclusion can be fairly drawn from the evidence.

Conceding the competency of the evidence as to the intoxicating character of the liquor, if the question to be determined rested alone on such evidence, we are disposed to think, under the settled rule prevailing in this court, it would be doubtful whether we could disturb such finding. We do not feel called on to determine such question. The statute provides that the words "intoxicating liquors," as used therein, "shall be construed to mean alcohol, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever."

Alcohol is therefore an intoxicating liquor, regardless of the fact that the quantity drunk at any one time would not have that effect. It is immaterial, in a statutory sense, what effect alcohol may have on the human system; it is an intoxicating liquor. However much it may be diluted, it must remain an intoxicant when used as a beverage. That is to say, the statute provides that alcohol is an intoxicant whenever and however used as a beverage; and no matter how it may be diluted or disguised, it so remains, simply because the statute so declares. The liquor in question contained alcohol, and therefore it, as a matter of law, was intoxicating. *State v. Yager*, 72 Iowa, 431, supports this view.

It further follows that the court erred in finding as it did, and in rendering judgment for the defendant.

*Reversed.*

*Robinson, J.*, assents to the conclusion reached, but does not agree to all the grounds upon which it is based.

## MINNESOTA SUPREME COURT.

NASH, *Appt.*,

v.

BREWSTER, *Resp.*

(—Minn.—)

**1. Where, upon a bona fide sale of seed wheat, to be sown on the land of the purchaser, the amount of wheat specified in the seed grain note or contract given therefor was contained in a particular bin containing a larger quantity, all of the same quality and value, out of which it was agreed the purchaser was then and there entitled to take away the number of bushels purchased,—*held*, sufficient evidence of a sale and delivery of the wheat at the date of the note as between the maker and payee. Weighing or measuring is not absolutely essential to a completed sale, except when necessary to define the subject matter.**

**2. And where the seed grain described in such note or contract is actually and in good faith sold and furnished to the maker of the note for seeding purposes, pursuant to the agreement of the parties, and a portion of the amount received is subsequently sold or otherwise appropriated by him, and not sown upon the land designated, that fact will not defeat the lien of the seller, under the statute, for the price of that portion of such seed grain actually sown upon the land, upon the crop grown therefrom.**

**3. The statute authorizes the holder of a seed grain note, upon condition broken, to take possession of the crop raised from the seed for which it is given, and the holder thereof may in such**

case enforce his lien as against the holder of a subordinate lien thereon who has taken possession, and may maintain an action against him for the conversion thereof.

(December 21, 1888.)

**A**PPEAL by plaintiff, from an order of the District Court of Grant County (Brown, J.), granting a new trial after a verdict for plaintiff in an action for the conversion of certain wheat. *Reversed.*

The facts are stated in the opinion.

*Messrs. Parsons & Brown*, for appellant:

When property is sold, to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent.

*Benj. Sales*, Corbin's 4th Am. ed. pp. 428-440, §§ 469-487.

While certain cases apparently oppose this doctrine, they in reality are in harmony with it.

See *Chapman v. Shepard*, 89 Conn. 413; *Woods v. McGee*, 7 Ohio, pt. 2, 127; *Hutchinson v. Hunter*, 7 Pa. 140. See also *Kingman v. Holmquist*, 86 Kan. 735, and cases there cited.

*Messrs. R. H. Marden and George Ketcham* for respondent.

*Vanderburgh, J.*, delivered the opinion of the court:

The seed grain note described in the complaint, upon which a recovery is sought by the

\*Head notes by the COURT.

plaintiff, contains the requisite statutory provisions, and was filed in the proper office on the day of its date. Lovejoy, the maker of it, occupied the premises therein described under a lease from the owner, one Toombs, and bought the wheat to sow thereon. He actually and in good faith purchased the 200 bushels mentioned, at seventy-five cents per bushel; and the evidence tends to show that he sowed 120 bushels of the same upon the land upon which the crop in dispute was raised, and of the balance he exchanged, with plaintiff's consent, sixty or seventy bushels with defendant for other seed wheat of a different kind, which it was expected would ripen earlier, and which was also sown; and the rest was otherwise used by him. Plaintiff recovered a verdict for \$90 and interest in this action, which is in form for a conversion of the wheat grown on the land from the seed so purchased, and appeals from the order setting it aside.

1. Lovejoy sowed the wheat and caused it to be harvested. After it was stacked, Toombs took possession of it under the stipulation in his lease giving him a lien on the crops raised on the land, caused the same to be sold, and it was bid off by the defendant, and was thereafter threshed and put into Toombs' granary. Both Toombs and the defendant denied the plaintiff's right to the wheat or the proceeds, and their testimony shows that they appropriated the same with full knowledge of plaintiff's rights and claims, and assert a prior and superior claim of title thereto under the foreclosure, which is set up as an affirmative defense in the answer; and it sufficiently appears that a demand by plaintiff would have been unavailing, though he swears that he made it. Under the statute the plaintiff was authorized to take possession of the grain upon which the lien was given for the purpose of enforcing the same, and we think the evidence in the case amply sufficient to show a conversion of the same by defendant.

2. There is also evidence tending to show that Toombs waived his lien in favor of the plaintiff before the wheat was sold and delivered to Lovejoy, and it is not claimed that Brewster, who bought the wheat as a favor to Toombs, occupied any better position than the latter. Toombs admits that he asked the plaintiff about seed wheat for Lovejoy, and informed him that he had rented him his farm, and he helped haul the wheat away, knowing it was furnished for seed; and the plaintiff testifies that Toombs requested him to let Lovejoy have the wheat, and represented that the latter could give him a first lien on the crop, and that he let Lovejoy have the wheat with the understanding that his lien for the seed was first. The court charged the jury that the plaintiff's lien was first if the seed was actually sown, and to this no exception was taken by the defendant's counsel, and the rejected instructions asked by them did not embrace the same proposition. It is unnecessary to decide in this case, therefore, the question whether the lien for seed grain takes precedence of a provision in a lease in the nature of a mortgage upon the crops, to be subsequently raised on the land, made before the purchase of the seed.

3. The principal questions, however, argued in this court, and those upon which the case  
2 L. R. A.

turned in the court below on the motion for a new trial, are whether there was a compliance with the statute as respects the delivery of the seed wheat to Lovejoy, and the use thereof in seeding, so as to give effect to the seed grain note as a lien on the crop. It is claimed that the seed was not furnished until after the execution of the note, because the 200 bushels therein described were a part of a larger quantity stored in the same bin, and was not separated or hauled away at the time.

It is held in *Kelly v. Seely*, 27 Minn. 388, that the contract must be executed, and the sale completed, at the time the note is given. We have no doubt that upon the evidence, and for the purposes of the contract, the sale in this case must be deemed completed at the time of the execution of the note, and that, as between the parties, at least, the title passed. The transaction appears to have been *bona fide*, and the evidence, which was uncontradicted, tended to prove that the wheat in the bin of which the 200 bushels was a part was all of the same kind, and Lovejoy had the same right to take that amount from the bin, and remove it, as he would if it had been separated. He was given permission to haul it away by the load and the plaintiff was in the mean time to be the bailee of the same. It was unnecessary to put the parties to the extra trouble of handling it twice in the granary, or to remove it all in one day. The evidence was sufficient to warrant the jury in finding that it was the intention of the parties that the title should presently pass; and in such cases it is a question of intention to be gathered from the circumstances. Weighing or measuring is not absolutely essential to a complete sale, except when necessary in order to define the subject matter. *Windsor v. Leonard*, 24 Pa. 14.

It might be more conclusive or satisfactory, but, if the evidence was sufficient to show the intention of the parties, and the vendee had the absolute right to take away the amount sold at the time, it is sufficient. *Burrows v. Whitaker*, 71 N. Y. 291; *Hatch v. Standard Oil Co.* 100 U. S. 124 (35 L. ed. 554).

Accordingly, though the authorities are not uniform, we think the rule is quite well established that, upon a sale of a specific quantity of grain, its separation from a mass, indistinguishable as to kind, quality or value, of which it is a part, is not necessary to pass the title, where the intention to do so is otherwise made manifest. *Kimberly v. Patchin*, 19 N. Y. 330; *Russell v. Carrington*, 42 N. Y. 122; *Loddell v. Stowell*, 51 N. Y. 75; *Chapman v. Shepard*, 39 Conn. 418; *Hurf v. Hires*, 40 N. J. L. 581-586; *Chase v. Washburn*, 1 Ohio St. 244; 6 Am. Law. Rev. 450-458; 2 Schouler, Pers. Prop. § 258; 1 Benj. Sales, Corbin's notes, § 395. etc.

It was competent for the parties to make themselves tenants in common of the wheat in a particular bin by the sale of a part, and in such case the plaintiff might sever and take his own at any time. His legal rights were as well defined and complete as if his portion had been measured out and placed in a separate bin on plaintiff's premises, and in his care. *Channon v. Lusk*, 2 Lana. 311.

Of course the rule above stated would not apply where the basis for it is wanting; that is

to say, except where the mass is ascertained, and is of uniform quality and value.

4. It is also contended that the exchange of a portion of the 200 bushels by the vendee, and his failure to sow the amount named in the note, were fatal to his lien under the rule established in *Kelly v. Seely*, *supra*.

But in that case the transaction appeared to be fraudulent. The note did not express the amount delivered or sold, as the statute required, and "None was to be furnished or received until after the execution of the note, and nearly half of it (at least) was not furnished or received at all. The amount of wheat stated in the note was then never furnished or received, and consequently the note does not state the amount furnished or received."

But that is not this case. Here the sale was made and note given in good faith. The note does express the amount sold and received, and there was, as we have seen, a sufficient delivery of the grain at the time the note was given. Of course, the vendor ran the risk of a subsequent diversion of it to other purposes. But the fact that by mutual agreement a part of it

was exchanged for other seed wheat, which took the place *pro tanto* of the amount exchanged therefor, did not render the contract of no effect.

As the plaintiff on this appeal only claims a lien upon the product of the identical wheat delivered and sown, we are not called upon to decide the question whether his lien also extended to the crop raised from the wheat substituted for that furnished by him. We are satisfied, however, that the mere fact that the vendee failed to sow the entire quantity purchased did not deprive plaintiff of his lien upon the crop grown from that portion of seed sold and actually sown. Otherwise, miscalculation as to the amount needed, or destruction or waste of some of the seed furnished, might destroy the security for the whole.

This case does not fall within the rule in *Kelly v. Seely*, as properly understood and applied; and the verdict is amply supported by the evidence.

*The order granting a new trial is reversed, and the case is remanded, with directions to render judgment for plaintiff upon the verdict.*

## ILLINOIS SUPREME COURT.

NEW YORK & CHICAGO GRAIN & STOCK EXCHANGE, *Appt.*,

v.  
CHICAGO BOARD OF TRADE *et al.*

(.....III.....)

1. **The doctrine that when private property is devoted to a public use and becomes affected with a public interest it ceases to be *juris privati* only and is subject to public regulation, applies to the furnishing of market reports to the public by the Chicago Board of Trade.**
2. **The Chicago Board of Trade cannot after having so conducted its affairs for a long term of years as to create a standard market for agricultural products, and in concert with telegraph companies built up a system for the instantaneous and continuous indication of that market, until such system has become impressed with a public interest, be allowed to discriminate between persons, and say that one shall and another shall not receive the market reports, when all are equally willing to conform to reasonable rules on the subject and pay for the information.**
3. **Hence, held, that the Chicago Board of Trade, and the telegraph companies acting in connection with it, have no right to refuse to furnish the New York & Chicago Grain & Stock Exchange, an Illinois corporation organized for buying and selling grain, with the regular telegraphic "ticker" market quotations—it appearing that such Exchange was willing to conform to the regulations of the Board of Trade in reference to furnishing such quotations, and to pay for the same, and that it was not engaged in a gambling or "bucket shop" business.**

(January 25, 1889.)

**A** PPEAL by plaintiff, from a judgment of the Appellate Court, First District, affirming a decree of the Circuit Court of Cook & L. R. A.

County, dismissing a bill for an injunction. *Reversed.*

The bill was filed by the New York & Chicago Grain & Stock Exchange against the Board of Trade of the City of Chicago, the Western Union Telegraph Company, and the Gold & Stock Telegraph Company, to restrain the defendants from removing telegraphic instruments and severing the wire connecting plaintiff's place of business with the "ticker" circuit, by which market quotations were transmitted.

The facts, and questions presented, are stated in the opinion.

*Messrs. Bisbee, Ahrens & Decker*, for appellant:

Whenever private property of whatever kind is used in such a manner as that the public interest is affected by it, then reflexively the property or franchise or whatever it may be, is also affected with a public interest and ceases to be *juris privati*.

Hale, De Portibus Maris; *Munn v. Ill.* 94 U. S. 118 (24 L. ed. 77); *Hockett v. State*, 2 West. Rep. 764, 105 Ind. 250; *State v. Nebraska Teleph. Co.* 17 Neb. 126; *Pensacola Teleph. Co. v. Western U. Teleph. Co.* 96 U. S. 9 (24 L. ed. 710); *State v. Bell Teleph. Co.* 38 Ohio St. 296; *Mo. v. Bell Teleph. Co.* 23 Fed. Rep. 539; *American Rapid Teleph. Co. v. Connecticut Teleph. Co.* 49 Conn. 852, 44 Am. Rep. 237; *Allnut v. Inglis*, 12 East, 527; *Southern Express Co. v. Memphis etc. R. Co.* 13 Cent. L. J. 68, 8 Fed. Rep. 799, 2 McCrary, 579; *Southern Exp. Co. v. St. Louis etc. R. Co.* 10 1<sup>st</sup> ed. Rep. 210, 869.

The information and news of the changes and fluctuation of the market as gathered by the Board of Trade is itself a species of property (*Kiernan v. Manhattan Quotation Teleph. Co.* 50 How. Pr. 194), and, however transferred by the Board of Trade to the telegraph company, and however transmitted by the tel-

ograph company, is property which from its very nature the public has an interest in.

Having procured this market information by whatever means, and having set it in motion over their circuits throughout the country, the defendant telegraph companies cannot depart from the objects and purposes of their own incorporation so far as to exercise the dangerous right of discriminating and monopolizing under any circumstances whatever. The general rule in regard to all such corporations is that they cannot discriminate against anybody, and devices that may be adopted to justify or protect or cover such an exercise of authority should be construed by courts as void, being against public policy.

*Horner v. Gravers*, 7 Bing. 743; *Craft v. McConoughy*, 79 Ill. 846.

**Mr. Sydney Smith**, for appellees:

The regulations of the Board of Trade as to the collection and transmission of market reports are valid.

*People v. Chicago Board of Trade*, 45 Ill. 112, 80 Ill. 134; *Pitcher v. Chicago Board of Trade*, 11 West. Rep. 38, 121 Ill. 412.

Under the rules of the Board of Trade, the market news and statistics are collected and compiled at the expense of the members and are their private property in their associated capacity.

*Kiernan v. Manhattan Quotation Teleg. Co.* 50 How. Pr. 194.

*Munn v. Illinois*, 94 U. S. 118 (24 L. ed. 77), relied on by appellant, simply reaffirmed the principle that where property is voluntarily devoted by its owner to such a public use that it "becomes affected with a public interest," the legislative power of the State may regulate this public use—not destroy the property itself, nor compel its owner to part with it, or with any interest in it—which principle bears no analogy to the question in this cause as appears from the opinion of *Chief Justice Waite*, where it is said: "Here is no attempt to compel these owners to grant to the public an interest in their property, but declare their obligations if they use it in this particular manner." See also opinion of *Chief Justice Breen*, in the same case in this court—*Munn v. People*, 69 Ill. 89.

That the Board of Trade has the legal right to control its own market news and statistics, gathered and compiled at its own cost and expense from funds contributed by its members; and to determine what telegraphic dispatches touching the same it will send directly from the floor of its exchange during business hours; and to whom they shall be sent; or whether it will send any such dispatches whatever, see—

*Metropolitan Grain & Stock Exchange v. Chicago Board of Trade*, 15 Fed. Rep. 847; *Morris Grain & Stock Exchange v. Western U. Teleg. Co.* 22 Fed. Rep. 23; *Bryant v. Western U. Teleg. Co.* 17 Fed. Rep. 826.

**Baker, J.**, delivered the opinion of the court:

The objects of the Board of Trade of the City of Chicago are: "to maintain a commercial exchange, and to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of

business disputes; to acquire and to disseminate valuable commercial and economical information; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits."

The association existed for some years prior to the 18th day of February, 1859, as a mere voluntary and unincorporated society of persons engaged in the grain, produce and commission business; and at that date it was incorporated by a special Act of the General Assembly of the State of Illinois, and was given power and authority to do and carry on business such as is usual in the management of boards of trade or chambers of commerce, and the specific powers enumerated in the Act of incorporation. Among the express powers delegated was authority "to establish such rules, regulations and by-laws for the management of their business and the mode in which it shall be transacted as they may think proper."

The growth and progress of the association in commercial influence has been commensurate with that of the city in which it is located. The initiation fee for admission to it is \$10,000; and it has some two thousand members. It maintains an exchange hall, upon the floors of which, between certain prescribed hours of each business day, the business of its members is transacted. It has been said, and with much show of reason, that the floors of this exchange hall stand in the gateway of commerce. The members of the board meet thereon to buy and sell; their trading is by open *visa voce* bidding, and when a purchase and sale is made memorandums thereof are taken by both parties to the transaction.

Four fifths of the grain and provisions produced in the States and Territories of the Northwest are bought and sold in this market, and the business there done is so vast in its proportions that it fixes the market prices of grain, breadstuffs and meats for the extensive territory that is tributary to Chicago, and seriously affects and to a considerable extent controls the values of the necessities of life throughout the United States and the civilized world.

For many years prior to August, 1883, the Board of Trade permitted the Western Union Telegraph Company, by its agents and servants in that behalf, to occupy and use its exchange hall, and there collect and transmit, without any restrictions whatever, reports on the dealings, fluctuations and changes of the market on the board. This information was sent by telegraph throughout the country, and delivered without discrimination to all persons who desired and would pay for the same. There were numerous customers of this commercial news department of the business of the telegraph company, and they were scattered over the land, wherever the business of buying and selling grain and provisions was followed. The Western Union Telegraph Company then had and still has a lease upon and control of the Gold & Stock Telegraph Company, which latter corporation, in turn, had and has a monopoly of the telegraphic instruments known as "tickers."

Telegraphic circuits were established by the Western Union Telegraph Company in Chicago and in other principal cities; and by

means of Morse instruments and these tickers market information passed to every office and place of business connected by wire with one of these circuits, and was automatically registered, so that every merchant or dealer provided with these instrumentalities, wherever his place of business might be, was instantaneously and from minute to minute and from hour to hour, during the business sessions of the Board of Trade, informed of all fluctuations and changes in the market prices of grain and other products as they occurred.

On the 29th of August, 1883, the Board of Trade amended its standing rules by adopting what is known as section 20 of Rule 4, which is as follows:

"The board of directors shall provide an efficient corps of market reporters whose duty it shall be, under such regulations as may be prescribed for their government, to ascertain the current market prices of such commodities as are dealt in by members of the association during the hours for trading prescribed by these rules, the reporting of which may be desired by any considerable number of correspondents, and also all changes which may occur in the same from time to time; such reports to be frequently communicated by telegraph to such approved correspondents in the City of Chicago, or elsewhere, as may desire the same and are willing to pay necessary charges for compiling and transmitting them by telegraph under such arrangements as may be made by the board of directors with any telegraph company for the performance of the service of transmission. The forwarding of such reports to any particular individual, firm or corporation shall be only on the condition that it is an accommodation service in which the Board of Trade assumes no responsibility beyond reasonable care in their compilation, and one that may be performed at the pleasure of the board, or if performed may be discontinued or withheld with or without previous notice. Any individual, firm or corporation, before being supplied with the reports herein provided for, shall make an application for the same in such form or manner as may be authorized by the board of directors, or by a committee appointed by it for that purpose before any reports are forwarded to the applicants. A list of all correspondents to whom such reports are sent shall be kept on file in the office of the secretary of the board, and shall be subject to the inspection of any member desiring to do so."

Since the adoption of this rule, the board, under a contract or arrangement with the Western Union Telegraph Company, has employed a corps of market reporters who collect and transmit from the floor of the exchange, over a wire owned by it, the occurrences on the floor of the exchange, showing the fluctuations and changes of the market right along, just as they transpire, during the day, to the central office of the said telegraph company. From this office such information is immediately retransmitted over the ticker circuits in the city, and over telegraph wires, to different points.

The expense to the board of its corps of market reporters is \$10,000 a year, and the telegraph company pays to the board \$750 a

month, making \$9,000 per annum for the market quotations; and the telegraph company collects compensation from the persons receiving the dispatches or connected with the ticker circuits.

The board furnishes to the telegraph company, from day to day, a list of the names of the approved correspondents, some 1800 or 1400 in number, to whom and to whom only the market reports are to be transmitted, and they are sent to these designated parties only. The theory of the Board of Trade and of the telegraph companies is that this commercial information, starting with the opening of business in the morning and giving the transactions on the floors of the exchange and the fluctuations and changes in the market from minute to minute and hour to hour until the close of the business day, is a private telegraphic message sent by the board to each of the persons designated in the list furnished in the morning; and on this theory the name of an officer of the board is added to the information collected and sent to the telegraph company, as evidence that the matter which has been sent in sections during the day is a telegraphic dispatch sent by authority of the Board of Trade as its own private message.

The appellant corporation, the New York & Chicago Grain & Stock Exchange, is organized under the Laws of the State of Illinois for the purpose of doing business in buying and selling grain on commission, and on the 29th of April, 1885, its place of business was at No. 140 Monroe Street, Chicago; and it had in use at said place, in its business of buying and selling grain on commission, one Morse instrument and two tickers, which were connected with the wires of the Western Union Telegraph Company, and by means of which the market information in relation to the changes and fluctuations of the market on the Board of Trade of Chicago was transmitted and delivered to it instantaneously and continuously during business hours; and which information it was using in and about its business.

At and before the time of the filing of the bill of complaint herein, the appellant, thus being in receipt of the market information in respect to the transactions on the board of trade, demanded the continuance of such information and offered to pay for the same and submit to all reasonable requirements in relation thereto. Appellees, however, insisted upon their right to remove the telegraphic instruments and sever the wire connecting its place of business with the ticker circuit. They threatened and were about to deprive appellant of the use of the wire and instruments and withhold from it the market reports; and thereupon appellant exhibited this bill of complaint, and upon the ground that the contemplated conduct and proceedings of appellees, the board of trade and said telegraph companies, would be disastrous to its business and would produce irremediable injury and damage, obtained a preliminary injunction in the Circuit Court of Cook County.

At a subsequent term of the court the cause was heard on bill, answers, replications and proofs; and the court found that appellant was not entitled to the relief prayed for in its bill, and said bill was dismissed for want of equity, and a decree rendered against appellant for



costs. This finding and decree was afterward affirmed in the Appellate Court of the First District; and the cause is now here on appeal from the judgment of the latter court.

The contention of the Board of Trade is that it is strictly a private corporation, and that both the individual and aggregate business of its members is essentially private business, and that the market news and statistics collected and compiled at the expense of the association are the private property of the association, and that it has a legal right to control such market news and statistics, and determine what telegraphic dispatches touching the same it will send directly from the floor of its exchange during business hours, and to whom they shall be sent, or whether it will send any such dispatches whatever.

The Board of Trade is a private corporation, and it was incorporated for the purpose of affording facilities to its members in doing business with each other. In their transactions upon the floors of the exchange they deal as principals with each other, but in respect to the outside world they are brokers and commission merchants for the producers, consumers, shippers and merchants whom they represent. For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessities of life throughout the country and the world.

The great power and influence which the board possesses in dictating market values is owing to the vast aggregation of products which are drawn to its portals for a market and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. The great bulk of this business, though in form and as between the members the mere private and individual dealings of such members, is in reality the business of the numerous producers, consumers, merchants and shippers for and on behalf of whom these members deal. A potential factor in attracting this accumulation of business to the halls of the exchange, and in vesting the board with this power to regulate and determine the market prices of grain and provisions, is the fact that many years ago the board admitted and invited the telegraph companies, which are quasi public corporations, to the floors of the exchange, and permitted and encouraged them to gather market quotations, showing the changes and fluctuations in the prices of the various products as they occurred, and send instantaneous information from the floors of the board, by means of telegraph lines and instruments, to all the principal towns and cities, and by means of ticker circuits to the places of business of all persons desirous of such information; which information was furnished to all persons and corporations without discrimination who were willing to receive and pay for the same.

In this way the business of the country in buying and selling agricultural products has been brought under the control of the market values for such products as fixed and deter-

mined on the Board of Trade; and the business of dealing in such products has been brought to conform to the method of receiving instantaneous and continuous market reports inaugurated and for years persisted in by the Board of Trade and the telegraph companies.

This market news is a species of property; and if the statistics with reference to the individual business of the members of the association and the aggregate business of its members had from the start been gathered and compiled at the expense of its members and for their sole use, it may be it would have been strictly private property held in trust by the board for the use and benefit of such members and wholly free from any public interest therein. But the board did not so exercise its franchises and so conduct its business, but admitted the telegraph companies to the floor of its exchange and permitted and encouraged them from day to day and year after year to gather these statistics of the dealings on the board and telegraph them immediately as they were made, throughout the land to whomsoever would pay for such information until the business of the country had adapted itself to these means and appliances, and the point was reached when the quotations upon the board were puissant to determine the market values of the products of the country; and all persons dealing in such products could not without the knowledge and benefit of these immediate quotations intelligently and safely so deal.

The facts that the Board of Trade is a private corporation and that the dealings between its members are private business, such as is transacted between dry goods, grocery and commission merchants, and that the statistics of these dealings collected as we have stated are private property, are not conclusive that such statistics are not charged with a public interest and that there is no duty due the public in respect thereto.

In the case of *Munn v. Illinois*, 94 U. S. 113 [34 L. ed. 77], the Supreme Court of the United States recognized and followed the doctrine that when private property is devoted to a public use and becomes affected with a public interest, it ceases to be *juris privati* only, and is subject to public regulation. The court there said: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

Assuming that these market quotations and reports are property, and the private property of the Board of Trade, yet if they have been so used by the board and by the telegraph companies with the knowledge and consent of the board as to become affected with a public interest, then they are subject to such public regulation by the Legislature and the courts as is necessary to prevent injury to such public interest.

The doctrine in question has application both to the property of individuals and of corporations, and it is therefore immaterial that any

such corporation may be a mere private corporation. If the interest is public, then it is necessarily to all alike, common to all and upon equal terms. The doctrine, as applied to the matter of these quotations, would forbid that a monopoly should be made of them by furnishing them to some and refusing them to others who are equally willing to pay for them and to be governed by all reasonable rules and regulations, and would prevent the Board of Trade or the telegraph companies from unjustly discriminating in respect to the parties who will be allowed to receive them.

The market information here involved is not collected by the board merely for the use of the members of the association. For many years it was gathered, disseminated by the telegraph companies, and sent to all alike who would pay for it, wholly regardless of any question of membership in the board.

The change that has been made by section 20 of Rule 4, in respect to this commercial news department, seems to be more colorable than substantial, and appears to be intended merely to enable the board to make a monopoly of such news.

At first the telegraph companies by their paid agents gathered the statistics and telegraphed them from the floors of the exchange. Now, the board appoints and pays the agents who collect the statistics and transmit them to the central telegraph office of the Western Union Telegraph Company, from whence they they are distributed to the approved correspondents; but nine tenths of the expense of this service of collecting the market reports is refunded to the board by the telegraph company.

The question here is not one of withholding altogether instantaneous quotations and information respecting the prices at which grain and provisions are being sold upon the market of the exchange, nor one of discriminating between its own members and such persons as are not members in giving such information. Before the board itself assumed to control the sending of this news, no discrimination was made in distributing it between those who were and those who were not members of the board; and since the change was made a very large proportion of the approved correspondents are not members, and the rule contemplates that persons other than members should be such correspondents.

The question is, Can the board so conduct its affairs for a long term of years as to create a standard market for agricultural products, and, acting in concert or combination with the telegraph companies, build upon a great system

for the instantaneous and continuous indication of that market and its fluctuations, until the public and all persons dealing in such products conform their business to this system, and until by the usage and custom of merchants, thus advanced by the methods adopted by the board and telegraph companies, such instantaneous quotations become necessary to the successful and safe transaction of business, and until such system has become impressed and affected with a public interest, and then be allowed to discriminate between persons and parties, and, where all alike are willing to conform to reasonable rules and requirements and pay for the information desired, say that one shall and another shall not have such information.

If the board has such right, and these corporations are lawfully permitted so to do, then they have the power to create monopolies and dictate who shall deal in the agricultural products of the country, and at will impoverish or enrich merchants, shippers and producers.

It is vain to say that the ordinary newspaper reports of the state of the market are all that are necessary to legitimate dealers in grain and provisions; the business of the country has outgrown such condition and this very largely through the methods adopted and introduced by appellees themselves. The fact that fourteen hundred persons, firms and corporations are in receipt of these instantaneous market reports and are willing to pay therefor the large fees and charges demanded of them for the receipt of the same, is proof positive that a business advantage is gained by immediate knowledge of the condition of the market. The persistent efforts of the Board of Trade itself to control these market reports are an indication of their estimate of their value.

There is no question involved in this case of gambling contracts or of so called "bucket shops." There is no evidence in the record tending to show that appellant is engaged in a gambling business or dealing in puts and calls, and it is admitted that the business it is doing is not in violation of law.

We think the case made by the bill of complaint and the proofs brings it within the rule announced by the Supreme Court of the United States in *Munn v. Illinois*, *supra*; and in our opinion it was error in the circuit court to dismiss the bill for want of equity and error in the appellate court to affirm the decree of dismissal. *The judgment of the Appellate Court and the decree of the Circuit Court are reversed, and the cause is remanded to the Circuit Court, with directions to enter a decree as prayed for in the bill.*

## PENNSYLVANIA SUPREME COURT.

COMMONWEALTH OF PENNSYLVANIA, *Pff. in Err.*,

Charles REYBURG.

(....Pa....)

1. Whether cider is vinous or spirituous is not

NOTE.—See *State v. Intoxicating Liquors*, ante 406.

2 L. R. A.

a question of law to be decided by the court, but of fact to be determined by the jury.

2. Where there is some testimony to the effect that persons using cider felt the effects of it the same as if they had been drinking whisky or beer, it is sufficient to carry to the jury the question whether the cider was a vinous or spirituous liquor.

(January 14, 1899.)

**E**RROR to the Quarter Sessions of Warren County, to review a judgment for the defendant, on a verdict directed by the court, on the trial of an indictment for selling "vinous, spirituous, malt and brewed liquors, and various admixtures thereof," without a license. *Reversed.*

The indictment was under the Act of May 18, 1887 (Pub. Laws, 108) which makes it unlawful "to keep or maintain any house, room or place, hotel, inn or tavern, where any vinous, spirituous, malt or brewed liquors, or any admixtures thereof, are sold by retail, except a license shall have been previously obtained," and imposes a penalty upon "any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors or any admixture thereof, without a license."

*Messrs. J. W. Dunkle, Dist. Atty., Geo. H. Higgins, Ex-Dist. Atty., and D. I. Ball,* for the Commonwealth, plaintiff in error:

Under such a law as this of 1887, an indictment charging the sale, without a license, of vinous, spirituous, malt and brewed liquors would undoubtedly be sustained and a conviction warranted, by proof of a sale of either whisky, brandy, gin, ale, beer or wine.

*State v. American Forester Powder Mfg. Co.* 9 Cent. Rep. 496, 50 N. J. L. 75.

It is the duty of the court to say, as matter of law, whether a particular liquor of well known use and character, as, for instance, whisky or beer, is within or without the statute; but in respect to "compounds, preparations in which the alcoholic stimulant is present, which are not of established name and character, and which may be . . . mere substitutes for the usual intoxicating beverages . . . the question is one of fact and must be referred to a jury."

*Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284.

*Messrs. George N. Frazine and James W. Wiggins* for defendant in error:

In the construction of a penal statute words of doubtful import should be construed not in a comprehensive, but in a restricted, sense—a popular and common sense, not a scientific, technical or peculiar one.

*Dunham v. Kirkpatrick*, 101 Pa. 86; *Schuykill Nav. Co. v. Moore*, 2 Whart. 477; *Gideon v. Tyson*, 5 Watts, 84; *Robertson v. French*, 4 East, 185; 1 Bl. Com. \*59.

**Green, J.**, delivered the opinion of the court:

The only question in this case is whether cider is a vinous or spirituous liquor. It certainly is not malt or brewed; and as the Act of 1887, under which the indictment in this case is framed, defines only three or four kinds of liquor as those which require a license to validate their sale, the only inquiry arising is whether cider, which the defendant did sell, is a vinous or spirituous liquor.

The learned court below charged the jury that there was no evidence that it was intoxicating, or that it had an intoxicating effect, and therefore the defendant could not be convicted. Without stopping to refine upon the meaning of the word *intoxicating*, or the degree

of alcoholic admixture which is necessary to render any liquor intoxicating, it is only necessary to say that the intoxicating quality is not the one which is prohibited by the Act; and hence an issue upon that question does not arise under the indictment. If, however, any liquor which is sold without license is either vinous or spirituous it comes within the prohibition of the Act. But the question whether cider is vinous or spirituous is not a question of law to be decided by the court, but a question of fact to be determined by the jury.

Of course if there is no evidence on the trial that a liquor is either vinous or spirituous, malt or brewed, it would be the duty of the court to say so to the jury and direct an acquittal for that reason. But if there is evidence on that subject, more than a *scintilla*, it is for the jury, and not for the court, to decide upon it.

Cider is defined by Worcester to be: "A fermented liquor made from the juice of apples; formerly used for all kinds of strong liquors except wine," and by Webster: "A drink made from the juice of apples. (Note.) The word was formerly used to signify the juice of other fruits and other kinds of strong liquor, except wine, but it is now appropriated to the juice of apples before and after fermentation."

Certainly in common acceptation cider is not understood to be either a vinous or a spirituous beverage; yet when fermented it doubtless contains a percentage of alcohol sufficient to bring it within the fair meaning of the term *vinous*; and although not the product of distillation, it may, when mixed with spirituous liquor, and sold in that condition under the name of cider, be regarded as "spirituous" within the meaning of the prohibition.

The evidence on the trial was very weak indeed. No skilled person having knowledge of the chemical composition of cider was examined, and there was no direct evidence as to whether the liquor sold as cider was vinous or spirituous. There was not even any direct evidence whether the cider sold by the defendant was fermented, but there was some testimony that persons using it felt the effects of it, the same as if they had been drinking whisky or beer. We think there was evidence sufficient to carry to the jury the question whether the cider sold by the defendant was a vinous or spirituous liquor.

We attach no importance to the argument adduced from a consideration of other Acts of Assembly. This is a criminal statute and must be strictly construed. If the article sold was a vinous or spirituous liquor, the defendant was guilty; if not, he was innocent, and should be acquitted; but whether it was or not was a question for the jury, and not for the court.

We do not mean to intimate that the mere unfermented juice of the apple is in any circumstances to be regarded either a vinous or spirituous liquor; but we do not know and cannot say, as matter of law, that its character may not be so changed by fermentation as to bring it within the meaning of the term *vinous*. Of course an admixture with spirits might render the compound spirituous.

*Judgment reversed, and new venire awarded.*

**Trunkay, J.**, absent.

## IOWA SUPREME COURT.

MONTROSE PICKLE CO., *Appt.*,  
v.  
DODSON & HILLS MFG. CO. *et al.*

(.....Iowa.....)

Garnishment process served within the State upon a resident common carrier will not reach property not actually within the State but in course of transportation by the carrier to a point without the State.

(December 18, 1888.)

**A**PPEAL by plaintiff from a judgment of the Keokuk Superior Court (Bank, J.), discharging a garnishee. *Affirmed.*

Statement by **Rothrock, J.:**

This is an action upon an account for merchandise sold and delivered by the plaintiff to the Dodson & Hills Manufacturing Company, defendant. An attachment was issued, upon the ground that the defendant was a nonresident of the State; and the Diamond Jo Line of steamers, a corporation, was garnished in the action, upon the claim or supposition that it had property in its possession, belonging to the defendant, which was liable to attachment. The garnishee answered, denying that it had any property in its custody subject to the writ.

Issue was taken upon the answer of the garnishee, and a trial was had by the court, and a judgment was rendered discharging the garnishee. Plaintiff appeals.

*Messrs. Anderson & Davis* for appellant.

*Messrs. Craig, McCrary & Craig* for appellees.

**Rothrock, J.**, delivered the opinion of the court:

At the time the action was commenced the plaintiff was a resident of this State. The defendant was a nonresident of the State, and a resident of the State of Missouri. Service of the original notice, and of the notice of garnishment, was made personally on the defendant in St. Louis, in that State. The defendant made no appearance in the action, and a default was entered against it, and what appears to have been a personal judgment was rendered upon the default.

It is not important to determine the effect of the judgment rendered upon service of the original notice out of the State. It is not a material question in the case.

The Diamond Jo Line of steamers is an Iowa corporation, with its principal place of business at the City of Dubuque. It is a common carrier of freight and passengers upon steamers to and from all points on the Mississippi River between St. Paul, Minn., and St. Louis, Mo. On the 30th day of September, 1887, said steamer

company received on board of one of its boats at Alexandria, Mo., some 500 or 600 barrels of pickles, for transportation to St. Louis. The property was shipped by the Dodson & Hills Manufacturing Company, at Alexandria, to the Dodson & Hills Manufacturing Company at St. Louis. The pickles were loaded on the steamer on the forenoon of that day. On the same day, and while the steamer, with the property in dispute on board, was on its way down the river to its destination, the garnishment notice was served on the steamer company at Dubuque, and one of its agents at Keokuk.

The question to be determined is whether the property was liable to attachment by garnishment. The superior court held that the garnishee was not liable, because the property was not within the jurisdiction of that court; that the defendant's title thereto was not doubtful; that it was capable of manual delivery, and, if within the jurisdiction of the court, it should have been levied upon and taken into custody by the officer executing the writ of attachment; and that it was not the subject of garnishment. This is the sole question presented to this court for determination.

The ground of the attachment was that the defendant was a nonresident of this State. An attachment issued upon this ground avails nothing, unless the defendant has property or debts owing to him within this State. Without such property or debts, there could be no service of the attachment, either by actual levy or by the process of garnishment. It is not claimed by appellant that any jurisdiction of the property could be obtained by seizing it outside the State. The contention is that, as the garnishee is a resident of the State, the *situs* or location of the property in question must be held to be in this State. This rule has been held to apply to debts owing by the garnishee to the defendant. *Mooney v. Union Pac. R. Co.* 60 Iowa, 846.

That was a case of garnishment of the wages of a railroad employé. The garnishee was held to be a resident of this State, and there was no contract that the wages due were to be paid in the State of Nebraska, where the employé resided and the garnishee had its principal place of business. It appears to us that the right to garnish the steamer company, and hold it for the value of the property in question in this case, presents a very different question. The law of attachment in this State does not contemplate that property not actually within the State, but located in another State, shall be the subject of garnishment. We need not cite the various sections of the statute upon the subject of attachment and garnishment. Its whole scope and tenor leads to the conclusion that the claim made by counsel for appellant cannot be sustained.

**NOTE.**—Garnishment on property in transit, *infectual*. Garnishment is ineffectual to bind property in the hands of an agent or servant (*Fowler v. Pittsburgh etc. R. Co.* 35 Pa. 22); or when held by a mere bailee, for his possession is that of the owner. *Hall v. Filter Mfg. Co.* 10 Phila. 370. In such cases the property should be attached by direct seizure. *Id.*, *Wade, Attachm.* 625. Where a public carrier is summoned as garnishee in respect to goods held

for transportation in an action against the consignor the presumption is that they are the property of the consignee; hence the carrier should not be held as garnishee. *Bingham v. Lamping*, 28 Pa. 840. See *Ill. Cent. R. Co. v. Cobb*, 48 Ill. 402; and compare *Walker v. Detroit etc. R. Co.* 49 Mich. 445. It is otherwise held in a case of money in the hands of an express company. *Adams v. Scott*, 104 Mass. 164.

The argument of the appellant is grounded upon the thought that when the garnishment notice is served the relation of debtor and creditor at once arises between the garnishee and the defendant. It is true the statute provides that a judgment may be rendered against the garnishee if he does not deliver the property to the sheriff. This is a right given to the garnishee. He may at any time, after answer, exonerate himself by placing the property at the disposal of the sheriff. Code, § 2986.

If property in a distant State may be reached by process of garnishment, in order to avail himself of this right the garnishee must transport the property to the sheriff holding the writ, and deliver it to him. The garnishee cannot be deprived of this right; and as he is an innocent party, he cannot be compelled to bring the property within the jurisdiction of the court.

The facts in this case are as good an illustration of the fallacy of this claim as can be given. The steamer company had taken this property upon one of its boats, and was under way, bound under its contract of affreightment to deliver the same at St. Louis. To avail itself of its right under the above statute, it would be required to ship the goods back to Keokuk, make its answer, and deliver the property to the sheriff. The law imposes no such obligation upon a garnishee; and yet, under the claim made by appellant, the garnishee must either do this or become the debtor of the defendant for the value of the property. The law puts no such hardship upon a garnishee. It is very different where a debt is garnished. It is a debt first and last. In such case the proc-

ess of the law does not practically compel the garnishee to become a debtor against his consent.

This identical question was determined by the Supreme Court of Wisconsin in the case of *Bates v. Chicago Railway Company*, 60 Wis. 296. In an elaborate opinion, in which many of the authorities cited by counsel in this case are reviewed, it was held that personal property under the control of the garnishee, but situated out of the State where suit is brought, cannot be reached by the process of garnishment. In that case, as in this, the property was in actual transit, and out of the State, when the garnishment notice was served. We do not think it necessary to do more than refer to that case, and the authorities therein cited. It appears to us in its reasoning to be eminently sound, and that no other conclusion could have been fairly reached; and the rule adopted has peculiar force when applied to an attempt to garnish a common carrier while transporting goods outside the State where the suit is commenced.

As was said by Chief Justice Breese in *Illinois Central Railroad Company v. Cobb*, 48 Ill. 402: "When the property has left the county, and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation and trouble of such process, merely because it had received that to be carried which the law compelled it to receive and carry."

It will be understood that we do not determine the question as to the right to garnish a carrier of property, where the same is within this State.

*Affirmed.*

## MINNESOTA SUPREME COURT.

MINNESOTA LOAN & TRUST CO., as  
Guardian, etc., *Rept.*,

v.

Franklin BEEBE *et al.*, *Appls.*

(.....Minn.....)

**\*Corporation as guardian, trustee, etc.**

The provisions of General Laws 1883, chap. 107 ("An Act to Authorize the Organization of Annuity, Safe-Deposit and Trust Companies"), granting to such corporations power to act as guardians of the estates of insane persons,—*held, valid.*

(January 11, 1890.)

**A** PPEAL by defendants, from a judgment of the District Court of Hennepin County (Young, J.), in favor of the plaintiff, as guardian of an insane person, in an action on the bond of a former guardian. *Affirmed.*

\*Head note by the COURT.

**NOTE.**—Private corporation may be trustee. It seems to have been considered formerly that no corporation could hold property subject to a use or trust in favor of another; but this view is not wholly obsolete. *Vidal v. Girard*, 48 U. S. 2 How. 187 (11 L. ed. 205); *Morawetz, Priv. Corp.* § 384. It is not necessary that the authority to assume a trust be conferred by express words, but it may be implied whenever the trust is in the furtherance of

The questions presented are stated in the opinion.

*Mr. E. W. Rossman* for appellants.

*Mr. Wm. J. Hahn* for respondent.

*Mitchell, J.*, delivered the opinion of the court:

This is an action by the plaintiff, as guardian of Robert Chambers, an insane person, upon the bond of his former guardian, to recover money due his estate. The principal question is as to the constitutionality of the provisions of "An Act to Authorize the Organization of Annuity, Safe-Deposit and Trust Companies" (Gen. Laws 1883, chap. 107, § 9, subd. 4), granting to such corporations power to act as trustee, assignee, receiver, executor of a will, administrator of an estate, guardian of the person or estate of a minor or guardian of the estate of any lunatic, imbecile, etc., and authorizing any probate or other court to appoint and commission any such corporation, authorized to do

the general objects of the corporation. *Vidal v. Girard*, 48 U. S. 2 How. 189 (11 L. ed. 205); *Chapin v. School Dist. No. 2*, 35 N. H. 445; *Phillips Academy v. King*, 12 Mass. 546; *Robertson v. Bullions*, 11 N. Y. 243. Property is devised or granted to a corporation, partly for its own use and partly for the use of others. The power of a corporation to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others. *Re Howe*, 1 Paige, 214.

business in this State, as such trustee, etc., in all cases where such court could lawfully appoint and commission a natural person; and providing that in such cases no bond, oath or other qualification should be necessary to enable such corporation to accept such appointment.

The contention of counsel seems to be that the Legislature has no right to grant to any corporation the power to act in any such fiduciary capacity. His argument deals in much criticism and denunciation of the statute, some of which might have some weight if addressed to the Legislature; but he entirely fails to point out any provision of the Constitution with which it conflicts. The sum of his argument is that such a statute is in derogation of the common law, or conflicts with prior statutes, and is impolitic. But none of these considerations go to the question of the validity of the Act. With our preconceived ideas on the subject, it might seem somewhat inappropriate to intrust the person of a minor to the custody of a corporation; but perhaps experience will prove that the objections to this are largely artificial and imaginary.

But this question does not arise in this case. While the statute authorizes these corporations to act as guardians of both the persons and estates of minors, it only authorizes them to act as guardians of the estates of insane persons. This action pertains solely to the estate of the ward, and the fact that the probate court has assumed to appoint the plaintiff guardian of both his person and estate will not, although unauthorized as to the former, affect the validity of the appointment as guardian of the estate.

To the appointment of corporations, organized for that special purpose, under well guarded statutes, to the position of trustee of a trust, executor of a will, administrator or guardian of an estate, or other place of trust, involving the custody and management of property only, there can be no possible objection on either constitutional grounds or considerations of policy. The common-law grounds upon which it was held that corporations could not act in any of these fiduciary capacities were purely artificial. The reason given by Blackstone why a corporation aggregate could not act as an executor or administrator is that it could not take the necessary oath; but even at common law, in England, this technical difficulty was evaded by the corporation naming an agent, called a "syndic," to whom letters were issued. Moreover, it is, of course, entirely competent for the Legislature to dispense altogether with an oath in such cases.

Another reason often assigned why a corporation could not act as a trustee was that, as a court of equity often enforced a trust by laying hold of the conscience of the trustee, therefore, inasmuch as a corporation has no conscience, it is not qualified to act as trustee. The reason most commonly given why a corporation could not act as trustee, executor, guardian, or in other such fiduciary capacity, was that such an appointment involved a personal trust, and therefore a corporation lacked one of the essential requisites of a good trustee—personal confidence. 1 Perry, Trusts, § 42.

But at least as to trusts, technically so called, this doctrine has long since been exploded, even 2 L. R. A.

at common law, as too artificial. *Tidal v. Girard*, 43 U. S. 2 How. 187 [11 L. ed. 205].

And there are now numerous instances in which corporations have been expressly empowered by statute to administer estates, and neither the validity nor policy of such legislation has ever before, to our knowledge, been questioned. 1 Morawetz, Priv. Corp. § 357.

In fact, in many of the States, particularly the older ones, this is fast becoming the favorite method of administering estates and executing trusts. The facts that such corporations have perpetuity of existence; that they are less liable than natural persons to sudden fluctuations of fortune; that, being organized for that special purpose, they can administer estates more efficiently and economically; and that, in case of large estates, it is often difficult to find a natural person who is both able and willing to accept the trust, and give the necessary bonds—have suggested the necessity and created the demand for such organizations.

The statute is criticised because it does not require the corporation to take an oath or give a bond, as in the case of natural persons. But this is purely a question for the Legislature. If they deem the securities deposited with the state auditor, and the other safeguards placed by the statute around the organization and management of such corporations, to insure the faithful execution of all trusts imposed upon them as an equivalent for the bond and oath required of natural persons, they have the undoubted power to so provide.

Other objections are made to these provisions of the Act which would not be entitled to notice, except for the earnestness with which they are urged by counsel. For example, it is urged that they amount to legislative interference with the constitutional powers of the probate court, to which is given jurisdiction over the estates of deceased persons and persons under guardianship. It need only be suggested, in answer to this, that the jurisdiction of the courts pertains to the execution of the laws, and not their enactment. This statute neither appoints any guardian or administrator, nor compels the courts to appoint any particular person. It merely provides that a certain class of persons shall be qualified to act in those capacities.

The suggestion that the Act is in conflict with section 33, art. 4, of the Constitution of the State, is equally untenable. This is not a special or private law, giving special or exclusive privileges, immunities or franchises to a particular corporation, but a general law for the organization of corporations for certain purposes, and defining their powers. There is nothing in the point that these provisions of the Act are not specified in its title. They are all germane to the subject there expressed, which is the organization and incorporation of annuity, safe-deposit and trust companies. This section of the Act is but an enumeration of the powers granted to such corporations; and it was never before heard that, in a general law for the organization of a particular class of corporations, the powers granted to them should be detailed in the title of the Act.

The contention that the plaintiff failed to establish a cause of action, because it did not prove the insanity of Chambers or the regularity of the proceedings in the probate court ap-

pointing it his guardian, is predicated upon an entire misconception of the status and probative force of the records of that court. In a collateral action, the letters themselves are conclusive of the regularity of the proceedings resulting in their issuance, as well as of the insanity of the

person upon whose estate they were issued. *Moreland v. Lawrence*, 28 Minn. 84; *Pick v. Strong*, 26 Minn. 308; *Davis v. Hudson*, 29 Minn. 27. *Order affirmed.*

*Vanderburgh, J.*, took no part.

## ILLINOIS SUPREME COURT.

Charles W. ROCKHOLD, *Plff. in Err.*,  
v.  
CANTON MASONIC MUTUAL BENEVO-  
LENT ASSOCIATION.

(.....ILL.....)

1. It is *ultra vires* a corporation created "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members," and declared by statute not to be an insurance company, to contract for "endowment insurance" payable to a member on his arriving at a certain age.
2. The plea of *ultra vires* is maintainable by such a corporation as a defense to an action for such endowment insurance, by a member charged with knowledge of the want of power to make such contract and whose payments of assessments to the corporation had not been retained by it to increase its property, but had been paid to those entitled thereto.
3. The beneficiary certificate containing such unauthorized agreement for endowment insurance will be valid in so far as it is payable to the beneficiaries on the death of the member; and when the member has not seasonably rescinded the contract and the benefits of the beneficiaries thereunder have intervened, he cannot recover from the corporation assessments paid by him, none of such assessments having been for endowment insurance.

(January 25, 1890.)

**ERROR** to the Appellate Court, Second District, to review a judgment reversing a

judgment of the Circuit Court of Peoria County, in favor of the plaintiff in an action of assumpsit. *Affirmed.*

The action was brought by Charles W. Rockhold against the Canton Masonic Mutual Benevolent Society, for the benefit contracted to be paid him on his arriving at the age of seventy years.

The questions presented are stated in the opinion.

*Messrs. McCulloch & McCulloch* for plaintiff in error.

*Messrs. Daniel Abbott and H. R. Benson* for defendant in error.

*Scholfield, J.*, delivered the opinion of the court:

Two questions are presented by this record. *First*, Was the clause in the policy in suit whereby defendant in error assumes to promise to pay to plaintiff in error "one dollar for each member of Division A," etc., within the power vested in defendant in error by its charter, and therefore obligatory upon it when the policy was delivered? *Second*, If it was not within the power vested in defendant in error by its charter, and therefore not obligatory upon it when the policy was delivered, has the promise since become obligatory upon the defendant by subsequent acts of the parties? They will be considered in the order stated.

*First*. The familiar rule is: a corporation, public or private, possesses and can exercise no other powers than those specifically con-

**NOTE.**—*Social incorporations; benefit societies.* In construing charters of social incorporations the object is to discover the intention of the parties; and to this end, and to carry out the objects of the organization, a liberal policy has been generally adopted. *Morawetz, Priv. Corp.* §§ 316-338; *Bacon, Ben. Societies*, § 48. When incorporated, benefit societies are not different in law from other corporations which have no capital stock and are not formed for the pecuniary profit of the stockholders. *Morawetz, Priv. Corp.* §§ 577-725. An association, the purpose of which was to endow the wife of each member with a sum of money equal to as many dollars as there are members of the association, to be raised by assessments on them, is not a "benevolent society." It is not intended to bestow any benefit or help without what was thought to be an equivalent. *State v. Trubey*, 37 Minn. 97; *Foster v. Moulton*, 35 Minn. 458; *State v. Critchett*, 37 Minn. 13; *Com. v. Wetherbee*, 105 Mass. 149; *Bacon, Ben. Societies*, § 51. A person who deals with corporations must, at his peril, not only notice the terms of their charters, but also all the general legislation of the State creating them, by which business with corporations is affected. *Morawetz, Priv. Corp.* §§ 642, 818. The laws and regulations determine the rights of the members and the association, and may be enforced by the parties and beneficiaries, according to their respective rights as therein provided. *Arthur v. Odd Fellows Ben. Assn.*, 20 Ohio St. 557, 560; *May, Ins.* § 552; *Bliss, L. Ins.* § 426; *Oseola Tribe Red Men v. Schmidt*, 57 Md. 108; *Union Mut. Assn. of Battle Creek v. Montgomery* (Mich.), 14 West. 2 L. R. A.

*Rep.* 880. In an action upon a benefit certificate, the society will not be allowed to assert in defense that the designation of the beneficiary in the certificate was one of a class of persons not included in the enumeration, in the charter, of those for whom benefits were to be provided. *Matt v. Roman Catholic Mut. Prot. Society*, 70 Iowa, 455; *Lamont v. Hotel Men's Mut. Ben. Assn.*, 30 Fed. Rep. 817, 420, 120 Ill. 121; *Lamont v. Grand Lodge Iowa Legion of Honor*, 31 Fed. Rep. 177; *Folmer's App.* 87 Pa. 135; *Elsley v. Old-Fellows Mut. Relief Assn.* 2 New Eng. Rep. 167, 112 Mass. 224; *American Legion of Honor v. Peiry*, 1 New Eng. Rep. 715, 140 Mass. 580; *Mutual Ben. Assn. v. Hoyt*, 46 Mich. 473; *Knights of Honor v. Nairn*, 60 Mich. 44; *Rice v. New Eng. Mut. Aid Society*, 5 New Eng. Rep. 813, 146 Mass. 248; *Bacon, Ben. Societies*, § 265. A member who is acquainted with its by-laws is chargeable with notice of the restrictions thereby imposed upon the power of the trustees to invest the funds of the association. *Red Jacket Tribe v. Gibson*, 70 Cal. 128.

*Acts ultra vires.* A corporation has no other powers than such as are specifically granted; or such as are necessary for the purpose of carrying into effect the powers expressly granted. *Ang. & A. Corp.* § 111. The corporation having been created for a specific purpose, not only can make no contract forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. *Ang. & A. Corp.* § 265. Whether or not an



ferred in this charter, or such as are incidental or necessary to carry into effect the purpose for which the corporation was created.

Among other corporations which may be organized under chapter 82, Rev. Stat. 1874, are corporations not for pecuniary profit. The provisions in that respect, pertinent here, are found in sections, 29, 30 and 31.

Section 29 provides that the certificate that shall be filed by the promoters of the corporation, with the Secretary of State, shall state, among other things, "the particular business and objects for which it is formed."

Section 30 provides that, upon filing this certificate, the Secretary of State "shall issue a certificate of the organization of the corporation, society or association, making a part thereof a copy of all papers filed in his office in and about the organization thereof, and duly authenticated under his hand and seal of state . . . Upon complying with the foregoing conditions, the corporation, society or association shall be deemed fully organized and may proceed to business," etc.

Section 30 invests corporations thus created with the usual attributes and powers of corporations, and concludes thus: "Associations and societies which are intended to benefit the widows, orphans, heirs and devisees of the deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies."

The organization of the defendant in error was in strict pursuance of these statutory provisions. The certificate filed by the promoters with the Secretary of State declared the purpose for which the corporation is formed to be "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members."

This is the measure of the powers vested in the defendant in error. The certificate of the Secretary of State could not, and it does not assume to, extend the corporate powers to any other purpose or object.

The policy or certificate in suit, so far as material to be read in this connection, is as follows:

*"This Certificate of Membership Witnesseth:* That the Canton Masonic Mutual Benevolent Society, in consideration of the representations made to it in the application for membership, and the sum of \$5 to it in hand paid by Charles W. Rockhold and the sum of \$1.80 to be paid by the said Charles W. Rockhold within ten days after due notice has been served upon him of the death of a member of this society, or upon his arriving at seventy years of age, or after he has been a member in good standing for twenty-five consecutive years, each member shall be assessed and shall pay to the secretary of the society a sum according to the class of which he is a member,—Do promise and agree to and with the said Charles W. Rockhold, his heirs, executors, administrators and assigns, well and truly to pay or cause to be paid to the said Charles W. Rockhold, or to his wife if living, if not, to his children, or to his legal representatives, the sum of \$1 for each member of Division A, within sixty days after due notice and satisfactory evidence that he is a beneficiary member, or of his death."

It is so manifest that the bare statement of the fact must be satisfactory, that the promise to pay a sum of money to a person upon his arriving at a given age is not included within or incidental to a promise to pay a sum of money to his widow or his children or his legal representatives upon his death. They are, upon the contrary, as distinct and independent as undertakings can be. The former is a species of life insurance known as "endowment insurance" (Bliss, Life Ins. § 6, p. 7; *Briggs v. McCullough*, 36 Cal. 542); while the latter, under the provision of the statute quoted, is not to be deemed insurance.

We are, therefore, of the opinion that the clause in question was *ultra vires* the defendant in error, and therefore was not obligatory upon it when the policy or certificate in suit was issued. *State v. Central Ohio Mut. Relief Assn.* 29 Ohio St. 399; and *People v. Nelson*, 46

incorporated benefit society can invoke the doctrine of *ultra vires* to avoid a contract must depend upon the general rules of law applicable to corporations. Bacon, Ben. Societies, § 285. By-laws of a corporation in contravention of the statute under which it is organized are *ultra vires* and of no effect. *American Legion of Honor v. Perry*, 1 New Eng. Rep. 715, 140 Mass. 580. The by-laws of such association are to be construed with reference to the statute. *Elsey v. Odd Fellows Mut. Relief Assn.* 2 New Eng. Rep. 697, 142 Mass. 224.

*How regarded under the various state statutes.* An association, being intended only for the benefit of widows, orphans, heirs and devisees of deceased members, no annual dues being required, and the members receiving no money as profit, or otherwise, while it is an insurance company, is such a one as under the Statutes of Illinois is exempted from depositing a guaranty fund; and this is so, although the members are subject to assessment for annual expenses, and although the officers who are also members, are paid for their services. *Commercial League Assn. v. People*, 30 Ill. 168. An association which pays half the total amount of the policy at the expiration of two thirds of the life expectancy of the member, and which, having no capital, depends solely upon a system of voluntary assessments and contributions, need not conform to the Deposit Laws of New York. *People v. Mutual Endowment & Accident Assn.* 27 Hun. 543, 17 Am. L. Rev. 133. An association to relieve the sick and to pay to members over seventy-five

years old a certain benefit, does not come under the general insurance laws. *Supreme Council Order of Chosen Friends v. Fairman*, 10 Abb. N. C. 162, 62 How. Pr. 390. Individuals associated together by no other tie than that of mutual indemnity, having paid officers, giving premiums for new members, and in which the sole condition of membership is health and probable duration of life, are engaged in insurance, and must conform to the Insurance Laws of Missouri. *State v. Citizens Ben. Assn.* 6 Mo. App. 163, 6 Cent. L. J. 491; *State v. Merchants Exchange Mut. Benev. Society*, 72 Mo. 143. An incorporation "for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members," was held not subject to the Insurance Laws of Ohio. *State v. Mutual Protection Assn.* 26 Ohio St. 19. *Hirschl. Fraternities & Societies*, 12. The National Mutual Aid Association, organized under the Laws of Ohio, is not included in the Act of Pennsylvania which taxes foreign insurance companies. *Com. v. National Mut. Aid Assn.* 94 Pa. 481. Under the peculiarities of the Iowa Statutes, an association, though having as its sole object the insurance of its members, was held not obliged to conform to the general insurance laws. *State v. Iowa Mut. Aid Assn.* 59 Iowa, 126; *Hirschl. Fraternities & Societies*, 14. An agent of the Connecticut Mutual Benefit Company was held properly convicted of the offense of soliciting life insurance without first obtaining authority. *Com. v. Wetherbee*, 105 Mass. 149.

N. Y. 477, are directly in point and conclusive as to this question.

*Second.* This court has held that while the contract of a corporation remains wholly executory, the corporation may interpose the plea of *ultra vires* as a defense to a suit for its enforcement; but where the contract has been fully performed by the party contracting with the corporation, and the corporation has received the benefits of such performance, it cannot invoke the doctrine of *ultra vires* to defeat an action brought against it on such contract (*Bradley v. Ballard*, 55 Ill. 415; *Dorst v. Gale*, 83 Ill. 136; *Bloomington Mut. Ben. Asso. v. Blue*, 8 West. Rep. 642, 120 Ill. 121; and counsel for plaintiff in error correctly insist that this last quoted rule is conclusive of the present question).

But it will be seen that the present case is totally different from the cases cited. The question there was between the corporation and a third party, in regard to money received by the corporation which, in legal presumption, tended to increase the property of the corporation. Here the question is between the corporation and one of its constituent members who is charged with full knowledge of the want of power in the corporation to make the particular contract. The assessments paid by the plaintiff were not paid to the defendant to be retained by it to increase its property, but to be paid out by it to other persons entitled thereto by virtue of beneficiary certificates or policies, and, since there is no evidence to the contrary, it is to be presumed this was done. No action therefore will lie by the plaintiff against the defendant to recover this money back. *Murphy v. Bidwell*, 52 Mich. 487.

The beneficiary certificate or policy is valid as a certificate or policy payable to the widow or children of the plaintiff upon his death, and void only as a certificate or policy payable to him after being a member in good standing for twenty-five years or upon arriving at seventy years of age. *Farmers & T. Bank v. Harrison*, 57 Mo. 503; *Bank of Wooster v. Steens*, 1 Ohio St. 235; *Vanatta v. State Bank*, 9 Ohio St. 27; *Utica Ins. Co. v. Cadwell*, 8 Wend. 302; *Beach v. Fulton Bank*, Id. 583.

Whether plaintiff might have rescinded the contract, and recovered back the premium paid, is not important to inquire, since to have done so, he must have acted promptly before the rights of third parties intervened. He has never offered to rescind the contract, but, upon the contrary, it is expressly agreed between the parties as follows:

"That said plaintiff has since the time of receiving said certificate paid all assessments, Nos. 1 to 51 inclusive; such assessments amounting in the aggregate to \$165.60, the same being all assessments for which said plaintiff was liable by virtue of holding said certificate and being a member of said society. But in no case has said defendant corporation exercised the power of paying, or collecting benefits to be paid, to living members of said society; and in no case has the plaintiff been required by said society to pay any such assessments; the defendant believing it had no power to make any such assessments."

Moreover, on the 28d of November, 1881, a little more than five years before plaintiff in error

became seventy years of age, he was notified by the defendant in error that it has been instructed by the State Auditor that it had no authority to insert the clause in question in the policy or certificate; and that, in consequence of such instruction, no more policies or certificates would issue with the clause in question. And it is agreed that of the 1836 members of class A, to which plaintiff belongs, only 597 members held certificates or policies, at the date when plaintiff in error became seventy years of age, with the clause in question; and that the policies or certificates of the remaining 1239 members were to be paid only to the widows, orphans and heirs of deceased members. And so, instead of attempting to rescind the contract, he has acquiesced in and abided by it with full knowledge of the extent of its validity.

It is true, as contended by plaintiff's counsel, that his rights under the contract could not be changed without his consent. But inasmuch as, at most, his rights were only to have the contract carried out as one to pay, at his death, to his widow and orphans, or to rescind that contract, it is plain that his rights have not been changed or altered by any act of the corporation.

*The judgment of the Appellate Court is affirmed.*

**Baker, J.**, having passed upon the case in the Appellate Court, took no part in the decision.

**Shope, J.**, took no part in the decision.

ATCHISON, TOPEKA & SANTA FE R.  
CO., *Appt.*,  
v.

Mark SCHNEIDER *et al.*

(...Ill....)

1. Under the Eminent Domain Act of Illinois it is not intended that the right given the jury to personally examine the premises is to be construed as permitting them to disregard the sworn testimony in fixing the assessment of damages.

**NOTE.—Eminent domain; rule of damages.** When an entire lot of ground is taken, upon which the owner is engaged in business, the cost and inconvenience of removing the business are proper elements of damage. *Chicago etc. R. Co. v. Hock*, 6 West. Rep. 697, 118 Ill. 587; *St. Louis etc. R. Co. v. Capps*, 67 Ill. 607.

**Party entitled to assessment by jury.** In condemnation proceedings either party is entitled to have a jury and the introduction of evidence and mode of conducting the trial after the jury is impaneled are according to the rules of practice in trials at law. *Union Mut. L. Ins. Co. v. Snee*, 10 West. Rep. 154, 123 Ill. 57. The compensation may be assessed by the same or different juries as to separate tracts of land described in the same petition. *Concordia Cemetery Asso. v. Minnesota & N. W. R. Co.*, 10 West. Rep. 573, 121 Ill. 200. It is proper to allow the party to be sworn to hear evidence and to assess damages as to other parties. *Concordia Cemetery Asso. v. Minnesota & N. W. R. Co.*, 10 West. Rep. 573, 121 Ill. 199.

**New trial.** The circuit and county courts are always open to condemn property under the Eminent Domain Act, and when engaged in a trial in vacation they have and exercise the same judicial powers in vacation as when in session, and may grant new trials. *Centralia & C. R. Co. v. Rixman*, 10 West. Rep. 600, 121 Ill. 215; *Bowman v. Venice & C. R. Co.*, 102 Ill. 493.

3. **The rule as to the assessment of damages** for property taken under the Eminent Domain Act is that where there is a conflict of evidence and the verdict is consistent with all the facts and circumstances in the case, it will not be set aside merely because the court may regard the weight of evidence in the record against it; but when it clearly appears that the amount fixed is wholly inconsistent with and contrary to all the proofs, it is the duty of the court to interfere and resubmit the case to another jury.

4. **Evidence of average monthly profits** of the business conducted on the premises sought to be condemned under the Eminent Domain Act is admissible when limited to the question of the loss which would be incurred by the suspension of business during the time necessarily consumed in moving.

5. **A new trial** as to the assessment of damages should not be refused for the reason that the railroad corporation seeking to acquire the property had entered thereon on giving bond pending appeal as provided by the statute, and had made such changes therein as would prevent a new jury viewing it as it was when the proceeding for condemnation was begun.

(January 25, 1889.)

**APPEAL** by petitioner, from a judgment of the Circuit Court of Cook County (Tutbill, J.), upon a verdict assessing the amount of damages for property sought to be acquired by petitioner for railroad purposes, under the Eminent Domain Act. *Reversed.*

The facts and questions presented are stated in the opinion.

*Messrs. Williams & Thompson* for appellant.

*Mr. W. P. Black* for appellees.

*Wilkin, J.*, delivered the opinion of the court:

This is a proceeding by appellant against appellees, under chapter 47 of our statute, to condemn certain lots on State Street in the City of Chicago for railroad purposes, on which appellees held leases. On the lots were two buildings numbered 574 and 578, the first held by Schneider, at a rental of \$60 per month, and the other by Hickey at \$110 per month. Both leases expired April 30, 1889.

The building occupied by Schneider is a two story frame the lower story being used by him for the manufacture and sale of cigars, and the upper one sublet for a dwelling, at \$30 per month.

The other building is a three story brick with basement. Hickey's lease covered the basement, and first and second stories in which he kept a saloon.

At the time of the hearing, June 14, 1888, these leases had about ten and one half months to run. The jury having heard the evidence produced by the respective parties, as to the value of these leasehold interests, and having examined the premises, made their report, giving to petitioners the right to take and appropriate the property, and allowing each of said appellees the sum of \$1,200, "as compensation for their respective leasehold interests" and the sum of \$1,300 to each "as compensation for inconvenience and cost of removal from the premises."

Judgments being entered on this report, appellant prayed an appeal, which was allowed on its filing bond in the sum of \$10,000, which bond was duly presented and approved, whereupon appellant moved for an order, allowing it to enter upon and use the said premises pending the appeal, but the motion was denied. Appellant then paid the amount of the judgments to the county treasurer, and on presentation of his receipt therefor the court granted the order of entry.

A reversal is urged here mainly upon the ground that the verdict of the jury is unauthorized by the facts appearing in the record.

At the instance of appellees the court instructed the jury as to the measure of compensation as follows: "The jury are further instructed that in determining the amount of compensation to be awarded to the defendants, respectively, in this case, they may properly take into consideration all evidence tending to show the actual value of the leasehold interest to the respective defendants, of which it is proposed to deprive them; the actual loss to be suffered by these defendants, respectively, from the loss, destruction or depreciation of the improvements placed by them in the properties specially adapted to the conduct of their business, if any shown by their evidence, the reasonable costs of removal, and of refitting in other localities for the further conduct of business as shown by the evidence; and also any injury that the jury may find from the evidence will result to said defendants respectively by reason of the unavoidable interruption of their business, incident to their removal from their present site and their establishing in new locations during the period of such interruption, if any shown by the evidence."

Substantially the same rule was announced in instructions asked by appellant. No controversy can therefore be raised here as to that question; and, accepting it as a fair legal guide to the jury in fixing the amount which appellees should be paid as just compensation for being deprived of their property, it is impossible to escape the conviction that the verdict in this case on which judgments were entered is the result of prejudice, inadvertence and mistake.

In the first place, it must strike the impartial mind as remarkable that under leases so essentially different as to the property leased, the amounts of rent reserved and the uses to which the buildings were appropriated, the leasehold interest should be of precisely the same value and that the cost and inconvenience of removal in each case should be exactly the same. But the evidence, instead of explaining or reconciling this apparent inconsistency, only makes it more glaring and leaves no doubt that the amounts were arbitrarily fixed by the jury regardless of the proofs.

Appellant introduced four witnesses as to the value of the leasehold interests, each of whom testified that the rent reserved viz.: \$60 in the one case, and \$110 in the other, was the full rental value of the premises, and that neither was worth more than the said amounts agreed to be paid.

Appellees both testified in their own behalf, but neither contradicted appellant's witnesses on that subject, and only one witness introduced by them does so, and he only as to the lease of

Hickey, which he says in his judgment is worth \$200 per month, or a bonus of \$90 per month.

Appellant also introduced two witnesses as to the cost of removal. One of these swears that the cost to Schneider to move his fixtures, and put them up in another building, replacing what might be necessary with new material, would be \$235.40, and to Hickey \$161. The other estimates the cost to Schneider at \$263.50 and to Hickey at \$143.50. While the evidence of appellees, and witnesses introduced by them, on this element of damages would justify a finding of much larger sums than those fixed by either of said witnesses, it is impossible to so construe their evidence as to sustain the finding of \$1,800, reported by the jury. In fact, by their own testimony Schneider's expense for furniture and fixing up his establishment was only between \$700 and \$800, and that of Hickey about \$1,200; in which last amount he admits is included the cost of his moving into the building and a pool table for which he paid \$375.

The verdict of the jury is not only contrary to the weight of the testimony but manifestly against all the evidence; and this is not denied or controverted by counsel for appellees. It seems, however, that it was sustained below, on the theory that the jury might legally base its report as to the amount of compensation to be paid, on their personal examination of the premises without regard to the testimony of witnesses; and this view is now urged in support of the judgment below and is thought to be sustained by decisions of this court.

While it is true that we have frequently held that the personal examination by the jury, in such cases, is in the nature of evidence and is to be considered by them in connection with all other evidence in the case, and that an assessment will not be set aside merely because it may differ in amount from the preponderance of the evidence appearing in the record, it has not been held by this or any other court, so far as we are aware, that all the evidence may be ignored and the amount fixed directly contrary thereto.

In *Mitchell v. Illinois Railroad & Coal Company*, 85 Ill. 567, it is said: "As to the damages sustained, the evidence is conflicting. Under the statute the jury had a right to view the premises and draw their own conclusions from such observations as well as from other testimony offered in the case."

In *Chicago Railroad Company v. Hopkins*, 90 Ill. 323, after stating that the evidence was conflicting, and upon that preserved in the record the inclination might be to hold the assessment too large, but that the jury personally examined the *locus in quo*, it is said: "It is the evident intention of the law that such personal examination by the jury is in the nature of evidence, to be considered by them; and to what extent they were influenced by such examination in their assessment, it is impossible to tell. The result of the personal investigation may have been such as to have fully justified the assessment made, even if it was clear that the preponderance of the evidence preserved in the record was against so large an amount."

In *Green v. Chicago*, 97 Ill. 873, we said: "Inasmuch as the value of the land taken is pure-

ly a question of fact, to be determined by the jury from all the particular circumstances in each case, it is believed no general rule can be laid down applicable alike to all cases . . .

Where in any case the different theories and processes, submitted by witnesses for ascertaining the value of property taken, lead to widely different results, and the opinions of the witnesses themselves are conflicting and wholly irreconcilable, and there is sufficient evidence upon which the verdict may be sustained, the court ought not to disturb it, unless it is manifest from all the circumstances in the case that the jury adopted a false theory in arriving at their conclusion; in which event the verdict ought to be set aside."

So in *McReynolds v. Burlington Railroad Company*, 106 Ill. 156, it was again said: "The opinions of witnesses here were extremely conflicting. The jury went upon the premises and saw for themselves the situation;" and what was said in *Chicago Railroad Company v. Hopkins*, *supra*, is repeated with approval. To the same effect is the language used in *Chicago Railroad Company v. Blake*, 2 West. Rep. 815, 116 Ill. 166.

While there is language used in the instruction commented upon in *Kinman v. Chicago Railroad Company*, which would seem to go farther, and authorize the jury to fix the amount independent of the sworn testimony, yet the instruction, taken as a whole, was thought to be in accord with the decisions above referred to, and was approved on their authority. The oath which the jury is required to take by section 8, as well as the language used in section 9, of the Eminent Domain Act, clearly shows that the sworn testimony shall not be disregarded in fixing the amount of the assessment; and the rule deducible from all the decisions of this court is that where there is a conflict of evidence and the verdict is consistent with all the facts and circumstances in the case, it will not be set aside merely because the court may regard the weight of evidence in the record against it; but when it clearly appears that the amount fixed is wholly inconsistent with, and contrary to, all the proofs, it is the duty of the court to interfere and resubmit the case to another jury. In this view of the law it was error to overrule appellant's motion for a new trial.

It is also urged as a ground for reversal that the court below refused to admit evidence of actual rentals derived from similar premises, in the near vicinity of those in question. The evidence fails to show that the property inquired about was similar and in the near vicinity to that of appellees. There was therefore no error in refusing the testimony offered.

Both Hickey and Schneider were allowed, over objection by appellant, to state their average monthly profits during the year preceding the hearing, and this is also urged as error. It appears from the record that this evidence was held competent as tending to prove, with other testimony, the loss which would be incurred by the suspension of business during the time necessarily consumed in moving; and thus limited, we see no objection to it.

The case of *Chicago, S. F. & C. R. Co. v. Phelps*, 15 West. Rep. 281, decided and the opinion filed at Ottawa in June last, is decisive of the right of appellant to an order permitting

it to enter upon the premises sought to be condemned, on filing its appeal bond in conformity with the order granting an appeal, and the court below erred in refusing to make it; but as the same purpose was accomplished by paying the money to the county treasurer, the judgment would not be reversed for that error.

Counsel for appellees maintains that by actually taking possession of the buildings in question, and especially by a removal of one of them, and permitting the other to stand vacant and fall into ruin, appellant has put it out of the power of the court to grant a view of the premises as they were when occupied by appellees, and therefore another trial cannot be had, as contemplated by the statute, and appellant should for that reason be held to have waived its right to insist upon a reversal and new trial.

Assuming that the facts exist as stated (of which there is no proof in the record), and that the question is fairly before us for decision, we have no hesitancy in holding the position untenable. Section 18 of the Act, as construed in *Chicago Railroad Company v. Phelps, supra*, gives appellant "the right to enter upon the use of the property" pending the appeal. Section

12 of the same Act gives the right of appeal. The position of counsel amounts to saying that the exercise of one of these rights is a waiver of the other; whereas, by the very terms of the statute they are concurrent. A personal examination of premises to be condemned by the jury may be desirable in most cases, but is not essential to a trial under the statute.

An attempt is made to justify the amounts found by the jury by assuming that something was allowed to each of appellees for the goodwill of their business. It is a sufficient answer to this position to say that all evidence on that subject offered by appellees was excluded by the court below; besides, the report of the jury shows that no such allowance was made.

There is no view of this record, that we have been able to discover, which will justify an affirmation of the judgment below. It is clear that the sum of \$2,500 to each of appellees for the unexpired term of their leases and cost and inconvenience of moving is unreasonable and unauthorized by the proof—is largely in excess of just compensation. *The judgment of the Circuit Court will therefore be reversed, and the cause remanded for further proceedings.*

#### NEW YORK SUPREME COURT.

Hiram LOCKWOOD, *Appl.*,

*v.*

Mary LOCKWOOD *et al.*,—John O. BAKER,  
Purchaser, *Respt.*

(.....Hun.....)

**The statutory provision in reference to wills devising real estate in this State, executed by a nonresident and probated in another State, that an exemplified copy of such will or of the record thereof shall be presumptive evidence of the will and of the due execution thereof, does not render such will effectual to pass real estate in this State unless executed in accordance with the laws of this State.**

(January 23, 1889.)

**A** PPEAL by plaintiff, to the General Term of the Supreme Court, First Department, from an order of Special Term denying a motion to require purchaser to complete purchase in a partition suit. *Affirmed.*

The question presented is stated in the opinion.

*Mr. Edw. H. Rockwell* for appellant.  
*Mr. C. L. Westcott* for respondent.

*Van Brunt, P. J.*, delivered the opinion of the court:

The objections to the title in question are made because of defects in the execution and probate of the will of one John N. Williams, through whom the title was derived. John N. Williams died in South Carolina, where his will was made, executed and witnessed by three persons and admitted to probate in accordance with the Laws of South Carolina; and an exemplified copy thereof was filed and recorded in the surrogate's office in the County of New York, and certificates of the Judge of the Court

of Probate and various lawyers of South Carolina were attached and recorded with the will—showing that it could not be removed from the records of that State, and hence could not be produced here.

Upon the admission of the will to probate in South Carolina but one witness appeared and was examined as to its execution, and there was no proof either as to the absence of the other witnesses or of their handwriting, or any secondary proof whatever in reference to said witnesses. There was no proof, nor did the attestation clause state, that any witness signed such will at the request of the testator. It is clear that, under the circumstances, the will was not executed or proven according to the Laws of the State of New York.

But it is claimed that, in view of the peculiar legislation authorizing the recording of wills admitted to probate in another State or Territory, these objections cannot prevail.

The law of this State, as it stood when the will was recorded (Laws 1864, chap. 811, as amended by Laws 1872, chap. 680),\* provided that where any real estate situate in this State has been, or shall hereafter be, devised by any person residing out of this State, and within any other State or Territory of the United States, and the will of such person shall have been finally admitted to probate in such other State or Territory, and filed and recorded in the office or court where the same shall have been admitted to probate, an exemplified copy of such last will and testament, or of such record thereof, and of the proofs, may be recorded in the office of the surrogate of any county in this State where any real estate so devised is situated—which record in said surrogate's office, or an exemplified copy thereof, shall be, in cases

\*Subsequently amended by Laws of 1878, chap. 324, § 2703, Code Civ. Proc. [Rep.]

where the original cannot be produced, presumptive evidence of said will, and of the due execution thereof, in all cases or proceedings relating to lands so devised.

The objection made by the plaintiff certainly has some support from the language of this provision, but in the construction of this portion of the law we must have regard to the intention of the Legislature and the objects sought to be attained. It is apparent what the intention of the Legislature was, namely: to allow an exemplified copy of the will and proofs, which have been recorded in another State or Territory, where the original could not be produced, to have the same effect as though the original had been so produced.

It certainly was not the intention to give greater effect to the exemplified copy of a will and the proofs than would be given to the will itself. If such a construction is to be placed upon this section, then we would have this peculiar condition of circumstances: that a will executed in South Carolina according to its laws but not according to the Laws of the State of New York, devising real estate in New York, would be effectual because of the Laws of South Carolina that a will which is probated must be filed and cannot be removed from the record for the purpose of production in New York; whereas, a will made in North Carolina according to the Laws of North Carolina, admitted to probate in North Carolina, but not executed according to the Laws of New York, would not be effectual to pass the title to real estate in New York because the Laws of North Car-

olina authorize the taking of the will off the files for the purpose of probate elsewhere. Such a condition of affairs was never contemplated; and all that was intended by the Legislature was that the exemplified copy of the record should be as effectual as the production of the original in those cases where, in consequence of the law of the residence of the testator, the original could not be produced. It was never intended to change the requirements of the law of this State in regard to the descent of real estate.

It is true that the language of the section is that the exemplified copy, in cases where the original cannot be produced, shall be presumptive evidence of the will and of the due execution thereof. But it is only presumptive evidence; and where upon an examination of the record itself it is apparent that the will has not been executed in such a manner as to comply with the laws of this State in reference to the transmission of real estate, the presumption is overcome, and no longer exists.

The claim upon the part of the appellant, that the record is of more value than the original, shows the falsity of the position; and the construction of the section does not necessarily depend upon any such absurd rule.

We are of opinion, therefore, that the will not being executed in accordance with the laws of this State so as to pass real estate, no title to the devisee thereunder passed and *the order appealed from should be affirmed, with \$10 costs and disbursements.*

**Bartlett and Daniels, JJ., concurred.**

## UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

George D. BARNARD & CO.

v.

KNOX COUNTY, Missouri.

(....Fed. Rep. ....)

**The provision of the Missouri Constitution** (art. 10, § 12), that "No county shall be allowed to become indebted in any manner or for any purpose, to an amount exceeding in any year

the income and revenue provided for such year," is to be construed as referring to that class of debts which it is optional with the county court or other governing body of the county to incur, and not to compulsory obligations cast on the county by operation of law.

(February 6, 1889.)

**ACTION** on county warrants, submitted on agreed statement of facts. *Judgment for plaintiff.*

**NOTE.**—*Constitutional inhibition against counties contracting debts.* The inhibition against contracting debts in a political subdivision of the State, exceeding the income of the current year, does not apply to claims against a county for keeping and transporting prisoners by the sheriff of another county. *Potter v. Douglas County*, 2 West. Rep. 489, 87 Mo. 240. The county court has no power in any year to contract a debt of the county in excess of the revenues of the county for such year, unless authorized thereto by two thirds of the voters of the county voting at an election held for that purpose; and warrants issued to pay such a debt are void, although the debt was created for remodeling and building additions to the county court house. *Book v. Earl*, 3 West. Rep. 240, 87 Mo. 246. The evident purpose of the framers of the Constitution and the people who adopted it was to abolish in the administration of county and municipal government the credit system and establish the cash system, by limiting the amount of tax which might be imposed by a county for county purposes and limiting the expenditures in any given year to the amount of revenue which such tax would bring in to the treasury for that year. Section 12 is clear and explicit on this point. *Book v. Earl*, 3 West. Rep. 242, 87 Mo. 246. The limitation imposed upon county indebtedness by section 6, art. 11, of the Constitution.

of Colorado includes debts incurred by operation of law, as well as those arising from express contracts. *People v. May*, 9 Colo. 404. Under the Constitution of Illinois, art. 9, § 7, the limitation is held to apply to both absolute and contingent indebtedness. *Springfield v. Edwards*, 34 Ill. 628; and as well to debts payable in the future as to those payable presently. *Law v. People*, 87 Ill. 385; but not to demands arising from the negligence of corporate officers. *Chicago v. Sexton*, 3 West. Rep. 455, 115 Ill. 230. Under the Constitution of Iowa, art. 11, § 3, the limitation is held to apply as well to school districts. *Winspear v. Holman Dist. Twp.*, 37 Iowa, 542; *National State Bank v. Marshall Ind. Dist.*, 39 Iowa, 490; *McPherson v. Foster*, 43 Iowa, 48; *Mosher v. Ackley Ind. School Dist.*, 44 Iowa, 122. But it does not apply to county bonds held by an innocent purchaser. *Sioux City & P. R. Co. v. Osceola County*, 45 Iowa, 168, 52 Iowa, 26. Under the Constitution of Michigan, art. 10, § 9, it was held that a statute authorizing Saginaw City to build a court house for the county was held defective, and enforceable against the county only to the extent of the constitutional limitation. *Calum v. Saginaw*, 50 Mich. 7. The same was held in Wisconsin under the Constitution of that State, art. 11, § 3. *Hebard v. Ashland County*, 55 Wis. 140.

2 L. R. A.

The material facts are set forth in the opinion.

*Messrs. Taylor & Pollard* for plaintiff.

*Messrs. Geo. Balthrope and W. C. Holister* for defendant.

**Thayer, D. J.**, delivered the opinion of the court:

This is an action on forty-nine county warrants issued during the years from 1882 to 1886 both inclusive, in payment for books and stationery sold and delivered to Knox County at the instance and request of various county officers, and for public use.

The defense is that when the warrants sued upon were issued by the County Court of Knox County, the county court had drawn warrants in excess of the total revenue of the county for the years during which the warrants were respectively issued, and that the debt sued for was for that reason contracted in violation of section 12, article 10, of the Constitution of the State of Missouri, which provides that "No county . . . shall be allowed to become indebted in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the voters thereof voting at an election to be held for that purpose."

The case has been submitted upon an agreed statement of facts, from which it appears that the books and stationery in question were furnished for public use at the instance and request of the Probate Judge, the clerks of the county and circuit court, and the sheriff and collector of the county, and that the same "were suitable and necessary for the officers in their official capacity, to whom they were sold."

It also appears that the total warrants issued by Knox County each year from 1882 to 1886, both inclusive, exceeded the revenue derived for the respective years from the highest rate of taxation which the law permits, to wit: fifty cents on each \$100 of valuation; but that deducting the warrants drawn on the "pauper fund" and "road and bridge fund," the warrants drawn in any one of said years did not exceed the revenue for said year.

Judgment must be rendered for the plaintiff for the full amount claimed in each count (that is for the amount of the warrant described therein and interest at 6 per cent per annum from the date of the alleged presentation) for two reasons:

In the first place there is nothing in the agreed statement to show that the indebtedness sued for was illegally contracted, even if it be conceded that the constitutional inhibition (§ 12, art. 10, *supra*) applies or has reference to such an indebtedness.

The only fact admitted by the agreed case is that warrants were issued each year from 1882 to 1886 inclusive, in excess of the total county revenue for the respective years, provided warrants drawn on the "pauper and road and bridge funds" are taken into account, and not otherwise. But whether when the several items of indebtedness sued for were contracted, and the various warrants were drawn, the limit of legal indebtedness had then been reached, and the county had exhausted its power to contract further indebtedness, is not shown.

2 L. R. A.

The stipulation falls short of establishing the facts alleged in defendant's special plea.

In this State, as is well known, county courts are required to subdivide the total county revenue into five different funds, and each fund must be devoted to the payment of the particular class of expenses for which it is set apart, and to no other. Warrants drawn by the county court must also specify the fund on which they are drawn. Mo. Rev. Stat. §§ 6818-6821, both inclusive.

By section 5870, Revised Statutes of Missouri, county treasurers are required to keep a record of warrants presented against the respective funds, and to pay them out of the funds on which they are drawn in the order of presentation, with the proviso that warrants issued to pay for "services that are usual, and for all expenses necessary to maintain the county organization," must be paid in preference to warrants that are otherwise drawn—that is, to pay for services or expenses that are of an unusual character.

It is evident, therefore, that when a county incurs an indebtedness exceeding its income or revenue for the year, and some part of it is for that reason invalid, it must be that part (if any) which may be appropriately termed an extraordinary indebtedness, or that part which was contracted after the limit of legal indebtedness had been reached. The debt sued for in this case was not an unusual debt for a county to contract. On the contrary it was an obligation such as the county was compelled to incur annually. Its officers could not discharge their official duties without suitable books and stationery. Therefore it is important to know when the various items of indebtedness sued for in this case were contracted, and to what extent the county had incurred liabilities up to that time. Without such proof—and the agreed case is silent on that point—the court cannot say that the county had exhausted its power to incur further debts, when a single item of the bill sued for was sold and delivered.

It will certainly not be presumed that the defendant contracted a debt in violation of law. The burden of showing such fact rests on him who alleges it.

In the second place it must be held that the indebtedness now under consideration is not within the purview of the section of the Constitution above quoted (§ 12, art. 10), because it was an indebtedness which the various county officers who contracted it were bound to incur in the proper discharge of their official functions. It is made the duty of the various officers at whose instance the books and stationery involved in this case were supplied "to provide suitable books and stationery," at the expense of the county, for the transaction of business in their several offices. Mo. Rev. Stat. §§ 623, 624, 1061, 1184, 5376.

The debt was contracted by those officers, and not by the county court.

In the case of *Potter v. Douglas County*, 2 West. Rep. 489, 87 Mo. 240, it was held that the constitutional prohibition now in question was leveled against a county becoming indebted through the action of the county court, the ordinary contracting agent of the county; and



that it had no application to an obligation cast on the county for the transportation of a prisoner to an adjoining county, and for his board whilst there confined in jail, inasmuch as the law made it the duty of the sheriff to take prisoners to an adjoining county and there confine them when there was no jail in the county where the offense was committed.

In *Rollins v. Lake County*, 34 Fed. Rep. 845, Judge Brewer held that a provision in the Constitution of the State of Colorado, very similar to the one now under consideration, did not forbid a county of that State from becoming indebted for witness', jurors' and sheriff's fees in excess of the amount limited by the Constitution, because the laws of the State made it obligatory on counties to pay all such fees.

It seems, therefore, that it is settled, both in this State, and in this circuit, that constitutional provisions limiting the amount of county indebtedness that may be incurred are to be construed as having reference to that class of

debts which it is optional with the county court or other governing body of the county to incur, and that they are not to be taken as having reference to compulsory obligations cast on the county by operation of law, as where a county is required to pay the ordinary expenses attending the maintenance of courts and the enforcement of the laws within the county, or where particular officers are required to provide, at the expense of the county, the necessary supplies for the proper discharge of the duties of their office.

As experience has heretofore shown that counties and municipalities generally become embarrassed by lavish expenditures which they were under no legal obligation at the time to make, or that might at least have been deferred to a more convenient season, the construction adopted in the cases above cited is both reasonable, and will most likely result in accomplishing the purpose had in view by the law maker.

*Judgment will accordingly be entered for the plaintiff.*

## VERMONT SUPREME COURT.

### NATIONAL BANK OF BELLOWS FALLS

### DORSET MARBLE CO. *et al.*

(....Vt....)

**One who indorses a note in blank**, whether by writing his name above or below that of the payee, is liable, *prima facie*, as a maker, and may be sued as such.

(February 1, 1889.)

**H**EARDED at the March Term of the Windham County Court, 1887, Powers, J., presiding. Judgment for the plaintiff, and exceptions by the defendants. *Affirmed.*

The action was assumpsit; plea the general issue. The defendants were sued as the joint makers of three promissory notes. The notes were executed by the Dorset Marble Company, and made payable to the order of J. H. Goulding, Treas. On the back of each note was written in blank the name of J. H. Goulding, Treas., and underneath his name were written, also in blank, the names of the defendants Hawley, Hollister and Gleason.

**Mr. F. G. Swinington**, for defendants:

The indorsements are regular. There is no ambiguity on the face of the notes, and the plaintiff was not misled. It accepted the notes with the defendants' indorsements, precisely in accordance with the real obligation which they intended at the time of indorsing; and parol testimony should not be allowed to contradict it.

*Bigelow v. Colton*, 13 Gray, 309; *Thacher v. Stevens*, 46 Conn. 561; *Clapp v. Rice*, 13 Gray, 403; *Dubois v. Mason*, 127 Mass. 37; *Good v. Martin*, 95 U. S. 95 (24 L. ed. 343); *Rey v. Simpson*, 68 U. S. 22 How. 341 (16 L. ed. 260);

**NOTE**—As to the effect of indorsement in blank, see *Pool v. Anderson*, 1 L. R. A. 712, and note.

3 L. R. A.

*Stevens v. Parsons* (Maine) 6 New Eng. Rep. 644, 1 Daniel, Neg. Inst. §§ 707, 707 a, 707 b, 709.

The notes were first indorsed by the payee; afterwards by the indorsers, underneath the name of the payee. The legal presumption is that the indorsers are second indorsers, and no parol evidence is admissible to contradict it.

1 Daniel, Neg. Inst. §§ 713, 714, 711, 717; *Good v. Martin*, *supra*.

**Mr. L. M. Reed**, for plaintiff, cited—

*Flint v. Day*, 9 Vt. 345; *Nash v. Skinner*, 12 Vt. 219; *Strong v. Riker*, 16 Vt. 554; *Sylvester v. Downer*, 20 Vt. 355; *Hunt v. Adams*, 5 Mass. 358.

**Rowell, J.**, delivered the opinion of the court:

The court below found, from testimony not objected to, that the defendants, Hawley, Hollister and Gleason, indorsed the notes, before they were used in any manner, for the sole purpose of giving additional security to them, and so procuring them to be discounted by the plaintiff, understanding among themselves and with the maker that the latter was the principal debtor, as the fact was, and they were accommodation indorsers, with the right to demand and notice that indorsers are entitled to; but that the plaintiff had no notice that they claimed to stand as indorsers and not as original promisors.

The plaintiff claims that this finding makes them original promisors, and is conclusive of the case. But without determining whether that is so or not, we put the case on the ground that the defendants take, and treat it as standing solely on what is disclosed by an inspection of the notes themselves in respect of the nature of the obligation, that the law presumes that the defendants intended to assume when they indorsed the notes.

Taking this ground, the defendants claim that as their names are indorsed under the name of the payee, and not over it, making

them what are called regular, instead of irregular, indorsers, the law conclusively presumes that the obligation they intended to assume is that of second indorsers, and that parol evidence is no more admissible to vary a contract implied by law than to vary a written contract.

There is great diversity of holding in this country, as to the nature of the obligation the law presumes a third party to have intended to assume when he indorses in blank commercial paper. But it is not necessary to examine the law of other jurisdictions much, for it is well settled in this State, by a long line of decisions; and although some of them may be obnoxious to criticism as anomalous and illogical, yet they have been so long acted upon by our citizens that they cannot now be disturbed without danger of injustice; and besides, it is often of more consequence that the law should be stable than that it should be logical.

The cases on this subject, for present purposes may be conveniently divided into two classes, namely: those of regular, and those of irregular, indorsements. In the case of irregular indorsements—that is, indorsements in blank by third persons above the name of the payee, or when the payee does not indorse at all—there is very little diversity of holding. By such indorsements it is pretty generally held, nothing else appearing, that the party intended to assume an absolute undertaking, and usually that of maker; but that this presumption may be rebutted by showing a contract for a different undertaking.

But in the case of regular indorsements—that is, indorsements in blank, of third persons, under the name of the payee—a different rule pretty generally prevails; and such indorsements are held to impose only the obligation of second indorsers; and parol evidence is not received to vary that obligation, because it is said that there is no ambiguity arising from a regular indorsement in respect of the nature of the obligation intended to be assumed, as there is from an irregular indorsement—for on the face of the paper a regular indorser is liable as second indorser; and that it is no more competent to vary the legal effect of a written instrument by pa-

rol evidence than it is to vary its express terms.

But in this State no distinction has ever been made in this behalf between regular and irregular indorsements, but they have alike been held, *prima facie*, to impose the obligation of maker.

In most, if not all, of the cases before *Sylvester v. Downer*, 20 Vt. 855, the indorsements were irregular, which brings the cases in line with a great majority of the cases in other jurisdictions. But in *Sylvester v. Downer* the defendant's indorsement was regular; that is, his name was written in blank under the names of the payees. This seems to be so from the case, but we have a copy of the note before us, which shows it to be so. Downer was sued as sole maker of the note, and although it is true that the evidence tended to show, and the jury found, that he intended to assume an unconditional obligation to pay the note according to its tenor, yet the court adverted to that fact only as putting at rest all pretense that it was not understood that he assumed the obligation his signature imported, and said: "The note, on being produced, showed his name indorsed upon it, and also that of the payees of the note. This, according to the decisions of this court, repeatedly made, imposed upon the defendant the obligation of the maker of the note, with this difference only, that, his undertaking being in blank, as between the parties to it, it was susceptible of being controlled by oral evidence of the real obligation intended to be assumed at the time of signing."

In *Pitkin v. Flanagan*, 23 Vt. 160, the payee's name was indorsed first in position in the bill of exchange, then the defendants', and then the plaintiff's, all in blank. The plaintiff had the bill to pay, and sought to recover the whole of it of the defendants, on the ground that as their names stood before his on the bill they were liable to him as prior indorsers. But the court held that the position of their names made no difference, and let in parol evidence of the circumstances.

The result is the defendants are held as makers, and the judgment is affirmed.

*Royce, Ch. J., and Veasey, J., did not sit*

## PENNSYLVANIA SUPREME COURT.

### RANKIN'S APPEAL

(...Pa.....)

1. **Relief in equity** may be had before plaintiff has established his rights at law, where the material facts out of which his rights arise are admitted; and if there is a doubt as to his rights, it is one of law only.
2. **Executors**, by paying taxes and selling a portion of the estate in coal, which is reserved from the sale of the surface of the ground, but who are not in the actual occupancy or possession of the property, and have no interest therein except a simple power of sale, are in no such possession as to prevent a seisin of the owner sufficient to support a claim of curtesy by her husband after her death.
3. **Where a tenant by curtesy** has had a share of property allotted or delivered to him in severalty in partition, other parties to the partition
- 3 L. R. A.

who did not in these proceedings raise the question of his right cannot afterwards deny that he was a life tenant.

4. **A devise of coal mines** and mining privileges, separate from the estate in the surface of the land, includes the use of the surface so far as necessary for mining purposes, and the use of a pit mouth thereon, although testatrix in her lifetime had granted a right of way for a tunnel which had been constructed and could be used for taking the coal to market.
5. **In partition of coal** between owners who do not own the surface, mining privileges pass as appurtenant or incident to the coal without express words, and include the use of a pit mouth which is not within the lines of either purport, but which is close to one of them, where it was the manifest intention to divide all the good merchantable coal.
6. **A tenant for life**, when not precluded by re-

straining words, may not only work open mines but may work them to exhaustion.

7. **A tenant by curtesy** in an estate which consists of coal mines and mining privileges has the right to work open mines even to exhaustion, although he is not tenant of the surface.

8. **Damages** are not recoverable by the owner of a coal mine, in a suit for an injunction, from the fact that one of the defendants had driven away from the mine a person who had a contract with the plaintiff, without any limit as to time, to take coal at a certain price per bushel, and who had cleaned out the entry to the mine, for which plaintiff had paid nothing, where it does not appear that plaintiff may not still mine and sell the coal and get a higher price for it.

(November 25, 1888.)

**APPEAL** by defendants, from a decree of the Common Pleas of Allegheny County, in equity, granting an injunction as prayed for by plaintiff. *Affirmed.*

The bill was brought by Edward P. Swift against J. S. Rankin, Louisa Rankin his wife, and Charles P. Rankin, to restrain defendants from interfering with plaintiff's operating a certain coal mine. The case was sent to a master, James C. Doty, Esq., who submitted the following report:

From the evidence submitted, the master finds the facts as follows:

1. That Margaret Giffin died in April, 1872, seised in fee simple of a certain tract of land, with coal therein, situate in the Township of Lower St. Clair, Allegheny County, having by her will, which was duly probated April 12, 1872, before the register of said county, and is of record in his office in Will Book, Vol. 15, page 464, devised to her daughter, the defendant Louisa Rankin, wife of the defendant Dr. J. S. Rankin, for her life, with remainder to her children, should she leave any, a part of said land, excepting and reserving from the devise all the bituminous and stone coal under the same, with mining privileges, and having by the same will devised the residue of her estate, which included the coal and mining privileges excepted and reserved as aforesaid, to her daughters, Emily Giffin and the said Louisa Rankin in fee simple, subject to certain charges since fully paid, and certain powers of sale given her executors.

2. That the said Emily Giffin intermarried with Edward P. Swift, the plaintiff, and died August 13, 1873, intestate, having had by said plaintiff one child, her only issue, who died soon after his mother, in infancy.

3. That afterward, by proceedings duly had in the orphans' court of said county, at No. 1 June Term, 1879, in partition, for partition of the residue unsold of the real estate of the said Margaret Giffin, deceased, so devised as aforesaid to the said Emily and Louisa, the said residue unsold was divided into two purparts, designated respectively "A" and "B;" and the purpart designated "A," embracing, *inter alia*, 30 acres and 106<sup>2</sup>/<sub>3</sub> perches of said coal under the land devised as aforesaid to the said Louisa Rankin for life, as shown by a plot or draft attached to the *alias* inquisition taken in such proceedings, was allotted and delivered to said plaintiff in severalty for his life; and the

partition so made was duly confirmed by the said orphans' court.

4. That in the coal so allotted and delivered to plaintiff as aforesaid, and underlying the land so devised as aforesaid to the said Louisa Rankin for life, a mine with an entry or pit mouth on the land so devised to her, was open and was worked by the said Margaret Giffin, or by her licensee, for many years before and until her death, and by her devisees, the said Emily and Louisa; or by their sufferance or license, in the lifetime of the said Emily; and during all the time aforesaid the coal mined therein was hauled from the said entry or pit mouth to the public road through and over the land so devised as aforesaid to the said Louisa Rankin for life.

5. The said pit mouth is located on the land so devised to the said Louisa Rankin for life, with remainder to her children as aforesaid, and neither on the surface over purpart A or purpart B, but about sixty feet from the line of purpart A, as shown by the said draft in said partition proceedings.

6. That plaintiff recently began and proceeded, by his servants, in a careful and workmanlike manner, to mine his said coal in his said mine, and to haul the same when mined from the said pit mouth, by a way long ago, and in the lifetime of the said Margaret Giffin, used for said purpose; but the defendant Charles P. Rankin, by force and threats, stopped plaintiff's workmen from mining and hauling the coal as aforesaid, and still keeps them from their work aforesaid, and threatened and attempted, and still threatens, to blow up and destroy the said entry to said mine.

7. That the said Charles P. Rankin is the lessee of the said Louisa Rankin, his mother, and is engaged in working her coal mine, and in interfering with the plaintiff and his servants, as aforesaid, in the use of the pit mouth, he claimed to be protecting and defending his rights as such lessee and the defendants all still maintain their right to prevent plaintiff and his workmen from using the pit mouth for mining or hauling away the coal allotted to him in the partition proceedings.

8. That by deed dated July 10, 1871, and recorded in the recorder's office, in and for said county, in Deed Book, Vol. 276, page 311, the said Margaret Giffin granted, *inter alia*, to Joseph Keeling a right of way through the coal under the land, a part of which was devised to Louisa Rankin, for life, to be used as a lateral railroad; that the tunnel and lateral railroad were made and built by Keeling through said coal; and thus the coal could have been mined and taken to market.

9. That Margaret Giffin, by her will, authorized and empowered her executors, as soon after her decease as it could be done to advantage, to sell at public or private sale, as they might deem best for the interest of her estate, all her goods and estate, real, personal or mixed, wherever found, not theretofore disposed of, including the coal (except three acres reserved) under the tract of land of which she died seised, and a portion of which was devised as aforesaid.

10. That the executors, as such, exercised some supervision and control of the coal, paid taxes thereon, and sold a portion thereof; but

they were not in the actual occupancy or possession of the property, and under the will they had no beneficial interest therein, but a simple power of sale.

11. That by articles of agreement, dated August 20, 1874, the said executors of Margaret Giffin, deceased, granted to Joseph Keeling & Co. the right and privilege to drive an entry or drain for the purpose of drainage through the coal unsold belonging to the estate of the said Margaret Giffin, deceased.

12. That on June 29, 1877, plaintiff commenced a proceeding in the orphans' court of said county, at No. 163 June Term, 1877, to compel the executors of Margaret Giffin, deceased, to sell the balance of the coal then unsold, but his application was finally refused upon the ground that there was no absolute direction in the will of said decedent to sell the realty.

The first question is as to the jurisdiction. Has a court of equity jurisdiction of a case like this?

The plaintiff in his bill claims the right to mine coal in a certain mine, and to haul the same when mined from a pit mouth and by a way alleged to have been long used for that purpose. He sets forth particularly the facts upon which he relies to support his right. He then avers that, in partial exercise of his rights in the premises, he began and proceeded, by his servants, in a careful and workmanlike manner, to mine his coal in the said mine, and to haul the same when mined from the said pit mouth, by said way; but that the defendant Charles P. Rankin, acting in confederacy with the other defendants, and with others to him unknown, assaulted his workmen when so mining and hauling his coal, and by force and threats stopped them from work, and still keeps them from their work, and threatened and attempted, and still threatens, to blow up and destroy the entry to said mine; by which wrongful acts and threats he has suffered great injury, and if they be not restrained, will suffer great and irreparable loss and injury.

This would seem to be a very proper case for equitable relief unless the objection that plaintiff's rights must first be established at law is well taken. Cases are very numerous to the effect that the right of complainant ought to be admitted or established at law before granting an injunction. But if the right of the plaintiff be clear, it need not first be established by a suit at law. *Hacke's Appeal*, 101 Pa. 245.

In one sense, the rights of the plaintiff are here denied. But the material facts out of which his rights arise are admitted. If there is a doubt as to his rights, it is one of law, not of fact. On a question of mere law the courts are bound to have an opinion, whatever may be the difficulty of making it up. *Brightly*, Eq. Jur. § 303.

A trial at law necessarily implies that there are some facts disputed and to be tried. In this case, all the material facts are admitted; there could be nothing for a jury to do, even if it were an action at law; the question would be legal, and for the determination of the court. The court, therefore, has jurisdiction of the cause, in the opinion of the master.

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The question to be determined upon the merits is, Has the plaintiff the right to enter upon the premises of defendants for the purpose of mining the coal allotted to him in the proceedings in partition? Has he a right to mine the coal, and, if so, can he use the pit mouth in so doing?

The plaintiff has a life estate in the coal. It is claimed that Mrs. Swift never was in possession, that the executors under the will of Margaret Giffin had control of the coal until after Mrs. Swift died, and that plaintiff, therefore, is not tenant by the curtesy. But the land was not devised to the executors. They had no estate or beneficial interest in it. They had simply a power of sale, if they thought best. They paid the taxes, and sold some of the coal, but the ownership was in Mrs. Swift and Mrs. Rankin as tenants in common, and the executors had no such possession as would defeat plaintiff's claim as tenant by the curtesy. It is not necessary to entitle a husband to claim by the curtesy, that there should have been what is considered in England an actual seisin of the wife or husband during the coverture. *Chew v. Southwark*, 5 Rawle, 160; *Buchanan v. Duncan*, 40 Pa. 82.

But if there is any doubt as to the tenancy by the curtesy, plaintiff is life tenant of his deceased child. Besides, Mrs. Rankin and her husband were parties to the partition proceedings, and should have raised the question then, if they denied that plaintiff was life tenant.

But another objection is made to plaintiff's claim. The pit mouth is located on land devised by Margaret Giffin to Louisa Rankin for her life, with remainder to her children. But all the coal under the land so devised, "with mining privileges," was excepted and reserved. The residuary clause of Margaret Giffin's will gave to her daughters Emily and Louisa all that remained of her estate after paying certain legacies, expressly including the coal under the farm, a portion of which was devised as above stated. There was no reference in the will to "mining privileges" save in the clause containing the exception and reservation mentioned above. Margaret Giffin in her lifetime granted a right of way for a tunnel through the coal under the land to Keeling, said tunnel to be used as a lateral railway, and Keeling had made the tunnel, and thus the coal could be mined and taken to market through the tunnel. Defendants contend that the "mining privileges" referred to in the will, and which were excepted and reserved in the devise to Louisa Rankin and her children, had reference solely to this right of way previously granted to Keeling, and did not include the pit mouth or entry, or any other use of the surface for the purpose of mining coal. But, it seems to the master, this would be a very narrow construction. The terms would embrace much more. The surface and the coal were made separate estates by the will. The coal would be unavailable without mining privileges. The testatrix must have intended to reserve all mining rights and privileges, and that these should be enjoyed and possessed by the owners of the coal. The use of the surface, then, so far as necessary for mining purposes, and the use of the pit mouth, passed to Mrs. Swift and Mrs. Rankin by the will of their mother.

Again; it is said that plaintiff acquired no right to use the pit mouth for mining purposes under the proceedings in partition. No reference is made to any mining privileges, or to the pit mouth, in the proceedings. This was perhaps either an oversight or it was deemed unnecessary. Nor is the pit mouth within the lines of either purpart A or purpart B. But the mouth of the pit is about sixty feet from purpart A, which was allotted to plaintiff. It was the manifest intention to divide all the good merchantable coal. The line stops where such coal ends. The out crop extends a little distance beyond to the pit mouth. The merchantable coal is separated into two purparts of equal size and value. In the judgment of the master, the mining privileges, including the use of the pit mouth, passed as appurtenant or incident to the coal without express words. It is a well settled rule that when anything is granted, all the means to obtain it are granted also, and all shall pass inclusive, together with the thing, by the grant of the thing itself. *Noy's Maxims*, 198; *Hovell v. McCoy*, 8 Rawle, 356.

An analogous rule would apply in this case. But, if not, then the mining privileges, and the use of the pit mouth as a part thereof, still remain undivided, and the plaintiff has the right to them as tenant in common.

But defendants say that plaintiff has no right to mine the coal allotted to him for life, because he is not life tenant of the surface. It is conceded that where the wife dies in possession of lands with open mines on it, and her husband comes into possession of the estate immediately on her death, he may continue to work the mines, because the law looks upon the open mines as yielding a product for the estate, as theretofore, and as estovers in connection with the estate, for its support and maintenance. But it is contended that where the open mines do not underlie the estate of the life tenant, and there is no estate to support estovers, that then no estovers can be claimed.

The defendants in their answer do not aver that they are remaindermen. Probably Mrs. Rankin had an estate in remainder, and the defendants are acting in the interest of those in remainder. But the issue is not directly as to the right of the tenant for life to mine the coal as against the remaindermen. However, the argument of counsel is largely upon that question, and whether properly raised or not, the master will consider the case in that aspect.

The mine was open and worked when the life estate commenced, and the pit had long been used for mining purposes. The attempt here is to prevent the life tenant from mining any part of the coal. The question is not whether those in remainder might not, in a proper action, restrain him from working more than what might be deemed his just proportion, or make him account for part of the profits, if he did so. In *Irwin v. Covode*, 24 Pa. 162, it is suggested that probably such relief might be afforded.

The rule is well settled that a tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion (*Shoemaker's App.* 106 Pa. 892; *Westmoreland Coal Co's App.* 85 Pa. 844; *Kier v. Peterson*, 41 Pa. 357; *Neel v. Neel*, 19 Pa. 828; *Irwin v. Covode*, 24 Pa. 162); and it is settled law 2 L. R. A.

that the rents of an open mine are income, and go to the tenant for life. Cases cited above; and see *Went's App.* 106 Pa. 301; *McClintock v. Dana*, Id. 886. The latter two cases also rule that, when land is chiefly valuable for coal mining purposes, although the mines are unopened, the power to lease the real estate includes the power to lease the coal lying under the surface. A life tenant of land, whereof the timber is the intended source of profit, may cut it for profit. *Williard v. Williard*, 56 Pa. 119. Where the mines are severed from the surface, the ordinary rules respecting waste have no application. *Bainbridge, Mines*, 53.

In *Neel v. Neel*, *supra*, it is said: "As to all tenants for life, the rule has always been that the working of open mines of all sorts is not waste. The tenant for life has the usufruct of the whole land, and takes the whole profit that can be derived from it in following out the use made of it by the donor . . . And the tenant for life is not at all limited by the extent of the use made of the property by the author of the gift . . . It is sufficient that he opened them (the pits) and derived any profit from them, even if it were only *fire-bots*. The fact of his opening the pits made the coal a part of the profits of the land, and the right to them will pass as such by a devise of a life estate. If he meant otherwise, he should have said so; not having said so, this is the legal inference of his intention . . . And the tenant for life may work them, even though the working of them may have been discountenanced before the death of him through whom the estate comes."

In *Irwin v. Covode*, *supra*, the court says: "As yet the Legislature have prescribed no limitation to the use which a tenant for life may make of open mines. In virtue of their common-law powers the court might doubtless restrain unskillful mining and wanton injury to the inheritance, but not such proper mining as is subject to no other objection than its liability to exhaust the mine. The profits of coal mines depend much on expensive preparations for working them, and in order to compensate this necessary investment, as well as to compete successfully with rival operations, a large amount of coal must be mined and sold. To deny a tenant for life the right to mine largely, would be to deny him the right to mine profitably—to shut him up to mining for his own fuel merely . . . Nor are such improvements necessarily injurious to the remainderman, for the estate is liable to fall in at any moment, and when it comes to him he takes it with all that has been added to develop and improve it." Should the tenant for life exhaust lands so held, and leave them mined on the hands of those in succession, "It would be no more than occurs in every life estate in chattels which perish with the using. So long as the estate is used according to its nature—in *formam doni*—it is no valid objection that the use is consumption of it; and it is no fault of the tenant that it is not more durable."

A life estate in personal property, to which reference is made, is in many respects analogous to the usufruct of movables under the civil law: the person entitled to such use having the right to enjoy and use all the movable effects, according to their nature, things to be consumed become his property; things not to be

consumed, may be put to the use for which they were designed, without abusing them, and after the time for such use had elapsed, to be yielded in the condition they happen to be after the usufruct has expired. *Holman's App.* 24 Pa. 174.

The above quotations are not made to support the general principle, which is so well settled, but in order that the reasoning of the court upon the subject may be seen, and because much of the language used might be applied to the present case. They answer many objections urged against life tenants' right to mine coal.

In considering the question, respect must be had to the nature of the property. The whole value is in the coal. It was the intended source of profit. The estate descended to the life tenant as an open mine. If he cannot work it, it is of no use to him. It came to him from his wife without any restriction or limitation. Mrs. Swift was the owner of the coal in fee. She might have disposed of it by will as she chose. She might have limited plaintiff's rights as she saw fit. But when she did not see proper to restrain the gift, why should it be done? Not having done so, the obvious inference is that she intended him to take what the law gave to a life tenant of open mines. She must have expected him to derive some profit from the mine. Who can say that those in remainder were any more the objects of decedent's bounty than the life tenant? In the absence of any expression by her, or of a restriction upon her gift to him, it must be presumed that she meant him to enjoy the profits of the open mine while he lived.

Every tenant for life is entitled, of common right, to take reasonable estovers—that is, wood from off the land, for fuel, fences, agricultural erections and other necessary improvements. 4 Kent, Com. 73.

So he is entitled, through his lawful representatives, to emblements, or the profits of the growing crops, in case the estate determines by his death, before the produce can be gathered. From their nature we cannot conceive of estovers or emblements without land to support them. So also, in all the cases that have been discovered by the master where it was decided that the tenant for life might work open mines, he has also been life tenant of the surface as well as the coal. It is argued, therefore, that a tenant for life cannot work open mines unless he is also tenant of the surface. But why should it make any difference? He takes the coal not as estovers. He takes the mine for life, to use it, according to its nature, as a source of profit. The cases do not limit the amount of coal he may mine. He may mine to exhaustion. His right to mine is not affected by the comparative value of the coal and the surface.

In *Willard v. Willard*, *supra*, where the timber was the chief value, he was allowed to cut the timber. When the textatrix severs the surface from the coal, and gives a life estate to one, that would evidence an intention that he should derive some benefit from it. That is practically this case. There does not seem to be any substantial reason for not applying the general principle with regard to the right of life tenants to work open mines. The objection as

to the injury to the remaindermen by allowing life tenants to work open mines, has been answered repeatedly. In some instances those in remainder might be gainers, for the life estate may determine after expensive preparations for mining have been made, and before any coal has been taken out. If it is hard on them in some cases, it does them no injustice; and, if a contrary rule was applied, it would be very hard on the tenant for life.

The foregoing was written under the impression that the plaintiff was willing to forego his claim for damages, and that, therefore, it covered the whole case. But it seems the master was in error. The plaintiff insists upon a decree for damages, as well as for an injunction; and, if he has suffered damages, the court will decree on account thereof as incidental to the main relief. *Bispham, Eq. Secur.* 478; *Allison and Evans' App.* 77 Pa. 221.

Upon this branch of the case the facts are as follows:

Plaintiff had a contract with Henning to take out coal, for which he was to pay plaintiff one half cent per bushel in the pit. There was no limit as to time, nor as to the amount of coal to be mined. Henning was to take out all the coal he could sell in the neighborhood, but he was not required to mine any specified quantity, or for any specified time. Under the contract, Henning set some men to work to clear out the entry and the drain, and to put the pit in proper shape to take out coal. Henning was to clear out the pit mouth under the bargain, and to take the expense of the clearing out of the coal. After the clearing was done, he put a man, Lorsen, in to dig coal, and a man, Boebnert, to haul it. They worked for nearly two days. The work was stopped by Charles P. Rankin on the second day. None of the other defendants interfered with the work. No mining had been done in the pit since the men were stopped. Because they were interfered with, Henning could get no one to go there and work. The expense of clearing up and wages for the work done amounted to about \$30, which Henning paid. The plaintiff never paid him back, nor was he asked for it, or spoken to about it. The pit would average about fifteen coal cars a day. A car holds about thirty bushels. If Henning had not been interfered with, he probably would have taken out that quantity. At the time the mining was stopped, four hundred bushels per day could have been mined and sold in the neighborhood.

Upon these facts, it seems to the master that the plaintiff ought not to have a decree for damages. None could reasonably be asked against any of the defendants excepting Charles P. Rankin. The other defendants did not stop the work. Charles P. Rankin neither mined nor destroyed any of the coal. The coal still remains unmined. The plaintiff may still mine and sell it, and he may get a higher price for it than under his contract with Henning. The plaintiff paid nothing for cleaning the entry, nor as wages to the men. There is no means of determining how long Henning would have worked, nor how much coal he would have taken out. It would depend on many contingencies—as his success in working the mine; the wages of miners and laborers; the state of the market; facilities for transportation; demand

for the coal; the supply of natural gas; the abundance and scarcity of money; and the state of the country. Dependent on such a list of contingencies, it would be impossible to extract a rule for measuring the damages. If any damages have been sustained by plaintiff, they are so uncertain that they cannot be ascertained.

The master is therefore of opinion, upon the whole case, that the plaintiff is entitled to a decree restraining the defendants from interfering with him, and his workmen, in using the pit for the purpose of mining and hauling away his coal, with costs, but not for the payment of any damages sustained by him.

The defendants filed exceptions to the report, which were overruled by the court, and a decree rendered and entered in accordance with the report; whereupon defendants appealed.

*Messrs. Bruce, Negley & Shields* for appellants.

*Mr. John G. Bryant* for appellee.

#### Per Curiam:

We are so well satisfied with the report of the learned master, in this case, that we deem further comment unnecessary.

*Decree affirmed, and appeal dismissed, at costs of appellants.*

### KANSAS SUPREME COURT.

Frank A. BAKER, *Plf. in Err.*,

v.

Mary E. STEWART.

(....Kan....)

**\*1. A deed conveying real estate to a husband and wife** conveys the same to them in entirety, and on the death of one the survivor takes the entire estate.

**2. Neither the statutes relating to married women, nor the statutes relating to descents and distributions, nor any other statutes, have changed this rule of law in Kansas with respect to the rights of the survivor.**

*Horton, Ch. J., dissenting.*

(December 8, 1888.)

**ERROR** to the District Court of Franklin County (Benson J.), brought by defendant below to review a judgment in favor of the plaintiff below in an action for breach of covenant. *Reversed.*

Statement by *Valentine, J.*:

This was an action brought by Mary E. Stew-

art, in the District Court of Franklin County, against Frank A. Baker, to recover damages for an alleged breach of certain covenants contained in a general warranty deed executed by Baker and wife to the plaintiff for certain land situated in that county. A jury was waived, and the case was submitted to the court upon the following agreed statement of facts:

"(1) That Joshua Baker, being the owner in fee simple of the said land in controversy, on the 28d day of November, A. D. 1877, together with his wife, Elizabeth, conveyed the same by deed of general warranty of that date to Frank A. Baker and Alice Baker, which said deed was duly recorded May 9, 1881; (2) that at the time of said conveyance said Frank A. Baker and Alice Baker were husband and wife, and resided in the State of Kansas; (3) that prior to the third day of October, 1881, the said Alice Baker died, leaving surviving her as her heirs at law her said husband and two children born of said marriage, to wit: Mary E. Baker, born in 1877, and Annie A. Baker, born in 1880, both of said children now residing with their

#### \*Head notes by the Court.

**NOTE.—Conveyance to husband and wife; common-law rule as to estate.** At common law, if an estate is granted (Rogers v. Benson, 8 Johns. Ch. 431) to a man and his wife, they are neither properly joint tenants, nor tenants in common, for husband and wife being considered one person in law, they cannot take the estate by moieties; both are seised of the entirety, *per tout* and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor. *Davis v. Clark*, 28 Ind. 423; *Torrey v. Torrey*, 14 N. Y. 422. See *Jackson v. Stevens*, 18 Johns. 110; *Bevins v. Cline*, 21 Ind. 87; *Dias v. Glover*, 1 Hoffm. Ch. 77; *Doe v. Parratt*, 5 T. R. 653; *Green v. King*, 2 W. Bl. 1211. They could not take the estate by moieties. 2 Bl. Com. 182. Where, therefore, an estate was granted to a husband and wife and a third person the husband and wife had one moiety and the third person the other. *Litt. § 291*. But if the conveyance was to a man and woman who were at the time not married, but subsequently intermarried, they took by moieties and held the estate by moieties after marriage. *Moody v. Moody*, Amb. 649. Statutes converting joint tenancies at the common law into tenancies in common, except where, in the instrument, it is otherwise expressly declared, do not apply to or affect the peculiar estate taken by husband and wife under a deed to them jointly. *Marburg v. Cole*, 49 Md. 412, 33 Am. Rep. 289; *Farmers & M. Nat. Bank v. Gregory*, 49 Barb. 162; *Taul v. Campbell*, 7 Yerg. 319, 27 Am. Dec. 511; *Brownson v. Hull*, 16 Vt. 308; *Diver v. Diver*, 56 Pa. 106; *Doe v. Howland*, 8 Cow. 277; *Den v. Hardenbergh*, 10 N. J. L. 49; *Shaw v. Hearsey*, 5 Mass. 521; *Doe v. Harrison*, 1 Dana, 36; *Greenlaw v. Green*, 2 L. R. A.

*law*, 13 Maine, 182; *Dickinson v. Codwise*, 1 Sandf. Ch. 214; *Thornton v. Thornton*, 3 Rand. 179; *Rogers v. Grider*, 1 Dana, 242. This is based upon the principle that husband and wife are only one person in law, and have no separate existence, and no separate title to lands, and their rights and interests are identical; that a conveyance to both of them is a conveyance to one person. *Miller v. Miller*, 9 Abb. Pr. N. S. 446; *Sutliff v. Forgey*, 1 Cow. 98-95. No interest in such an estate could be sold on execution for the debts of the husband or wife; but the conveyance creating it may be set aside for fraud. *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64.

**Rule prevails in certain States.** The rule of the common law prevails in many of the States, as will be seen by the following cases:

*Arkansas*—A deed to husband and wife vests in the grantees an estate in entirety. *Kline v. Ragland*, 47 Ark. 112; *Robinson v. Eagle*, 29 Ark. 202.

*Indiana*—*Davis v. Clark*, 28 Ind. 423; *Arnold v. Arnold*, 30 Ind. 305; *Falls v. Hawthorn*, 30 Ind. 444; *Simpson v. Pearson*, 31 Ind. 1; *Anderson v. Tannehill*, 42 Ind. 141; *Hulett v. Inlow*, 57 Ind. 412; *Chandler v. Cheney*, 37 Ind. 391; *Barnes v. Loyd*, 37 Ind. 523.

*Maine*—*Harding v. Springer*, 14 Maine, 407.

*Maryland*—*Hannan v. Towers*, 3 Har. & J. 147.

In Massachusetts it is held that the husband and wife are to be considered in law as one person, and the survivor is entitled to the whole estate, and that a deed by one will not bind the other. *Dutch v. Manning*, 2 Dane, Abr. 230; *Ross v. Garrison*, 1 Dane, Abr. 35; *Shaw v. Hearsey*, 5 Mass. 521; *Fox v. Fletcher*, 8 Mass. 274; *Varnum v. Abbot*, 12 Mass. 479; *Wales v. Coffin*, 13 Allen, 218.

*Michigan*—*Fisher v. Provin*, 25 Mich. 347; *Jacobs*



said father; (4) that on said third day of October, 1881, the said Frank A. Baker and Okie Baker, his wife (said Frank having remarried) conveyed by deed of general warranty the lands in controversy to the plaintiff, Mary E. Stewart, which deed was duly recorded on the third day of October, 1881; (5) that no conveyance, by order of the court or otherwise, has ever been made or obtained to divest the interest of the said minor children in said lands, if any interest said children inherited from their said mother, Alice Baker. And it is agreed that the only question in this case is, Upon the death of said Alice Baker, did the surviving husband, Frank A. Baker, inherit the entire estate, or did the said children of Alice Baker inherit any interest in said premises?"

Upon this agreed statement of facts the court below rendered judgment in favor of the plaintiff, and against the defendant, for the sum of \$800, and costs of suit; and to reverse this judgment the defendant, as plaintiff in error, brings the case to this court.

**Mr. William H. Clark** for plaintiff in error.

**Mr. C. B. Mason** for defendant in error.

**Valentine, J.**, delivered the opinion of the court:

It appears that on November 23, 1877, Joshua Baker and his wife, Elizabeth Baker, who owned certain real estate in Franklin County, conveyed the same by a general warranty deed to their son, Frank A. Baker, and his wife, Alice Baker, which deed was duly recorded. Afterwards, and before October 3, 1881, Alice Baker died, leaving surviving her her husband and two children born during the marriage.

Upon these facts, and some others not necessary to mention, the main question arising in the case, and the one now presented to this court, is whether, on the one side, the foregoing deed conveyed the foregoing real estate to Frank A. Baker and his wife as tenants in

common, or whether, on the other side, it conveyed it to them as joint tenants or tenants in entirety. If the deed conveyed the land to Frank A. Baker and his wife as tenants in common, then the decision of the court below is correct, and must be affirmed; but if it conveyed it to them either as joint tenants or as tenants in entirety, then such decision is admitted to be erroneous.

The real question, stated more explicitly, is this: At the death of Alice Baker, who took the foregoing real estate? Did Frank A. Baker, as the survivor of the two, and as one of two joint tenants or tenants in entirety, take the whole of the estate, or did he, as a tenant in common with his wife, take only the one half thereof, and leave his wife's heirs to take the other half? No question has ever been presented in this case as to who had the right to control the property during the joint lives of Frank A. Baker and his wife, or whether either or both together could have legally sold the same, or any interest therein, during that time. These matters, however, will be considered to some extent hereafter.

We suppose it will be admitted that a deed might be executed to a husband and wife which would convey to them, if the language of the deed explicitly said so, any one of the foregoing estates—that is, an estate in common, or a joint tenancy, or a tenancy in entirety; for such has always been the law, and property owners can generally convey their property just as they please.

**Walker, J.**, however, in the case of *Smith v. Smith*, 30 Ala. 642, 648, used the following language: "The reason why, under a conveyance to husband and wife, they did not take either as joint tenants or tenants in common, is that they were, according to the principles of the common law, incapable of so taking."

**Mr. Bishop**, in his work on *Married Women* (vol. 2, § 285), criticises this language as follows: "Let us pause to say that the majority

*v. Miller*, 50 Mich. 119; *Etna Ins. Co. v. Resh*, 40 Mich. 241; *Manwaring v. Powell*, 40 Mich. 371.

*Mississippi*—*McDuff v. Beauchamp*, 50 Miss. 531; *Hemingway v. Scales*, 42 Miss. 1.

*Missouri*—*Garner v. Jones*, 52 Mo. 68; *Gibson v. Zimmerman*, 12 Mo. 385.

*New York*—The husband and wife hold the lands conveyed to them by entireties, and not as joint tenants or tenants in common; the husband being entitled to the possession during their joint lives, and upon the death of one the whole estate vests in the survivor. *Dias v. Glover*, Hoffm. Ch. 71; *Dickinson v. Codwise*, 1 Sandf. Ch. 214; *Barber v. Harris*, 15 Wend. 815; *Jackson v. McConnell*, 19 Wend. 175; *Doe v. Howland*, 3 Cow. 277; *Torrey v. Torrey*, 14 N. Y. 430; *Wright v. Saddler*, 20 N. Y. 320; *Freeman v. Barber*, 3 Thomp. & C. 574;  *Rogers v. Benson*, 5 Johns. Ch. 431; *Jackson v. Stevens*, 16 Johns. 110; *Goelet v. Gori*, 31 Barb. 814; *Farmers & M. Nat. Bank v. Gregory*, 49 Barb. 162; *Miller v. Miller*, 9 Abb. Pr. N. S. 444. The common-law doctrine has never been abrogated, and husband and wife take as tenants by entirety, and not as tenants in common or joint tenants. *Bertles v. Numan*, 62 N. Y. 152—*Dunforth, J.*, and *Finch, J.*, dissenting, on the ground that the common-law doctrine was abrogated by the statute enabling a wife to hold separate estate, and for reasons stated in *Meeker v. Wright*, 70 N. Y. 202, where the husband and wife were held to take as tenants in common, the conveyance being made to them jointly, with no statement in the deed as to the estate. It has been held, however, that if the conveyance expressly declares that they should hold as joint tenants they would do so. *Hicks v. Cochran*, 4 Edw. Ch. 107; *Stewart v. Patrick*, 68 N. Y. 450.

*North Carolina*—*Den v. Whitmore*, 2 Dev. & B. L. 2 L. R. A.

537; *Den v. Branson*, 5 Ired. L. 426; *Woodford v. Higby*, 1 Winst. L. 237; *Jones v. Potter*, 89 N. C. 220. When land is given by will to husband and wife they hold by entireties. *Simonton v. Cornelius*, 98 N. C. 433.

*Pennsylvania*—Where a husband and wife are seized of land by entireties and the husband survives the wife, a sheriff's sale of the land upon a judgment against the husband will discharge a mortgage executed by the husband and wife after the entry of the judgment. *Fleck v. Zillhaber*, 9 Cent. Rep. 673, 117 Pa. 213.

*Tennessee*—*Taul v. Campbell*, 7 Yerg. 319; *Ames v. Norman*, 4 Sneed, 683.

*Vermont*—*Brownson v. Hull*, 16 Vt. 309.

*Virginia*—*Thornton v. Thornton*, 3 Rand. 179.

*Wisconsin*—*Ketchum v. Walsworth*, 5 Wis. 96; *Bennett v. Child*, 19 Wis. 365.

*States in which rule not applied.* In New Hampshire and New Jersey the common-law rule has been abolished by statute. *Clark v. Clark*, 56 N. H. 105; *Washburn v. Burns*, 34 N. J. L. 18; *Den v. Hardenbergh*, 10 N. J. L. 42; *Den v. Gardner*, 20 N. J. L. 556; *McDermott v. French*, 15 N. J. Eq. 78; *Holles v. State Trust Co.*, 27 N. J. Eq. 303. In Kentucky, unless the right of survivorship is especially provided for in the conveyance, they hold as tenants in common. *Crown v. Joyce*, 3 Bush, 454; *Elliott v. Nichols*, 4 Bush, 502. In Texas, where a gift is made to husband and wife, the wife has an undivided half interest, as her separate estate. *Bradley v. Love*, 60 Tex. 472. In Connecticut the husband and wife become joint tenants, and the husband has the power of conveying his interest. *Whitelsey v. Fuller*, 11 Conn. 337. See 1 Devlin, Deeds, § 118, and note, where above cases are gathered.

of legal persons would probably deny this proposition of the learned judge; because, as we saw in the first volume [vol. 1, §§ 616, 618], husband and wife, if they were joint tenants or tenants in common before marriage, continue to be the same after marriage, and do not become tenants by the entirety of the estate, which shows them to be capable of holding as tenants in common or as joint tenants; and it is perhaps the better doctrine at the common law that a conveyance to them after marriage may, by express words, create in them either of these two tenancies."

Mr. Washburn, in his work on Real Property (vol. 1, \*425), uses the following language: "It is always competent, however, to make husband and wife tenants in common, by proper words, in the deed or devise by which they take, indicating such an intention."

Chancellor Kent, in his Commentaries (vol. 4, \*363), uses the following language: "It is said, however, to be now understood that husband and wife may, by express words, be made tenants in common by a gift to them during coverture." See also *McDermott v. French*, 15 N. J. Eq. 78, 80.

Certainly, a husband and wife may be made tenants in common by a separate deed to each, converting to each a separate moiety of the estate. This may also be accomplished by a separate conveying clause as to each in the same deed; and certainly no good reason can be given why the same thing might not be accomplished by any express words in a single deed executed to the two together, showing the intention of the parties to be that the husband and wife should take the estate as tenants in common. But it would require express words or words strongly implying such an intention. Without such words the estate conveyed would be an estate in entirety.

We suppose it will also be admitted that the deed in the present case would at common law have conveyed the property in entirety to Frank A. Baker and his wife, Alice Baker, and would not have conveyed it to them as ordinary joint tenants, or as tenants in common. We suppose it will also be admitted that, if the deed in the present case conveyed the estate to Frank A. Baker and his wife, either in entirety or as joint tenants, then that Frank A. Baker, as the survivor of the two, was, at the death of his wife, entitled to the land, and the defendant in error, plaintiff below, should not recover in this action. But if the deed did not so convey such estate, and conveyed the same to Baker and wife purely, solely and entirely as tenants in common, then the plaintiff in error, defendant below, was not, at the death of his wife, entitled to the land, and the defendant in error, plaintiff below, should recover in this action. Almost all authority is in favor of the theory that such deed conveyed an estate in entirety to Frank A. Baker and wife, and that he, as the survivor of the two, was, at the death of his wife, entitled to the entire estate. Among the decided cases supporting this view of the case are the following: *Myers v. Reed* (U. S. Circuit Court Dist. Or.) 17 Fed. Rep. 401; *Gibson v. Zimmerman*, 12 Mo. 385; *Garnier v. Jones*, 52 Mo. 68; *Hall v. Stephens*, 65 Mo. 670; *Robinson v. Eagle*, 29 Ark. 202; *Harding v. Springer*, 14 Maine, 407; *Robinson v.*

*Hall*, 16 Vt. 309; *Shaw v. Hearsey*, 5 Mass. 520; *Fox v. Fletcher*, 8 Mass. 274; *Draper v. Jackson*, 16 Mass. 480; *Wales v. Coffin*, 18 Allen, 213; *Pierce v. Chace*, 108 Mass. 254; *Pray v. Stebbins*, 1 New Eng. Rep. 521, 141 Mass. 219; *Bertles v. Nunan*, 92 N. Y. 152; *Zornitlein v. Bram*, 1 Cent. Rep. 66, 100 N. Y. 12; *Kip v. Kip*, 33 N. J. Eq. 213; *Buttler v. Rosenblath*, 8 Cent. Rep. 353, 42 N. J. Eq. 651; *Rates v. Seely*, 46 Pa. 248; *Diver v. Diver*, 56 Pa. 106; *French v. Mehan*, Id. 286; *McCurdy v. Canning*, 64 Pa. 39; *Fleek v. Zillhaber*, 9 Cent. Rep. 673, 117 Pa. 213; *Hannan v. Trovers*, 3 Har. & J. 147; *Marburg v. Cole*, 49 Md. 402; *Den v. Whitmore*, 2 Dev. & B. L. 537; *Den v. Branson*, 5 Ired. L. 426; *Woodford v. Higby*, 1 Winst. L. 237; *Doe v. Garrison*, 1 Dana, 35; *Banton v. Campbell*, 9 B. Mon. 587, 594; *Babbitt v. Scroggin*, 1 Duval, 273; *Taul v. Campbell*, 7 Yerg. 319; *Ames v. Norman*, 4 Sneed (Tenn.) 688; *Berrigan v. Fleming*, 2 Lea, 271; *Hemingway v. Scales*, 42 Miss. 1; *McDuff v. Beauchamp*, 50 Miss. 531; *Allen v. Tate*, 58 Miss. 585; *Ketchum v. Walworth*, 5 Wis. 95; *Bennett v. Child*, 19 Wis. 362; *Fisher v. Provin*, 25 Mich. 347; *Ætna Ins. Co. v. Reah*, 40 Mich. 241; *Manwaring v. Powell*, Id. 371; *Jacobs v. Miller*, 50 Mich. 119; *Bevins v. Cline*, 21 Ind. 37, 41; *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Ind. 305; *Falls v. Hawthorn*, Id. 444; *Simpson v. Pearson*, 31 Ind. 1; *Chandler v. Cheney*, 37 Ind. 391; *Barnes v. Loyd*, Id. 523; *Jones v. Chandler*, 40 Ind. 588; *Anderson v. Tannehill*, 42 Ind. 141; *Hulett v. Inlow*, 57 Ind. 412; *Patton v. Rankin*, 68 Ind. 245; *Carver v. Smith*, 90 Ind. 222.

On the side of the defendant in error, cases are cited from Iowa, Illinois, and New Hampshire which are relied on as supporting the opposite view of the case. But these cases were decided under special statutes, and therefore are not authority at all. Under such statutes there could not be any joint tenancy or tenancy by entirety, but only a tenancy in common, and therefore the decisions in those States could not have been otherwise than as they were. The Statute of Iowa upon this subject reads as follows: "Sec. 1939. Conveyances to two or more, in their own right, create a tenancy in common, unless a contrary intent is expressed." McClain, Ann. Stat. Iowa 1882, § 1939.

The Statute of Illinois upon this subject reads as follows: "Sec. 5. No estate in joint tenancy in any lands, tenements or hereditaments shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees (unless otherwise expressly declared as aforesaid) shall be deemed to be in tenancy in common." Starr & C. Stat. Ill. 1885, p. 571, chap. 30, ¶ 5.

The Statute of New Hampshire upon this subject reads as follows: "Sec. 14. Every conveyance or devise of real estate made to two or more persons shall be construed to create an estate in common, and not in joint tenancy, unless it shall be expressed therein that such estate is to be held by the grantees or devisees

as joint tenants, or to them and the survivor of them, or other words are used clearly expressing an intention to create a joint tenancy. Sec. 15. Joint heirs shall be deemed tenants in common." Gen. Laws N. H. 1878, p. 325, chap. 185, §§ 14, 15.

It seems to be admitted that at common law the deed in the present case would convey an estate in entirety to Frank A. Baker and his wife; but it is claimed that the rule of the common law has been changed by our statutes. No statute, however, has been referred to, nor can any statute be found, that enacts directly that such a deed should not convey such an estate. Indeed, there is no statute that pretends in direct terms to change or modify the common law in any particular with respect to such a deed. It is claimed, however, that the Married Woman's Act by indirection or impliedly, changes or modifies this rule of the common law.

Now, how such Act changes or modifies the rule of the common law in this regard it is difficult to understand. That Act was passed by the Legislature, presumably, for the benefit of married women, and not to take away from them any of their rights or privileges.

Now, nine tenths of the married women of this country are younger than their husbands, and the life tables, wherever they state the expectancy of life for males and females separately, show that the expectancy of life for women is greater than that for men of the same age and health. See, especially, Dr. William Farr's tables in any volume of the American Almanac from 1879 up to the present time. Hence, in the great majority of instances, married women must survive their husbands. Now, if the Married Woman's Act transforms an estate in entirety into an estate in common, then it will, in a great majority of instances, divest married women of one half of their estates. Without the Act, a married woman, holding with her husband an estate in entirety, would, when he dies (if she survives him), take the entire estate; but with the Act, if it is to be construed as the defendant in error would desire to have it construed, she would take, under such circumstances, only one half of the estate, and must lose the other half. As will be shown hereafter, however, this Act has nothing to do with the estate which either the husband or the wife shall hold, but only with the possession, control and enjoyment by married women of their own separate property, of estates which they in fact own.

For the purposes of this case it will be admitted, and it is our opinion, that, under the statutes of this State relating to married women, they have all the rights, powers and privileges that married men have, and may control their separate property, and buy and sell and trade and traffic, to the same extent that married men may, and with like effect and consequences. But none of these things affect this case. It will be admitted that Alice Baker, while living, had the right to control the real estate in question to the same extent that her husband, Frank A. Baker, had. But that does not affect this case in the least. It does not determine what estate of inheritance passed from Joshua Baker and wife to Alice Baker or to Frank A. Baker. It only determines that each had during their

joint lives an equal right to control the estate that did in fact pass. The estate that did in fact pass was an estate for life to each of them, with a contingent estate in fee simple, or of inheritance to each of them, the latter estate depending upon the contingency as to which should outlive or survive the other. So long as each lived each had the right to possess and enjoy the entire estate; but when one died, the other took the entire estate. Undoubtedly, such an estate could have been created by the deed from Joshua Baker and wife to them, if the deed had expressly said so; and under all the authorities the deed that was actually executed would at common law have conveyed just such an estate as conclusively and certainly as though it had expressly said so. And nearly all the authorities hold that the statutes relating to married women, and giving to them the right to control and manage their own separate property, do not in the least affect the question as to what estate passes by a deed to a husband and wife, or what either shall take on the death of the other, and these authorities hold that such estate is still one of entirety. Among the authorities to this effect we would cite the following: *Diver v. Diver*, 56 Pa. 106, 109; *McCurdy v. Canning*, 64 Pa. 39, 41; *Kip v. Kip*, 83 N. J. Eq. 218; *Buttler v. Rosenblath*, 8 Cent. Rep. 353, 42 N. J. Eq. 651; *Chandler v. Cheney*, 37 Ind. 391, 412 et seq.; *Carver v. Smith*, 90 Ind. 222; *McDuff v. Beauchamp*, 50 Miss. 581; *Fisher v. Provin*, 25 Mich. 947; *Robinson v. Eagle*, 29 Ark. 202; *Bertles v. Numan*, 92 N. Y. 152; *Zornlein v. Bram*, 1 Cent. Rep. 66, 100 N. Y. 13; *Marburg v. Cole*, 49 Md. 402; *Bennett v. Child*, 19 Wis. 362. See also 2 Bishop, Married Women, §§ 284-289.

In the case of *Buttler v. Rosenblath*, 8 Cent. Rep. 353, 42 N. J. Eq. 651 (decided in 1887), it is decided as follows: "(1) A conveyance of land, since the passage of the Married Woman's Act of 1852, to husband and wife, does not create a tenancy in common. (2) That Act endows the wife with the capacity, during the joint lives, to hold in her possession, as a single female, one half the estate in common with her husband. The right of survivorship still exists as at common law. (3) To constitute a tenancy in common between husband and wife there must be in the conveyance an expression of an intention to do so."

In the case of *Diver v. Diver*, 56 Pa. 106, 109, Mr Justice Strong, who was afterwards one of the Justices of the Supreme Court of the United States, in delivering the opinion of the court, used the following language: "But it is said the Act of 1848, by destroying the legal unity of the husband and wife, has converted such an estate into a tenancy in common; that is, that such a deed conveys a different estate from that which the same deed would have created if made prior to the passage of the Act. To this we cannot assent. It mistakes alike the letter and the spirit of the statute, imputing to it a purpose never intended. The design of the Legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property by removing it from under the dominion of the husband. To effectuate this object she was enabled to own, use and enjoy her property, if hers before marriage, as fully after marriage as

before. And the Act declared that if her property accrued to her after marriage, it should be owned, used and enjoyed by her, as her own separate property, exempt from liability for the debts and engagements of her husband. All this had in view the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her. It has nothing to do with the nature of the estate. The Act does not operate upon rights accruing to her until after they have accrued. It takes such rights of property as it finds them, and regulates the enjoyment; that is, the enjoyment of the estate after it has vested in the wife. And the mode of authorized enjoyment is significant. It is to be as her separate property is enjoyed, as property settled to her separate use. The Act, therefore, no more destroys her union with her husband than does a settlement of property for her separate use. To a certain extent she is enabled, but no more than is necessary, to protect her property after it has been acquired. We have held that she can convey her lands only by joining in deed with her husband. *Pettit v. Frete*, 88 Pa. 118. This is a clear recognition of the existing unity of the two. It need not be repeated that no greater effect is to be given to the Act of 1848 than its language and spirit demand. It is a remedial statute, and we construe it so as to suppress the mischief against which it is aimed, but not as altering the common law any further than is necessary to remove that mischief. To hold it as operating upon the deed conveying land to a wife, making such deed assure a different estate from what it would have assured without the Act, is to lose sight of the legislative purpose. Were we to do so, it would become, in many cases, a means of divesting her of her property, instead of an instrument of protection. In the present case, if it has converted the estate granted to Diver and his wife into a tenancy in common, it has taken from her her ownership and enjoyment of the entirety during her husband's life, and her right of survivorship to the whole."

The case of *Carver v. Smith*, 90 Ind. 222, is a late case, and equally explicit upon this subject. And see, also, the latest New York cases upon this subject.

As we have before stated, the question as to who had the control of this property, or how it should be controlled while Alice Baker was alive, is not a question in this case. The only question in this case is, Who took the property after her death? But suppose that this question shall, nevertheless, be considered. The right or privilege or power of the husband, at common law, to control the use of the wife's real estate, was never any part of the estate held by either, but was always simply a right or privilege or power growing out of and founded upon the marriage relation. At common law the husband has such right of control over all the wife's real estate, and not merely over such of her real estate as was held by the two in entirety. Now, cannot this right to control of the wife's real estate be changed by statute without abolishing or destroying the nature of the estate held by the husband or the wife, or both—the inheritance? Nearly all the authorities say that this may be done. May not the common law upon any given subject be amended or

altered by statute without wholly destroying the entire common law upon that subject? May not the common law on any subject be altered in part, and left in force in part?

The common law, in this State, has probably been so amended that the husband and wife have an equal right to control all the land which they own in entirety, but in other respects the estate of entirety is probably precisely the same as it was before the statutes relating to married women took effect. With this change in the right of the husband to control the real estate owned by his wife, or by him and her in entirety, the estate of entirety has become more like the ordinary estate of joint tenancy, though it is not yet strictly like such an estate. It does not matter in this case, however, which of these two estates the present is or was. If it was either an estate in entirety or an estate in joint tenancy, then the claim of the defendant in error is untenable. The claim of the defendant in error is tenable only upon the theory that the estate in the present case was one of pure tenancy in common.

It is also urged, faintly, but still urged, that the statutes relating to descents and distributions have transformed the estate in entirety into an estate or tenancy in common. How this has been done, however, is not made plain. It is difficult to understand just how any person may transmit to another, by death or otherwise, more than such first-mentioned person ever owned. Only a descendible estate can pass to an heir. In estates in entirety held by a husband and wife each owns a life estate in the entire property, but the statutes relating to descents and distributions do not pretend to affect such estates. They do not enact that a life estate shall pass to an heir; and of course such an estate cannot. Each (the husband or wife) also owns a contingent estate in fee simple in the entire estate, based upon the survivorship of one as to the other. The survivor takes the whole estate, and the heirs of the other take nothing. The one who dies first renders it utterly impossible for the contingency of survivorship on that one's part, the contingency upon which that one's inheritable estate is founded, ever to take place, and renders it utterly impossible for that one ever to obtain any inheritable interest in the property, or any interest which could by any possibility be transmitted to heirs. By that one's death that one's contingent inheritable estate is ended and determined, and ended and determined before any absolute inheritable estate ever became vested in him or her; and hence that one, at his or her death, could have nothing which could be transmitted to heirs.

There have always been laws in all the States with reference to descents and distributions; and yet it has never been supposed that such laws prevented or hindered the creation of estates in entirety. Nearly all the courts hold that estates in entirety may still exist, and may be created by an ordinary deed of general warranty to the husband and wife, and such estates are no more against our present laws in Kansas relating to descents and distributions than such estates have always been against all other laws concerning descents and distributions in this and other States. So far as the homestead is concerned, our laws concerning descents and

distributions recognize the right of the survivor, either the husband or the wife, and in whosesoever name the title may be vested, to occupy such homestead, and the whole of it after the death of the other. See Act Concerning Descents and Distributions, §§ 2, 28.

The homestead is a kind of "community" property. No other statutes have been referred to as abolishing estates in entirety, and we think there are none.

Under the facts of this case we think that Frank A. Baker, as the survivor of his wife, Alice Baker, is entitled to the entire estate, and that no part of the estate passed to her heirs.

*The judgment of the court below will be reversed, and cause remanded; with the order that judgment be rendered in favor of the defendant below, and against the plaintiff below, for costs.*

**Johnston, J.**, concurring.

**Horton, Ch. J.**, dissenting:

At common law, where real property was conveyed to the husband and wife by deed, both husband and wife were seised of the estate thus granted *per tout, et non per my* (by the whole, and not by a part), as one person, and not as joint tenants or tenants in common. The survivor became sole seised of the entirety of the estate. The reason why, under a conveyance to husband and wife, they did not take, either as joint tenants or tenants in common, was that they were, according to principles of the common law, incapable of so taking. The authorities fully sustain this statement of the reasons on which the common-law rule, prescribing the effect of a conveyance to husband and wife, is founded.

Littleton, after stating the rule, says that "The cause is, for that the husband and wife are one person in law." 2 Co. Litt. 187 a.

Blackstone says that "Husband and wife being considered as one person, they cannot take the estate by moieties, but both are seised of the entirety." 2 Bl. Com. 182.

Chancellor Kent says: "They are not properly joint tenants nor tenants in common; for they are but one person in law, and cannot take by moieties." "This species of tenancy arises from the unity of husband and wife." 2 Kent, Com. 182.

So with the adjudged cases. They all proceed, not on any supposed intention of the parties to the conveyance, but on the sole ground of the incapacity of husband and wife, who are regarded as one person in law, to take, "during coverture, separate estates in property which is conveyed to both of them." *Green v. King*, 2 W. Bl. 1211; *Jackson v. Stevens*, 16 Johns. 115; *Ames v. Norman*, 4 Sneed (Tenn.) 692; *Barber v. Harris*, 15 Wend. 617; *Stuckey v. Keefe*, 26 Pa. 397; *Rogers v. Benson*, 5 Johns. Ch. 437; *Pollard v. Merrill*, 15 Ala. 174; 4 Kent, Com. 382; 1 Greenl. Cruise, 863, §§ 44, 45; 1 Thom. Co. Litt. note, p. 741; Bell, Husband & Wife, 396; *Bredon's Case*, 1 Coke, \*76 b, 193, note (Thom. & F. ed.).

In accordance with this view it has been held, and upon reasoning entirely conclusive, that husband and wife cannot at common law, by any words in a grant to them, during coverture, be made either joint tenants or tenants in common. *Stuckey v. Keefe*, 26 Pa. 397; *Johns-*

*ton v. Hart*, 6 Watts & S. 319; *Dias v. Glover*, 1 Hoffm. Ch. 71.

Therefore the statement in the opinion that, under the rule of the common law, a deed might be executed to a husband and wife which would convey to them an estate in common, or in joint tenancy, is not only not admitted, but is against the great weight of authority; and I might say against all reported English cases, but a single one, upon which text writers and one court, in attempting to defend estates in entirety, have built largely. See *Stuckey v. Keefe*, *supra*, and the authorities there cited.

As a strong illustration that estates in entirety are not applicable to our society and institutions, I cite *Dias v. Glover*, *supra*. In that case the conveyance was made to "J. C. and P. C., his wife, as tenants in common and in equality of estate, and not as joint tenants." Notwithstanding the purpose and intention of all the parties to the conveyance, it was decided that, under the common law, the conveyance was not permitted to have any operation in creating a tenancy in common. The words "as tenants in common" and "entirety of estate, and not as joint tenants," were rendered nugatory by the incapacity of the husband and wife, under the common law, to take as tenants in common.

One of my objections to establishing or recognizing estates in entirety in this State is that it is not in consonance with our laws that the intention of the parties to a conveyance to a husband and wife cannot have any operation. The adoption of estates in entirety determines the incapacity of husband and wife to take either as joint tenants or tenants in common. 2 Kent, Com. 182; 4 Kent, Com. 382.

There are citations in the opinion, from Bishop, Washburn and Chancellor Kent, attempting to support the rule that even at common law it is competent to make husband and wife tenants in common by proper words in the deed or devise by which they take.

The case of *McDermott v. French*, 15 N. J. Eq. 78, is also referred to for the same reason.

The citation from Bishop is based upon *Wales v. Coffin*, 18 Allen, 218, and the New Jersey case of *McDermott v. French*, *supra*, and one English case [*Webb v. Russel*, 3 T. R. 393] referred to in 1 Preston on Estates, 182, and also in 2 Preston on Abstracts, 41.

The Massachusetts case decides "That, by common law, a deed or devise to husband and wife creates one indivisible estate in them both, and the survivor of them, not because of their supposed incapacity to hold in moieties, but because, such being presumed to be the intention of the parties, the law holds the estate to be limited accordingly." This last conclusion of the decision is contrary to Blackstone and all the other common-law authorities. The English case in 2 Preston on Abstracts, 41, is the authority for the citation from Kent. Washburn gives as his authority the New Jersey case only. The New Jersey case is founded upon the citation from Kent and the English case in Preston.

The assistant vice-chancellor, in *Dias v. Glover*, *supra*, very conclusively questions the solidity of Mr. Preston's opinion. He observes: "It is true that Mr. Preston says (1 Prest. Est. 182): 'In point of fact, and agreeable to natural reason, the husband and wife are distinct

and individual persons, and, accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do.' He cites 1 Inst. 187b, only. I find nothing in the place referred to bearing upon this position, unless it be the rule laid down that if a man makes a lease to A, and to a baron and feme—that is to A for life, to the husband in tail, and to the feme for years—in this case it is said that each has a third part in respect to the severalties of their estates.

"In Mr. Preston's work on Abstracts (vol. 2, p. 41) he states this position more reservedly: 'And even a husband and wife may, by express words (at least, so the law is understood), be made tenants in common, by a gift to them during coverture.'"

Therefore the citations from Bishop, Washburn, Kent and the New Jersey report are virtually based upon the single English case which is contrary to all the English and common-law decisions, and is not held by *Vice-Chancellor Hoffman* as good authority. If it be conceded that a conveyance can be made to husband and wife, under the common law, by proper words, so as to create them tenants in common, then the reason on which the rule of an estate in entirety was founded has ceased to exist, and, there being no reason for the rule, such estate should not be adopted or recognized: "for," says Blackstone, "husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety *per tout, et non per my.*"

Again; as one of the reasons for the recognition of estates in entirety, it is suggested in the opinion that such a rule is beneficial to married women, because the life tables show the expectancy of life for women is greater than for men of the same age and health. In this case the wife, Mrs. Alice Baker, died before her husband, and it will be no satisfaction to her children to be informed that they are denied the right to inherit any part of the estate their mother had in her property in her lifetime, because, as a general rule, estates in entirety do not take away from married women their rights or privileges. This denial of inheritance, in my opinion, is in conflict with chapter 33, Compiled Laws 1885, being the Act relating to descents and distributions. Section 28 of that chapter reads:

"All the provisions hereinbefore made in relation to a widow of a deceased husband shall be applicable to the husband of a deceased wife. Each is entitled to the same rights or portion in the estate of the other, and like interests shall in the same manner descend to their respective heirs. The estates of dower and by curtesy are abolished." And section 29 reads: "... Children of a deceased parent inherit in equal proportions the portion their father or mother would have inherited if living." See also the other sections of said chapter 33.

But I do not accept the conclusion announced, that estates in entirety are beneficial to married women on account of the life tables. While some of these tables show that the expectancy of life for women, including married and single, is greater than that for men, all of the tables

show that from the age of ten to thirty-five the female rate of mortality exceeds the male. 10 Chambers' Encyclopedia, 2.

It is also shown, by the experience of assurance officers, that, while female annuitants are longer lived than male, female assured lives are no better. Id. The majority of women who ever marry are married before they reach the age of thirty-five, the greater number under thirty. Therefore the life tables do not show conclusively that the expectancy of life for wives is greater than that for men. The ratio of male to female mortality differs considerably at different ages.

A very large number of decided cases are cited as supporting estates in entirety. These authorities, however, are not to be accepted as conclusive in this State: *First*. The Constitution and Statutes of Kansas are more liberal than those of many States in recognizing the rights and privileges of women. *Second*. The courts generally have been very slow in conceding the wife to be the companion and equal of the husband, and entitled to enjoy equally with him the rights of property.

Under the ancient doctrine of the common law, where estates in entirety originated, the husband and wife were not only one person in law, but the very being or legal existence of the woman was suspended during the marriage, or at least was incorporated and consolidated into that of the husband, under whose wing, protection and cover she performed everything, and is therefore called, in law French, a *feme covert—famina tiro cooperta*; and was said to be *covert baron*, or under the protection and influence of her husband, her baron or lord; and her condition during her marriage was called her coverture. 1 Cooley, Bl. 8d ed. 442.

In this State a husband and wife are two independent persons, and the husband has no more immediate interest or control over the property of the wife than any other person. Our system of marriage literally implies the equality of the husband and wife; the integrity and individuality of each; the mutual obligation in which love and duty find no bondage; the division of labor; and the multiplication and sharing of happiness.

"Marriage involves neither the assumption of indebtedness, nor the acquisition of property. A married woman may contract and be contracted with concerning her separate real and personal property; sell, convey and incur the same; sue and be sued without reference thereto—in the same manner, and to the same extent, and with like effect, and as freely as any other person may in regard to his or her real or personal property. She may purchase property from her husband, perform labor and services on her sole and separate account. She has the same control of her person and property as her husband. She has the same right as to the nurture, education and control of her children, and also the same rights in the possession of the homestead. *Knaggs v. Mastin*, 9 Kan. 532; *Tallman v. Jones*, 18 Kan. 488; *Going v. Orns*, 8 Kan. 85; *Larimer v. Kelley*, 10 Kan. 298; *Butler v. Butler*, 21 Kan. 526. She may participate in all city elections, attend caucuses, nominate candidates, and vote for such persons and principles as her judgment dictates. In fact, in Kansas a woman is in nearly all

matters accorded civil and political equality with man. She is not his servant, nor his slave." *State v. Walker*, 86 Kan. 811. See chapter 62, Comp. Laws 1885.

Then again, this court heretofore has been fearless in disregarding doctrines founded upon circumstances peculiar to England, but not applicable to the society and institutions of this country.

In *Simpson v. Munde*, 3 Kan. 172, as far back as 1865, this court wiped out the "indescribable myth" known as the "English Vendors' Lien," although the great weight of authorities, under the common law, recognized and enforced it.

In *Norris v. Corkill*, 32 Kan. 409, notwithstanding the numerous decisions of various States that the husband is liable for the torts of his wife, under the common law, this court held that, considering the liberal provisions of the statutes regarding married women, the common-law rule was changed, and that the husband was not liable for slanderous words spoken by his wife.

In *Butler v. Butler*, 21 Kan. 521, the writer of that opinion inclined to the belief that, notwithstanding the great weight of authority under the common law, a voluntary conveyance by a woman, just prior to her marriage, without the knowledge of the husband, was not a fraud upon his marital rights. This upon the ground that the rights and privileges of married women have been so changed by the laws of the State from the common law that the reason for any such rule failed, and therefore the rule itself ceased.

The case of *Diver v. Diver*, 56 Pa. 106, in which the opinion was written by *Mr. Justice Strong*, afterwards one of the Justices of the Supreme Court of the United States, is strongly relied upon. That decision, however, is founded upon the case of *Pettit v. Fretz*, 33 Pa. 1118, where the Married Woman's Act of Pennsylvania is so construed as not to give the wife the absolute right to dispose of her estate as a *feme sole*. To show that the decision is not applicable to our State, I merely quote a part of the opinion: "If the Married Woman's Act of April 11, 1848, were literally interpreted . . . we could not fail to see that it would work a repeal of our old statutes of conveyancing, which the Legislature had exhibited no intention to repeal; that it would change the law of actions; that it would expose wives continually to the hazards of barter and business, without that aid and protection which the common law entitled her to receive from her husband; that it would dethrone him from the headship of the family, take her thoughts and time from the care of the family, and introduce confusion and discord, which would in their turn entail upon the public evils tenfold greater than those which the statute was intended to remedy . . . The marriage relation is the foundation of our social organization. If we are not to stand by the 'ancient landmarks,' while the Legislature leaves them untouched—if, taking the words of the enactment, we are to run them out into all possible constructions, however attenuated, and however remote from the great central idea—we shall substitute a judicial system of concubinage in Pennsylvania for the common-law relation of marriage; for so soon as the mate-

rial interests of the relation are severed at all points, and for all purposes, marriage will become a mere partnership of convenience, to be formed and dissolved like other partnerships when the partners think they can do better for themselves." Therefore the decision of *Diver v. Diver*, when construed in connection with the decision of *Pettit v. Fretz*, *supra*, therein referred to, is no authority for this court to follow.

This court, unlike the Pennsylvania Courts, has never dwarfed or limited by construction the statutes respecting the rights of married women, for fear "that it would dethrone the husband from the headship of the family, take the thoughts and time of the wife from the care of the family, and introduce confusion and discord, which would in their turn entail upon the public evils tenfold greater than those which the statutes were intended to remedy." The statute concerning the common law reads: "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the General Statutes of this State; but the rule of the common law that statutes in derogation thereof shall be strictly construed shall not be applicable to any general statute of this State; but all such statutes shall be liberally construed to promote their object." Section 3, chap. 119, Comp. Laws 1885.

In this State, as I have already shown, the statutes and decisions recognize the separate existence of the wife, her separate property, her separate contracts and her separate suits. Therefore the nice distinction created in the ancient books of estates in entirety are not, in my opinion, in line with our constitutional and statutory law, judicial decisions and the condition and wants of the people. In the language of the old Massachusetts Statute (1785, chap. 62): "Tenancies in common are more beneficial to the Commonwealth and more in consonance with the genius of Republics." In 1 Swift, Syst. 272, Judge Swift remarks that the odious and unjust doctrine of survivorship was never adopted in his State. In my view I am supported by the decisions of many strong and able courts:

In *Cooper v. Cooper*, 76 Ill. 57, it was said that "Under the legislation of this State, giving married women the right to acquire property, and hold the same free from their husband's control, the reason for the rule which holds that a conveyance to husband and wife makes them tenants by the entirety, with right of survivorship, has ceased to exist, and they will, in this State, take and hold as tenants in common."

In *Hoffman v. Stigers*, 28 Iowa, 302, it was held that "Under our law joint tenancies, and in entirety, are not favored, and a conveyance to two or more persons in their own right creates a tenancy in common, unless a contrary intent is expressed. And this rule, under our statute, applies to a conveyance, whether by judgment or deed, vesting the estate in a husband and wife jointly." In the opinion in that case it was also said: "And as the courts in most of the States condemn entailments or perpetuities, so we do and should joint tenancies, or at least their common-law incident—the right of survivorship."



*J. Clark v. Clark*, 56 N. H. 106, it was decided that tenancies by entirety became inoperative by the passage of the Act of 1860 in relation to married women. In that opinion it was said: "It appears that the testator died in 1862, after the Act in regard to the estates of married women took effect, whereby married women, so far as their property not derived from their husbands was concerned, became practically endowed with the rights and subject to the liabilities of unmarried women. That mysterious joint tenancy, in which the subtle genius of the English real law so much delighted itself, where the tenants took not *per my et per tout*, but by entireties, could no longer arise. The existence of a married woman, so far as her property is concerned, is no longer by our law merged into that of her husband; but she has become a separate being, endowed, so far as her separate estate is concerned, with the powers and subjected to the liabilities of unmarried women."

In *Walshall v. Gores*, 36 Ala. 728, the syllabus reads: "At common law, under a devise to husband and wife during coverture, the entire estate vested in both of them as one person, and on the death of either continued in the survivor; but under the statutes of this State creating and regulating the separate estates of married women (Code, §§ 1981-1997), such devise creates the same estate in the parties as if it had been made before coverture. On the death of the wife intestate, her undivided moiety descends to her heirs at law, subject to the statutory rights of her surviving husband during his life; and on the subsequent death of the husband the wife's heirs become entitled to the possession of her undivided moiety." In that opinion it was said:

"Article 3, chap. 1, tit. 5, pt. 2, of the Code, relates expressly to separate estates of married women. Code, p. 380. The seventeen sections which compose that article embody the principles of a new policy with reference to married women, which was unknown to the common law. *Smith v. Smith*, 30 Ala. 648. One of the principles embodied in the provisions of the Code here referred to is that the distinct existence of the wife as a legal person is so far recognized as to enable her to take an estate separate from her husband. Code, §§ 1982, 1983," etc.

In *Whittlesey v. Fuller*, 11 Conn. 387, I find the following language: "But it is said that although this estate has all the incidents of a joint tenancy, yet that the relation of husband and wife is such that they cannot receive an estate by moieties, but that each must be seised of the entirety, and, of course, that no part of the property so held can be conveyed by one of them. And that such is the doctrine of the English books cannot be doubted. Husband and wife cannot take by moieties, during the coverture, and he has no power to sever the jointure, nor to dispose of any part of the land . . . And the reason given is that husband and wife are one. If that were the real reason, it is very difficult to see why a deed to the wife would not be, in effect, a deed to the husband and wife, and *vice versa* . . . But in Connecticut we cannot learn that it was ever recognized as a law of our State. On the contrary, so far as we are informed, deeds or devises of lands to husband and wife have been consid-

ered as vesting the estate conveyed in the same manner as to other persons. The wife having a separate existence, so as to be able to take by a deed to herself, her identity has not been considered as destroyed, from the fact that the conveyance was to her and to her husband, by one and the same instrument. Estates have been, as we believe, frequently, and, so far as we are informed, uniformly, settled upon that principle; and, although no adjudged case has been shown upon this subject, this practical construction is in such strict accordance with the common understanding, so conformable to the simplicity of our practice, and to the general principles of our law, and has been so long acquiesced in, as to afford high evidence of the question having been settled by the highest authority."

In Ohio it was held, in 1826, that joint tenancy never existed in that State, and that a devise made to husband and wife gives them the rights of tenancy in common. The court, in speaking of joint tenancy, says: "The reasons which give rise to this description of estate in England never existed with us. The right of survivorship is not founded in principles of natural justice, nor in any reason of policy applicable to our society and institutions; but, on the contrary, it is adverse to the understandings, habits and feelings of the people." *Sergeant v. Steinberger*, 2 Ohio, 305.

In *Penn v. Cox*, 16 Ohio, 30, it was held that the doctrine of survivorship did not apply where the land had been sold to the husband and wife, and that the Act regulating descents and distributions embraced the whole subject of descents, and was intended to provide for all cases. *Wilson v. Fleming*, 12 Ohio, 68.

In *Meeker v. Wright*, 76 N. Y. 262, it was decided that "Where, since the passage of the Act of 1860 concerning the rights and liabilities of husband and wife, lands have been conveyed to the husband and wife jointly, without any statement in the deed as to the manner in which the grantee shall hold, they are tenants in common."

Subsequently, in *Bertles v. Nunan*, 92 N. Y. 152, that decision was overruled by a divided court. The reasons, however, given for that decision do not apply in this State; for in the opinion it is stated that, under the Statutes of New York, "The ability of the wife to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute. A husband still has his common-law right of tenancy by the curtesy. Although section 7 of the Act of 1860 authorizes a married woman to maintain an action against any person for an injury to her person or character, yet we have held that she cannot maintain an action against her husband for such an injury; and so it was held, notwithstanding the Acts of 1848, 1849 and 1860, that the common-law disability of husband and wife growing out of their unity of person to convey to each other still existed. *Whits v. Wager*, 25 N. Y. 383; *Winans v. Peables*, 39 N. Y. 423; *Meeker v. Wright*, 76 N. Y. 262, 270.

It is believed, also, that the common-law rules as to the liability of the husband for the torts and crimes of his wife are still substantially in force." See, to the contrary, the decisions of

this court already quoted, and, among others, *Norris v. Corkill*, *supra*.

It is claimed, however, that some of the decisions favorable to the view I maintain are not in point, because of express statutes concerning joint tenancy and tenancy in common. If I read these decisions correctly, several of them are made solely upon the ground that the statutes giving to the wife her separate property rescind or abrogate the rule that a conveyance to husband and wife makes them tenants by the entirety, with right of survivorship. Further than this, it has been expressly decided by courts adopting estates in entirety that statutes abolishing joint tenancy have no application to a joint estate of husband and wife, or an estate in entirety. *Diver v. Diver*, *supra*. In that case it was said: "Nor does the Act of March 31, 1812, which abolished survivorship among joint tenants, apply to such an estate [in entirety], for it is not a joint tenancy."

In *Marbury v. Cole*, 49 Md. 402, which is a decision sustaining estates in entirety, it was said: "The Code, art. 49, § 12, being the codification of the Act of 1822, chap. 162, provides that no instrument of conveyance shall be construed to create a joint tenancy, unless it is expressly provided that the property shall be held in joint tenancy. But, as we have seen, the estate conveyed to husband and wife in a deed like the one before us is not to them as joint tenants at the common law, and hence the statute just referred to does not affect or apply to such an estate as that conveyed to husband and wife. This has been expressly so held by this court, in the case of *Craft v. Wilcox*, 4 Gill, 504. Similar statutes to our own exist in a large number of the States of the Union, converting joint tenancies at the common law into tenancies in common, except where, in the instrument, it is otherwise expressly declared; and the invariable construction has been that they do not apply to or affect the peculiar estate taken by husband and wife under a deed to them jointly." 4 Kent, Com. 862.

Therefore, if the decisions adopting or sustaining estates in entirety are to be followed, the various statutes referred to in the opinion concerning joint tenancy and tenancy in common cannot have much force, because estates in entirety are founded upon the incapacity of the husband and wife to take separately, or by moieties, and in these statutes estates in entirety are not expressly stated. If the doctrine of estates in entirety be the proper one, then the statutes referring to conveyances made to two or more are not applicable to estates in entirety, because those estates are also founded upon the doctrine that husband and wife are one in law, and one only. Therefore conveyances to two or more do not apply to a conveyance made to husband and wife, if they are only one in law.

Again, at common law, the right to control the possession of the estate of the wife under such a conveyance, during their joint lives, is in the husband, as it is when the wife is sole seised. The husband, by that law, has, during coverture, the usufruct of all the real estate which his wife has in fee simple, fee tail, or for life. So, also, under the common law, the husband has the right to make a lease of the

estate conveyed in fee to him and his wife, which will be good against the wife during coverture, and will fail only in the event of his wife surviving him.

This view of the common law is stated by *Mr. Chief Justice Nelson*, in *Barber v. Harris*, 15 Wend. 616. Where a deed of real estate is made to the husband and wife, "Each is seised of the entirety; but, being one person, there can be no moiety or separate estate between them, and the husband, therefore, cannot forfeit or alienate the estate, because the whole of it belongs to the wife as well as to him . . . During the life of the husband he undoubtedly has the absolute control of the estate of the wife, and can convey or mortgage it for that period."

*Mr. Chief Justice Beasley*, in *Washburn v. Burns*, 34 N. J. L. 18, announces the doctrine to be, "When an estate in land is vested in husband and wife as an entirety under the common law, the husband is entitled to the use and possession of the property during the joint lives of himself and wife. During this period the wife has no interest in or control over the property." See also *Pray v. Stebbins*, 1 New Eng. Rep. 521, 141 Mass. 219; *Topping v. Sadler*, 5 Jones (N. C.), 357; *Jones v. Strong*, 6 Ired. L. 387.

This view of the matter is contrary to the decision in *Diver v. Diver*, *supra*, but that decision upon the power of the wife to use and possess the property conveyed to her and her husband, during coverture, is in conflict with the majority of decisions recognizing estates in entirety.

If we are to follow precedent in preference to principle, and adopt the old law of Great Britain concerning estates in entirety, it seems to me that the weight of authority should also be followed to the effect that the wife has no interest or control over such estate during the joint lives of herself and husband. The ancient theory that husband and wife are one person in law, and one only, in view of our society and institutions, is, in my opinion, a mere fiction or myth, without any substance or reason, which it is useless and illogical to perpetuate. If husband and wife, in taking, holding and possessing property, are two persons, instead of one only, as our Constitution and laws recognize, and if husband and wife can take the estate by moieties, as our laws permit, then the reason for the existence of an estate in entirety has wholly ceased, and such estates should not be recognized in this State. Such an estate was called "an oasis in the desert of the common law," when that law conferred wealth and power upon the husband, and poverty and dependence upon the wife. But in the condition of things under our Constitution, laws and society, the excuse or reason for such estates is not to me apparent.

For the foregoing reasons I wholly dissent from the views expressed in the opinion, and also dissent from the judgment rendered. I think Frank A. Baker and Alice Baker, his wife, were tenants in common, and not tenants in entirety, of the premises conveyed to them by Joshua Baker on November 23, 1877, and therefore, that the judgment of the trial court should be affirmed.

## UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI.

## UNITED STATES

v.

George K. TOZER.

(....Fed. Rep....?)

1. An indictment under section 2 of the Interstate Commerce Act, for "unjust discrimination," need not aver by what particular device the defendant managed to discriminate in favor of a particular shipper.
2. Counts under the third section, for "undue and unreasonable preference" and for "undue or unreasonable prejudice or disadvantage," need not allege that the service for which a different rate was charged was rendered "under substantially similar circumstances and conditions"—those words being only found in the fourth section, in relation to greater charge for shorter haul.
6. A count under the third section is sufficient if it shows with requisite certainty by any apt language that the accused has committed an

act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage.

4. A count under the third section, charging the subjection of a certain locality to an undue prejudice, by charging its merchants a higher rate for transporting property to a certain point than was exacted from residents of a certain other locality, must show with precision that the lower rate was for transportation between the same points as the higher rate.
5. A count under the sixth section, alleging the allowance of a rate less than the established and published rate which "was in force on that day," sufficiently negatives the inference that the rate might have been reduced by the carrier without notice, as permitted by that section.
6. When an agent of a railroad is prosecuted under the Interstate Commerce Act, it is not necessary either to allege or prove that the particular unlawful act complained of was done under authority conferred by its principal or by its direction; it is sufficient to show that the ac-

NOTE.—*Interstate Commerce Act construed.* The purpose of the Interstate Commerce Act requires that when circumstances will fairly admit of it, charges to all points for like service should be made relatively equal. *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703. Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which in itself is impartial. *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 704. Less desirable traffic must be accepted upon reasonable terms, as well as that which is more desirable. *Riddle v. New York L. E. & W. R. Co.* 1 Inters. Com. Rep. 737. "Goods of like description" and "goods of same description" refer not to the contents of the parcels, but to the parcels themselves—that is, like or different for the purpose of carriage. *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 220; *Nitshill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & McN. 39; *Merry v. Glasgow R. Co.* 4 R. & Can. Traf. Cas. 333. To render a preference of one over another unlawful, under the Act to Regulate Commerce, it is not necessary that it should be accomplished by any "device"; and it is equally true that the ingenuity of man cannot invent a "device" for the perpetration of an unlawful preference on the part of a carrier engaged in interstate commerce, without incurring the penalties pre-scripted by the statute. *Scotfield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 67. The offense under the second section of the Act consists in charging, demanding, collecting or receiving by a common carrier to which the Act applies, from any person or persons, a greater or less compensation for service rendered or to be rendered, in the transportation of persons or property subject to the Act. *Griffiee v. Burlington & M. R. R. Co.* 2 Inters. Com. Rep. 194. So, a discount allowed by a railroad company where consignments of coal in one year shall amount to 30,000 tons or upwards is an unjust discrimination. *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363. A common carrier by rail, to which property is offered for transportation, cannot in any indirect manner and by refusal to perform obligations imposed by law upon it, enforce its contracts, but must for that purpose resort to the customary remedies. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 102. Nor can a common carrier, as a reason for refusal to afford to another common carrier the customary reasonable and equal facilities for the interchange of traffic, assign the fact that such other common carrier supplies no public necessity, the public having been fully accommodated without it. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 103. The provisions of section 1, requiring charges to be reasonable and just, and of section 2, forbidding unjust discrimination, apply when exceptional charges are made under section 4, as they do in other cases. *Re Southern R. & Steamship Assn.* 1 Inters. Com. Rep. 273.

Rates must be reasonable, and be fairly adjusted. Whether railroad companies combine or act separately in making rates and charges is not important; the essential requirement is that however made they shall be reasonable of themselves, and so fairly adjusted as to be reasonable in their relations to each other and in their results. *New Orleans Cotton Exchange v. Cincinnati etc. R. Co.* 2 Inters. Com. Rep. 239. Rates should be so relatively reasonable as to protect communities and business against unjust discrimination. *Boards of Trade Union v. Chicago etc. R. Co.* 1 Inters. Com. Rep. 608. The relative reasonableness of rates on shipments from western points to cities on the Atlantic seaboard is to be determined by all the circumstances and conditions that affect the traffic to the respective points between which the rates are questioned, and not solely by one standard of comparison. *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754. Making of freight rates may be affected by a variety of practical considerations, as: the sparsely settled character of the country; the articles of freight upon which the railroad must depend as compared with other roads transporting similar commodities through more populous communities; the relation of local and through freights; the mode of shipping and delivering, as wheat from elevators, and wheat in sacks; and expenses of hauling empty cars. *Evans v. Oregon R. & Nav. Co.* and *Reed v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641; *Hayes v. Pennsylvania Co.* 12 Fed. Rep. 309; *Scotfield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 43 Ohio St. 571; *M. Pac. R. Co. v. Texas & P. R. Co.* 30 Fed. Rep. 2; *Girardot v. Midland R. Co.* 4 R. & Can. Traf. Cas. 291; *Greenock v. S. E. R. Co.* 2 Nev. & McN. 319; *Concord & P. R. R. Co. v. Forsaith*, 59 N. H. 122. A variety of practical considerations must enter into making of freight rates and determine to a great extent whether rates are reasonable. *Evans v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641. The question of the reasonableness of rates is always a perplexing one; a great variety of considerations are necessarily involved in each instance; theory and conjecture merely are not enough; a comparison of one isolated rate with another is not sufficient; the whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than an approximation. *Howell v. New York etc. R. Co.* 2 Inters. Com. Rep. 162. The length and character of the haul, the costs of service, the volume of business, the conditions of competition, the storage capacity and the geographical situation of the different terminal points are all elements of importance bearing upon the relative reasonableness of the respective charges for transportation. *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754. A *prima facie* case of unreasonableness of rates is not made out by showing that the rates for a certain commodity are higher in certain cases than certain other rates, and that they produce a large profit to the carrier. *Howell v. New York etc. R. Co.* 2 Inters. Com. Rep. 162.

Difference in rates, when justified. Different rates may be charged where shippers own private side

cused was in fact an agent of a railroad subject to the Act, and that the wrong was committed under color of his office or agency.

(February 6, 1887.)

**ON** demurrer to an indictment in five counts, under the Interstate Commerce Act. *Demurrer overruled, except as to one count.*

The case is fully stated in the opinion.

*Messrs. Thomas J. Portis and W. A. Martin* for defendant, for the demurrer.

*Messrs. Thomas P. Bashaw, U. S. Dist. Atty., and Chas. Claflin Allen* for the United States, *contra*.

**Thayer, D. J.**, delivered the opinion of the court:

This is an indictment containing five counts founded on the Interstate Commerce Act approved February 4, 1887. 24 U. S. Stat. at L. p. 379.

A demurrer has been filed to the several counts which raises the various questions to be decided.

The first count charges the defendant, who is alleged to be an agent of the Missouri Pacific Railway Company, with unjust discrimination in that he charged the Hayward Grocery Company or suffered and permitted it to be charged

at the rate of forty-six cents per 100 pounds on sugar shipped from Hannibal, Missouri, to Helper, Kansas, over the line of the Missouri Pacific Railway, whereas at or about the same date he charged the Chicago, Burlington & Quincy Railroad for transportation of sugar between the same points and over the same line, at the rate of only thirty-four cents per 100 pounds.

The particular objection made to this count appears to be that the count does not show whether the discrimination was accomplished by granting to the Chicago, Burlington & Quincy Railroad a "special rate, rebate or drawback" or by some other device.

The point is obviously not well taken, as section 2 of the Act, under which the count is framed, makes it utterly immaterial how the discrimination was effected, whether by a special rate accorded to one shipper and denied to another, or by a "rebate, drawback or other device." The offense defined by the second section consists in an "unjust discrimination" no matter how it is effected, whether directly or indirectly; and for that reason it is unnecessary to aver in an indictment by what particular device the defendant managed to discriminate in favor of a particular shipper.

The second, third and fourth counts of the indictment are founded on the third section of

tracks and return cars more promptly. *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 102. A difference in the cost of service will justify a carrier in making a reasonable difference in its rates. *Chicago & A. R. Co. v. People*, 67 Ill. 11-24; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 10 H. L. 97, 56 Am. & Eng. R. R. Cas. 253; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 368; *Ransome v. Eastern Counties R. Co.* 2 Nev. & M. 202; *Girardot v. R. Co.* 4 R. & Can. Traf. Cas. 291; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 101, 102; *Ransome v. Eastern Counties R. Co.* 1 Nev. & M. 63, 1 C. B. N. S. 437, 26 L. J. C. P. 91; *Foreman v. Great Western R. Co.* 2 Nev. & M. 202; *Nitshill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & M. 39; *Bellsdyke Coal Co. v. North British R. Co.* 2 Nev. & M. 105; *Bell v. London etc. R. Co.* 2 Nev. & M. 185; *Holland etc. R. Co. v. Festiniog R. Co.* 2 Nev. & M. 267; *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306, 18 Am. & Eng. R. R. Cas. 490; *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.* 1 Inters. Com. Rep. 329; *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363. The difference in rates must bear some proportion to the difference of the cost to carriers. *Re Harris & Coker mouth, & W. R. Co.* 1 Nev. & M. 97-102, 3 C. B. N. S. 693; *Garton v. Bristol & E. R. Co.* 1 Nev. & M. 227, 6 C. B. N. S. 639-655; *Nicholson v. Great Western R. Co.* 1 Nev. & M. 185; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 122; *Baxendale v. R. Co.* 1 Nev. & M. 202; *Ransome v. Eastern Counties R. Co.* 1 Nev. & M. 69. Less rates may be charged for furnishing freight in fully loaded trains at regular intervals. *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366. A difference in charge is justified where the transportation is over steep grades. *Bellsdyke Coal Co. v. North British R. Co.* 2 Nev. & M. 105; *Nitshill Coal Co. v. Caledonian R. Co.* 2 Nev. & M. 39. A difference in bulk will justify difference in rates. *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306. Or difference in expense of loading and unloading. *Chicago & A. R. Co. v. People*, 67 Ill. 23. Or when return loads could not be had. *Chicago & A. R. Co. v. People*, 67 Ill. 24; *Girardot v. Midland R. Co.* 4 R. & Can. Traf. Cas. 291. Railroads have a right to grant special privileges to religious teachers. *Re Religious Teachers*, 1 Inters. Com. Rep. 21.

**Classification.** There is nothing illegal or wrongful in a railroad company making a rate for immigrants as a class, and declining to give the same rate to others for whom different accommodations are furnished. *Savery v. New York Cent. & H. R. Co.* 2 Inters. Com. Rep. 211. The difference in classification adopted by the "western classification" (which applies to business from the Pacific

Coast to all points west of the Missouri River) between "raisins" and "dried fruits" is, in connection with the different rules of the classifications as to mixed car loads, an unreasonable discrimination. *Martin v. Southern Pac. R. Co.* 2 Inters. Com. Rep. 1. Rates established for the purpose of keeping up a line of road material (as railroad ties) for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified. *Reynolds v. Western N. Y. & P. R. Co.* 1 Inters. Com. Rep. 685. The classification of railroad ties in a different class from other lumber, thus imposing a higher rate upon ties than upon other lumber, is an unjust discrimination. *Reynolds v. Western N. Y. & P. R. Co.* 1 Inters. Com. Rep. 685. Classification of coals as gas coal and common coal is, under the facts of the case, improper. *Nitshill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & M. 39.

**Preference as to localities.** Preferences to localities in furnishing facilities or rates for the shipment of goods are prohibited. *Hozler v. Caledonian R. Co.* 17 Seas. 702, 24 L. T. 339, 1 Nev. & M. 27; *Re Jones & Eastern Counties R. Co.* 3 C. B. N. S. 718, 1 Nev. & M. 45; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366; *Richardson v. Midland R. Co.* 4 R. & Can. Traf. Cas. 1; *Girardot v. Midland R. Co.* 4 R. & Can. Traf. Cas. 291. A railway company must give equal facilities and similar rates to all persons in receiving and delivering goods. *Cooper v. London & S. W. R. Co.* 4 C. B. N. S. 738, 27 L. J. C. P. 324, 1 Nev. & M. 185; *Bell v. London etc. R. Co.* 2 Nev. & M. 185. To constitute an unreasonable preference, there must be inequality in the charge for travelling over the same line, or the same portion of the line. *Caterham R. Co. v. London, B. & S. C. R. Co.* 1 C. B. N. S. 410, 1 Nev. & M. 32; *Finnie v. Glasgow & S. W. R. Co.* 2 Macq. 177, 26 L. T. 14. A tariff naming a rate from one locality lower than that enjoyed by its neighbor, when the circumstances are the same, tenders a preference or advantage to the first; and when any shipper is damaged by the exaction of an additional burden the preference becomes undue and unreasonable, unless it can be justified upon some sound and substantial ground. *Re Tariffs of the Transcontinental Lines*, 2 Inters. Com. Rep. 203. What amounts to an undue preference is a question of fact and not of law. *Diphwys Casson Slate Co. v. Festiniog R. Co.* 2 Nev. & M. 73, 32 L. T. N. S. 271; *Watkinson v. Wrexham etc. R. Co.* 3 Nev. & M. 5; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 3 Nev. & M. 441. When a railroad company in establishing its charges on the different branches of its road so adjusted them as to divert trade and business to one locality, such unreasonable preference for one place is not excused by the fact that the rates are the result of competition with other

the Act, which declares it to be unlawful for a carrier subject to the provisions of the Act, "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, . . . in any respect whatever, or to subject any particular person, company, etc. . . . to any undue or unreasonable prejudice or disadvantage, in any respect whatever."

The second count charges that defendant willfully and unlawfully gave an undue and unreasonable preference and advantage to the Chicago, Burlington & Quincy Railroad Company in that he charged the Hayward Grocery Company at the rate of forty-six cents per hundred for the transportation of one barrel of sugar from Hannibal, Missouri, to Helper, Kansas, and at or about the same time only charged the Chicago, Burlington & Quincy Railroad Company at the rate of thirty-four cents per 100 for the transportation of two barrels of sugar between the same points.

The third count is of the same tenor as the second, except that it charges the defendant, by the same Act mentioned in the second count, with subjecting the Hayward Grocery Company "to an undue and unreasonable prejudice and disadvantage."

carriers. *Raymond v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 637. Rates that are just and reasonable from selected manufacturing points through the entire territory east of Missouri River and west of the Atlantic seaboard, are *prima facie* just and reasonable from all other points in the same territory. *Re Tariffs of the Transcontinental Lines*, 2 Inters. Com. Rep. 203. The Commission is not willing to determine the relative reasonableness of rates at many stations, and in a large extent of territory, upon the mere face of tariffs, and without further proof. *Spartanburg Board of Trade v. Richmond & D. R. Co.* 2 Inters. Com. Rep. 186.

*Distributing trade centers not entitled to preference.* Trade centers, or large commercial towns, are not, as a matter of right, entitled to have more favorable rates than the smaller towns for which they form distributing centers; and if carriers shall give to such smaller towns rates as favorable as to the larger, the Commission will not interfere. *Martin v. Chicago, B. & Q. R. Co.* 2 Inters. Com. Rep. 32. It is not ground of complaint against a railroad that it equalizes its rates as between small and large towns, even though the effect may be prejudicial to the large towns which before had been specially favored. *Crows v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 708. When the reasonableness of rates is in question, charges on long through lines cannot offer a just basis for comparison with local rates for relatively short distances. *Crows v. Richmond & R. Co.* 1 Inters. Com. Rep. 708. The principles laid down in this case restated and reaffirmed in *Martin v. Chicago, B. & Q. R. Co.* 2 Inters. Com. Rep. 32. The apportionment of rates to different parts of a through line do not determine the charge to the public, but may be significant on the question of reasonable rates for the whole distance. *Brady v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 78.

*Jurisdiction and power of commission.* The Act includes only such carriers as use a railway or a railway and water craft "under common control, management or arrangement for a continuous carriage or shipment" from one State to another. *Ex parte Koehler*, 1 Inters. Com. Rep. 28; *Mo. & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co.* 1 Inters. Com. Rep. 607. So far as a railroad whose line is entirely within one State issues through bills of lading to points in other States and makes through rates, it falls under the provisions of the Act. *Re Annapolis, W. & B. R. Co.* 1 Inters. Com. Rep. 315. The word "line" means a physical line, not a business arrangement; and one line of a road may be part of several lines. *Boston & A. R. Co. v. Boston & L. R. Co.* 1 Inters. Com. Rep. 571. That the ultimate destination of freight delivered to a carrier, for transportation from one point to another in the same State, is in another State does not

The fourth count charges the defendant with subjecting a locality, to wit: the City of Hannibal, to an undue and unreasonable prejudice and disadvantage, by demanding and collecting of divers merchants doing business in Hannibal, greater compensation for transporting property from Hannibal to Helper, Kansas, than he demanded and collected of the Chicago, Burlington & Quincy Railroad, "for the transportation of property, transported for divers persons in the City of Chicago . . . over the lines of railroad of said Chicago, Burlington & Quincy Railroad Company and said Missouri Pacific Railway Company to said Town of Helper."

It is insisted that the second, third and fourth counts are each bad, because the pleader does not aver, in the language of the statute, that the service referred to as having been rendered for the parties named, and charged for at a different rate, was rendered "under substantially similar circumstances and conditions."

If these counts were framed under the fourth section, for violation of the long and short haul clause of the Act, in which section the words "under substantially similar circumstances and conditions" are used to describe the offense—the point made would be well taken.

bring the transportation by such carrier within the jurisdiction of the Commission. *Mo. & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co.* 1 Inters. Com. Rep. 607. The power of the Commission to relieve from hardship under the Act is strictly limited. *Re Iowa Barb Steel Wire Co.* 1 Inters. Com. Rep. 605. It has no power to require adoption of an equal and uniform mileage basis. *La Crosse Manufacturers & J. Union v. Chicago etc. R. Co.* 2 Inters. Com. Rep. 9. Damages will not be awarded by the Commission where defendants are entitled to have the amount assessed by a jury. *Hiddle v. N. Y. L. E. & W. R. Co.* 1 Inters. Com. Rep. 787; *Heck v. East Tenn. V. & G. R. Co.* 1 Inters. Com. Rep. 775. A claim for damages for ejection of passenger from a car will not be entertained; he will be left to his remedy in the courts. *Council v. Western & A. R. Co.* 1 Inters. Com. Rep. 698. The Act does not afford a remedy for transactions occurring before it took effect. *Ottinger v. Southern Pac. R. Co.* 1 Inters. Com. Rep. 607; *Traders & T. Union v. Philadelphia & R. R. Co.* 1 Inters. Com. Rep. 371; *Holbrook v. St. Paul, M. & M. R. Co.* 1 Inters. Com. Rep. 323. The Commission will not express its opinion in a case not within its jurisdiction. *Re Iowa Barb Steel Wire Co.* 1 Inters. Com. Rep. 605. A collateral inquiry raised by the evidence will not be determined until the parties have been furnished with an opportunity to be heard in a proceeding brought under the statute. *Business Men's Assn. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 48. Where the parties neither by evidence nor argument supply the Commission with information as to the question propounded it will not be decided. *Rice v. Louisville & N. R. Co.* 1 Inters. Com. Rep. 722.

*Complaint.* The person aggrieved should complain in his own name; complaint by a ticket broker will not be entertained. *Ottinger v. Southern Pac. R. Co.* 1 Inters. Com. Rep. 607. The complainant need not necessarily have a pecuniary interest to be entitled to a hearing. *Boston & A. R. Co. v. Boston & L. R. Co.* 1 Inters. Com. Rep. 571. The burden of proving the exaction of unreasonable rates is on petitioner. *Harding v. Chicago etc. R. Co.* 1 Inters. Com. Rep. 375. A complaint, of which no reasonable ground for investigation appears, will not be filed. *La Crosse Manufacturers & J. Union v. Chicago, M. & St. P. R. Co.* 2 Inters. Com. Rep. 10. The Act contemplates that a carrier complained of for charging exorbitant rates may change rates before a hearing. In such case the petition may be dismissed. *Fulton v. Chicago etc. R. Co.* 1 Inters. Com. Rep. 375. The burden is on the carrier to justify any departure from the rules prescribed by the statutes. *Re Southern R. & Steamship Assn.* 1 Inters. Com. Rep. 278.

But in framing a count under the third section it is not necessary to use the language last quoted. A count under the third section is sufficient if it shows with requisite certainty, by any apt language, that the accused has committed an act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage. The second and third counts of the present indictment clearly show that defendant charged and received of the Hayward Grocery Company a greater rate of compensation than he charged and received of the Chicago, Burlington & Quincy Railroad Company, for transporting the very same class of goods between the same points and over the same route. These counts are sufficient in law although the pleader does not aver that the service rendered to each party was rendered "under substantially similar circumstances and conditions." The fact that it was so rendered sufficiently appears without that averment.

The fourth count in my opinion lacks the requisite precision of statement, and as it is demurred to on that ground, as well as on the ground last mentioned, it will be adjudged insufficient. It is uncertain whether the pleader intended to charge that defendant demanded of merchants doing business in Hannibal greater compensation for the transportation of goods from that city to Helper than he demanded of the Chicago, Burlington & Quincy Railroad Company for the transportation of goods between the same points, or greater compensation than he demanded of the latter company for transporting goods from Chicago to Helper. The fourth count appears to be susceptible of either construction and for that reason, if for no other, the demurrer ought to be sustained.

The fifth count of the indictment is based on the sixth section of the Act and alleges in substance that the defendant on June 15, 1887, as agent of the Missouri Pacific Railway Company charged and collected of the Chicago, Burlington & Quincy Railroad a less rate of compensation for the transportation of goods from Hannibal to Helper, than the "established and published" rate of freight charges over the Missouri Pacific Railway between those points.

To this count the objection is made that it is not averred that the Missouri Pacific Railway had not, on that date, reduced its published freight rate between Hannibal and Helper, as it was privileged to do under the sixth section, without notice.

This objection is not tenable for the reason that the pleader does allege that a given freight rate of forty-six cents per 100 pounds between the two points last named, had been "established and published" prior to June 15, 1887, and that said rate "was in force on that day" when the unlawful charge is said to have been made. This averment deprives the objection of the force it would otherwise have. It shows that no reduction in the established rate had taken place, and that the rate accorded to the Chicago, Burlington & Quincy Railroad was not given in conformity with a general reduction in freight rates, but was an advantage allowed to it over other customers.

A further and final objection made to the whole indictment is that it does not show that the defendant as agent of the Missouri Pacific Railway Company, had any authority to do the acts charged in the various counts.

This objection does not strike me with any force.

It is alleged in each count that defendant was agent of the Missouri Pacific Railway Company and had general charge of its freight office at Hannibal, Missouri.

Section 10 of the Interstate Commerce Act renders any agent of a railroad company that is subject to the provisions of the Act, amenable to the penalties denounced therein, if he either alone or with any other person or corporation willfully does any of the acts prohibited or declared to be unlawful.

When an agent of a railroad is prosecuted under the statute for an unlawful act, it is not necessary in my opinion either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal or by its direction. It is sufficient to show that the accused was in fact an agent of a railroad subject to the provisions of the Act, and that the wrong was committed under color of his office or agency. Whether in the particular matter complained of the agent exceeded his power, is certainly immaterial in a prosecution against the agent. If it has any bearing on the question at issue, the fact that the agent has exceeded his powers in violating the law ought to aggravate the offense rather than excuse it.

*The demurrer is overruled as to all the counts except the fourth, as to which it is sustained for the reasons before stated.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

George T. BUTTERFIELD

v.

City of BOSTON.

(...Mass....)

**A city is not liable for injuries** resulting to a traveler upon its highway while attempting to cross a drawbridge, from the momentary negligence of the gateman, where it has supplied a

**NOTE.**—That municipal corporations are mere agencies of government, and, that they are not liable for negligence of their officers, see *Hines v. City of Charlotte*, 1 L. R. A. 844.

2 L. R. A.

sufficient draw and suitable gates and has employed competent persons to manage them.

(February 23, 1889.)

**ON** defendant's exceptions. *Sustained.*

This was an action of tort to recover damages resulting from an alleged defect in the Warren Bridge, a public highway of the City of Boston.

At the trial in the superior court (before Blodgett, J.), the jury returned a verdict for plaintiff, and defendant alleged exceptions.

The facts sufficiently appear in the opinion.

**Mr. Andrew J. Bailey** for defendant.  
**Messrs. Francis S. Hesselstine and William H. Hart** for plaintiff.

**Morton, Ch. J.**, delivered the opinion of the court:

This case was tried upon the second count in the declaration, and the only question before us is whether the defendant is liable by reason of a defect in a highway. The facts are not in dispute. Warren Bridge is a part of a highway which the City of Boston is bound to keep in repair. Stat. 1874, § 259.

The plaintiff was intending to drive across the bridge. When he reached it, the gateman was in the act of closing the gate; seeing the plaintiff he opened the gate and beckoned him on. The plaintiff drove on and when his horse had put his fore feet upon the draw it was moved by the draw tender and the plaintiff and his horse and vehicle were thrown into the river.

The gates provided by the city were suitable and the gateman and draw tender were competent persons. To render the city liable the plaintiff must prove that he received an injury through a defect or want of repair or of sufficient railing in the highway or bridge, which might have been remedied or which injury might have been prevented by reasonable care and diligence on the part of the city and that the city had notice of the defect or might have had notice by the exercise of proper care and diligence on its part. Pub. Stat. 52, § 18.

We are of opinion that the facts of this case do not bring it within the letter or the spirit of this statute. The injury to the plaintiff was caused by the momentary negligence of the gateman or the draw tender, for which they may be liable, but for which the city is not liable. *Nowell v. Wright*, 8 Allen, 186; *McDougall v. Salem*, 110 Mass. 21; *French v. Boston*, 129 Mass. 592.

It seems to us a misuse of terms to say that the injury happened through a defect in the street, of which the city had notice, and which it might have remedied by reasonable diligence. The draw tender is required by law to open the draw for the passage of vessels. The law contemplates that it shall frequently be opened. The open draw, though it made the street dangerous, was not a defect under the statute. Nor can the city be held liable because at the moment when the plaintiff went upon the bridge the gateman opened the gate. If this was negligence on his part he may be liable. *Nowell v. Wright*, *supra*.

But the city had supplied a sufficient draw and suitable gates, and had employed competent persons to manage them. The injury to the plaintiff was caused, not by any failure of the city to perform its duty, but, as we have before said, by a momentary negligence of the gateman. For this negligence the city is not

-2 L. R. A

responsible; and it cannot be indirectly held liable upon the theory that this negligence created a defect in the street which the city by reasonable diligence might have remedied. We are therefore of opinion that the instructions of the learned justice who presided at the trial were erroneous.

*Exceptions sustained.*

Nellie E. COVENY, Guardian, etc., *Petitioner.*

William McLAUGHLIN *et al.*

(....Mass....)

The word "surviving," in a will devising property to testator's wife for life, and adding: "But on her decease I give and devise the same to my surviving children to be divided equally between them," refers to the children surviving on the wife's decease.

(February 23, 1890.)

**ON report. *Petition dismissed.***

This was a petition for partition of real estate formerly owned by John Coffey, and being the estate mentioned in the will of said Coffey. Heard in the Supreme Judicial Court before Field, J., who reported the case to the full court.

**Mr. John H. Ponce** for petitioner.

**Mr. George M. Stearns** for respondent, Timothy Coffey.

**Messrs. Richardson & Hall** for respondent, William C. Craig.

**C. Allen, J.**, delivered the opinion of the court:

The testator devised his dwelling house to his wife for her life, and added: "But on her decease I give and devise the same to my surviving children to be divided equally between them."

Five children survived the testator, but only two survived the wife; and the question is, whether the word *surviving* relates to the time of the testator's death, or to that of his wife's death. According to the natural use of language, it has reference to the latter event. It is placed in close connection with her decease. No reference is made to the time of his own death in any part of the will. The word *surviving* would be unnecessary and meaningless if he meant to give the remainder of the estate to all of his children.

The children surviving on her decease must be taken to be the devisees intended. See *Denny v. Kettell*, 185 Mass. 188, and cases there cited.

*Petition dismissed.*



## MINNESOTA SUPREME COURT.

Fred HAAS *et al.*  
v.  
Ida L. SACKETT *et al.*  
(.....Minn.....)

**\*Conversion of negotiable instrument.**

Defendants, the payees and holders of a promissory note, desiring to raise money on it, wrote their names on the back of it, and applied to plaintiffs to discount it. Upon their request defendants left the note with them for the sole purpose of giving them an opportunity of ascertaining as to the solvency of the makers. Subsequently the plaintiffs refused either to discount the note, or to return it to defendants. Thereupon defendants brought suit against them to recover the value of the note thus wrongfully withheld, in which they obtained judgment, which plaintiffs paid. *Held*, that defendants were not liable as indorsers; that payment of the judgment invested plaintiffs with title to the converted property as of the date of the conversion, which was merely the obligation of the makers of the note, without any contract of indorsement by defendants—no such contract ever having been consummated.

(January 16, 1889.)

**A**PPEAL by plaintiffs, from an order of the District Court of Hennepin County (Hicks, J.), overruling a demurrer to the answer in an action against defendants as indorsers of a promissory note. *Affirmed*.

The facts, and question presented, are stated in the opinion.

*Messrs. John H. Randall and A. J. Shores* for appellants.

*Messrs. Stocker & Matchan* for respondents.

**Mitchell, J.**, delivered the opinion of the court:

The defendants were sued as indorsers of a

promissory note, which it was alleged they indorsed and sold to plaintiffs. The defendants answered that, wishing to raise money on the note by getting it discounted, they wrote their names on the back of it, and then applied to the plaintiffs to discount it; that, at plaintiff's request, they left the note with them for a day, for the sole purpose of affording them an opportunity to ascertain the solvency of the makers; that defendants subsequently demanded a return of the note, which plaintiffs wrongfully refused; that thereupon they brought an action against the plaintiffs for the value of the note thus wrongfully taken and held, in which they obtained judgment for such value, which the plaintiffs subsequently paid. From an order overruling their demurrer to this answer plaintiffs appeal.

The line of argument by which plaintiffs seek to hold the defendants liable is, in brief, as follows: payment of the judgment invested them with title to the property converted, of which they are to be deemed the purchasers, their title relating back to the date of the conversion; that, as defendants indorsed the note with a view of selling it as indorsed paper, if they had sold it in that form they would have been liable as indorsers; that by bringing their action for damages they elected to sell it, and the plaintiffs were compelled to become purchasers of it; that what defendants thus elected to sell, and the plaintiffs were compelled to purchase by payment of the judgment, was the property in the form in which it was converted, to wit: the note of the makers indorsed by defendants.

This argument is certainly ingenious, but, as it seems to us, unsound. The payment of the judgment neither created any new property, nor added any new force to the note, or to anything written upon it, but merely vested in the plain-

**\*Head note by the COURT.**

**NOTE.**—*Conversion of commercial paper.* Conversion lies for paper representative of value, choses in action and corporate stock. *Ayres v. French*, 41 Conn. 151; *Payne v. Elliot*, 54 Cal. 341; *McAllister v. Kuhn*, 96 U. S. 87 (24 L. ed. 615). Trover will lie by the maker of a note which has never been delivered, against the payee, who wrongfully obtains possession, and refuses to give it up on demand (*Goggerley v. Cuthbert*, 2 Bos. & P. N. R. 170; *Evans v. Kymer*, 1 Barn. & Ad. 528; *Neal v. Hanson*, 60 Maine, 84); for a chattel note (*Hicks v. Lyle*, 46 Mich. 488); for certificate of stock (*Daggett v. Davis*, 53 Mich. 35); for shares of stock (*Payne v. Elliot*, 54 Cal. 339; *Budd v. Multnomah St. R. Co.* 12 Or. 271); for special deposit of bonds. *First Nat. Bank v. Dunbar*, 19 Ill. App. 558; *Cooley, Torts*, 524. The action is based upon title; and plaintiff must be the general owner or have some special property in the subject matter; and must have the actual possession or a right to the present possession at the time of the conversion. *Fairbank v. Phelps*, 23 Pick. 335; *Burton v. Tannehill*, 6 Blackf. 470; *Ames v. Palmer*, 42 Maine, 197; *Lewis v. Mobley*, 4 Dev. & B. L. 323; *Curd v. Wunder*, 5 Ohio St. 92; *Caldwell v. Cowan*, 9 Yerg. 232; *Thayer v. Hutchinson*, 13 Vt. 507; *Grant v. King*, 14 Vt. 267; *Smith v. Plomer*, 15 East. 607; *Hollins v. Fowler*, L. R. 7 H. L. 757, 20 Week. Rep. 868; *Cochrane v. Hy-mill*, 27 Week. Rep. 776; *National Mercantile Bank v. Hanson*, L. R. 5 Q. B. Div. 177, 28 Week. Rep. 424; *Taylor v. McKeand*, 28 Week. Rep. 628; *Indermaur's Com. Law Cas.* 85. Possession alone is sufficient to enable one to maintain the action of trover, and, in a leading case, always since recognized as authority, the finder of a jewel was held entitled to

bring trover against one who, having taken the jewel for examination, refused to restore it. *Armory v. Delamirie*, 1 Strange, 505; *Wilbraham v. Snow*, 2 Wms. Saund. 47 note; *Shaw v. Kaler*, 104 Mass. 448; *McAvoy v. Medina*, 11 Allen, 548; *McLaughlin v. Waite*, 9 Cow. 670; *Brandon v. Planters & M. Bank*, 1 Stew. (Ala.) 320; *Clark v. Maloney*, 3 Harr. (Del.) 68; *Cooley, Torts*, 519. In trover, if the plaintiff shows that property in his possession has been taken and converted, he shows *prima facie* his right to maintain the suit; and it is only when he is compelled to show his title, in order to make out his right to immediate possession, that it can be important for him to go further. *Foster v. Chamberlain*, 41 Ala. 158; *Cooley, Torts*, 521.

**Rule of damages.** In an action for conversion of property the rule of damages seems to be that, if the owner treats the demand for return of the property and refusal to return it as a conversion, his injury is measured by the value at that time. *Burk v. Webb*, 32 Mich. 173. See *Third Nat. Bank v. Boyd*, 44 Md. 47. The judgment and satisfaction of the judgment in conversion passes title in the property converted to the defendant. *Heppburn v. Sewell*, 5 Har. & J. 211; *Arnold v. Kelly*, 4 W. Va. 642; *Osterhout v. Roberts*, 8 Cow. 43; *Stirling v. Garritte*, 18 Md. 468; *Atwater v. Tupper*, 45 Conn. 144; *Bell v. Perry*, 43 Iowa, 368; *Lovejoy v. Murray*, 70 U. S. 3 Wall. 1 (18 L. ed. 129); *Elliott v. Hayden*, 104 Mass. 180; *Bacon v. Kimmel*, 14 Mich. 201; *Thayer v. Manley*, 73 N. Y. 305; *Smith v. Smith*, 51 N. H. 571; *Shakers United Society v. Underwood*, 11 Bush, 353; *Brinsmead v. Harrison*, L. R. 6 C. P. 584; *Morris v. Robinson*, 3 Barn. & C. 196. The title by relation vests as of the time when the conversion took place. *Bacon v. Kimmel*, 14 Mich. 201. See *Bulme v. Hut-ton*, 9 Bing. 471; *Cooley, Torts*, 458.

tiffs title to the converted property as it existed at the date of the conversion. All that plaintiffs converted, and hence all they acquired title to by payment of the judgment, was the note of the makers. True, it had the names of the defendants upon the back of it; but this did not constitute a contract of indorsement, for no such contract had ever been made. The fallacy in plaintiffs' argument consists in assuming that what they converted was the note of the makers, with defendants' contract of indorsement upon it. Literally, the word *indorsement* means merely to write on the back; but technically, as applied to a note, it means a contract to pay on certain conditions.

In this case no such contract was ever consummated. Had defendants brought an action of claim and delivery, all they would have recovered would have been the note of the makers, or its alternative value. In the action for conversion, all they could recover was the value of the paper as the obligation of makers; and hence that is all that the plaintiffs acquired title to by payment of the judgment.

Suppose, instead of a note, the property had been a horse, which defendants had offered to

sell with a warranty, and the plaintiffs had obtained possession merely for the purposes of trial, and had subsequently refused to buy or to return the property, and defendant had brought an action for damages for the wrongful conversion. Could there be any doubt that the measure of damages would be the actual value of the horse, and not what it would have been if according to the proposed warranty?—Or would anyone claim that after payment of the judgment in such a case the plaintiffs could maintain an action on the proposed warranty? Clearly not, for the simple reason that the contract of warranty, like that of indorsement in this case, was never in fact entered into or consummated.

The cases where the execution and delivery of a promissory note were procured by fraud are not analogous. There a contract has in fact been entered into, although voidable on account of the fraud. By electing to sue for damages instead of rescinding, the maker elects to let the note stand as his contract. In the present case no contract whatever was ever made.

*Order affirmed.*

## INDIANA SUPREME COURT.

EVANSVILLE & TERRE HAUTE R. CO.,

*Appt.,*  
v.

Sarah L. CRIST.

(.....Ind.....)

1. **A complaint for injuries sustained by a traveler on a highway**, alleging that he was injured without any fault or negligence on his part, sufficiently avers his freedom from contributory negligence—although it states that he was riding on an embankment thrown up by a railroad company along side the track for which an excavation had been dug in the highway, where such embankment was the only place of passage.
  2. **A railroad company which has made an excavation in a highway** for its track, throwing up an embankment on which travelers may pass, and has failed in its duty to so restore the highway as not unnecessarily to impair its use, is liable for injury sustained by a traveler riding on such embankment, where his horse is frightened by the running of a hand car on the track, although, if the company had been free from fault respecting the highway, there might have been no right of action on account of the hand car.
  3. **Knowledge that there is some danger** in attempting to ride along a highway on an embankment thrown up by a railroad company—which has failed to restore the highway to its proper condition—will not preclude a recovery for injuries sustained in consequence of the fright of a horse occasioned by the running of a hand car, where the traveler was using the only highway which led to or from his home; nor was plaintiff bound to use more than ordinary care.
  4. **An opinion as to rate of speed** of a moving hand car on a specified occasion may be expressed by a witness who managed hand cars or assisted in managing them.
  5. **A physician speaking as an expert** can testify as to the effect of a personal injury.
- 2 L. R. A.

6. **The refusal of instructions asked after the argument has begun** is not error.

(January 8, 1889.)

**APPEAL** by defendant, from a judgment of the Circuit Court of Greene County (Buff, J.), in favor of the plaintiff in an action for damages for a personal injury. *Affirmed.*

The complaint was in three paragraphs, each of which contained in addition to the allegations set out in the opinion, the following statement of the injury received by plaintiff:

"Whereby she was greatly injured in this: the tibia or shin bone in her left leg was fractured and broken near about one and one half inches above the ankle joint; the bones of the ankle and heel were wrenched out of place and dislocated, and the tendons lacerated and torn loose, so that such injuries will leave her a cripple for life; that three of her ribs were broken, and her spine was greatly injured, in such a manner as to be incurable; by reason of which injuries plaintiff became, and is now, and will be permanently, lame, crippled and sick, and has been ever since entirely disabled from attending to her business, and will be so disabled in future."

Each paragraph of the complaint was demurred to by the defendant, but the demurrers were overruled, and such overruling was assigned as error.

Defendant moved to strike out the following question and answer in the deposition of Dr. Crowder "for the reason that the same is immaterial and irrelevant, and because plaintiff has not sued for an injury occasioned by fracturing the fibula." *Question.* "State what in your judgment from the examination made, and your knowledge as a physician and surgeon, was the immediate cause of the injury." *Answer.* "I think the fibula had

been fractured about two inches above the ankle joint, and the internal malleolus had been fractured from the tibia." Defendant also moved to strike out the following portion of an answer in the same deposition: "With the resulting inflammation of the pleura had obstructed the motion of the chest, so that the lower part of the left lung was not normally expanded in respiration;" and also a question and answer relating to a continued pain at the base of the brain, tenderness on pressure on the spine opposite the eighth rib, dilation of the pupils of the eyes at times, impairment of vision at times, loss of memory, and slowness of speech." These motions were denied.

Other facts are stated in the opinion.

**Messrs. John E. Iglehart and Edwin Taylor**, for appellant:

Appellee was in fault in not getting off her horse before the car reached her, and thus avoiding all risk and danger.

*Bellevue R. Co. v. Hunter*, 83 Ind. 367; *Cincinnati, H. & I. R. Co. v. Butler*, 1 West. Rep. 110, 108 Ind. 81; *Indiana, B. & W. R. Co. v. Greene*, 3 West. Rep. 883, 106 Ind. 279; *Indiana B. & W. R. Co. v. Hammock*, 12 West. Rep. 297, 118 Ind. 1.

When a person crossing a railroad track is injured by collision with a train, the fault is, *prima facie*, his own; and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury.

*Hathaway v. Toledo W. & W. R. Co.* 46 Ind. 25. See *Cincinnati, H. & I. R. Co. v. Butler*, 1 West. Rep. 110, 108 Ind. 81.

While there may be facts tending to support the verdict, yet if a preponderance of the evidence against those facts is clearly established, without substantial contradiction, a verdict ought not be permitted to stand. The question is whether or not appellee was guilty of any negligence which contributed to the injury.

See *Hyatt v. Johnston*, 91 Pa. 200; *Ryder v. Wombwell*, L. R. 4 Exch. 89; *Schuykill & D. Improvement Co. v. Munson*, 81 U. S. 14 Wall. 442 (20 L. ed. 867); *Pleasants v. Pant*, 89 U. S. 22 Wall. 120 (22 L. ed. 782); *Marion Co. v. Clark*, 94 U. S. 284 (24 L. ed. 61); *Griggs v. Houston*, 104 U. S. 553 (26 L. ed. 840); *Bagley v. Cleveland Rolling Mill Co.* 21 Fed. Rep. 159; *Wittkowsky v. Wasson*, 71 N. C. 451; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 535, 536, 103 N. Y. 855-860.

**Messrs. William C. Hultz, Orion B. Harris and John S. Bays**, for appellee:

The evidence tends to show that the defendants were guilty of the grossest negligence in failing to stop the hand car.

*Indianapolis etc. R. Co. v. Pitzer*, 7 West. Rep. 396, 109 Ind. 179; *Louisville etc. R. Co. v. Bryan*, 5 West. Rep. 261, 107 Ind. 51; *Palmer v. Chicago etc. R. Co.* 11 West. Rep. 676, 112 Ind. 250; 2 Wood, Railway Law, § 320; *Indianapolis etc. R. Co. v. McBrown*, 46 Ind. 229.

To use a street or highway with a defect in it is not within itself contributory negligence, but is only a circumstance to be considered by the jury.

*Huntington v. Breen*, 77 Ind. 29; *Turner v. Buchanan*, 83 Ind. 147; *Wilson v. Trafalgar & B. O. Gr. Road Co.* 83 Ind. 326; *Henry County Turnp. Co. v. Jackson*, 86 Ind. 111; *Nave v.*

*Black*, 90 Ind. 205; *Albion v. Hetrick*, 90 Ind. 545; *Indianapolis v. Cook*, 99 Ind. 10; *Louisville etc. R. Co. v. Phillips*, 11 West. Rep. 119, 112 Ind. 59; *Lake Shore & M. S. R. Co. v. Pinchin*, 11 West. Rep. 247, 112 Ind. 592; 3 Am. & Eng. Encyclop. p. 84.

If it does not "clearly" appear by the complaint that appellee could have gotten off her horse after seeing the hand car, and that a person of ordinary prudence would have done so, the complaint is good.

*Salem v. Goller*, 76 Ind. 291; *Ohio & M. R. Co. v. Walker*, 12 West. Rep. 781, 118 Ind. 198.

A highway intersected by a railroad must be so far restored as not to impair its usefulness, more than the additional use of it for railroad purposes renders absolutely necessary.

*Evansville & T. H. R. Co. v. Carverner*, 12 West. Rep. 208, 118 Ind. 51.

A failure to so restore is actionable negligence.

*Evansville & T. H. R. Co. v. Carverner*, *supra*; *Louisville etc. R. Co. v. Smith*, 91 Ind. 119; *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Dellzell v. Indianapolis & C. R. Co.* 32 Ind. 45; *Louisville, N. A. & C. R. Co. v. Phillips*, 11 West. Rep. 119, 112 Ind. 59. See also *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338; *State v. Dayton & S. E. R. Co.* 86 Ohio St. 484; *Roberts v. Chicago & N. W. R. Co.* 35 Wis. 679; *People v. Dutchess & C. R. Co.* 58 N. Y. 165; *Mills, Eminent Domain*, §§ 198, 199; 2 Wood, Railway Law, § 271; *Thompson, Neg. pp.* 843, 844, §§ 5, 6; *Field, Corp.* § 549; *Wood, Nuis.* §§ 300-303, 753, 754; 3 Works, Pr. p. 272; 3 Am. & Eng. Encyclop. pp. 906, 267.

**Elliot, J.**, delivered the opinion of the court:

The complaint of the appellee is in three paragraphs. Each avers that the injury for which a recovery is sought was caused by the negligence of the defendant, and that plaintiff was injured without any fault or negligence on her part. They each contain these allegations: "That the appellee lived with her father, who owned land not far from the appellant's railroad; that the only means of egress and ingress was a public highway; that the defendant constructed and built the last described line of railroad across, upon and along last described highway for a distance of three quarters of a mile west from the eastern terminus of said last described highway, and unlawfully, carelessly and negligently failed to construct its line of railroad so as not to interfere with the free use of said highway, and so as to afford security for life and property, in this: that the defendant dug an excavation some six feet deep and fifteen feet wide in the highway for a distance of 150 yards, and piled the dirt from said excavation along the sides thereof, making embankments some nine feet high for the distance of 150 yards, leaving no way for persons to pass along the highway except upon the embankment, with the railroad track between; and that the defendant unlawfully, carelessly and negligently failed and still fails in every particular to restore the highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

The second and third paragraphs each contains these allegations upon the subject of the defendant's negligence: "That on the 8th day of October, 1886, this plaintiff was lawfully riding her horse upon the highway so impaired, eastward to her home; that while she was so riding along it, between her home and the western highway running north and south, the defendant's agents approached along said railroad from the east in a hand car, and frightened plaintiff's horse, and, knowing the situation of plaintiff, but disregarding their duty, they negligently managed the hand car, in this: that after seeing the dangerous situation in which plaintiff was placed, they failed to stop said hand car, and thereby prevent plaintiff's horse from becoming frightened, and thus prevent plaintiff from being injured; that on account of such negligence, and the negligence of defendant in failing to restore the highway to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchise, this plaintiff, without any fault or negligence on her part, was greatly injured."

The first paragraph does not contain the allegations last quoted, but does contain, in addition to those already mentioned, the following averments: That on account of the defendant's negligence in failing to restore the highway, the plaintiff, "while riding her horse eastward to her home upon the highway so impaired, on the 8th day of October, 1886, without any fault or negligence on her part, was thrown from her horse" and injured.

The question whether the complaint shows that there was not contributory negligence on the part of the appellee cannot be decided without first ascertaining and determining what duty the appellant owed the public respecting the highway which it had changed from its former condition; for it is important to give due prominence to two essential facts: one is that the plaintiff was in lawful use of a public highway; and the other is that, for its own benefit, the appellant had changed the highway, and negligently failed to restore it to its former condition, thus making its use unsafe and dangerous.

Nor can this question be disposed of without giving just effect to the general averment that there was no fault or negligence on the part of the plaintiff. This averment makes the complaint good upon the question of contributory negligence, unless the facts specifically pleaded clearly show that the plaintiff was negligent. We concur with appellant's counsel that, ordinarily, the specific facts will control the general averment if they make it clear that there was contributory negligence. *Reynolds v. Cope-land*, 71 Ind. 422.

It has, however, long been the rule in this court that unless the facts specifically stated clearly show that there was contributory negligence, the general averment will rescue the complaint from its assailant. In the case of *Salem v. Goller*, 76 Ind. 291, it was said: "The allegation that he was without fault, like the general averment of negligence, has a technical significance, and admits proof of any facts tending to show its truth."

The cases are collected in *Ohio Railway Company v. Walker*, 12 West. Rep. 781, 118 Ind. 196, and it was said: "The rule that the gen-

eral averment is sufficient has been so long established, and so often approved, that we should feel bound to adhere to it even if we doubted its soundness; but we think its soundness can be vindicated on principle. It is in the nature of a negative fact, and an averment of such a fact cannot be made with the same particularity as an affirmative one. The elementary books, recognizing this, agree that in such case a general averment is ordinarily sufficient. It is evident that any other rule would be practically incapable of enforcement, for a negative fact can seldom be alleged except generally and by way of denial, since any other course would require a process of exclusion and elimination that would lead to an almost endless pleading. If the specific facts absolving the plaintiff from fault must be pleaded, then it would be necessary to enumerate every fact that might be considered as tending to charge him with fault, and negative its existence. In some cases this process of enumeration and exclusion would be practically impossible. In others it would lead to a prolixity of pleading that would do no good, but would produce uncertainty and confusion."

The question now in hand, therefore, comes to us, not as one of evidence, but as one of pleading, and therefore as one to be determined under the rule stated. For this reason the cases cited by the appellant which bear upon questions arising on the evidence and on the instructions are not relevant. Testing the complaint by the settled rule, it must be held to show that the plaintiff was not guilty of contributory negligence, since the specific facts do not clearly negative the general averment. They do not, in truth, negative it in any respect, but, on the contrary, are consistent with it.

The two important facts to which we have referred—the place where the injury was received, and the duty of the appellant respecting the highway it had made unsafe—when assigned their due weight, fully and clearly relieve the plaintiff from any imputation of negligence, especially in this, when considered, as they must be, in connection with the explicit averment of her complaint that she was without fault or negligence. She was upon a public highway leading from her home, and there she had a right to be. She was, it is true, bound to exercise ordinary care in using the highway, but she was not bound to do more. She was not crossing a railroad track, where the rights and duties of the company and a traveler are reciprocal; but she was upon a public way, which the company had no right to use in operating its road, or to make unsafe.

The action is not, it is to be remembered, to recover for injuries received on a crossing, for the complaint proceeds upon a radically different theory. The cases of *Indiana Railway Company v. Greene*, 8 West. Rep. 888, 106 Ind. 279; *Indiana Railway Company v. Hammock*, 12 West. Rep. 297, 118 Ind. 1; and *Cincinnati Railroad Company v. Butler*, 1 West. Rep. 110, 108 Ind. 81—are not in point, for the reason that they were cases where the injury was received on a crossing, and not cases where the interference with a public highway and a negligent breach of duty caused the injury. Throughout this case this difference runs, exerting all through it a controlling influence.

Here the defendant negligently failed to perform a duty imperatively enjoined upon it by positive law. When we come to consider the question of the appellant's negligence, as we shall presently do, we shall state the nature and extent of that duty; but at this point we need only declare that the complaint avers and the demurrer confesses that a statutory duty respecting a public highway was violated, and that this wrong, concurring with another wrong, caused the plaintiff's injury. We do not, of course, decide that the negligent breach of a statutory duty not constituting a willful tort would make the defendant liable if the plaintiff's negligence contributed to the injury for which she seeks a recovery; but what we do decide is that the character of the duty and the nature of the place where the injury was received are important factors in the solution of the legal problem.

If it were granted that the plaintiff had knowledge that she would be exposed to some danger in attempting to ride along the highway, made unsafe by the defendant's wrong, that fact of itself would not, in such a case as this, necessarily preclude a recovery. Knowledge is not always a bar to a recovery. It is not a bar in such a case as the present, for the plaintiff was not bound to refrain entirely from using the only highway which gave her access to her home or led from it.

We have many decisions upon this general subject. In one of them it was said: "The appellant, though he saw the engine, was not bound to anticipate all the perils to which he might be exposed in driving past it, or to refrain absolutely from pursuing his usual course on account of unseen and unknown, though probable, risks. Some risks, such as arise from obstructions in highways, are taken constantly by the most prudent of men; and where, as in this case, the party pursues the usual course, believing it to be safe, he is not guilty of contributory negligence. It was a question for the jury, and by their general verdict they have found upon this point in favor of the appellant, and with it this special finding is not irreconcilable or necessarily inconsistent." *Turner v. Buchanan*, 82 Ind. 147.

A later case contains this statement of the rule: "It is to be determined from the facts of the case whether the known danger is likely to subject the plaintiff to injury; and if it is, then he must be held guilty of negligence in encountering it. While, therefore, it cannot be held that one who does not go out of his way to avoid a known danger is not always guilty of contributory negligence, yet it must be held that he is guilty of negligence where he attempts to pass the danger, where there is such a probability of injury as would deter a reasonable man from assuming the risk of passing it. If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will preclude a recovery." *Lake Shore & M. S. R. Co. v. Pinchin*, 11 West. Rep. 247, 112 Ind. 592.

The principle we assert was applied in a case in all its characteristic features the same as the present. We refer to the case of *Evansville Railroad Company v. Carvener* 12 West. Rep. 208, 118 Ind. 51.

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There are numerous other cases in our reports asserting this general doctrine. Among them are *Huntington v. Breen*, 77 Ind. 29; *Wilson v. Trafalgar & B. C. Gr. Road Co.* 83 Ind. 326; *Henry County Turnpike Co. v. Jackson*, 86 Ind. 111; *Nase v. Flack*, 90 Ind. 205; *Indianapolis v. Murphy*, 91 Ind. 832; *Louisville etc. R. Co. v. Phillips*, 11 West. Rep. 119, 112 Ind. 59.

In a recent edition of a work of excellent standing it is said: "The fact of using a highway after obtaining such knowledge does not necessarily and conclusively establish negligence contributing to an injury resulting from a defect therein." 1 Shearm. & Redf. Neg. 4th ed. § 101.

In another work it is said: "And exposure to known danger [is] not always negligence." 4 Am. & Eng. Encyclop. Law, 86.

Very many authorities are cited in support of this proposition. To the authorities there collected may be added the later cases of *Pa. Tel. Co. v. Varnau*, 15 Atl. Rep. 624; *Gulf etc. R. Co. v. Gascamp* (Tex.) 7 S. W. Rep. 227; *R. Co. v. Arnold*, 4 South. Rep. 250.

But while it is true that knowledge of danger does not necessarily defeat a recovery, yet in all cases it is an important factor, and in many the character of the knowledge and the nature of the danger may be such as to constitute contributory negligence. If the danger is so near and so great that a prudent man, knowing of its existence, would not assume the hazard of encountering it, then it does constitute such contributory negligence as will defeat a recovery. *Gosport v. Evans*, 11 West. Rep. 115, 112 Ind. 133; *Lake Shore & M. S. R. Co. v. Pinchin*, *supra*; *Richmond v. Mulholland* (Ind.) 18 N. E. Rep. 832; *Eckerd v. Chicago & N. W. R. Co.* 70 Iowa, 358; *Fulliam v. Muscatine*, 70 Iowa, 436.

It is quite clear that it cannot be said in this case that the danger was one which the plaintiff was bound to shun, or assume at her own peril all the risk attending the attempt to pass it. The case is not one of a plaintiff casting himself upon a known danger which a prudent person would not have encountered.

We come now to the question which, as we have seen, is intimately blended with the one we have already discussed, and that is the negligence of the defendant. The initial step in the defendant's wrong was the negligent violation of a mandatory statute. Section 3903 of the Revised Statutes of 1881 provides for the construction of railroads; and, in prescribing the duties and rights of a railroad company, declares that it shall have the right "to construct its road upon or across any stream of water, watercourse, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

This statute prescribes a plain duty. Indeed, the duty existed independent of the statute, but the statute makes it all the more clear and positive. The right to interfere with a highway is coupled with the duty to make it as

safe as it was before it was disturbed, or at least to use reasonable care and skill to do so. This duty is violated if there is a failure to restore it to its former condition in all cases where the exercise of reasonable care and skill can effect a restoration. The rule which governs cases of this class is thus stated by a writer of acknowledged accuracy and ability:

"Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly within the provisions of the law, but also with the highest decree of care to prevent injury to the persons or property of those who may be affected by such acts. Hence, where a railroad has been permitted to lay its track along or across a highway, it is bound to the use of every reasonable precaution to prevent injury to those passing along the highway, or crossing its track that is laid along or across the highway; and if it fails to exercise a proper degree of care—not only such as is provided by statute, but also such as is rendered necessary by the character of the obstruction and its location, having reference to a like reasonable exercise of care on the part of those approaching the obstruction—it becomes a nuisance to the extent of its injury to individual rights, and renders the company liable in damages for all the consequences." 2 Wood, Railway Law, § 271.

Possibly the rule is rather too strongly stated; but, strong as the statement is, many well considered cases give it adequate support.

Our own cases recognize and enforce a rule very much the same as that stated by the author from whom we have quoted, although it is perhaps not quite so strongly stated. *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143; *Louisville etc. R. Co. v. Phillips*, 11 West. Rep. 119, 112 Ind. 59; *Evansville & T. H. R. Co. v. Carverner*, 12 West. Rep. 203, 113 Ind. 51.

In the case last cited it was said: "Leaving the highway in such a condition as to require the wheels of vehicles passing over the railroad track to be raised nine inches perpendicularly from the surface of the highway in order to pass over the top of the rails was *prima facie* a negligent interference with the free use thereof. *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Johnson v. St. Paul & D. R. Co.* 31 Minn. 283.

The facts in the complaint before us make a very much stronger case than the one from which we have quoted, and, as the injury is shown to have been caused by the condition of the highway, a strong case is made out. At another place in the opinion from which we have quoted it was said: "A defendant who, in violation of an express statutory duty, places or causes an obstruction in a public highway, will not be heard to say that he did not anticipate an injury which was the direct result of his unlawful act, when the person injured was without fault." *Wabash etc. R. Co. v. Locke*, 11 West. Rep. 877, 112 Ind. 404.

In harmony with the doctrine declared by the authorities we have cited is this statement in a text book: "Where one has a license to interfere with a highway, as where a railroad company is authorized to lay its track along, under or over a highway, the terms of the

license, so far as it directs the manner of such interference, must be strictly complied with. Any other interference is a nuisance." 2 Shearm. & Redf. Neg. 4th ed. § 859.

This statement luminously exhibits the law, for it goes back to the fundamental principle that he who unlawfully interferes with a highway creates a nuisance, and is liable in damages to one who suffers a special injury.

It is established law that a complaint which charges negligence in general terms is good on demurrer. This was proved to be the rule by our own decisions, and by other authorities in a case recently decided—that of *Ohio & M. R. Co. v. Walker*, 12 West. Rep. 731, 113 Ind. 196.

As all of the paragraphs of the complaint contained appropriate allegations charging the defendant with negligently failing to discharge its duty, they are good, irrespective of the negligence in running the hand car. The super-added act of negligence, even if it does not strengthen the complaint, certainly does not weaken it. By showing a second wrong, and continuing it with the first so as to form a continuous cause of action, the pleading was, as we believe, strengthened and not weakened. *Indianapolis, P. & C. R. Co. v. Pitzer*, 7 West. Rep. 396, 109 Ind. 179.

The wrong of the defendant in negligently failing to restore the highway is, as we have seen, of itself sufficient to constitute a cause of action; and the additional act of negligence in the management of the hand car, if not considered as adding strength to the complaint, cannot, at all events, detract from it; but we think that the fact that the defendant, by its own wrong, rendered the highway unsafe, made it necessary for it, in operating its road, to exercise care to prevent injury to one placed in danger by that wrong. We are not dealing with a case where the railroad company was not guilty of any breach of duty respecting the highway on which the plaintiff was traveling, but with a case where, in violation of a positive duty, it wrongfully interfered with a highway. Here the two wrongs blend in one concurring tort. If the appellant was free from fault respecting the public highway, we add, to prevent possible misunderstanding, we should have an entirely different case, and one in which it may be that no action would lie.

A man who has managed hand cars, or assisted in managing them, may express an opinion as to the rate of speed a hand car was moving on a specified occasion. Mr. Lawson says that on questions of speed "the opinion of an ordinary witness is admissible." Exp. Ev. 462.

The reason for the rule is that velocity or speed is a subject which cannot be placed before a jury by a statement of the observed facts. *Bennett v. Meehan*, 88 Ind. 566; *Loehbaugh v. Birdsell*, 90 Ind. 466; *Carthage Turnp. Co. v. Andrews*, 102 Ind. 133, 143; *Louisville etc. R. Co. v. Jones*, 7 West. Rep. 33, 108 Ind. 551; *Salter v. Utica & B. R. R. Co.* 59 N. Y. 631; *Railroad Co. v. Johnson*, 22 Am. Law. Reg. N. S. 117; *Pulsome v. Concord*, 48 Vt. 135.

Under the allegations of the complaint it was competent for the plaintiff to prove the nature and extent of her injuries. *Ohio & M. R. Co. v. Hecht*, 17 N. E. Rep. 297.

It was entirely proper to permit a physician,

speaking as an expert witness, to testify as to the effect of the injury. *Louisville etc. R. Co. v. Wood*, 12 West. Rep. 303, 118 Ind. 544.

It is not error to refuse instructions asked after the argument has begun. *Bartley v. State*, 9 West. Rep. 814, 111 Ind. 358; *Terry v. Shively*, 93 Ind. 418; *Jolly v. Terre Haute Draw-bridge Co.* 9 Ind. 417.

We do not doubt the power of the trial court

to order a new trial when the verdict is wrong upon the evidence. This court, however, it is hardly necessary to say, will not weigh the evidence to ascertain where the preponderance is, but it will accept as trustworthy that deemed so by the jury and the trial court. This rule is applicable here, and makes it our duty to sustain the verdict.

*Judgment affirmed.*

## ILLINOIS SUPREME COURT.

Mary VANOLINDER *et al.*, Appts.,

v.

John T. CARPENTER.

(.....Ill.....)

1. In construing a devise which assumes to give a life estate to the ancestor and the remainder in fee to the "heirs" of such ancestor (the word "heirs" being used in its technical sense as meaning all who are to take generally, and not as the equivalent of "children" or some other partial or restricted class of heirs), the intention to give only a life estate will not control, but under the rule in *Shelley's Case* (which is in force in Illinois) the ancestor takes the fee.

2. The opinion in *Belalay v. Engel*, 107 Ill. 182, disapproved and overruled in so far as it places the decision upon the intention of the testator to vest a fee in the legal representatives or legal heirs of the ancestors and not upon the intention of the testator to use the words "legal

representatives" or "legal heirs" as synonymous with "children," and therefore as words of purchase and not of limitation.

(January 25, 1889.)

APPEAL by plaintiffs, from a judgment of the Circuit Court of Kendall County (Upton, J.), in a suit for the construction of the will of Hiram Bauder, deceased. *Affirmed.*

The will sought to be construed is as follows:

"I, Hiram Bauder, of the Town of Bristol, County of Kendall and State of Illinois, make this my last will and testament. I give and bequeath to my beloved wife, Mary Bauder, and to my daughters, Harriet Elizabeth, Nancy Catharine and Melissa, the use of all my property, after the payments of all debts (except what is hereafter disposed of by this will) to be divided among them as the same would be by law without a will, except that it is my will that

NOTE.—The rule in *Shelley's Case* stated. Where the ancestor, by any gift of conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, "the heirs" are words of limitation of the estate, and not words of purchase. The remainder is immediately executed in possession, in the ancestor so taking the freehold. 1 Coke, 98 b; 1 Preston, Estates, 254; 4 Kent, Com. 215; *Baker v. Scott*, 62 Ill. 86; *Brislain v. Wilson*, 63 Ill. 173; *Beacroft v. Strawn*, 67 Ill. 28; *Ryan v. Allen*, 9 West. Rep. 498, 120 Ill. 648; *Little v. Wilcox*, 11 Cent. Rep. 850, 119 Pa. 439. The rule is that, when the word "heir" or "heirs" is used in the will, and there is nothing in the context explaining or controlling its use, or showing a different intention on the part of the testator, it must be interpreted according to its strict and technical import.

Thus construed, the word "heirs" includes and designates the persons upon whom the law would cast the inheritance in case of intestacy; and, whether few or many, all are comprehended in the word "heirs." 2 Jarman, Wills, 61; *Rawson v. Rawson*, 62 Ill. 66; *Ryan v. Allen*, 9 West. Rep. 497, 120 Ill. 648. The rule operates to give the ancestor an estate for life in the first instance, and by force of the devise to his heirs, the inheritance also by conferring the inheritance on him as the stock from which alone they can inherit. *Vowinkle v. Patterson*, 5 Cent. Rep. 181, 114 Pa. 21; *Hileman v. Bouslaugh*, 13 Pa. 344. A devise of an estate to a daughter to be so secured to her that she shall enjoy it during her natural life, and after her decease to go to her heirs forever, will, under the rule in *Shelley's Case*, give her an estate in fee simple. *Wickler v. Ray*, 6 West. Rep. 495, 118 Ill. 477; *Baker v. Scott*, 62 Ill. 86; *Brislain v. Wilson*, 63 Ill. 173; *Beacroft v. Strawn*, 67 Ill. 28; 2 Washb. Real Prop. 564.

Conditions which must concur. The conditions which must concur in order to the operation of the rule in case of a devise, are: (1) a freehold must be devised. An estate in the first taker, less than a freehold would not be sufficient, because a seisin in the first taker is necessary to draw the remainder to the particular estate. *Pibus v. Mitford*, 1 Vent. 372; *Webster v. Cooper*, 55 U. S. 14 How. 500 (14 L. ed. 510); *Ogden's App.* 70 Pa. 509; *Wms. Real Prop.* 256; 2 Washb. Real Prop. 598, 601. (2) The estate of free-

hold must be taken by the same instrument which contains the limitation to the heirs, and for this purpose a will and codicil will be deemed one instrument. To attract the rule in *Shelley's Case* the limitations to the ancestor, and to his heirs, must be created by the same instrument (*Coape v. Arnold*, 2 Smale & G. 311; 4 DeG. M. & G. 574; *Moore v. Parker*, Ld. Raym. 37), but the remainder to the heirs. If given by different instruments the rule does not apply. 2 Washb. Real Prop. 598; *Co. Litt.* 299 b; *Butler's note*, 261; *Doe v. Fonnereau*, 2 Doug. (K. B.) 508; *Webster v. Cooper*, 55 U. S. 14 How. 500 (14 L. ed. 510); *Adams v. Guerard*, 29 Ga. 675. But a will and schedule to it, are considered as one instrument for the purpose of this rule. *Hayes v. Foorde*, 2 W. Bl. 698; 3 Jarman, Wills, 110. A will and an annexed codicil are considered as constituting one instrument. So the rule applies, if instead of a grant of a remainder, there appeared in the same instrument a power of appointment to the heirs. *Wms. Real Prop.* 256; 2 Washb. Real Prop. 598; *Hayes v. Foorde*, 2 W. Bl. 698; *Tud. Lead. Cas.* 453, 484; *Co. Litt.* 239 b; *Butler's note*, 261; *Tillinghast v. Coggeshall*, 1 R. I. 383. When the remainder is created by different instruments the particular estate will not be enlarged into a fee, though all the other requisites for the application of the rule are present. *Coape v. Arnold*, 81 Eng. L. & Eq. 133. (3) The interest, devised to the ancestor, and limited to the heirs, must be of the same quality. *Baker v. Scott*, 62 Ill. 86; *Ryan v. Allen*, 9 West. Rep. 497, 120 Ill. 648; that is, both must be legal or both equitable. 2 Minor, Inst. 342; *Husband, Inst.* 284; *Stacey v. Rice*, 27 Pa. 75, 81; *Bacon's App.* 57 Pa. 504, 514; *Little v. Wilcox*, 11 Cent. Rep. 853, 119 Pa. 439. The rule applies as well to personal property as to realty. *Parish v. Parish*, 1 Ala. Sel. Cas. 619.

Rule applies to equitable as well as legal interests. The rule applies to equitable as well as legal interests; but the estate of the ancestor and the limitation to the heirs must be of the same quality, either legal or equitable. *Striker v. Mott*, 28 N. Y. 91; *Shreve v. Shreve*, 43 Md. 382; *Thurston v. Thurston*, 6 R. I. 293; *Reynell v. Reynell*, 10 Beav. 21; *Green v. Green*, 90 U. S. 23 Wall. 486 (23 L. ed. 75); *Croxall v. Shererd*, 72 U. S. 5 Wall. 208 (18 L. ed. 572); 2 Minor, Inst. 342; *Husband, Inst.* § 284; *Stacey v. Rice*, 27 Pa.



none of the real estate be sold or disposed of for their use except the wood land in the Big Woods, but be kept sacred for their heirs; and I give and bequeath to my adopted boy, William B. Duffet, \$200 when he becomes of age, provided he lives with my wife and family till that time or till the family is broken up, which is my wish that he do so; and I bequeath to my mother, Clara Bauder, \$25 a year from the income of my property during her natural life. It is my desire that my family remain together," etc.

Just after the execution of the will Bauder died, leaving his widow, Mary Bauder, and the three daughters mentioned in the will. A short time after the testator died, Melissa, one of the daughters, died, leaving no issue. Harriet Elizabeth married John T. Carpenter, defendant herein, about twelve or more years ago. Harriet died, leaving one child, a daughter, named Carrie C. Carpenter, who died in March, 1885, leaving no issue, but leaving a will, in which she makes her father, John T. Carpenter, sole devisee of all her property. The daughter, Nancy Catharine, married Leander Keck, in January, 1864, and is now living, and is one of the complainants herein. She has some three or four children living. Mary Bauder, the widow, is still living, and is also one of the complainants, under the name of Mary Vanolinder, she having remarried.

When Bauder, the testator, died, he left about \$5,000 of personal property and some 400 acres of land in Kendall County, a house and lot and a block of land in Montgomery, in Kane

County, and the timber land in the Big Woods, mentioned in the will, and being about forty acres. The timber land in the Big Woods was sold as allowed by the will, and the proceeds divided among the devisees by arrangement between them.

In 1863 Mary Bauder, the widow, and Harriet and Nancy, the surviving daughters, made a division of the real and personal estate of the testator between them as follows: Mrs. Bauder took one third of the personal and real estate out first; then they divided two thirds into three equal parts; then Harriet and Nancy deeded to Mrs. Bauder, in addition to the one third taken out by her, one sixth of the real estate; then they divided the balance between Harriet and Nancy equally; and the parties have occupied respectively according to that division.

Carpenter now claims that, by virtue of the will of his daughter he has a present estate of inheritance, and a present right of possession, in all said real estate left by Hiram Bauder to the extent of his wife's right to Melissa's share, as well as her own share which descended to her and his daughter Carrie, in whose will he is devisee; claiming that an immediate estate of inheritance in the real estate descended by the will to Melissa and the other daughters and their mother; an estate of inheritance *eo instanti* upon the death of the testator, under the rule in *Shelley's Case*.

Mrs. Bauder, Nancy Keck and her husband, Leander, deny that position; and as Nancy Keck's children also have a contingent interest in the real estate, this bill was filed to have a

81; Bacon's App. 57 Pa. 504. The rule is applied to executed trusts with this qualification: that the two estates, the freehold in possession and the remainder, must both be legal or both equitable. The rule will not apply where one is legal and the other is equitable. Tiedeman, Real Prop. § 434, citing Silver v. Wilson, 2 T. R. 444; Adams v. Adams, 6 Q. B. 880; Doe v. Ironmonger, 3 East, 533; Curtis v. Price, 12 Ves. Jr. 89; Croxall v. Shererd, 72 U. S. 5 Wall. 281 (18 L. ed. 577); Ward v. Amory, 1 Curt. C. 419; Tillinghast v. Coggeshall, 7 R. I. 383; Tallman v. Wood, 26 Wend. 9. Where the estate limited to the ancestor is an equitable or trust estate, and the estate limited to the heirs is an executed use or a legal estate, the two will not coalesce in the ancestor. The rule in *Shelley's Case* is not applicable. Croxall v. Shererd, 72 U. S. 5 Wall. 286 (18 L. ed. 572); Tillinghast v. Coggeshall, 7 R. I. 383. But if both are legal it will not prevent the rule from applying if one of them is charged with a trust and the other is an absolute estate. Tud. Lead. Cas. 484; Douglas v. Congreve, 1 Beav. 50, 4 Bing. N. C. 1. An equitable estate in a life tenant does not, under the rule in *Shelley's Case*, coalesce with the legal estate in remainder to his heirs and constitute an estate tail. Little v. Wilcox, 11 Cent. Rep. 850, 119 Pa. 439, 21 W. N. C. 215.

**Prevalence of the rule.** It is a well established rule, and prevails wherever it is not abolished by statute, and has been generally recognized by the courts of this country, and it still prevails in perhaps most of the States. George v. Morgan, 36 Pa. 65; Carter v. McMichael, 10 Serg. & R. 429; Kleppner v. Lavery, 70 Pa. 73; James' Claim, 1 U. S. 1 Dall. 47 (1 L. ed. 31); Moore v. Dimond, 5 R. I. 121; Tillinghast v. Coggeshall, 7 R. I. 383; Lyles v. Digges, 6 Harr. & J. 364; Chelton v. Henderson, 9 Gill, 432; Roy v. Garnett, 2 Wash. (Va.) 9; Smith v. Chapman, 1 Hen. & Munf. 240; Dott v. Cunningham, 1 Bay, 453; Carr v. Porter, 1 McCord, Ch. 60; Polk v. Farris, 9 Yerg. 209; Davidson v. Davidson, 1 Hawks, 163; Hull v. Beals, 23 Ind. 28; Steeloff v. Redman, 23 Ind. 251; Hancock v. Butler, 21 Tex. 804; Hawkins v. Lee, 22 Tex. 547; Baker v. Scott, 62 Ill. 86; Brislain v. Wilson, 63 Ill. 175; Butler v. Huestis, 68 Ill. 594; Tiedeman, Real Prop. § 432. But the rule still holds good in all grants and devises in which the limitation in remainder is to the heirs generally, or to the heirs of

the body, of the first taker. Bullock v. Waterman St. Baptist Society, 5 R. I. 273; Moore v. Dimond, Id. 137; Manchester v. Durfee, Id. 549; Cooper v. Cooper, 6 R. I. 284; Tillinghast v. Coggeshall, 7 R. I. 383; Jilson v. Wilcox, Id. 518; Moore v. Little, 41 N. Y. 66; House v. Jackson, 50 N. Y. 163. In Rhode Island it is declared by statute not to apply to devises in which the property is limited to one for life and remainder to the children or issue of the devisee for life. Williams v. Angell, 7 R. I. 145.

The rule has been abolished by statute in Maine, Massachusetts, Connecticut, New York, Missouri, Michigan, Tennessee, Virginia, Kentucky, Alabama and Wisconsin. 2 Washb. Real Prop. 607, note 2; Wms. Real Prop. Rawle's note, 360. In these States the rule has been abolished altogether, both as to grants and to wills. Tiedeman, Real Prop. § 433; Richardson v. Wheatland, 7 Met. 173; Bowers v. Porter, 4 Pick. 205; Goodrich v. Lambert, 10 Conn. 448; Moore v. Little, 40 Barb. 488; Williamson v. Williamson, 18 B. Mon. 329. But in New Hampshire, New Jersey and Ohio the rule is only abolished as to wills. 2 Washb. Real Prop. 607, note 2; Dennett v. Dennett, 40 N. H. 500; Den v. Demarest, 21 N. J. L. 523. In Mississippi it is abolished as to real estate. Powell v. Brandon, 24 Miss. 343. It prevailed in Alabama until the 17th of January, 1853, when the Code of 1852 became operative; and deeds and wills which took effect before that date are governed by it. McQueen v. Logan, 80 Ala. 304. It was made part of the law in Massachusetts until March 8, 1792, when it was abolished by statute so far as it respects wills. Webster v. Cooper, 55 U. S. 14 How. 488 (14 L. ed. 510). Where the rule is abolished by statute the question whether a remainder to heirs of the first taker is vested or contingent must be determined on general principles. Williamson v. Williamson, 18 B. Mon. 329.

**Not a rule of property, but of construction.** The rule in *Shelley's Case* is, at most, a technical rule of construction, and not a rule of property, and has always, since the decision in *Perrin v. Blake*, 4 Burr. 2579, given way to the clear intention of the testator or donor, when that intention could be ascertained from the instrument in which the words supposed to be words of limitation were used. Baker v. Scott, 62 Ill. 86; Butler v. Huestis, 68 Ill. 594; Belslay v. Engel, 107 Ill. 186; Chelton v. Henderson, 9 Gill, 432; Carter v. Reddish, 33 Ohio St.

construction put upon the will. The complainants contended:

"That the only devise to the said Mary Bauder and the said daughters of said Hiram Bauder, was the use of the said real estate to the said Mary Bauder, Nancy, Harriet and Melissa, for their lives; and no part of the real estate itself was devised, but it was to be kept intact undivided, unimpaired and undisposed of and sacred to those who might be their heirs living upon the death of all of them; and until the decease of all of said first takers, the use should remain to the survivor or survivors of them. And that when Harriet died no estate passed to her daughter or to anyone else, but her mother and sister, under the will as aforesaid, had the use of the same during their lives; and that, Melissa having died, no estate passed from her, but the same remained likewise in her mother and sisters, under the will, for their use during their lives; and that the survivors are entitled to the use of the whole estate during their lives.

"That the word 'heirs' as used in the will, is a word of purchase, and not of limitation, and that it was the intention of the testator in and by said will that his said widow and three daughters should have a life estate only in his real estate, and upon the death of all of them, the remainder should go to such of their heirs as might then be living; that the rule in *Shelley's Case* does not apply to said devise in said will and to apply the same would be contrary to the intention of said testator."

The circuit court decided that, as to the real estate of Hiram Bauder, "The said Mary

Bauder, Harriet Elizabeth, Nancy Catharine, and Melissa, in and by said will, took an immediate estate of inheritance therein; that the word 'heirs,' as used in said will was a word of limitation, and not of purchase; that such was the intention of the testator in said will, and that the rule in *Shelley's Case* applies thereto."

From this decision the plaintiffs appealed.

**Mr. Charles Wheaton**, for appellants:

The word "heirs" when used in a will ought to be taken as *designatio personarum* whenever it is manifest the testator intended to use it in that sense.

*Butler v. Huettis*, 68 Ill. 594.

In *Belsley v. Engel*, 107 Ill. 182, it is held that the plain intention of the testator overrules the rule in *Shelley's Case*.

See also *Baker v. Scott*, 62 Ill. 86; *Perrin v. Blake*, 4 Burr. 2579; *Finlay v. Riddle*, 3 Binn. 139; *Millett v. Ford*, 6 West. Rep. 424, 109 Ind. 159; *McMahan v. Newcomer*, 82 Ind. 565; *Doe v. Jackman*, 5 Ind. 233; *Helm v. Friabee*, 59 Ind. 526; *Rapp v. Matthias*, 35 Ind. 832; *Brown v. Harmon*, 73 Ind. 412; *Clifford v. Farmer*, 79 Ind. 529; *Hileman v. Bouslaugh*, 13 Pa. 344; *Taylor v. Taylor*, 63 Pa. 481; *Patrick v. Morehead*, 85 N. C. 62.

Where technical words are employed in a will in such a manner that to give them their strict meaning would defeat the intention of the testator, apparent from the will, a more liberal or popular interpretation will be given to them in order to carry such intention into effect.

*De Kay v. Irving*, 5 Denio, 646.

15; *Daniel v. Whartenby*, 84 U. S. 17 Wall. 689 (21 L. ed. 661). It is a rule of construction, and not of interpretation, and takes effect only when the interpretation of the will has been ascertained. *Yarnall's App.* 70 Pa. 335; *Perrin v. Blake*, 4 Burr. 2579; *Guthrie's App.* 37 Pa. 13; *Foster v. McKenna* (Pa.) 10 Cent. Rep. 366. The only matter determined by the rule is whether a person shall take by descent or purchase. *Webster v. Cooper*, 55 U. S. 14 How. 488 (14 L. ed. 510). All devises made before the enactment of statutes abolishing this rule in *Shelley's Case* will be construed in accordance with the rule. *Williams v. Williams*, 11 Lea. 632; *Quick v. Quick*, 21 N. J. Eq. 13. "Heirs," "issue" or "children of the first taker" are either words of limitation or purchase, as will best effectuate the devisor's intention. *Doe v. Collis*, 4 T. R. 294; *Shriver v. Lynn*, 49 U. S. 2 How. 56 (11 L. ed. 172); *Foxwell v. Craddock*, 1 Patt. & H. (Va.) 250; *Daly v. James*, 21 U. S. 8 Wheat. 496 (5 L. ed. 670); *Perrin v. Blake*, 4 Burr. 2579; *Barshaw v. Spencer*, 2 Atk. 583; *Chelton v. Henderson*, 9 Gill, 432; *Re Wynch's Trust*, 27 Eng. L. & Eq. 375.

**Terms "heir," "heirs," "children," "issue," etc., construed.** Where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word "heirs" is a word of limitation: if to the heirs of his body, he takes a fee tail, if to his heirs general, a fee simple (1 *Preston, Estates*, chap. 3; *Broughton v. Langley*, 2 Ld. Raym. 573; *Whiting v. Wilkins*, 1 Bulst. 215; *Bedford's Case*, 6 Moore, 718; *Perrin v. Blake*, 4 Burr. 2579; and the word "nearest," like "next" or "first" prefixed to the term "heirs" or "heir," without the use of other words of limitation, will not vary the effect of the devise. *Ryan v. Allen*, 9 West. 437, 120 Ill. 648; 1 *Coke*, 93 b; 1 *Preston, Estates*, 264; 4 *Kent, Com.* 215; *Baker v. Scott*, 62 Ill. 86; *Brelain v. Wilson*, 63 Ill. 173; *Beacroft v. Straw*, 67 Ill. 28; 2 *Fearne, Rem.* 202. The devise "for life in such cases takes an estate in fee. *Washb. Real Prop.* 598; *Hockstedter v. Hockstedter*, 7 West. Rep. 77, 108 Ind. 53; *Shimer v. Mann*, 99 Ind. 132; *Biggs v. McCarty*, 80 Ind. 363; *Gonzalez v. Barton*, 45 Ind. 298; *McCray v. Lipp*, 85 Ind. 116; *Andrews v. Spurlin*, 38 Ind. 232; *Doe v. Jackman*, 5 Ind. 233; *Preston, Estates*, 271. In *Davis v. Davis*, 89 N. J. Eq. 13, the words "lawful heirs" were construed to

mean legitimate children. *Eldridge v. Eldridge*, 3 Cent. Rep. 345, 41 N. J. Eq. 89. If clearly shown that the word "heirs" was used as meaning children, the court will give it that meaning. *Shimer v. Mann*, 99 Ind. 208; *Ridgeway v. Lamphear*, 99 Ind. 251; *Brumfield v. Drook*, 101 Ind. 190; *Criswell's App.* 41 Pa. 383. The word "children" in its primary sense and "issue" are words of purchase; *Foster v. McKenna* (Pa.) 10 Cent. Rep. 364; but "heir" and "heirs" are words of limitation, and not of purchase. *Schoonmaker v. Sheely*, 3 Denio, 433.

**Instances of construction of terms.** In the creation of a fee-tail estate there must be words of procreation indicating the body out of which the heirs were to issue or by whom they were to be begotten: while words of inheritance only were necessary at common law to the creation of a fee. *Lehndorf v. Cope*, 11 West. Rep. 321, 122 Ill. 317. The words "heirs male" import heirs of the body. *Weart v. Crusier*, 9 Cent. Rep. 117, 49 N. J. L. 475. A devise to T. without words of limitation, "and if he should die leaving no lawful heirs the whole to descend to his brothers and sisters, share and share alike, or to their legal representatives," vests a fee-tail estate in T. *Titzell v. Cochran* (Pa.) 8 Cent. Rep. 513. So, prior to the Act of 1855, a devise to a son for life, and to his legal heirs at his death, if any, and if not then to testator's grandchildren, the son took an estate in fee-tail. *Bassett v. Hawk*, 10 Cent. Rep. 789, 118 Pa. 94, 20 W. N. C. 369. A devise to certain grandchildren and their lawful issue, and in case of the death of either without lawful issue, the share of such child to go to the survivor under the operation of the Act of 1855, is converted into a fee simple. *Reinoehl v. Shirk*, 11 Cent. Rep. 644, 110 Pa. 108, 21 W. N. C. 127. The word "issue" is *prima facie* construed "heirs of the body, and standing alone the words "die without leaving lawful issue" import an indefinite failure of issue. *Reinoehl v. Shirk*, 11 Cent. Rep. 644, 110 Pa. 108, 21 W. N. C. 127. A devise to one and to his "heirs of the blood of the father" creates a fee simple conditional which is, by the Maryland Statute, converted into an unqualified fee simple. *Baltimore & O. R. Co. v. Patterson* (Md.) 12 Cent. Rep. 109. In a devise to a sister "and at her death to her children, or other lineal descendants," the words "other lineal descendants," so qualify the words "child" or "children," as to make them words of limitation and not of

The court will not resort to a technical construction for the purpose of defeating the manifest intention of the testator.

*Gardner v. Gardner*, 6 Paige, 455; *Stewart v. Chambers*, 2 Sandf. Ch. 382.

So the word "heirs" will not be interpreted as a word of limitation, if the intention is apparent to use it in another sense.

*Burtis v. Doughly*, 3 Bradf. 287.

The main thing to get at in the construction of a will is the intention of a testator, to be ascertained from the whole will taken together.

1 Jarman, Wills, Perkins' ed. 414, 425; *Covenhoven v. Shuler*, 2 Paige, 122; *Crosby v. Wendell*, 6 Paige, 548; *Pond v. Bergh*, 10 Paige, 140.

In a will, a general intent must yield to a particular intent, to be gathered from a construction of the whole will taken together.

2 Wms. Exrs. pp. 1152-1164; *Forth v. Chapman*, 1 P. Wms. 667.

To effectuate the clear intention of the testator, as apparent upon the whole will, words and limitations may be transposed, applied or rejected.

2 P. Wms. 1162; *Cooper v. Hayes*, 96 Ind. 386; *Harria v. Carpenter*, 7 West. Rep. 903, 109 Ind. 540; *Wiggins v. Perkins* (N. H.) 2 New Eng. Rep. 895.

**Messrs. M. O. Southworth and N. J. Aldrich**, for appellee:

Though an estate be devised to one for life, or with any other restrictive expressions, yet, if there be added afterwards apt and proper words to create an estate of inheritance in the heirs, the extensive force of the latter words

should overbalance the strictness of the former and make him a tenant in fee.

The true question of the intent would turn, not upon the quantity of the estate intended to be given to the ancestor, but on the nature of the estate intended to be given to the heirs.

See *Baker v. Scott*, 62 Ill. 100.

In the case at bar the testator devises "the use" of all his property, etc.; and it has been contended by the other side that such language does not carry an estate in the land, only the income from it, the estate held in abeyance. That such is not the law, see:

*Handberry v. Doolittle*, 38 Ill. 202; *Oskeden v. Oskeden*, 1 Atk. 552; *Hall v. Carter*, 2 Atk. 858; *Mills v. Banks*, 3 P. Wms. 7; *Mather v. Mather*, 103 Ill. 613; *Ryan v. Allen*, 9 West. Rep. 486, 120 Ill. 648; 2 Jarman, Wills, 609, and cases there cited.

**Schofield, J.**, delivered the opinion of the court:

The question here is whether in construing a devise which assumes to give a life estate to the ancestor and the remainder in fee to the heirs at law of such ancestor, the language of the devise in giving the life estate and other parts of the devise showing, in connection with the language, that his intention was to give only a life estate, must control.

It is quite clear upon authority that the answer must be in the negative. We held in *Baker v. Scott*, 62 Ill. 88, that the rule in *Shelley's Case* is in force here, as a rule of property, and that the question of intent in determining

purchase, *Mason v. Ammon*, 9 Cent. Rep. 744, 117 Pa. 127, 20 W. N. C. 180.

*Intention of testator governs in equity.* When the formal instrument by which an executory trust is to be carried out, comes to be drawn, a court of equity will see that a settlement is made which will in due form of legal conveyancing effectuate the intention of the creator of the trust. *Wood v. Burnham*, 6 Paige, 513; *Sackville-West v. Holmesdale*, L. R. 4 H. L. 543; *Yarnall's App.* 70 Pa. 340; *Neves v. Scott*, 50 U. S. 9 How. 211 (13 L. ed. 108). When a testator, instead of passing the legal estate by his will, leaves something to be done by trustees, so that the parties are obliged to come to a court of equity to have the benefit of it, then if the legal operation of the trust would convey a fee simple or fee tail to the first taker, if there was any language showing different intention, the court will direct a conveyance to be made so as to carry out the intention and not the strict rule of law. *Angell, Petitioner*, 13 R. L. 633; *Egerton v. Earl Brownlow*, 4 H. L. Cas. 210.

Where there are words of limitation in a devise inconsistent with the devolution of the estate by inheritance from the first taker, the rule will not be applied. *Montgomery v. Montgomery*, 3 Jones & L. T. 61; *Doe v. Callis*, 4 T. R. 234; *Greenwood v. Rothwell*, 6 Scott, N. R. 679; *Robins v. Quinliven*, 79 Pa. 333; *Fulton v. Harman*, 44 Md. 251. Where there is an express declaration that the first taker shall have only a life estate, and a fee simple shall vest in his heirs, the rule in *Shelley's Case* does not apply. *Moore v. Brooks*, 12 Gratt. 185. Where the declaration prohibits the first taker from selling or disposing of the land devised, and the remainder is given to his heirs, the word "heirs" is construed as a word of purchase. *Roberts v. Ogbourne*, 37 Ala. 174.

*When the rule does not apply.* The rule in *Shelley's Case* does not apply to a case where an estate for life is granted with remainder to the issue of the first taker, or children of the tenant for life. *Chambers v. Payne*, 6 Jones, Eq. 276; *Reeder v. Spearman*, 6 Rich. Eq. 85; *Gernet v. Lynn*, 31 Pa. 94; *Stump v. Jordan*, 54 Md. 619; *Bannister v. Bull*, 18 S. C. 220; *Donnelly v. Turner*, 60 Md. 61. Even where the words "descend to children" are used (*Tate v. Townsend*, 61 Miss. 316) if the limitation be to the heirs of his body, the first taker would have an estate tail instead of a fee. *Pibus v. Mitchell*, L. R. A.

*ford*, 1 Ventr. 372; *Hileman v. Bouslaugh*, 13 Pa. 351; *Toller v. Attwood*, 15 Q. B. 229; *Doe v. Harvey*, 4 Barn. & C. 610; *Tiedeman, Real Prop.* § 434; *Clarke v. Smith*, 49 Md. 106; *Cooper v. Coursey*, 2 Coldw. 416; *Williams v. Williams*, 10 Heisk. 565. Where an estate is given to a person for life, with remainder to his heirs and their heirs forever the estate of the first taker is not enlarged into a fee by the operation of the rule, since the words "their heirs forever" form a new stock of inheritance inconsistent with descent from the first taker. *Moore v. Little*, 40 Barb. 488; *Schoonmaker v. Sheely*, 3 Denio, 488; *Brant v. Gelston*, 2 Johns. Cas. 384; *Rogers v. Rogers*, 3 Wend. 503; *Wood v. Burnham*, 6 Paige, 513; *Dennett v. Dennett*, 43 N. H. 409; *Williams v. Beasley*, 1 Winst. L. (N. C.) 102; *Findlay v. Riddle*, 3 Binn. 130.

Where a testator gave the interest of a fund to his son for life, and then provided that at the decease of the latter the principal sum be paid to his lawful heirs, share and share alike, the term "lawful heirs" means children and not next of kin. *Eldridge v. Eldridge*, 3 Cent. Rep. 344, 41 N. J. Eq. 80. Under such devise the son took a life interest in the fund, and his children took a remainder which vested at once on the death of the testator. *Eldridge v. Eldridge*, 3 Cent. Rep. 344, 41 N. J. Eq. 89. The testator devised to his daughter the improvement of a farm, the premises to be equally divided between all her legal heirs at her decease. It was held that she took a life estate only, and that her children living at the testator's death took a vested remainder in fee. *Bowers v. Porter*, 4 Pick. 126; *Eldridge v. Eldridge*, 3 Cent. Rep. 345, 41 N. J. Eq. 89.

*Executory trusts not within rule.* Where trusts are merely executory, and something remains to be done to perfect and carry into effect the testator's intention, the court is not confined to the strict rules of common law, but governs itself by the testator's intention, and does that which will best answer and support it. *Wood v. Burnham*, 6 Paige, 513; *Slocloff v. Redman*, 26 Ind. 237; *Livingston v. Murray*, 67 Barb. 220. Where the trusts respecting the shares of the daughters were legal and valid trusts; were not passive, but active; were not executed but executory trusts—the rule in *Shelley's Case* had no application to them; but they were saved by the Revised Statutes, article Relative to Uses and Trusts, § 48. *Wagstaff v. Lowrie*, 22

whether it is applicable in a given case does not turn upon the quantity of estate intended to be given to the ancestors, but upon the nature of the estate intended to be given to the heirs; and it was shown in that case that in the great case of *Perrin v. Blake*, 4 Burr. 2579 (3 Greenl. Cruise, Real Prop. 818) as finally decided in the Exchequer Chamber it was admitted that the rule in *Shelley's Case* often defeats the undoubted intention of the devisor, "for" it was said: "There was never an instance where an estate for life was expressly devised to the first taker that the devisor intended he should have any more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention and vests the remainder in the ancestor."

Preston, in his work on Estates, says in Volume 1, page 281, \*283, speaking of the legal effect under the rule in *Shelley's Case* of the word "heirs" in a devise or grant, "That all possible heirs of the given description are to take in succession from generation to generation under the name of heirs of the ancestor, is to bring the case immediately within the rule. That only one individual or several individuals is or are to take in the characters of heirs, or rather as particular persons described by that name, either for their lives only or for an estate of inheritance to be deducible from them as the stock or ancestor; and that their heirs are described by super-added words of limitation, and as their descendants, is to exclude the rule."

And again, in the same volume at page 362, \* 363, this author says: "In wills the rule" (i. e.

in *Shelley's Case*) "applies generally and without exception to the several limitations as often as the gift to the heirs is without any expression of qualification;" and he thus illustrates his meaning: "Neither the express declaration, (1) that the ancestor shall have an estate for his life and no longer; nor (2) that he shall have only a life estate in the premises, and that, after his decease, it shall go to the heirs of his body, and in default of such heirs vest in the person next in remainder; and that the ancestor shall have no power to defeat the intention of the testator; nor (3) that the ancestor shall be a tenant for his life and no longer, and that it shall not be in his power to sell, dispose, or make away with any part of the premises— . . . will change the word 'heirs' into a word of purchase."

Kent says (vol. 4, p. 238, 8th ed.) in speaking of the decision of the Exchequer Chamber in *Perrin v. Blake*, *supra*: "The result of that famous controversy tended to confirm, by the weight of judicial authority at Westminster Hall, the irresistible pre-eminence of the rule (i. e. in *Shelley's Case*), so that even the testator's manifest intent could not control the legal operations of the word *heirs* when standing for the ordinary line of succession as a word of limitation, and render it a word of purchase. If the term *heirs* as used in the instrument comprehended the whole class of heirs, and they became entitled, on the death of the ancestor, to the estate, in the same manner and to the same extent and with the same discernible qualities as if the grant or devise had been simply to him and his heirs, then the word *heirs* is a word of

Barb. 221. Persons described as sons or children take as purchasers, and not by descent; and the remainders are vested as soon as such persons come into being. Macumber v. Bradley, 28 Conn. 445; Adams v. Ross, 30 N. J. L. 512; Price v. Sisson, 13 N. J. Eq. 177; Sinton v. Boyd, 19 Ohio St. 30; Price v. Taylor, 25 Pa. 102; Tyler v. Moore, 42 Pa. 389; Taylor v. Taylor, 63 Pa. 43; Flint v. Steadman, 38 Vt. 210; Ford v. Flint, 40 Vt. 349; Webster v. Cooper, 55 U. S. 14 How. 600 (14 L. ed. 510); Slater v. Dangerfield, 15 Mees. & W. 263; Lees v. Mosley, 1 Younge & C. (Exch.) 589. Where by devise, a life estate was limited to Elizabeth, and remainder to her sons as tenants in common, share and share alike, and the heirs of their bodies, the fee tail was not limited to the heirs in tail of the first taker: the rule in *Shelley's Case* did not apply. The two sons could not take an estate tail from their mother as tenants in common. They must take it as purchasers or not at all. Webster v. Cooper, 55 U. S. 14 How. 488 (14 L. ed. 510). If they are executory, as they usually are in marriage settlements; or if it is the clear intention of the donor that the tenant for life shall not have the power to cut off the estate in remainder—the rule will not apply. 2 Washb. Real Prop. 496; Sand. Uses, 311; Jones v. Loughton, 1 Eq. Cas. Abr. 342; Gill v. Logan, 11 B. Mon. 231; Berry v. Williamson, 11 B. Mon. 245. That the words "to be equally divided," prevent the application of the rule in *Shelley's Case*, and limit the interest of the first taker to an estate for life, is the settled law in this State. Mills v. Thorne, 55 N. C. 302; Ward v. Jones, 5 Ired. Eq. 400; Jenkins v. Jenkins, 56 N. C. 259. Under a devise to testator's two sons, John and Edward, of a farm, to them as long as they live, and after their death to their children, John and Edward take a life estate, with remainder to their children as purchasers, upon the death of the survivor. Jones v. Cable, 6 Cent. Rep. 355, 114 Pa. 586. The gift in remainder vested at once on the death of the testator, the context of the will showing no different intention. Theobald, Wills, 275; 1 Roper, Legacies, 599; Bowers v. Porter, 4 Pick. 188; Eldridge v. Eldridge, 8 Cent. Rep. 345, 41 N. J. Eq. 89. Devise to grand-daughter; remainder in fee to her children, construed. Where the estate is given

"after his death, to his issue by him lawfully begotten of his body," these must necessarily have been his children. They could not have been otherwise. It will do no violence, either to the language here used or to the context, if this clause be regarded as if the testator had substituted the latter words for the former in framing this part of the instrument. If this had been done there could have been no controversy between these parties. *Re Sanders*, 4 Paige, 288; *Daniel v. Whartenby*, 84 U. S. 17 Wall. 644 (21 L. ed. 664). Even "heirs of the body" may be read under circumstances so as to mean children, and when so read those words will give, as this word, not forced out of its signification, gives, to the first taker no more than his life estate. *Moon v. Stone*, 19 Gratt. 205. If it be objected that the devise to the daughter for life, with remainder to her issue, is, at common law, turned into a fee in the daughter by the operation of the rule in *Shelley's Case*, upon the ground that the word "issue" is used as the equivalent of heirs, and is here a word of limitation and not of purchase; the answer is that the rule applied only to the case of the first taker and not to the use of the word in a case like the present. *Hennesey v. Patterson*, 35 N. Y. 98; *Cushman v. Henry*, 4 Paige, 345. The word "children," in a devise, was a word of purchase, and not of limitation. *Beacroft v. Strawn*, 67 Ill. 33; *Armstrong v. Moran*, 1 Bradf. 315; *Christie v. Phyle*, 19 N. Y. 344; *Bufar v. Bradford*, 2 Ark. 221; *DeWitte v. DeWitte*, 11 Sim. 41. The word "children" in its primary and natural sense is a word of purchase, but the words "heirs," and "heirs of the body" are, in their primary and natural sense, words of limitation, and not of purchase. *Rivard v. Gisenhof*, 55 Hun, 261; *Schoonmaker v. Sheely*, 3 Denio, 490. The term "children" in its natural sense, is a word of purchase, and it is to be taken to have been used as such, unless there are other expressions in the will which show that the testator intended to use it as a word of limitation only. *Christie v. Phyle*, 19 N. Y. 354. It would be unreasonable to suppose that the testator, who evidently looked to succession, could mean that a child of the deceased child should take coextensively with the children. *Barstow v. Goodwin*, 2 Bradf. 418.

limitation, and the intention will not control the legal effect of the word. The term must be used as a mere designation of one or more individuals or a new import given to it by super-added or ingrafted words of limitation, varying its sense and operation, in order to make it a word of purchase."

The principle applicable here is clearly and forcibly stated in "Hayes' Principles for Expounding Dispositions of Real Estate," 96 (7 Law Library, 52) thus: "The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not. We might as well be asked whether a testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no exceptions."

To like effect is *Bender v. Fleurie*, 2 Grant, Cas. 345. The testator gave to his daughter certain land in these words: "She shall have it as her own during her life, and then it is to come to the heirs of her body for their own use;" and the Supreme Court of Pennsylvania said: "But it is said, the testator did not mean to give her an estate tail. Perhaps he did not. But he has used words which in law mean nothing else. If he intended to give but a life estate *voluit non dixit*, we must take what he said, not what he meant. . . . But no court in this State, or in England, has ever treated the phrase 'heirs of the body' as words of purchase, when they are used with reference to the issue of a devisee, to whom a life estate is given. They are words of limitation, and as such they create an estate tail in the first taker, which cannot be cut down even by the clearest expression of a desire that it shall be a life estate only."

Under our statute cutting off entails, as construed in *Butler v. Huetis*, 68 Ill. 594, such a devise, we concede, would not here create an estate tail; but that is purely because of our statute. The rule of construction thus laid down is beyond question pertinent and applicable here to devises, like that before us, which are unaffected by any statute of our State.

In *Hileman v. Bouslaugh*, 13 Pa. 344, the same court, speaking of the rule in *Shelley's Case* said: "The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not, whether the author of the limitation intended it to be applied or not."

And again: "The question on a will is not whether the testator intended that the rule shall not operate, for this is not subject to his power, but whether he used the words 'heirs of the body' as synonymous with the word 'children' or its proper equivalent."

The result of the authorities in regard to the question before us is well stated by Mr. Justice Elliott, speaking for the Supreme Court of Indiana, thus: "It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern, and the rule in *Shelley's Case*; but this appearance of conflict fades away when it is brought clearly to mind that when the word 'heirs' is used as a word of limitation it is treated as conclusively

expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument. If once it is granted that the word was used in its strict legal sense, nothing can avert the operation of the rule in *Shelley's Case*; so that the inquiry is, Was the word used as one of limitation? The only method in which an instrument employing the word 'heirs' can be shown not to be within the rule, is by showing that the word was not employed in its strict legal sense." *Allen v. Craft*, 7 West. Rep. 512, 109 Ind. 476. See also Theobald, Wills, 886 *et seq.*

The doctrine thus sustained was assumed by us to be the law in *Wicker v. Ray*, 6 West. Rep. 495, 118 Ill. 472; *Ryan v. Allen*, 9 West. Rep. 486, 120 Ill. 648, though the present question was not there discussed.

Counsel for appellant cite general rules of construction and some cases in apparent conflict with the foregoing views. A careful examination of the general rules cited will show that when their application to causes like the present is understood there is no conflict; and the cases cited, with the exception of *Belslay v. Engel*, 107 Ill. 182, hereafter to be noticed, will be found, on examination, distinguishable from the present case in that it appeared in those cases, from the connection in which they occurred, that the word *heirs* or *heirs of body* were used as synonymous with "child" or "children" or some other limited class, and not as meaning those who take by inheritance generally, as heirs, in the technical sense of that word. Thus in *Millett v. Ford*, 6 West. Rep. 424, 109 Ind. 159, the devise is this:

"I give and bequeath unto my son James R. Rachels, during his lifetime, the following real estate . . . to have the use of the above described land during said James' lifetime, and after his death to the heirs of his body in lawful wedlock, and none others." The words "heirs of his body in lawful wedlock," could by no possibility intend others than his children; and so the devise was precisely as if it had been to James R. Rachels and his children.

And so in *Urich's Appeal*, 86 Pa. 386, the devise is to the devisor's children and their heirs; but in a subsequent clause he declares that none of his children should have the right to sell or incur the lands, but the land shall remain free for their children or heirs, etc., showing clearly that "children" and "heirs" were used as synonymous; in other words that when he said "heirs" he intended "children."

The other cases cited by counsel for appellant will be found to be alike distinguishable from the present case—restricting and narrowing the meaning of the word "heirs" to particular persons, or to a particular class of persons less than that of heirs in general.

The devise in *Belslay v. Engel*, *supra*, was: "Sixth. I give and bequeath unto my granddaughter, Catherine Belslay, the free use and occupation of" (then describing the lands in dispute) "to have and to hold to use and occupy and enjoy the same . . . during her natural life," etc. "Thirteenth. It is my will, and this bequest is made upon the express declaration that in case any of my said grandchildren should depart this life without issue of their

body, then that all their share of said real estate . . . shall be equally divided among all my grandchildren and their legal representatives, and the title thereto thereafterwards so vest forever. It is my will that no title in fee to any of said land shall vest in my said grandchildren, and I declare it to be my will that they shall have only a life estate therein, and that the fee simple shall vest in their legal heirs." It is plain that this is but equivalent to saying: "I give the life estate to my grandchildren and the remainder in fee to their children. The heirs of those that die without issue of their bodies—i. e., children—being excluded by the necessary effect of the devise, it inevitably follows that none but children of grandchildren could be their "legal representatives" or their "legal heirs;" and therefore in using these terms the testator clearly meant children of grandchildren—and such was the effect of the decision. Beyond all question, then, the case was rightly decided. In the argument of the opinion, however, there is language that seems to place the decision upon the intention of the testator to vest a fee in the legal representatives or legal heirs of the grandchildren as determined from a consideration of all the language of the will, and not, as should have been done, upon the evident intention of the testator to use the words "legal representatives" or "legal heirs" as synonymous with "children," and therefore as words of purchase, and not of limitation. This language of the opinion was unadvisedly assented to by a majority of the members of the court, and is now disapproved and overruled.

It is clear from the language, "to be divided among them as the same would be divided by law without a will," that the testator intended to give his wife and daughters the same use of the real estate that they would be entitled to had he made no will; but that they shall not be allowed to sell it.

A devise of the use of the land is equivalent to a devise of the land itself; and carries the legal, as well as the beneficial, interest therein. *Ryan v. Allen, supra.*

Had there been no will our statute would have given the widow dower in the lands and vested the fee in the daughters, one third each, as tenants in common. Neither would have had an interest in the individual interest of the other; and therefore the heirs of one would not, necessarily, have been the heirs of the other.

In the light of these observations the will must be read substantially thus: "I give to my wife, Mary, dower in my lands, and I give to my daughters Harriet E., Nancy C. and Melissa E., each, the undivided one third of my lands, subject to the dower of my wife, Mary, therein, except that it is my will that none of the real estate be sold or disposed of . . . but that the same be kept sacred for their heirs."

The injunction to not sell is plainly upon each, severally, because the title is not that of joint tenants but that of tenants in common, and each therefore might sell without regard to the others; and for like reason the injunction to preserve is upon each severally and necessary to preserve that which is given her and for her own heirs because the heirs of no one else merely as such can have any interest in her estate. The only limitation in the language employed in the

will is that we have been considering. There is nowhere a single word or syllable to indicate that the word *heirs* was here used as the equivalent of "child" or "children" or "issue," or to otherwise indicate a class less comprehensive than that included within the technical meaning of "heirs at law." Under our statute, therefore, this general language of the devise carries a fee (§ 13, chap. 80, Rev. Stat. 1874).

The word *heirs* as here used clearly means all who are to take generally, without exception, as a class of inheritable persons, and, as to the successive heirs of the daughters named, severally, and not a part—as individuals selected out of the class of heirs—and therefore brings the case within the rule in *Shelley's Case*. 1 Preston, Estates, pp. 282, 283.

Stress is laid in argument upon different matters as presented by the entire devise, claimed to show that the testator could not have intended to give an estate in fee to his daughters; but we have seen that that is not the question. If the language used, in the legal sense that must be placed upon it in the connection in which it occurs, imparts a conveyance in fee to the daughters, such must be its effect, although it may appear that he actually only intended to convey a life estate—the only inquiry permissible being whether, from other parts of the devise, it appears that the word *heirs* was used in a sense more restricted than the term itself imports as the equivalent of "children," "issue," or some other partial or restricted class of heirs.

Finding no cause to disturb the judgment, it must be affirmed.

James W. SYKES, *Plff. in Err.*,

PEOPLE of the State OF ILLINOIS.

(.... Ill. ....)

1. **Section 25 of the Illinois Warehouse Act** of 1871, imposing a penalty for issuing receipts for property not actually in store, is germane to and embraced within the title: "An Act to Regulate Public Warehouses, and the Warehousing and Inspection of Grain and to Give Effect to Article 13 of the Constitution of this State."
2. **Said section** was not repealed by implication by the passage of sections 124 and 125 of the Criminal Code, the provisions of the two Acts being distinct and not repugnant—the offense created by the former consisting solely in issuing a receipt from which a fraudulent result may occur, and that created by the latter consisting in the making or uttering of a receipt for a fraudulent purpose or with a fraudulent intent.
3. **That there was no intent to defraud** the party to whom a warehouse receipt was issued in violation of said section 25 is immaterial on the question of guilt under that section; the only intent necessary to be found to constitute the offense relates only to whether the warehouseman intended to issue the receipt knowing it to be false.
4. **The Warehouse Act** was intended for the protection of the public, and the issuance, by a warehouseman, to a bank, of receipts, transferable by indorsement, purporting to be for property in store belonging to the bank, when in fact no

such property was in store, and delivered by him to the bank as security for loans made by it to him, renders such warehouseman liable criminally under section 25 of the Act, although he had no intent to thereby defraud the bank.

5. **When punishment is prescribed within defined limits** (as, in section 25 of the Warehouse Act, imprisonment for not less than one and not more than ten years), evidence of intent is admissible in order to fix the degree of criminality and the punishment commensurate thereto, notwithstanding it may not be admissible upon the question of guilt or innocence.

(January 25, 1899.)

**ERROR** to the Criminal Court of Cook County (Horton, J.), to review a conviction under section 25 of the Warehouse Act of 1871. *Reversed.*

The case is stated in the opinion.

**Mr. J. A. Sleeper** for plaintiff in error.

**Messrs. George Hunt, Atty-Gen., Joel M. Longenecker, State's Atty., and George N. Stone** for the People, defendants in error.

**Shope, J.**, delivered the opinion of the court:

Upon the trial of this cause it was avowed by the prosecution that the prosecution was upon the counts under the Warehouse Act, which the court determined limited the charge to the 9th, 10th, 12th and 13th counts of the indictment; and the trial proceeded under those counts:

It is contended that the court erred in giving the second and third instructions on behalf of the People, for the reason that the jury were thereby told that if they believed from the evidence, etc., certain things, "as charged in the indictment, etc.," they should find the defendant guilty, instead of limiting the jury to the consideration of the facts charged as constituting the offense, in the particular counts under which the defendant was on trial.

The better practice in such cases is to direct the attention of the jury to the charge in the counts upon which the prosecution rely; but there was here no prejudicial error. In each of the instructions complained of the attention of the jury was directed only to the facts constituting the offense as charged in the counts to which the prosecution was limited.

The statute before referred to, and upon which said counts were predicated, is the 25th section of the Act of 1871 (Starr & Curtiss, ¶ 180, p. 1975), which is as follows:

"Any warehouseman of any public warehouse who shall be guilty of issuing any warehouse receipt for any property not actually in store at the time of issuing such receipt, or who shall be guilty of issuing any warehouse receipt in any respect fraudulent in its character either as to its date or the quantity, quality, or inspected grade of such property, or who shall remove any property from store (except to preserve it from fire or other sudden danger) without the return and cancellation of any and all outstanding receipts that may have been issued to represent such property, shall, when convicted thereof, be deemed guilty of a crime, and shall suffer, in addition to any other penalties prescribed by this Act, imprisonment in the penitentiary for not less than one and not more than ten, years."

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It is urged that this section of the statute is void because the provision imposing a penalty for issuing such warehouse receipts, etc., is not embraced in the title of the Act. The Act is entitled: "An Act to Regulate Public Warehouses, and the Warehousing and Inspection of Grain, and to Give Effect to Article 13 of the Constitution of this State."

Section 6 of the article referred to provides: "It shall be the duty of the General Assembly to pass all necessary laws to prevent the issue of false and fraudulent warehouse receipts, and to give full effect to this article of the Constitution, etc."

It is, we think, manifest from the mere statement that the section under consideration is germane to the purposes of the Act as stated in its title, and not, therefore, obnoxious to the objection. *People v. Lawenthal*, 93 Ill. 191; *Magner v. People*, 97 Ill. 320.

It is next insisted that this section of the Warehouse Act was repealed by the passage of sections 124 and 125 of the Criminal Code. The position is not well taken. The Warehouse Act and the Criminal Code, severally containing the sections referred to, were parts of the General Revision of 1874; and the presumption is that the Legislature intended the revision should be a consistent body of laws, and each part thereof be capable of enforcement. The provisions of these sections are not repugnant and there is, therefore, no repeal by implication.

The section of the Warehouse Act is directed against the issuance of warehouse receipts, etc., by warehousemen of public warehouses as designated in and regulated by that Act; and because of the public capacity in which they are acting, and that warehouse receipts for property stored in such public warehouses are, by the 24th section of the Act, made transferable by indorsement, and thereby a valid transfer of the property represented by such receipt is made, the offense is made to consist simply in committing or doing the acts prohibited. On the other hand, the sections of the Criminal Code referred to are directed against every person who shall "fraudulently make or utter any receipt or other written evidence of the delivery or deposit of any grain" or other commodity, upon any wharf, or place of storage, or in any warehouse, mill, store or other building; and includes places of deposit or of storage not public warehouses as designated in the Warehouse Act. In the one case the offense consists solely in issuing the receipt from which a fraudulent result may occur prejudicial to the public or those into whose hands the receipts may come; while in the other, it is made to consist in the making or uttering the receipt for a fraudulent purpose or with a fraudulent intent.

It is apparent, we think, that the objects sought to be attained by these enactments are distinct, and that full effect could not be given to the legislative intent in respect of the acts of public warehousemen under the sections of the Criminal Code alone.

The principal point of contention, however, is that the court erred in excluding from the jury, as it practically did, evidence tending to show the intent with which the several warehouse receipts were issued by the defendant; and



ruling that it was immaterial whether such receipts were issued by the defendant for a fraudulent purpose, or with a fraudulent intent, or not. As will be observed, we have to some extent anticipated this contention.

The defendant was a warehouseman of a public warehouse of Class C. He so testifies; and the evidence clearly establishes that his warehouse fell within that class as fixed by the second section of the Warehouse Act. It can make no difference that the defendant was a dealer also in the commodities for the storing of which he kept such public warehouse. His transactions as warehouseman could not be affected thereby. The receipts issued by the defendant to the bank purport on their face to be issued by the defendant, as warehouseman of a public warehouse of Class C, and are issued in compliance with the requirements of the 24th section of the Act. Therein is designated the brand or distinguishing marks of the property purporting to have been delivered for storage by the bank, as is provided shall be done in receipts for property stored in public warehouses of that class.

It is obvious, therefore, without further discussion, that the defendant was a warehouseman of a public warehouse, and issued the warehouse receipts charged in the counts of the indictment before referred to, and subject to all the regulations prescribed by the Warehouse Act for his conduct as such warehouseman. These several receipts were thus issued by him, when in fact, as he himself testifies, the particular property designated and described in such receipts was not in store with him at the time of the issuance of such receipt, or at any other time. It is conceded that no timothy seed in bags, bearing the marks and brands stated on the face of the receipts to have been deposited for storage by the bank, were ever at any time on deposit or in store in the defendant's warehouse, or under his control. The bank at no time made any deposit or stored any timothy seed therein.

The receipts were, therefore, false in every particular relating to the property thereby represented to be in store. If, therefore, the court was correct in its ruling, the defendant was clearly punishable under the statute referred to.

To understand this contention clearly, some reference to the facts is necessary. The defendant applied to the Merchants' Loan & Trust Company for financial accommodation. The proof tends to show that he indicated to the bank that the sums required might aggregate \$100,000, and proposed to issue warehouse receipts upon his own produce in store as collateral security for advances made by the bank, and keep the property represented by such receipts insured for the benefit of the bank; and the proof also tends to show that he procured insurance upon property purporting to be represented by such receipts.

An account was opened; advances made by the bank, for which the note of the defendant was given, to which the warehouse receipts introduced in evidence, and others, were collateral, to a large amount, aggregating at the time of the failure of the defendant, and remaining unpaid, over \$90,000.

The evidence offered by the defendant, and practically excluded, tended to show that it

was understood that the produce of the defendant represented in the receipts should not be tied up thereby; that the warehouse receipts were intended and understood to be mere formal security for advances made by the bank. And it is contended that, as the officers of the bank knew no deposit had been made of grass seed as shown on the face of the receipts or otherwise by the bank, that it was competent for the defendant to prove the understanding with which the bank received such receipts as tending to rebut the presumption of fraud or fraudulent intent on the part of the defendant in issuing the same.

If the statute in question was intended for the protection of the person to whom the receipt issued only, there would be much force in the position; for if the bank made no deposit it could not be deceived by the statement in the receipt that it had stored the property therein described. And if the property of the defendant actually in store was not to be represented in such receipts, and this was so understood, no fraud could have been perpetrated upon the bank. This statute, however, has a much broader scope, and is not designed alone for the protection of the person to whom the receipt is, in the first instance, issued; it is intended not only for his protection, but to protect the public at large and all persons into whose hands the receipt may come in the course of business.

By the provisions of the 24th section of the Act, these receipts of public warehousemen are made transferable by indorsement of the party to whom they are issued, and thereby a valid transfer of the property represented in such receipt is made. And it is provided that such indorsement may be made either in blank or to the order of another. Such receipts, therefore, pass from hand to hand by indorsement of the person to whom issued.

It cannot be doubted that commercial transactions are greatly facilitated by this transfer of property, and the purpose of the Act was to protect the holders of such public warehouse receipts from imposition and fraud. The receipts are required to be the true representatives of property actually in store in the warehouse, and their issuance is prohibited under any other conditions or circumstances. If the bank, in this case, as it might, had put these warehouse receipts in circulation, an actual fraud would have been committed, and the evil intended to be prevented by the statute, consummated. By the issuance of the receipts to the bank, it was furnished with the means of perpetrating a fraud, and this is one of the objects this statute sought to prevent. Any other construction would open the door to unlimited fraud, and render nugatory the protection attempted to be afforded to transactions through the public warehouses of the State by the statute.

It follows that, as touching the question of the guilt or innocence of the defendant, the intent with which the receipts were issued by him was immaterial. The intent necessary to be found, to constitute this offense, related alone to whether defendant intended to issue the receipt knowing it to be false. Thus far the common-law doctrine, that every criminal offense consists of the joint operation of act and

intent, enters into and must be considered as applying to statutory offenses. Bishop, Stat. Cr. 351-361.

If such receipts were issued by the defendant, he knowing that the property therein represented was not in fact in store as therein designated and described, the crime created by this section of the statute, as it relates to the issuance of such receipts, was committed. As before stated, it is immaterial whether the defendant intended a fraud upon the bank or other persons, if in fact his act knowingly committed was within the prohibition of the statute. This principle has found repeated recognition in this and other courts, in prosecutions for violations of the Dram Shop Act and other Acts. *McCutcheon v. People*, 89 Ill. 601, and cases cited; *State v. Morse*, 52 Iowa, 509; *Gardner v. People*, 62 N. Y. 299; *Halsted v. State*, 41 N. J. L. 552.

The Supreme Court of Iowa, in *State v. Stevenson*, 52 Iowa, 701, held, upon the same principle, that where a warehouseman shipped grain out of his control, for which he had given a receipt, leaving the receipt outstanding, he was criminally liable under a similar statute, although the grain was so shipped with the knowledge and without objection by the holder of the receipt. The court said: "It is evident from this whole section that it is for the protection of the community as well as the protection of the holder of the voucher. It is clear that Petrie (such holder), in this case, with the receipt in his possession, might perpetrate a fraud upon third parties, the grain not being stored with the defendant as stated in the receipt. The defendant could not, innocently, under the statute, with such a receipt outstanding, ship the wheat beyond his control, even in the presence of Petrie and with his verbal assent. Such an act would furnish Petrie the means of perpetrating a fraud, which is one of the objects of the statute to prevent."

It is urged with great persistency that the transaction here was a mere attempt to create a lien upon the property of the defendant, in the nature of a mortgage or pledge thereof; and that, therefore, the act of defendant in making and delivering said receipt cannot be deemed the issuance of a warehouse receipt within the meaning of said Act; and also that the statute does not contemplate the issuing of warehouse receipts for the property of warehousemen, but only for property deposited or stored in such public warehouse by others. It is highly probable, if a holder of these receipts was seeking to recover possession of the property therein named, or enforce some right thereunder, as against the assignee of the defendant, or others having liens thereon, he, having notice of the facts as here shown, would be bound by the transaction as it truly occurred between the warehouseman and the person to whom it issued; and the principle laid down in *Fishback v. Van Dusen*, 88 Minn. 111, cited by counsel for plaintiff in error, becomes applicable.

No such question here arises. The warehouse receipts, as we have seen, as issued, purported to be for grain stored by the bank with the defendant in his public warehouse, designated and marked as shown by the receipts, when in fact no such deposit had been made.

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Nor is it true, as the contention of counsel would indicate, that the receipts represented produce belonging to the maker thereof. Nor can it make any difference in the criminal responsibility of the defendant under this statute, that such receipts might have been intended by the parties to operate as a pledge or mortgage of the defendant's property; or that the officers of the bank knew or might have known that no such articles of property as therein described were in the custody of the defendant. The instructions asked on behalf of the defendant being based on the theory of counsel for plaintiff in error, that it was necessary for the People to show, and for the jury to find, that the receipts were issued by the defendant with a fraudulent intent, were properly refused.

We have seen that evidence tending to show that the defendant did not intend the perpetration of a fraudulent act is not admissible in justification or as exculpating the defendant from punishment for the alleged offense. Was it admissible for any purpose? If so, it was competent to be considered by the jury for such purpose, and its exclusion was error. While the penalty is denounced against any warehouseman of a public warehouse committing the acts prohibited by the statute, and no excuse can be heard that a fraud was not intended, yet a wide discretion is left by the statute to the jury, or court, to determine what penalty shall be inflicted in the particular case. That the Legislature did not deem all persons guilty of violating the provisions of said Act as deserving of a like punishment, is manifested by the fact that the penalty inflicted may, in the discretion of the jury, be for any term—not less than one nor more than ten years.

The purpose and object of punishment, in criminal cases, is stated to be to deter others from crime and thus protect the community, as well as, when the life is not taken, to reform the offender. On the one hand punishment will not be inflicted unless deserved, while, on the other hand, it will not be imposed unless for conservation of the public good. 1 Bishop, Cr. Law, § 210.

And the punishment should always be commensurate with, but never in excess of, the purposes of the law as thus understood. The degree of punishment to be inflicted is, in the first instance, a matter for legislative control; but when the Legislature has prescribed punishment in the alternative, or within certain defined limits, thereby vesting jurisdiction in the courts to determine which, or within the limits fixed, what penalty shall be inflicted in the particular case, the court is called upon to determine what punishment the turpitude of the offense proved, on the one hand, and protection to society on the other, demands.

It was not within the legislative contemplation that all persons convicted under this Act should receive the same punishment. One may be sentenced for a term of one year and another for ten years. One may have been guilty of a technical violation of the statute, involving no considerable degree of moral turpitude and from which no considerable injury could be inflicted upon the public; the other, have committed the offense under the most flagrant circumstances, showing a willful and deliberate purpose to inflict injury. In such case

the jury must determine what, within the time prescribed by the Legislature, is adequate punishment. This, manifestly, can be justly and properly done only by a consideration of the facts and circumstances attendant upon its perpetration, and which characterizes the purpose and motive in, and effect of, its commission.

If the evidence is to be confined to the mere proof of the issuance of the false receipt by the public warehouseman, what is there upon which to determine what, within the limit, shall be his punishment? Obviously nothing; unless it be permissible to prove, in aggravation or mitigation of the punishment, the immediate attendant circumstances of its issue. This we think may be done. It was, we think, competent for the defendant to prove the circumstances under which the receipts were issued and delivered as bearing upon the turpitude of the offense; and for the jury to consider

the same in determining the measure of punishment to be inflicted. Such evidence must necessarily be controlled by instructions as in other cases, where evidence is competent and admissible for a particular purpose.

We are of opinion that the court erred in holding that the evidence tending to show the purpose and intent by which the defendant was actuated in the commission of the offense was improper to be considered by the jury in mitigation of the penalties to be by them imposed. Nor can we say, if it had been submitted, that the term fixed by the jury for which the defendant should be confined in the penitentiary would have been the same. Its exclusion for the purpose indicated was, we think, prejudicial error.

*For the error in this regard the judgment of the Criminal Court is reversed, and the cause remanded for further proceedings.*

## NEW YORK COURT OF APPEALS.

Andrew TOOLE, *Resp't.*,  
v.

James TOOLE *et al.*—David M. Kochler,  
Purchaser, *Appt.*

(...N. Y....)

1. When the record in a partition suit discloses the existence of persons not made parties who might have an interest, the title acquired at a judicial sale under the decree therein is defective; and a purchaser will not be compelled to accept it, although it may be that such omitted persons were, by reason of alienage, incapacitated from having an interest. To be conclusive against such persons, the record must establish their incapacity.
2. The burden of establishing alienage of persons otherwise interested in property sought to be partitioned is upon the plaintiff in partition.
3. A purchaser at a judicial sale, who con-

tracts for a deed on a day fixed, is entitled to a deed under a decree which will convey an unquestionable title on the day fixed, and should not be subjected to further proceedings to perfect title.

(January 29, 1889.)

**A**PPEAL by the purchaser, under a decree in partition, from an order of the General Term of the Supreme Court, First Department, affirming an order of Special Term denying a motion by such purchaser to be relieved from the purchase. *Reversed.*

The question presented, and the facts connected therewith, are sufficiently stated in the opinion.

*Mr. Benno Loewy*, for appellant:

In order to deprive an heir of his succession to land of which a citizen died seised, on the ground of alienage, even as against the State, a

**NOTE.**—*Partition sale, rights of purchaser.* The purchaser is entitled to be protected by the court, even against an error. *Holden v. Sackett*, 12 Abb. Pr. 473; *Dorsey v. Thompson*, 37 Md. 26; *Woods v. Lee*, 21 La. Ann. 505; *McCaill v. Equitable L. Assur. Society*, 26 N. J. Eq. 531; *Yaple v. Titus*, 41 Pa. 195; *Kingsland v. Spalding*, 3 Barb. Ch. 341; *Knapp, Partition*, 416, 421. He has the right to require a good title, and will not be compelled to complete his purchase and accept a deed which leaves him to the uncertainty of a doubtful title, or to the hazard of a contest with other parties which will seriously affect the value of his property. *Jordan v. Poillon*, 77 N. Y. 518. One who buys at a judicial sale may demand a title free from any reasonable doubt, as condition precedent to the completion of his purchase. *Rice v. Barrett*, 3 Cent. Rep. 440, 102 N. Y. 161; *People v. Open Board of Stock Brokers Bldg. Co.*, 92 N. Y. 98. The purchaser of land at a judicial sale is entitled to a marketable title. *Fleming v. Burnham*, 1 Cent. Rep. 267, 100 N. Y. 1. A purchaser will not be compelled to complete his purchase where there are objections to the title, and the title is not a marketable one. He need not hazard his interest by taking such a title, and the court will not compel him to do so. *Shriver v. Shriver*, 86 N. Y. 576; *Argall v. Raynor*, 20 Hun. 267. If the defendants in the action have not all been properly served with process, the court will not compel the purchaser to complete his purchase. *Cook v. Farnham*, 71 How. Pr. 280. When upon a reference made by the court, it is found that objections were well taken, and it being impossible to cure them, the sale should be rescinded, and the purchaser re-

imbursed. *Parisen v. Parisen*, 46 How. Pr. 385. He cannot be compelled to take a title, the validity of which depends upon a fact which may be changed on new inquiry or is open to opposing influences. *Fleming v. Burnham*, 1 Cent. Rep. 267, 100 N. Y. 1; *Shriver v. Shriver*, 86 N. Y. 575; *Heilreigel v. Manning*, 97 N. Y. 56. Where a party seeks to disaffirm and rescind a contract of sale, and to recover back the deposit of his purchase money, on the ground of a defective title, he must satisfy the court that the title is absolutely bad, before he can recover. *O'Reilly v. King*, 28 How. Pr. 408; citing *Dicas v. Brougham*, 6 Car. & P. 249; *Re Whitlock*, 32 Barb. 48; *Cattell v. Corral*, 4 Younge & C. (Exch.) 237; *Fagen v. Davison*, 2 Duer, 158.

**Record, a muniment of title.** The record should show who the parties to the action were, and that the proceedings were promptly conducted. When such is the case, there being no errors or irregularities, the conveyance by the commissioner is binding effectually. *Arnold v. Butterbaugh*, 92 Ind. 403; *Elston v. Pigroft*, 94 Ind. 14; *F. napp, Partition*, 423, 424. Defects in the record or paper title may be cured or removed by parol evidence. *Heilreigel v. Manning*, 97 N. Y. 56; *Smith v. Wells*, 69 N. Y. 600; *Jordan v. Poillon*, 77 N. Y. 518; *Weeks v. Tomes*, 16 Hun. 349. A record in partition between others is evidence as a muniment of title. *Webb v. Weatherhead*, 58 U. S. 17 How. 577 (15 L. ed. 86). The title procured upon a sale, as the result of such action, should be respected. *McLanahan v. McLanahan*, 3 Penr. & W. 279; *Manly v. Pettet*, 38 Ill. 123; *Wood v. Fleet*, 36 N. Y. 499; *Mount v. Morton*, 20 Barb. 123; *Pomeroy, Remedies*, §§ 373, 374.

legal procedure in the nature of an "inquest of office" must be had.

8 Washb. Real Prop. 3d ed. p. 47; *People v. Cutting*, 8 Johns. 1; *Jackson v. Adams*, 7 Wend. 368; *Bradley v. Dwight*, 62 How. Pr. 300; *Wright v. Sadtler*, 20 N. Y. 820.

As to the rules of law governing the disposition of applications by purchasers at judicial sales to be relieved from their purchase, see—

*Fleming v. Burnham*, 1 Cent. Rep. 267, 100 N. Y. 1; *Jordan v. Poillon*, 77 N. Y. 518; *Shriver v. Shriver*, 86 N. Y. 584; *Hellreigel v. Manning*, 97 N. Y. 56; *Slade v. Joseph*, 5 Daly, 187.

A purchaser at a partition sale should be relieved from his purchase in the case of absence of parties who might have had claims to the property.

*Jordan v. Poillon*, 77 N. Y. 518.

In actions for specific performance, the courts have sometimes decreed that the purchaser should take title when its defects were cured before the final hearing, although existing at the commencement of the action (*Reformed Protestant Dutch Church v. Mott*, 7 Paige, 85; *Grady v. Ward*, 20 Barb. 548), but have never gone so far as to hold the action open and undetermined to enable the seller to bring a suit against other parties, and try the experiment of an effort to secure a good title at some uncertain date in the future.

*People v. Open Board of Stock Brokers Bldg. Co.* 92 N. Y. 104.

Under ordinary circumstances, a purchaser at a partition sale is entitled to a conveyance by a good title at the time fixed for that purpose, and an unreasonable delay in furnishing the same is a sufficient answer to an application to compel him to take a conveyance and fulfill the terms of sale.

*Rice v. Barrett*, 99 N. Y. 406.

*Mr. Lewis Johnston* for respondent.

**Gray, J.**, delivered the opinion of the court:

It is well settled by the decisions that a purchaser at a judicial sale should not be compelled by the courts to accept a doubtful title. Where irregularities or defects exist in the proceedings, which require further or other proceedings in order to cure them, the objection of an intending purchaser, based upon their existence, should not be overruled and his contract of purchase be directed to be completed. His contract called for a good title, and if it was bad, or doubtful, he should, on his application, be relieved from completing the purchase.

In these partition proceedings the absence of parties was shown who were of the same blood and kinship with the next of kin of Mary Hanley, deceased, whose estate was the subject of partition. If they were incapacitated by reason of alienage from having an interest in the property to be partitioned or sold, that was a fact possible of being conclusively established, by bringing them into the proceeding and trying out the question of their alienage by due process of law. A judgment obtained as the

result of such an action would set at rest forever any existing or possible claims. The proceeding is one *in rem*—the subject being the partition of the real estate, or the distribution of the proceeds of the sale.

The general term concede, in their opinion, that the purchaser, at the judicial sale in question, was not offered a title free from doubt, and that concession seems fatal to their order, by which he is directed to complete his purchase. We agree with that court that the proof, in the record of the partition proceedings, which discloses the existence of other persons, not made parties to the action, who might have an interest, did not sufficiently, or conclusively as against them, establish the incapacity of those persons as aliens to have or acquire such an interest.

The court should have granted the application of the appellant to be relieved from his contract, instead of ordering a further continuance of the proceedings in the action, by a reference to take proof upon the capacity or incapacity of the absent parties to take and hold the real estate by reason of their alleged alienage.

The burden of establishing the fact of alienage and of incapacity was upon the plaintiff in partition, and not upon the purchaser. He had the right to assume that the decree, and sale thereunder, conferred, not merely a good legal title, but a title not open to further question or reasonable dispute by other persons who stood in the same degree of kinship to the deceased. By the terms of his contract, he was entitled to a deed on a day fixed, and he was then ready to perform. That he was right in his objection to the title at that time, the general term acknowledged, and that being the case, they should not have changed his contract and held him to be bound to performance indefinitely, or pending further proceedings to perfect title.

The sale was in June, 1887, and the deed should have been delivered in July following. In January following, the general term ordered the further continuance of the proceedings before a referee, and then, in the following May or June, after a delay of nearly a year, ordered the purchaser to complete his purchase. There is an absence of any proof as to any damage occasioned by the delay; and it is unnecessary, if not improper, to indulge in presumptions as to the existence of any. We rest our decision upon the ground that, for reasons we have given, the title offered was not one free from doubt and was fairly open to the objection made.

*The orders of the General and Special Terms should be reversed*, and Koehler, this appellant, be relieved from his purchase and repaid his deposit upon the sale with interest thereon from July 8, 1887, and all his proper and reasonable expenses in examining the title, with costs herein at special and general terms and in this court.

All concur.

2 L. R. A.

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

GIBSON

v.

RICHMOND &amp; DANVILLE R. CO.

(—Fed. Rep.—)

1. **Railroad bondholders**, to whom stock of the corporation has been mortgaged as collateral security, cannot maintain a suit in equity to charge the lessor of the mortgaged road with the earnings derived under the lease, when such lease is not alleged to be void or voidable as between the parties to it.
2. **That the mortgage for such stock was given by the State**, which owned a majority of the stock, held not to bind the State to use its controlling interest in the road exclusively in the interest of its mortgagees of the stock, nor to impress the earnings received by the lessor of the road with a trust for the benefit of such mortgagees.

(February 23, 1899.)

**ON** demurrer to bill in equity. *Demurrer sustained.*

The case is stated in the opinion.

**Mr. George Hoadley**, for defendant, for the demurrer:

The plaintiff does not aver that the lease when made was improvident, or in violation of the duty owing by the directors of the North Carolina Railroad Company to their stockholders, or beyond their powers. The bill is therefore without any equity.

The power to lease was expressly given by law, and of this law this court is bound to take judicial notice.

*Owings v. Hull*, 84 U. S. 9 Pet. 607 (9 L. ed. 246); *Covington Drawbridge Co. v. Shepherd*, 61 U. S. 20 How. 227 (15 L. ed. 896); *Cheever v. Wilson*, 76 U. S. 9 Wall. 121 (19 L. ed. 607); *Junction R. Co. v. Bank of Ashland*, 79 U. S. 12 Wall. 226 (20 L. ed. 885); *Elwood v. Flannigan*, 104 U. S. 562 (26 L. ed. 842).

This rule extends not only to public statutes but to private statutes therein declared to be public.

*Beaty v. Knowler*, 29 U. S. 4 Pet. 152 (7 L. ed. 813).

It will not be presumed that the directors acted beyond their legal powers, in the absence of an averment to that effect; but it is established that they acted within their legal powers.

*State v. Richmond & D. R. Co.* 72 N. C. 634.

As the charter of a railroad company is a contract between the State and the stockholders, the terms of which necessarily, in legal implication, enter into and constitute part of every subscription to capital stock, it follows that the State of North Carolina and the complainant, as mortgagee of its stockholding interest in the North Carolina Railroad Company, became the owner of the stock, subject to the provisions of the charter, and to their honest exercise, from time to time, by the boards of directors.

*Nugent v. Putnam Co.* 86 U. S. 19 Wall. 241 (22 L. ed. 83); *Greenwood v. Union Freight R. Co.* 105 U. S. 13 (26 L. ed. 961); *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223; *Simpson v. Denison*, 10 Hare, 51; *Sparrow v. Evansville & O. R. Co.* 7 Ind. 869; *Bish v. Johnson*, 2 L. R. A.

21 Ind. 299; *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27; *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.* 86 N. Y. 107; *Woodruff v. Erie R. Co.* 93 N. Y. 609.

The plaintiff has no cause of action against the defendant company, for the reason that his mortgage is not on the property, but on the shares of stock held by the State of North Carolina in the corporation.

A mortgage on the stock is not a mortgage on the property.

*Marshall v. Western N. C. R. Co.* 92 N. C. 322.

The interest of a stockholder is of a collateral nature, and is not the interest of an owner.

See *Pullman's Palace Car Co. v. Mo. Pac. R. Co.* 115 U. S. 587 (29 L. ed. 499); *Utica v. Churchill*, 33 N. Y. 238; *Button v. Hoffman*, 61 Wis. 20; *Jones v. Davis*, 35 Ohio St. 476; *Bradley v. Bauder*, 36 Ohio St. 85; *Farrington v. Tenn.* 95 U. S. 638 (24 L. ed. 560); *Cabot Bank v. Morton*, 4 Gray, 159, and *Society for Illustration of Practical Knowledge v. Abbott*, 2 Beav. 567.

Pomeroy on Equity Jurisprudence, at section 1090, clearly distinguishes between the relation of the directors to a corporation and of the corporation to its stockholders, showing that while the directors are trustees, they are trustees, not for the shareholders, but for the corporation, so far as the corporate property is concerned. But so far as the shares are concerned, they are trustees for the shareholders.

See also *Cos v. Columbus, P. & I. R. Co.* 10 Ohio St. 385; *Burrall v. Bushwick R. Co.* 75 N. Y. 211; *Baldwin v. Canfield*, 26 Minn. 43; *Gashwiler v. Willis*, 38 Cal. 11; *Wheelock v. Moulton*, 15 Vt. 519, and *Bristol Milling & Mfg. Co. v. Probasco*, 64 Ind. 406.

The plaintiff, as mortgagee of stock, occupies no other and different relation to the corporation from that which an owner of stock holds. The defendant company never agreed to pay any more than the prior liens stated in the bill, and cannot be required to pay more.

*Christensen v. Eno*, 8 Cent. Rep. 70, 106 N. Y. 99.

The right of plaintiff, if he has any, is to sue for rescission of the lease.

*Re Ambrose Lake Tin & Copper Min. Co. L. R. 14 Ch. Div. 398*; *Memphis & L. R. R. Co. v. Dow*, 19 Fed. Rep. 394.

**Mr. Edward L. Andrews** for complainant, *contra*.

**Wallace, J.**, delivered the following opinion:

The complainant is the owner of certain bonds for \$1,000 each of the State of North Carolina, created pursuant to an Act of the Legislature of the State, and containing a certificate, executed by the authorized officers of the State, which recites that "Ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond."

The defendant is a lessee of the property of the North Carolina Railroad Company for a term of years. The complainant has filed this

bill, for himself and in behalf of other holders of the bonds, to compel the defendant to account for the earnings of the leased railway property in excess of the rent reserved in the lease. The defendant has demurred to the bill.

Succinctly stated the averments of the bill are: that the North Carolina Railroad Company was incorporated by an Act of the Legislature of the State of North Carolina, passed January 27, 1849; that the Act provided that the State should subscribe for \$3,000,000 of the \$4,000,000 authorized capital stock of the company, should be entitled to appoint eight of the twelve directors of the company, and should be entitled to vote by an official proxy upon its capital stock at all stockholder's meetings; that the State took the stock, and has always exercised its rights to appoint directors and vote; that the State created a statutory mortgage upon the shares of the stock to secure certain construction bonds issued by it; that subsequently it created a second statutory mortgage upon its shares of stock to secure an issue of bonds, of which the bonds in suit are a part, and issued \$2,500,000 of such bonds and sold them to the public; and that thereafter, September 21, 1871, and while the railway company was earning and paying 6 per cent per annum upon its capital stock, and while the State was in default in paying the interest on the second mortgage bonds, the defendant, with full knowledge of the rights of the second mortgage bondholders, took a lease of the railway at a rental merely sufficient to pay the interest on the first mortgage bonds, and has since been in possession of the property and in receipt of earnings therefrom largely in excess of the rental.

The Acts of the Legislature incorporating the railway company and authorizing the creation of the construction bonds by the State and the first mortgage upon the shares to secure their payment, are not fully set out in the bill; but as these are laws of which the courts must take judicial notice the bill is to be read in connection with their provisions. By the Act incorporating the railway company and directing the State to take shares therein power was granted to the corporation to lease its property and franchises.

Such effect was given to section 19 of the Act by the decision in *State v. Richmond & Danville Railroad Company*, 72 N. C. 634, where the lease in question to the present defendant was adjudged to be within the authority of the corporation. The Acts creating the statutory mortgages give effect to the lien of the bondholders at law and in equity without registry or proof of notice. The bill does not aver that the lease made to the defendant was improvident or in any respect invalid or vicious. The averment that at the time the lease was made the railway was earning 6 per cent upon its whole capital and the rent reserved was only equivalent to the interest on the first mortgage bonds of the State may be intended to suggest that the property was leased for an inadequate rental; but as the amount of the first mortgage bonds is not mentioned, and as their amount may have been for as much or for more than the amount of the capital stock, this averment does not even insinuate that the lease was improvi-

dent. The bill does not seek to have the lease declared invalid or vacated for any reason. Neither the railway company nor the State is made a party defendant.

The theory of the bill seems to be, and the case for the complainant has been argued upon that theory, that the State of North Carolina was invested by the legislation under which it became a stockholder of the railway company with complete control of the affairs of the company; that by the hypothecation of its shares to the second mortgage bondholders it impliedly agreed to become a trustee for them charged with the duty of exercising its power of control so as to preserve the earnings of the railway and appropriate them to the payment of the bonds; that, consequently, the earnings were a trust fund for the bondholders; that, by permitting the lease by the railway company to the defendant, the State consented to a diversion of the trust fund; and that as the defendant is the recipient of a trust fund with notice of the rights of the *cestui que trust* it must account for such of the fund which has come to its hands as is not applicable to the payment of interest to the first mortgage bondholders.

The proposition that the State assumed fiduciary obligations towards the second mortgage bondholders which do not ordinarily exist between mortgagor and mortgagee, and which gave the bondholders the right to insist that the railway company should be managed in their interest as a trust property, has been ingeniously presented, but does not seem to have any real substance.

The case is not distinguishable, in its legal aspects, from one where an individual, a majority stockholder of the stock of a corporation, has hypothecated his shares by chattel mortgage to a creditor as security for a loan. In such a case it may be assumed that both parties to the transaction understand at the time that the value of the security is to depend upon the financial prosperity of the corporation, and measurably upon the honesty and efficiency of the corporate management; but no promise or duty can reasonably be implied from that understanding that the shareholder who has mortgaged his shares is to use his power of control in the corporate affairs exclusively in the interest of the mortgagee, or is not to consent to or promote any scheme or undertaking in the conduct of its business which is within the scope of its legitimate functions and which he may believe to be expedient and proper. Certainly no promise or duty can be implied from such an understanding which would be inconsistent with his obligations to the other shareholders, or his good faith towards the creditors of the corporation. So long as he conducts himself towards the mortgagee honestly in exerting his power of control, he violates no duty, and the latter has no ground of complaint.

When, in consequence of a default in payment, pursuant to the terms of the hypothecation, the mortgagee's title to the shares becomes absolute, he is in a position to substitute himself in the place of the mortgagor, and participate in the control of the corporation according to the forms, and subject to the conditions, of the organic law. If instead of doing this he nevertheless allows the mortgagor to do

so, he ought not to complain, and cannot be heard to challenge any transactions with third persons by the corporation which are effected in the mean time in good faith and are within the corporate power.

Applying these familiar rules of law to the present case the second mortgage bondholders cannot assert with reason that the State has violated any fiduciary duty towards them, or that the corporation itself has been in any way a party to the subversion of their rights unless they are prepared to show, what is not alleged in the bill, that the lease was fraudulent or *ultra vires*. All persons dealing with a corporation must take notice of the provisions of its organic law.

In the present case the second mortgage bondholders were bound to know when they took their security that the railway company was authorized to lease its property and franchises and should have expected that circumstances might arise under which the interests of the corporation, its stockholders and its creditors, would be promoted by doing so. They were also bound to take notice of the prior rights of the first mortgage bondholders originating in the statutory mortgage created by the Acts of the Legislature, and to anticipate that the interests of these bondholders, to whose lien upon the shares of stock their own lien was subordinate, might require the company to lease its property. The second mortgage bondholders, therefore, took their securities with the knowledge that circumstances might arise under which it would be not only the right but the duty of the State, as a majority stockholder in the railway corporation toward the other stockholders and the first mortgage bondholders, to promote the leasing of the railway. Certainly it cannot be maintained that the effect of the second mortgage was such as to preclude the shareholders of the railway company, other than the State, and the prior mortgagees of the shares, from deriving the benefit of any legitimate mode of exercising the franchises granted to the corporation which might be expedient.

So far as appears from the bill the lease in question was a reasonable and legitimate arrangement, and has been acquiesced in since 1871 by the complainant and those whom he represents. It is fair to assume that the North

Carolina Railroad Company and the State both regarded it as probably offering a better income than could be derived from the ordinary traffic of the railway, and therefore as an arrangement which would promote the interest of shareholders and bondholders.

Very clearly the second mortgage bondholders cannot maintain a suit in equity to charge the defendant with the earnings derived under the lease, when they do not assert that the lease is void or voidable as between the parties to it. The lease is either a valid contract between the North Carolina Railroad Company and the defendant or it is an invalid one. If valid the complainants cannot assail it, and the defendant is entitled to stand upon the terms of the contract, and derive whatever profit it may be able to from operating the road after paying the rent. It cannot be valid as between the parties to it, and invalid as to the complainant, unless the second mortgage bondholders have rights or equities superior to those they would have if when the bonds were not paid they had demanded and acquired the shares of stock hypothecated to them as collateral security. It may be that they are not in a position to intervene in the affairs of the North Carolina Railroad Company and cannot, through their influence at corporate meetings or otherwise, cause such proceedings to be taken by the corporation as it ought to take if the lease were a fraud upon the stockholders whom it represented as trustee in entering into the contract.

But although the complainant may occupy a better position as to matters of procedure and remedy than he would if he were a stockholder, this circumstance cannot prejudice the right of the defendant to insist that the contract cannot be set aside, in whole or in part, unless it is invalid as between the North Carolina Railroad Company, as a trustee for its stockholders, and itself. The complainant's cause of action is founded on the rights to which he has succeeded as a mortgagee of the shares of stock; and his position is not assisted, nor is that of the defendant prejudiced, by his neglect to substitute himself as a stockholder in place of a mortgagee of the stock.

For these reasons, and without discussing the other questions which are presented by the demurrer, *the demurrer is sustained.*

## UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF GEORGIA.

FIRST NATIONAL BANK of Sheffield

v.

MERCHANTS BANK of Atlanta *et al.*

(....Fed. Rep....)

**1. Removal of causes.** A citizen of Alabama brought a bill in equity against a citizen of Georgia, a mere stakeholder; a citizen of Ohio, the real defendant, was made a party and removed the cause to the United States Circuit Court. On motion to remand, *held*, that the language of sec-

\*Head notes by NEWMAN, J.

NOTE.—For construction of Removal Acts of Congress, see *Whelan v. N. Y. L. E. & W. R. Co.* (C. C. Ohio) 1 L. R. A. 65; *Seddon v. Virginia, T. & C. Steel & Iron Co.* (C. C. Va.) 1 L. R. A. 108.  
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tion 2, Act of March 3, 1887, as follows: "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being nonresidents of that State."—refers to this language in section 1 of the same Act: "In which there shall be a controversy between citizens of different States" and not to the latter part of section 1 in reference to the locality in which suits may be brought by original process or proceeding; therefore, the parties to this case being citizens of different States and more than the jurisdictional amount being involved, the defend-



ant, a nonresident of this State, could properly remove the case to this court; and motion to remand will be refused.

**2. Irregularity in filing affidavit and bond for removal the day before taking formal order making movant a party and removing cause was cured by the order in this case.**

(June 16, 1888.)

**MOTION** to remand cause to state court.  
*Denied.*

The case is stated in the opinion.

*Messrs. Hoke & Burton Smith* for motion to remand.

*Messrs. Hopkins & Glen and Julius L. Brown contra.*

**Newman, J.**, delivered the following opinion:

This is a motion to remand; and in order that the question presented may be understood, a brief statement of the case is regarded as necessary. On the 18th day of July, 1887, the First National Bank of Sheffield filed its bill in equity in the Superior Court of Fulton County, Georgia, against the Merchants' Bank of Atlanta, on the following statement of facts:

On the 14th and 15th days of June, 1887, complainant had on deposit \$8,000 with the defendant. Prior to that time complainant had been dealing with the Fidelity National Bank of Cincinnati, Ohio, forwarding checks to said bank and said bank depositing, in place of said checks, currency to the credit of complainant in New York. Prior to said time the Fidelity National Bank had been perfectly solvent and was a bank which did an immense business, and complainant had dealt with it quite a length of time.

Just before or about the 14th day of June, 1887, said bank, through its officers, had squandered its money in sudden wild speculations in wheat and "futures" of different characters, and it had become totally insolvent; yet it continued to deal with complainant without giving complainant any notice of its changed condition, and fraudulently concealed such changed condition from complainant with full knowledge of the fact that complainant was not informed of said changed condition. By reason of said fraud the said Fidelity National Bank induced complainant on the 14th and 15th days of June, 1887, to send it two checks for \$4,000 each on the Merchants' Bank of Atlanta. The Fidelity National Bank received the said checks two or three days later and fraudulently sent the same to the Merchants' Bank of Atlanta without forwarding the currency to New York, to be deposited to the credit of complainant, and said checks reached Atlanta on or about the 20th day of June, but the Merchants' Bank has never paid out said \$8,000 to the said Fidelity National Bank and still has the same."

The prayers in the bill are for a decree requiring the Merchants' Bank to pay complainant \$8,000, and enjoining it from paying it to the Fidelity National Bank. Temporary injunction was granted. On October 8, 1887, an order was passed making David Armstrong, Receiver of said Fidelity Bank, a party to the cause; and thereupon on the same day upon petition of said Armstrong an order was passed by said superior court removing the cause to the Circuit Court of the United States.

2 L. R. A.

It is said in favor of this motion in the first place that the petition for removal, together with the bond and affidavit, were filed in the state court on the 7th day of October, 1887, and that David Armstrong, as receiver, was not made a party defendant until the next day, the 8th day of October. An examination of the record shows this to be true. It further shows that on the 7th day of October, the attorneys for complainant consented in writing that Armstrong, as receiver, be made a party defendant to said cause; and on the 8th day of October the court passed an order in which it is recited that Armstrong, as receiver, having been made a party in the cause, and having caused his appearance to be entered by his solicitor, and having made and filed a bond, and affidavit as required by law, said cause is removed to the Circuit Court of the United States.

I think that by this order the discrepancy in dates and the irregularities alluded to were cured. It seems that on the 7th when the receiver filed his petition for removal he had not, by formal order, been made a party; but I do not think that filing would have the effect to take from the court all jurisdiction to proceed further in the same, for it would seem that this proceeding by Armstrong to remove, when he was really not a party to the cause, would have no effect, and it required the order of the court, passed on the next day making him a party, to give the proceedings any force and effect whatever. I do not think, therefore, the position of counsel for complainant, that the matter alluded to requires the cause to be remanded, can be sustained.

It is said in the next place that the location of the Merchants' Bank, it being a Georgia Corporation, defeats the right of removal in the case. This would be true if the Merchants' Bank was a party to the controversy in the case having an interest therein, to be determined; but the record shows that it is only a nominal party. In the language of the petition, it is "but a stakeholder" of the fund in controversy, and it is apparent that the entire litigation and contention will be between the other two parties. The Merchants' Bank having no interest whatever therein, it simply holds the money to abide the judgment of the court as between the other two parties. *Bacon v. Rice*, 106 U. S. 99 [27 L. ed. 69].

But it is said that, even if this be true, the real and only controversy in the case is between the Sheffield Bank and Armstrong as receiver of the Fidelity Bank; that, then, the citizenship and residence of the parties is not such as to give this court jurisdiction by removal. In that aspect of the case it is a controversy between citizens and residents of different States, neither of whom is a citizen or resident of Georgia.

The decision of this question depends upon the construction that should be given the Act of March 3, 1887. By the first section of that Act the Circuit Courts of the United States are given "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, in which there shall be a controversy between citizens of different States." By the second

clause of the second section of this Act "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being nonresidents of that State." In the latter part of section 1 is this provision: "And no civil suit shall be brought against any person by original process of (or) proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

It has been assumed by some courts, without any discussion of the subject, and without any reason given therefor in their published opinions, that the language quoted from section 2, as to removals, applies to the language last quoted from section 1. *Yuba Co. v. Pioneer Gold Min. Co.* 33 Fed. Rep. 188; *McNeil Pipe, etc.* 5 S. E. Rep. 745; *Pitkin Co. Min. Co. v. Markell*, 33 Fed. Rep. 886; *Harold v. Iron Silver Min. Co.* 33 Fed. Rep. 529; *Tiffany v. Wilce*, 34 Fed. Rep. 230.

In the case of *Gavin v. Vance*, 33 Fed. Rep. 84, Judge Hammond after stating that "The contrary view is neither impossible nor improbable nor yet unreasonable," concludes that section 2 refers to the latter part of section 1. See also *Tiffany v. Wilce*, 34 Fed. Rep. 230.

In all the cases that I have just cited, with one exception, the plaintiff was a resident of the district in which the suit was pending, and a decision of the question presented here was unnecessary. My conclusion as to the proper construction of these two sections is different. I do not think that it can be said that jurisdiction is given by the language quoted from the latter part of section 1. It relates to the locality in which suits may be brought by original "process of proceeding," and is intended

for the benefit of defendants. It provides where they may be required to answer suits originating in the federal courts. Jurisdiction is conferred on the circuit courts by the first part of section 1; and that jurisdiction when founded on citizenship is between citizens of different States, provided the jurisdictional amount is involved; and it is to that portion of the section instead of the latter part, fixing the place where suits may be brought by original "process of proceeding," to which section 2 refers. "Removal of Causes" by Judge Speer of the Southern District of Georgia, § 21 *et seq.*, and analysis C; *Fales v. Chicago etc. R. Co.* 32 Fed. Rep. 673; *Short v. Chicago etc. R. Co.* 34 Fed. Rep. 225 (approving the *Fales Case*); *Vinal v. Continental Constr. Co.* 34 Fed. Rep. 228.

I should have come to the conclusion I have indicated without very much hesitation but for the fact that several federal judges, in cases I have cited, seem to have taken a different view and have assumed, although, as I have stated, without any discussion of the subject as here presented, that the provision in the latter part of section 1 related to cases removed to this court as well as cases originating in it. I am strengthened very much in my own opinion of course as to the proper construction of the statute, by the fact that the same opinion is entertained by a number of judges in cases last cited, where the question before me is considered and decided.

Counsel for Armstrong, receiver, have argued that the court may retain jurisdiction of this case because of the fact that Armstrong is a receiver of a national bank; and they further urge that it is a suit for "winding up the affairs" of a national bank, within the meaning of section 4 of the Act of 1887.

I should not be inclined to concur in this view of the matter; but, as jurisdiction of the case is retained for reasons hereinbefore expressed, it is unnecessary to pass upon this question.

*My conclusion is that the motion to remand this case must be denied.*

## UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF IOWA.

E. P. WELLES, Receiver of Commercial National Bank of Dubuque,

v.

Frank LARRABEE and First National Bank of McGregor.

(....Fed. Rep....)

1. A pledgee of stock in national bank, who holds it solely as collateral security for a debt due from the real owner of the stock, cannot be held liable as a stockholder for assessments thereon, when the name of such pledgee as owner or holder of the shares has never appeared upon the books of the bank, or even upon the certificates of stock.

2. A person who is not the owner of stock in a national bank, and who has no beneficial interest therein, cannot be held liable for assessments thereon by reason of the fact that the shares have been assigned to him to hold in trust, where it ap-

2 L. R. A.

pears upon the proper books of the bank that he holds the same as trustee. If he can be held to be technically a stockholder, under United States Revised Statutes, section 5151, he must be also held exempt from liability as a trustee under section 5152.

(December 11, 1888.)

ON demurrer to the answer in an action at law, brought by the receiver of an insolvent national bank, to recover an assessment on shares of stock. *Overruled.*

The facts are fully stated in the opinion of the court.

Messrs. Thomas Updegraff and William Graham for plaintiff,

Mr. James O. Crosby, for defendants:  
The relation between a pledgee and pledgee is that of trustee and *cestui que trust*. The same principle applies with like result as where real estate is conveyed by a debtor to a credit-

or, as security, with power to sell on default.

*Perry, Trusts*, § 427; *Easton v. German Am. Bank*, 127 U. S. 582 (83 L. ed. 210); *Story*, Bailm. §§ 3, 287, 808 and note 2, 818, 819; *Jones v. Baldwin*, 12 Pick. 816; *Cortelyou v. Lansing*, 2 Cal. Cas. 206; 2 Kent, Com. 559, 581; 4 Kent, Com. 188; *Thompson v. Dolliver*, 132 Mass. 108; *Whitaker v. Sumner*, 20 Pick. 399, 405, citing *Tuworth v. Moore*, 9 Pick. 847; *Fettyplace v. Dutch*, 18 Pick. 388; *Garlick v. James*, 13 Johns. 147; 2 Pars. Cont. 118; *Story*, Eq. Jur. §§ 1008, 1015, 1030, 1216.

As to pledge of shares of stock, see 2 Kent, Com. 18th ed. 577, note d.

The interpretation of United States Revised Statutes, § 5151, has been strict; and in every case, with a single exception, where a person's name has appeared on the stock books of a bank, as the owner of stock in his own right, he has been held liable to respond to the assessment, even though it were in fact held as collateral or in trust.

See *Price v. Whitney*, 28 Fed. Rep. 297; *Mobile & O. R. Co. v. Sessions*, 28 Fed. Rep. 595; *Davis v. First Baptist Society*, 44 Conn. 582; *Germania Nat. Bank v. Case*, 99 U. S. 628, 631 (25 L. ed. 448, 449), and cases cited.

*Crense v. Babcock*, 10 Met. 525, and *Grew v. Breed*, 10 Met. 569, decided in 1846, while seeming to favor the plaintiff, were interpreting Massachusetts Revised Statutes, chapter 86, section 41, which made no exception in favor of trustees, etc., as does United States Revised Statutes, section 5152; and the court held that trustees were individually liable, whether the trust appeared on the books of the bank or not.

In *Addery v. Storm*, 6 Hill, 624, 626, under a New York Statute, it was held that there is "no exception to the rule, unless the existence of the trust appears on the face of the usual evidence of ownership."

There are no cases interpreting United States Revised Statutes, section 5152, but every case coming within its language, which includes all trusts, should receive its protection, where "the existence of the trust appears on the face of the usual evidence of ownership," with the same strictness that section 5151 has been applied to fix the liability of all those coming within its language.

The claim that the McGregor Bank is the real owner of the stock and liable as such in this action, is refuted by *Anderson v. Philadelphia Warehouse Company*, 111 U. S. 479 (28 L. ed. 478), and *Henkle v. Salem Manufacturing Company*, 39 Ohio St. 547.

**Shiras, J.**, delivered the opinion of the court:

From the averments in the petition contained it appears that the Commercial National Bank was a corporation organized under the Act of Congress, doing business at Dubuque, Iowa; that on the 20th day of March, 1888, being insolvent, it ceased to do business, and the present plaintiff was duly appointed receiver thereof by the comptroller of the currency; that the liabilities were found to exceed the assets of the bank, and on the 26th day of July, 1888, the comptroller made an assessment upon the shares of the capital stock of said bank of 100 per cent upon the par value thereof, the same

to be paid by August 25, 1888; that on the 20th day of March, 1888, the defendant Frank Larrabee, as trustee for the defendant the First National Bank of McGregor, was the owner of 100 shares of the capital stock of said Commercial National Bank of the par value of \$10,000; wherefore judgment is asked against both defendants for said sum of \$10,000.

To this petition the defendants answer, setting forth that previous to the 23d day of May, 1885, one J. K. Graves had become indebted to the First National Bank of McGregor in two loans of \$5,000 each, evidenced by two promissory notes, and secured by the pledge of 100 shares of the capital stock of the Commercial Bank, the certificates being in the name of R. E. Graves, trustee, and by him assigned in blank; that on said 23d day of May, 1885, with a view to the extension of said loans, and for the securing the same, with the consent and by the direction of J. K. Graves, who was the real owner of said 100 shares of stock, the certificates named were surrendered to R. E. Graves, trustee, who was also president of the Commercial Bank, and a single new certificate of said 100 shares was issued to Frank Larrabee, trustee of the McGregor Bank; that J. K. Graves has never paid his indebtedness to said McGregor Bank; that said Larrabee has no interest whatever in said stock, but holds the same in trust for said J. K. Graves, and as collateral security for the payment of said indebtedness to the McGregor Bank due from J. K. Graves, who is the real owner of said stock; and that beyond said certificate of shares he has no estate or funds pertaining to said trust, or belonging to said J. K. Graves. To this answer the plaintiff demurs, and counsel have very fully argued the questions thereby presented for determination.

So far as the defendant bank is concerned, the question resolves itself into this: Can the pledgee of stock in a national bank, who holds the same solely as collateral security for a debt due it from the real owner of the stock, be held liable for the assessments thereon, when the name of the pledgee as owner or holder of the shares has never appeared upon the books of the bank, or even upon the certificates of stock? As to the defendant Larrabee the question is: Can a person who is not the owner of the stock, and has no beneficial interest therein, be held liable for the assessments thereon by reason of the fact that those shares have been assigned to him to hold in trust, it appearing upon the proper books of the bank that he holds the same as trustee.

It may perhaps aid in reaching the true solution of these questions to state briefly some principles which are fully recognized, touching the liability of stockholders and the grounds therefor. One of the purposes of a corporation is to enable those interested therein as shareholders to limit their liability for the indebtedness of the corporation. The statutes authorizing the creation of the particular corporation usually fix the limit of such liability.

In the case of national banks, the shareholders, in addition to being required to pay in the full amount of the stock subscribed for, are further liable, in case of need, for an amount equal to the face value of the stock held by them. In enforcing this liability the first prin-

principle recognized is that the actual owner of the stock may be held liable for the assessment upon the shares owned at the time of the failure of the corporation. This is upon the principle that the parties, who by reason of being the actual owners of the stock are entitled to the profits and benefits of the business carried on by the corporation, must respond to the burdens and debts up to the statutory limit. In the enforcement of this liability against stockholders it is well established that the actual owners of the corporate stock cannot shield themselves against such liability by putting the title of the stock in the name of some irresponsible third party. Creditors have the right to call upon the actual stockholders for contribution; and this right cannot be defeated by a merely colorable transfer of the legal title to some third party, who in fact holds the same for the benefit of the real owner of the stock. *Thompson, Liability of Stockholders*, § 215; *Johnson v. Laftin*, 5 Dill. 75; *McClaren v. Franciscus*, 43 Mo. 467; *Mechanics Bank v. Seton*, 26 U. S. 1 Pet. 802 [7 L. ed. 152].

It is a further recognized principle that a party who permits himself to be held out upon the books of the corporation as a shareholder in fact will, in favor of creditors, be held to be such. Parties dealing with a corporation have a right to assume that all persons shown by the books of the corporation to be stockholders are bound for the liabilities of the corporation in the manner provided by the statutes under which the corporation is organized. If, therefore, a person knowingly permits his name to appear upon the stock books as a shareholder in fact, he will be estopped in favor of creditors from denying liability. *Re Reciprocity Bank*, 22 N. Y. 17; *Thompson, Liability of Stockholders*, §§ 160, 161.

These general rules, and others deducible from the adjudged cases, are all based upon the foundation principle that the parties really interested as stockholders in corporations, and who as such are entitled to control and manage the affairs of the corporation, and to receive and enjoy the profits of the corporate business, are bound to respond to the liability imposed by the statute, when the business of the corporation has ceased to be profitable, and the ordinary assets are inadequate to meet the just demands of creditors. The rights of creditors are fully met and protected if the statutory liability is enforced against all who are in fact stockholders in the insolvent corporation, and against all who have knowingly permitted their names to appear or continue upon the corporate books as stockholders in fact, under such circumstances as would justify third parties in assuming that they were stockholders.

There is no principle of law or equity which justifies the holding a person liable as a stockholder in a corporation if in fact he is not one, unless he has knowingly permitted his name to appear as a stockholder, and thereby presumably misled parties dealing with the corporation. The liability sought to be enforced is purely statutory, and the declaration of the statute is that "the shareholders of every national banking association shall be held individually reponsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the ex-

tent of the amount of their stock therein at the par value thereof," etc. U. S. Rev. Stat. § 5151.

To be liable, the party charged must be a shareholder, and by the construction placed upon these and similar provisions in other statutes it is held that the actual shareholder cannot escape liability by placing the legal title of his shares in the name of a third party, and that one who knowingly permits his name to be placed upon the corporate books as an owner of stock, or who permits it to continue thereon after he has in fact sold his stock, will be estopped from asserting that he is not a shareholder in favor of creditors who might otherwise be misled.

Applying these principles to the facts averred in the record of the present case, what is the result? So far as the defendant bank is concerned it is not averred nor claimed that its name ever appeared upon the books of the Commercial Bank as a shareholder, or that it ever held itself out in any way to be the owner in fact of the shares of stock upon which it is now sought to be made liable. There is nothing averred, therefore, that works an estoppel upon the bank; and it may be heard to assert that it is not the actual owner of the stock in question. On part of plaintiff it is argued that the facts averred in the answer show that the McGregor Bank is the pledgee of the stock, and by reason of that fact must be held liable. If a person receives a transfer of stock, the legal title thereto being conveyed to him upon the corporate books, he becomes by his own act the apparent owner of the shares, and he cannot afterwards show, as against creditors, that in fact the transfer was by way of security only. *Hale v. Walker*, 31 Iowa, 844; *Wheelock v. Kost*, 77 Ill. 296; *Holyoke Bank v. Burnham*, 11 Cush. 188; *Adderly v. Storm*, 6 Hill, 624; *Pullman v. Upton*, 96 U. S. 828 [24 L. ed. 818]; *Germania Nat. Bank v. Case*, 99 U. S. 628 [25 L. ed. 448].

Some of the cases go to the extent of holding that, even if it appears on the corporate books that the stock is held in trust, and not absolutely, nevertheless the party in whose name it thus stands will be held liable. These cases seem to be based upon the assumption that the courts will disregard the addition of the word "trustee," and will hold the party to be on the face of the record the apparent legal owner of the stock. If this assumption is well taken, then the conclusion of liability is inevitable, under the rule that one who knowingly permits himself to appear as the legal owner of the stock upon the books of the corporation is estopped, in favor of creditors, from denying such ownership and the consequent liability. In these cases, however, the corporate books showed an assignment or transfer of the stock to the pledgee; and the true ground of liability in such cases, where it exists, is not because the pledgee is the owner in fact of the stock, for he is not, but the fact that the pledgee has received a transfer of the stock in such form that the legal ownership appears to be in him, and by thus holding himself out as apparent owner he is estopped from showing the contrary. It will be borne in mind, however, that the shares of the stock pledged as a security for the debt of J. K. Graves to the McGregor Bank were never carried on the books of the Commercial Bank in the name of the McGregor Bank.

The rule to be applied in such a case is found in *Anderson v. Phila. Warehouse Co.* 111 U. S. 479 [28 L. ed. 478], in which it is held that where stock in a national bank was transferred in good faith as security for a debt, and the legal title was placed in the name of an irresponsible third party, the pledgee could not be made liable for assessments upon such stock; it being held that the pledgee had a perfect right to thus take the stock as security for the debt due it, without making itself liable as the apparent owner thereof.

In the case at Bar, therefore, as the facts averred in the answer and admitted by the demurrer are that the McGregor Bank never owned the stock of the Commercial Bank, and that its only interest therein was by way of security for a debt due from the actual owner of the stock, and it not appearing that the McGregor Bank was ever held out or represented to be the owner of the stock in question, and as the legal title thereto never passed to the bank—it must be held that the answer, read in connection with the petition, presents a good defense to the action, and is not assailable by demurrer.

There is left, then, for consideration the question whether the facts appearing in the answer and petition constitute a defense for the defendant Larrabee. These facts are: that he never was the beneficial owner of the shares of stock in question; that the same were assigned to him in trust by the actual owner, J. K. Graves, to be held as security for the debt due the McGregor Bank; and that, when the transfer on the books of the Commercial Bank was made to him, the character of the title and interest transferred to him was indicated by the addition of the word "trustee" thereto.

Notwithstanding the ruling in some of the cases that such an addition is to be disregarded, the weight of authority accords with what on principle appears to be the common-sense construction of such a subscription. The word "trustee" is one of significance. It is constantly made use of, not only in legal phraseology, but in common speech, to indicate that one holds the title to property, not in his own absolute right, but for the benefit of some other party or parties.

The fair and reasonable conclusion that all would reach, upon noticing the fact upon the stock book of a corporation that certain shares of stock were held by A B, trustee, would be that he held the same, not in his own right, but for the benefit of some other party. If the subscription upon the stock register was in the name of A B, administrator or executor, could it be fairly said that persons dealing with the corporation would be justified in assuming that stock thus held was held by A B, in his own right, and not in a representative capacity? Such words as trustee, administrator, and executor have a well understood meaning, and, when attached to a name appearing upon the corporate books, are certainly sufficient to notify all that such shares of stock are held by the subscriber, not in his own right, but in a representative capacity, thus putting those dealing with the corporation upon inquiry. Thus in *Shaw v. Spencer*, 100 Mass. 382, it is said that it is an erroneous assumption that the word "trustee" alone has no meaning or legal effect;

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that "The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice, and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist."

In *Duncan v. Jaudon*, 82 U. S. 15 Wall. 165 [21 L. ed. 142], the supreme court cites this case of *Shaw v. Spencer* approvingly, saying: "And the Supreme Court of Massachusetts in a recent case, in its essential features like the case at Bar, decides that, if a certificate of stock expressed in the name of A B, trustee, is by him pledged to secure his own debt, the pledgee is, by the terms of the certificate, put upon inquiry as to the character and limitations of the trust, and, if he accepts the pledge without inquiry, does so at his peril. In that case the *cestui que trust* was not named in the certificate, and the court remarked that, if it were so, the duty of inquiry would hardly be controverted. If these propositions are sound—and we entertain no doubt on the point—the liability of the appellants for the conversion of the stock belonging to Mrs. Jaudon cannot be an open question."

It is not necessary to cite further authorities in support of the proposition that the addition of the word "trustee" to the name of Frank Larrabee upon the stock certificate was sufficient to charge parties with notice that he held the stock, not as his own, but as a trustee. Indeed, counsel for plaintiff in their argument do not controvert this proposition, but argue that the word "trustee" only notified parties dealing with the bank of the real facts, to wit: that Larrabee held the stock as pledgee, and as such is liable for the assessments. The facts, as pleaded in the answer, however, show that in fact J. K. Graves was the pledgee, and the McGregor Bank was the pledgee, and Larrabee was merely a trustee. There was no debt due him, nor could he in any way derive any benefit or advantage from the pledge. If Graves paid the debt due the bank, then it would become the duty of Larrabee to return the stock to Graves. If the debt was not paid, and the stock was sold for the payment thereof, then it would be his duty to pay the proceeds, or so much thereof as should be necessary to pay the debt, to the McGregor Bank, returning the surplus to Graves. Larrabee is neither the actual owner of the stock, nor has he any beneficial interest therein as pledgee or otherwise. His sole connection with the stock, according to the averments of the answer, was the taking and holding the title in trust for the real owner, Graves, subject to the claims of the McGregor Bank as a creditor of Graves; and according to the averments of the petition he was a trustee for the benefit of the McGregor Bank. Thus it appears that in fact Larrabee held the title of the stock as trustee only, and such fact appeared upon the face of the stock certificate; and by the express terms of section 5152 of the Revised Statutes it is declared that "Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable," etc.

Counsel for plaintiff argue that the trustees intended to be exempted by this section are

such only as, having funds in their hands for investment, have invested the same in stock of national banks, and that the exemption does not apply to cases where the trustee holds the naked legal title in trust for some third party; and in support of this proposition counsel cite *Thompson, Liability of Stockholders*, §§ 179, 180; *Hoare's Case*, 2 Johns. & H. 229; *Stover v. Flack*, 30 N. Y. 64; *Wheelock v. Kost*, 77 Ill. 296; *Johnson v. Laflin*, 5 Dill. 75.

These authorities are dealing with cases wherein the trust was a secret one, growing out of the relations of the parties. If, however, the trust is an express trust, and the fact that a trust exists appears upon the corporate books, what ground exists for holding that the statutory exemption does not apply? The statute provides that parties holding stocks as trustees shall not be personally liable; and, if the party has not estopped himself from showing that he holds the stock only as trustee, by permitting himself to be held out upon the corporate books as an owner of the stock in his own right, then it would seem clear that one who in fact holds the stock as trustee only is expressly exempted from personal liability.

All that is necessary to be done to bring one within the terms of the statute is to show that the party holds the stock as trustee, and this being shown, the exemption attaches. What good reason can be urged for holding that a person in whom the naked legal title of the stock is vested in trust merely, and who derives no benefit therefrom, and who has no funds or estate in his possession or under his control to which he might look for reimbursement, should be held personally liable for the assessments upon the stock thus held by him, when a trustee who has an estate or funds in his possession or under his control is expressly exempt from personal liability. If any distribution is to be made, it would be more in consonance with just principles to hold the trustee, having an estate or funds in possession, to which he might look for reimbursement, liable for the assessment; rather than one who holds merely a naked title.

If, however, the view taken by plaintiff's counsel of the meaning of section 5152 is correct, it does not follow that the defendant Larrabee is liable. The statutory liability does not attach to him unless he is a shareholder; and upon general principles it must be held that a mere naked trustee, who has no beneficial interest in the stock, but holds the title for the benefit of the real owner and parties in interest, the existence of such trust appearing upon the corporate books, cannot be held to be a shareholder within the meaning of section 5151 of the Revised Statutes.

In the cases of administrators, executors, and

trustees of that character, that there is no principal back of them, it might be argued with much force that they should be held liable as the owners of the stock, because the title vests in them, not as agents for some responsible principal, but as owners of the title, though bound to account for the proceeds thereof. To prevent liability from attaching to such administrators, executors, guardians and trustees, section 5152 was enacted; but it is not a fair inference that, by enacting the exemption therein provided for, it was the intent to make liable as shareholders in fact parties who are not the real owners of shares, and who do not and cannot participate in the management of the corporation, nor in the benefits and profits derived from the corporate business. As to such parties, the fundamental reason for liability to creditors fails.

If it be sought to hold the defendant Larrabee liable because by a technical construction of the word "shareholder" he may be included within the same, as found in section 5151, then he has the right to insist that a similarly technical construction be placed upon the word "trustee," as used in section 5152, in which case he would be exempt simply because he comes within the language of the section. But, looking beyond the mere language used in these sections, or rather construing the same according to the true meaning and purpose thereof, it must be true that Larrabee cannot be held liable under the provisions of section 5151, unless it appears that he is a shareholder in the defunct bank, or has held himself out as such. According to the averments of the answer he did not own the shares of stock assigned to him as trustee, and had no beneficial interest of any kind therein, nor could he derive any benefit therefrom. He had assumed the duties of a trustee for the owner or pledgeor, Graves, and for the creditor or pledgee, the McGregor Bank; but beyond the duties of such trusteeship he has no interest in the stock. He represents, on the one hand, the real owner of the stock, to whom creditors may look for the payment of the assessments, and on the other, the pledgee and creditor; and, occupying this position, he cannot be fairly or properly said to be a shareholder in the bank within the meaning of section 5151 of the Revised Statutes. Not being then a shareholder within the meaning of that section, or, if he be such, then being a trustee within the exception enacted in section 5152, he cannot be held liable for the assessments upon the stock held by him as trustee.

*The demurrer, therefore, to the answer must in favor of both defendants be, and the same is hereby, overruled.*

## ALABAMA SUPREME COURT.

HUDMON Bros. & Co.

E. P. DU BOSE.

(...Ala....)

**Warehousemen in Alabama** who deliver up cotton stored with them, to a third person producing their receipt therefor, may be held liable  
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to the mortgagee of such cotton whose mortgage is properly recorded in another county, although they have no actual notice of the mortgage.

(December 12, 1888.)

**APPEAL** by defendants, from a judgment of the Lee County Circuit Court in favor of plaintiff in an action of trover for the alleged

conversion of two bales of cotton. *Affirmed.* Defendants pleaded not guilty, and a special plea averring that they received the cotton as warehousemen for storage only, and delivered it up on production of their receipt, without notice of plaintiff's right or claim.

At the trial it appeared that plaintiff had, in 1880, advanced money to May and Roberts, who cultivated land in Macon County, to enable them to make a crop, and had taken as security therefor mortgages which covered, among other things, the entire crop of cotton to be raised on the land during that year. These mortgages were duly recorded in Macon County and the law day of each was October 1, 1880. The cotton in controversy was a portion of that covered by these mortgages. It had been carried by May and Roberts, on November 6, 1880, to Opelika in Lee County, and there stored in the warehouse of defendants, who gave a warehouse receipt for it and afterwards delivered it to some third person upon the production by him of their receipt. Plaintiff, upon inquiry, was informed by defendants that the cotton had been stored with them, and upon production of their receipt that they had delivered it to a third person whose name they declined to state. They had no actual notice of plaintiff's right or claim to the cotton.

*Messrs. A. & R. B. Barnes* for appellants.  
*Mr. W. J. Sanford* for appellee.

**Somerville, J.**, delivered the opinion of the court:

In *Lee v. Mathews*, 10 Ala. 682, decided as far back as 1846, the rule was settled by this court, in accordance with the English authorities, that an agent who intermeddles with the goods of another is guilty of a conversion, if the same act of intermeddling by his principal would, under like circumstances, have rendered the latter liable in trover. It was said by Ormond, J., that "Every act of intermeddling with the goods of another is a conversion; and that it is no answer to the true owner that the

person so receiving the goods was ignorant of his title, or that he received them for the use or benefit of another."

The same rule is reiterated in *Permyer v. Kelly*, 18 Ala. 716 (decided in 1851), and is fully sustained by the weight of authority *Marks v. Robinson*, 82 Ala. 69, 83.

The only exception to this rule which our decisions have established is stated in *Nelson v. Iverson*, 17 Ala. 216, the authority of which is recognized in *Marks v. Robinson, supra* (1887). This exception is that the mere receiving of goods by one who restores them to his bailor, before notice that such bailor's possession is wrongful, is not a conversion.

Under the above principles, the appellants were guilty of a conversion in receiving the appellee's cotton and shipping it on his order, unless they come within the exception announced in *Nelson v. Iverson, supra*. It is insisted in argument that such shipment is legally tantamount to restoring the cotton to the possession of the bailor. The rule, in our judgment, cannot be construed to go this far. The exception in question only embraces the act of restoring the thing bailed to the mere possession of the bailor—a substantial restoration of the original *status in quo* of the property. It does not include a restoration of the bailor's dominion by an act the essential nature of which is a defiance of the true owner's title, or the probable consequence of which will be to put the property beyond his reach; and such is the act of conversion here imputed to the appellants.

The rulings of the circuit court touching this point are, in our opinion, free from error. The registration of the appellee's mortgage on the cotton in controversy was constructive notice to the appellants of the existence of the mortgage, and as binding on them as actual notice would have been. *Mayer v. Taylor*, 69 Ala. 408; *Heflin v. Slay*, 78 Ala. 180; *Marks v. Robinson, supra*.

*The judgment is affirmed.*

## MISSOURI SUPREME COURT.

George A. SIMMONS, Admr. of Robert Tucker, Deceased, *Resp't.*

Britton A. HILL, *Appt.*

(....Mo....)

(December 20, 1888.)

**A**PPEAL by defendant, from a judgment of the St. Louis Circuit Court, in favor of plaintiff upon a motion for execution against defendant to recover unpaid subscriptions to the stock of an insolvent bank. *Reversed.*

The Missouri Revised Statutes of 1879, § 786, authorizes the issuance of an execution upon the motion of a judgment creditor of an insolvent corporation, against "any of the stockholders to the extent of the amount of the unpaid balance of the stock by him or her owned."

The facts are fully stated in the opinion of the court.

*Messrs. Britton A. Hill (pro se) and Martin, Laughlin & Kern* for appellant.

*Messrs. H. I. D'Arcey and James P. Maginn* for respondent.

**Brace, J.**, delivered the opinion of the court:

On the 7th of April, 1881, plaintiff's in-

1. **A purchaser, at a sale on execution, of stock in a corporation**, which defendant had previously transferred in good faith on the books of the corporation as collateral security, acquires no title by such purchase, so as to make him chargeable with liability as a stockholder, to the creditors of the corporation.
2. **The transfer of stock on the books of a corporation**, by persons holding it as collateral security, to one who had bid off such stock on execution against his debtor, who had pledged it as collateral, does not make him liable as a stockholder, where such transfer is made without his request or knowledge. The fact that he had bid it off on execution does not, by implication, authorize such transfer.

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testate obtained a judgment in the Circuit Court of St. Louis against the Butchers' & Drovers' Bank for the sum of \$10,880; and an execution issued thereon on the 26th of that month was returned *nulla bona* on the 6th of June, 1881. At the April Term, 1883, of said court, the plaintiff moved for an execution against the defendant as a stockholder in said bank. The motion was resisted, and on the hearing, was sustained, and an execution ordered against the defendant in the sum of \$5,000; and from this order the defendant appeals.

The facts in the case, as they appeared in evidence, are substantially as follows: on the 7th day of December, 1870, Peter Curran, being then the owner of 100 shares of the capital stock of said bank, of the par value of \$10,000, 50 per cent of which was unpaid, borrowed from the bank the sum of \$2,000, for which he executed his note, payable in ninety days, bearing 10 per cent interest, and at the same time transferred on the books of the bank fifty shares of his stock to P. S. Langton. On the 8th of May, 1871, Curran borrowed the further sum of \$3,964.50, for which he executed two notes, bearing the same rate of interest, and at the same time transferred to B. M. Chambers the remaining fifty shares of his stock. Chambers was the president and Langton was the cashier of the bank. According to the testimony of Chambers, by an oral agreement, the stock was to be held by him and Langton as collateral security for these loans. On the 27th of April, 1877, while the stock thus stood in the name of Langton and Chambers, Hill & Collins, a firm, of which the defendant was a partner, obtained judgment against Curran for \$2,500, and caused execution to be issued thereon. The officer holding the execution repaired to the bank, and demanded a statement of the amount of stock held by Peter Curran, and the cashier thereupon gave him the following certificate:

"There is no stock of the Butchers' & Drovers' Bank in Peter Curran's name. P. S. Langton, Cashier."

And the sheriff indorsed the following return on the execution:

"Executed this writ in St. Louis County on the 7th of May, 1877, by levying upon one hundred shares of stock in the Butchers' & Drovers' Bank, as the property of Peter Curran, the defendant; and I delivered a copy of this writ to B. M. Chambers, president of said bank, with my indorsement of said levy thereon, stating to him that I did levy on and take such rights and shares to satisfy this writ."

On the same day the sheriff advertised for sale, on the 19th of May, 1877, the interest of Curran in said 100 shares of stock to satisfy said execution; and at the sale it was struck off to Hill & Collins for \$1,000, which amount, after deducting costs, was credited on the execution; and as to the remainder the writ was returned *nulla bona* on the 4th of June, 1877, with this additional return: "I delivered a copy of this writ, together with the advertisement, a copy of which is hereto attached, to P. S. Langton, cashier of the Butchers' & Drovers' Bank, with my return of levy and sale of one hundred shares of stock above mentioned, and offered to transfer said stock to the purchasers, but was assured the defendant had none to transfer." Curran had never paid anything on

his notes, and at the time of this sale they were long overdue, and amounted, principal and interest, to more than \$9,000.

On the 12th of July, 1877, Hill & Collins brought suit against the bank for \$5,000 damages, for refusing to permit a transfer of Curran's stock upon the books of the bank; on the 13th the writ was served on Chambers, the president, and on the same day he and Langton transferred the 100 shares of stock in their name to Hill & Collins on the books of the bank, without their knowledge or consent. On the same day the bank closed in an insolvent condition, and ceased to do business. At the time of the transfer from Curran to Chambers and Langton the stock of the bank was worth, in the market, probably seventy or eighty cents on the dollar of paid-up stock. At the time of the levy of Collins & Hill there was no demand for it, and when transferred to them by Chambers and Langton, was worth nothing.

On the second of October, 1877, the bank filed an answer in the suit of Hill & Collins, and on the 28th of January, 1878, an amended answer, in which, after denying the allegations of the petition, and that Curran was the owner of any stock in the bank except as thereafter stated, then proceeded to set out the transfer of the stock by Curran to Chambers and Langton, to be held by them as collateral security for the payment of the notes before mentioned with interest, averring that said notes and interest remain due and unpaid, and setting up the provision in the charter of the bank, prohibiting a transfer except on its books, and after all debts due by the shareholder had been paid, but saying nothing about the transfer by Chambers and Langton to Hill & Collins on the 18th of July preceding.

On the trial, on the evidence in support of the answer. Hill & Collins took a nonsuit. They were, by the answers in this case, for the first time informed that Curran had transferred his stock to Langton and Chambers; and more than five years afterwards the defendant was first informed, by the commencement of this proceeding against him, that Langton and Chambers had transferred the stock to Collins & Hill. On this state of facts the circuit court held that the defendant was a holder of said unpaid-up stock, and as such subject to execution upon plaintiff's judgment against the bank to the amount remaining unpaid thereon.

The only question presented on the record of this case is: Was the defendant Hill a stockholder of the Butchers' & Drovers' Bank on the 6th of June, 1881, within the meaning of section 736, Revised Statutes 1879?

It will be observed from the foregoing statement that, if Hill was such stockholder, it must be because he became so either by virtue of his purchase at the execution sale of Curran's stock, or by virtue of the transfer of stock to him by Chambers and Langton. It therefore becomes necessary to inquire what were the legal relations of these parties to the stock. The transfer by Curran of his stock to Chambers and Langton was to them individually, on the books of the bank, absolute and unconditional. By that transfer they became the legal owners of the stock, entitled to vote it, draw dividends on it, and, to the extent of it, exer

cise control and management of the affairs of the bank, and become liable as holders of it to creditors of the bank. Curran then ceased to be a stockholder in the bank, so far as that stock was concerned. He had in good faith, for a valuable consideration, parted with it, and, as to subsequent creditors of the bank, was no longer liable as a stockholder, having lost the power either to protect them or himself, although he may have had an equity in respect of that stock against the holders by virtue of a parol agreement made at the time of its transfer.

"It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors." *Germania Nat. Bank v. Case*, 99 U. S. 628 [25 L. ed. 448].

"Where shares are held by a person as trustee for another, the legal holder of the shares, and not the equitable owner, is primarily liable both to the company and its creditors. Neither the company nor its creditors would be entitled to charge the equitable owner as shareholder." 2 Morawetz, *Priv. Corp.* § 858.

"Unless the rule has been changed by statute, liability to pay calls and to respond in the case of insolvency to creditors attaches to the holder of the legal title only; and the court will not look beyond the registered shareholder, nor inquire under what equities he holds." Thompson, *Liability of Stockholders*, § 178.

It follows that during the six years of the existence of this bank, after the transfer of Curran, during which time, by its management, the value of the stock was reduced from seventy-five cents on the dollar to nothing, those dealing with the institution were, by the books of the bank, and the law of the land, pointed to Chambers and Langton as the stockholders liable to respond to them for the amount unpaid on these 100 shares of stock, in case they should be compelled to resort to that fund for satisfaction of their demands. And in this summary proceeding, in which the court is charged with the duty of ascertaining who is the stockholder to be legally charged with liability for plaintiff's debt, and not to settle the equities between Curran's vendee, the bank, or its creditors, and the legal owner of the stock, the question that becomes important is not, Who stands in Curran's shoes? but Who stands in the shoes of Chambers and Langton, if they have ever legally cast them off? And for this purpose it is not necessary to define what, if any, interest or right the defendant acquired under the execution sale. He did not acquire Chambers and Langton's stock, for the process was not against them. Curran had none, and the defendant acquired none by his purchase, and did not, by reason of that purchase, become a stockholder.

Did he become one by virtue of the transfer of Chambers and Langton on the 18th of July? "The general rule is that a person whose name appears on the books of a corporation is a shareholder, both as to the corporation and as to the public." Thompson, *supra*, § 177.

This supposes, of course, that the shares have been placed in his name with his consent, as was remarked in the case of *Chapman v. Barker*, L. R. 8 Eq. 861. "If the mere placing

a name upon the register rightly or wrongly is to give the creditors a right to proceed against the individual, any one of us now in this court might find himself upon the register of some company, and liable to its creditors. It is an absurdity to say that I am to be liable because directors choose to put me down upon the register as a shareholder. . . . The case is wholly different where a person agrees to have his name put upon the register for any purpose. The creditors have a right to take as their debtor everybody who is properly upon the register, including the trustees for the company; but creditors do not, therefore, obtain the right of insisting upon retaining as their debtor a person whose name has been placed there by fraud or wrong, or ought never to have been there at all. An important question might arise as to how far a person, after he knows that his name has been wrongly placed upon the register, may, by acts of acquiescence, such as accepting a dividend or the like, be held liable. It is like any other case. He cannot approbate and reprobate. If, for his own convenience, he adopts the act, he must be liable for the consequence of the act. The question whether he has or has not adopted it is wholly one of degree and of evidence for the court. But I cannot entertain any doubt that a man, who is placed by the directors, through contrivance, in a position which they are not entitled to place him in, will not be liable to creditors or anybody else."

As Hill knew nothing of this transfer by Chambers and Langton to Hill & Collins until the motion in this case was filed for execution against him, and as from that moment he has been persistently repudiating it, it cannot be pretended that he ever expressly agreed to the transfer, or ratified it, by any act or word of his after it was done. But it is insisted that by his acts he, by implication, authorized it to be done, and is now estopped from denying that it was done with his assent; that, if Hill & Collins did not, by their purchase at the execution sale, become the owners of the stock that stood in the names of Chambers and Langton, and did not thereby become stockholders in the bank, they did by virtue of that purchase, acquire the equity that Curran had as against the bank and Chambers and Langton to redeem the stock; and that they must be held by their acts in acquiring that equity and their subsequent action to have requested a redemption, which was accepted by Chambers and Langton, and the bank; and that the transfer made to them was in pursuance of that request; and that the defendant thus became a stockholder of the bank.

We are cited to the case of *Foster v. Foller*, 37 Mo. 526, in support of the proposition that Hill & Collins, by their purchase at the execution sale, acquired Curran's equity of redemption in the stock. Without stopping to distinguish this case from that one, and without being understood as holding, either that Curran had an equity of redemption in this stock upon the facts in the case, or that, if he had, it passed by the execution sale—for the sake of argument let it be conceded that he had such an equity; that it passed by the sale; and that the argument may flow unimpeded, let any objection that might be raised to considering the

bank and its trustees as one in their transactions, or the right of the trustees to give away the trust fund, be waived. Do we find in the evidence any fact from which at any time either the bank, Chambers, or Langton would be authorized to infer a request upon the part of Hill & Collins that the incumbered stock should be transferred to them? Unless we do find such a fact, the defendant is not estopped from denying that it was assigned at his request.

A brief consideration of the salient facts in the case will answer this question, and for this purpose the further mention of the name of Collins may be omitted. The defendant, having a judgment for \$2,500, against Curran, being desirous of making his debt, and believing that Curran was the owner of stock in the bank, and that something might be made out of it, sues out his execution. The officer goes to the bank for the purpose of levying the execution on Curran's stock, if he has any, and informs the officers of his purpose. The law then made it the duty of the cashier to furnish the officer with a certificate under his hand, stating the number of shares the defendant in the execution held in the stock of the bank "with the incumbrance thereon." The cashier certified that "there was no stock in the bank in Curran's name."

Is it to be supposed for a moment that, if Curran had then been regarded by the officers of the bank as the holder of this stock, half paid up, worth in the market less than forty cents on the dollar, incumbered with a debt to the bank of more than \$9,000, and with a contingent liability for the amount unpaid thereon, and they had so certified, as it was their duty to do, that the subsequent levy and sale would have been proceeded with? If they had done so, the defendant would have seen at once that he was engaged in a vain pursuit, and would, doubtless, have abandoned it as quickly as he did a similar one, at a later stage in the proceedings when the officers of the bank first disclosed such a state of case in the answers, and supported by their evidence in the suit instituted by him against the bank for their refusal to permit a transfer on their book of Curran's supposed stock.

The defendant was seeking, by due process of law, to subject Curran's stock, if he had any, to his debt. In attempting to do so, he claimed to have become the owner of that stock by purchase under such legal process, and asked that a transfer be made on the books of the bank in pursuance of such purchase. The bank refused to permit such transfer to be made, and, when sued for damages for such refusal, by showing that at the time of the levy and sale Curran had no stock in the bank; that Chambers and Langton were the owners of the stock that Curran once owned; that Curran had a mere equity, and a worthless one at that, against the then holders of that stock—satisfied him that he had acquired nothing by his purchase, and he abandoned his action for damages, as he would, doubtless, have abandoned his pursuit of Curran's supposititious stock before the sale, if they had given him this information at the time it was their duty to have done so.

The defendant was after Curran's stock. He did not get it, because years before Curran had parted with it to Chambers and Langton. He

was not after Chambers and Langton's stock. He could not have gotten it if he had wanted it, by that process, and would not have wanted it if he could have gotten it—burdened as it was with liabilities far exceeding its value. This effort made by the defendant to subject the supposed stock of Curran (in his ignorance of the disposition that Curran had long since made of it) to the payment of his debt, and his subsequent action for damages, superinduced by the failure of the officers of the bank to give him timely and proper information of the actual condition of the stock, is the sole ground upon which is rested the claim that the transfer made by Langton and Chambers to the defendant on the 18th of July, 1877, was made at the request of the defendant.

Conceding, then, that the defendant acquired the right to redeem this stock from Chambers and Langton (he never exercised it, or sought to exercise it), they could not exercise it for him, and, without his consent, thrust upon him obligations which they had incurred by the ownership of this stock up to the very hour that the shades of bankruptcy closed in around the institution, and rendered its stock worthless. This transfer was not made in answer to any demand ever made by Hill to redeem this stock, for he never made such a demand. The only demand that he ever made, or was ever made in his behalf, was that the officer who made the sale under the execution might transfer on the books of the bank the stock of Curran that he undertook to sell. If that demand had been granted, and the transfer had been made by him, Langton and Chambers would have still remained the holders of the stock that Curran once owned, by virtue of his previous transfer to them; and Hill, by such transfer, would not have become the owner of that stock or a stockholder of the bank. How, then, can it be held that this secret transfer by them can enlarge the scope of that demand, or be held to be in compliance with it? Upon what principle of law or equity can the defendant be estopped from asserting that such transfer was without his assent?

Every dollar of indebtedness incurred by the bank upon the faith of this unpaid stock was upon the faith of the legal ownership of that stock by Chambers and Langton, and it would be monstrous to hold that, as these officers closed the doors of that institution, which they had conducted to the brink of financial ruin, to any future credit, upon the faith thereof, they could, in the act of doing so, unload their present obligations, incurred upon the faith of their past ownership of that stock, upon the shoulders of the defendant; or that creditors of the bank, by their act, could acquire a right to look from those whom they had trusted to him, whom they had not trusted to answer their demands, simply because he himself had been trying to secure his debt from one who had formerly been, but had long since ceased to be, a stockholder in the bank. There can be no doubt that the defendant was not a stockholder in the bank when the execution against it was returned *nulla bona*, and that the trial court committed error in holding that he was.

*The judgment of that court is therefore reversed.*

All concur except Ray, J., absent.

## UNITED STATES CIRCUIT COURT, EASTERN DIST. OF NORTH CAROLINA.

## [PHILADELPHIA NATIONAL BANK

v.  
DOWD, Receiver.

('.....Fed. Rep. ....')

1. The doctrine that when a trust fund has been wrongfully converted into another species of property it can be followed and subjected to the preferential rights of the *cestui que trust*, is to be limited to cases where the identity of the fund can be traced, and is not to be extended to cases where it has been so mingled with other moneys or property that it can no longer be specifically separated.
2. If a bank, on receiving from another bank commercial paper "for collection and immediate return," makes the collection and mingles the money collected with its general funds, and thereafter becomes insolvent, having cash on hand sufficient to cover such collection, the fund collected must be held to have so lost its identity that the cash on hand will not be impressed with a trust lien in favor of the bank for which the collection was made, as against general creditors.
3. Where money collected by a bank for another bank, under instructions for immediate return, is allowed to remain for several months with the collecting bank, which becomes insolvent without having made return, the bank for which the collection was made will not be considered a *cestui que trust*, but will be treated as an ordinary creditor.
4. The statutory prohibition against preferences in the distribution of assets of insolvent national banks will not prevent a *cestui que trust* from following trust money held for him by such bank as trustee, into any new investment thereof made by the bank, capable of identification, but will prevent its being followed after it has lost its identity by being mingled with the general funds of the bank.

(February 16, 1890.)

**A**CTION against the receiver of an insolvent national bank to recover the proceeds of

collections made by the insolvent bank for the plaintiff bank before the insolvency. *Bill dismissed.*

The facts are fully stated by the court.

*Messrs. Battle & Mordcaai* for plaintiff.  
*Mr. F. H. Busbee* for defendant.

*Seymour, J.*, delivered the opinion of the court:

The defendant is the receiver of an insolvent national bank. The plaintiff, a bank doing business in Pennsylvania, sent, during the winter and spring of the present year, to the bank of which defendant is receiver, commercial paper indorsed, "For collection and immediate return to the Philadelphia National Bank." This paper was collected by defendant's bank and the proceeds were mingled with the other moneys of the bank instead of being forwarded to the plaintiff. The bill contains an allegation, which is not controverted, "That the defendant's bank at all times subsequent to making such collections and at the time its affairs were placed in the hands of a receiver had on hand cash to a greater amount than that due to plaintiff."

Plaintiff asks to have the balance due it paid in full out of the assets of the insolvent bank, on the ground that the latter, by receiving the paper for collection and immediate return, became a trustee for the transaction of the affair, and that either its entire property or the money in its vaults became impressed with the trust. In other words, it claims a priority in the nature of an equitable lien on either the assets of the bank or its cash on hand.

The court holds that when defendant's bank mingled the money collected with its general funds, it was, if a breach of trust was committed thereby, a conversion of such money, and that thereupon the plaintiff became a simple contract creditor with no claim that has a preference at law over any other simple contract debt.

**NOTE.**—*Property converted by trustee continues subject to the trust.* It is an undoubted principle of this court that, as between the *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust. *Fox v. Mackreth*, 1 Lead. Cas. Eq. \*115, 4th Am. ed. 188, 212, 237; *Taylor v. Plumer*, 3 Maule & S. 562, 574, 576; *Ex parte Dumas*, 1 Atk. 232, 233; *Lane v. Dighton*, Amb. 409, 411, 413; *Lench v. Lench*, 10 Ves. Jr. 511, 517; *Lewis v. Madocks*, 17 Ves. Jr. 49, 51, 58; *Grigg v. Cocks*, 4 Sim. 438; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *Barnes v. Addis*, L. R. 9 Ch. 244; *Ex parte Cooke*, L. R. 4 Ch. Div. 123; *Nanty-Glo & B. Ironworks Co. v. Grave*, L. R. 12 Ch. Div. 538; *Be Hallett's Est.*, L. R. 13 Ch. Div. 695; *Rolfe v. Gregory*, 4 De G. J. & S. 578; *Mansell v. Mansell*, 2 F. & Wms. 678; *Wells v. Robinson*, 31 Cal. 133, 140, 141; *Lathrop v. Bampton*, 31 Cal. 17; *Schlaeffer v. Corson*, 52 Barb. 510; *Swinburne v. Swinburne*, 28 N. Y. 508; *Hastings v. Drew*, 76 N. Y. 2, 16; *Burdett v. Drew*, 57 N. Y. 587; *Holden v. N. Y. & E. Bank*, 72 N. Y. 286; *Newton v. Porter*, 60 N. Y. 133, 139-140; *Taylor v. Mosely*, 67 Miss. 544; *Burks v. Burks*, 7 Baxt. 353; *Broyles v. Nowlin*, 3 Cal. 191; *Tilford v. Torrey*, 53 Ala. 120; *Pindall v. Trevor*, 30 Ark. 249; *Friedlander v. Johnson*, 2 Woods, C. C. 675; *McDonough v. O'Neil*, 113 Mass. 92; *Tracy v. Kelley*, 52 Ind. 535; *Cookson v. Richardson*, 69 Ill. 137; *Coles v. Allen*, 64 Ala. 98 (when no trust arises); *Dodge v. Cole*, 37

Ill. 338; *Derry v. Derry*, 74 Ind. 500; *Newton v. Taylor*, 32 Ohio St. 399; *Barrett v. Banber*, 81 Pa. 247; *Velie v. Blodgett*, 49 Vt. 270; *Hubbard v. Burrell*, 41 Wis. 365; *Central Nat. Bank v. Conn. Mut. L. Ins. Co.*, 104 U. S. 54 (25 L. ed. 693); *Oliver v. Platt*, 44 U. S. 3 How. 333 (11 L. ed. 623); *May v. Le Claire*, 78 U. S. 11 Wall. 217 (20 L. ed. 50); *Duncan v. Jaudon*, 82 U. S. 15 Wall. 165 (21 L. ed. 142); *Bayne v. U. S.*, 93 U. S. 642 (23 L. ed. 967); *U. S. v. State Nat. Bank of Boston*, 96 U. S. 80 (24 L. ed. 647); 2 Pom. Eq. Jur. 626. If one acting as trustee convert the trust property without authority, he is responsible; and he who purchases from him, or aids in the conversion, with a knowledge of the want of authority, or under circumstances that will reasonably put one upon inquiry as regards the authority to sell or convert, is also liable. *Covington v. Anderson*, 18 Lea. 310. Wherever the trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the *cestui que trust*. *Murray v. Lyburn*, 2 Johns. Ch. 41; *Platt v. Oliver*, 2 McLean, 814; 2 Story, Eq. 583; *Ex parte Dumas*, 1 Atk. 232; *Scott v. Surman*, Willes, 400; *Thompson v. Perkins*, 7 Mass. 232; *Burdett v. Willett*, 2 Vern. 638; *Lewis v. Madocks*, 17 Ves. Jr. 57; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Everton v. Tappen*, 5 Johns. Ch. 497; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 104. It is the difficulty of tracing the trust money which has no earmark that prevents the application of the rule as to following the trust funds into the hands. *Ferris v. Van Vechten*, 78 N. Y. 121; *Hutchinson v. Reed*, Hoffm. Ch. 816.

**Mingling trust funds.** If a man mixes trust funds

If the money was not held by the bank as trustee, the result is the same. On the former supposition, however, plaintiff would have a right to follow the money into any new form into which it could be specially traced. But it is immaterial whether or not the bank stood in the relation of a fiduciary to the plaintiff, because, on the facts stated in the bill it appears that the money collected cannot be traced into any specific investment or fund, but has been indistinguishably mingled with the general assets of defendant's bank.

Such an opinion would have been very generally expressed without hesitation prior to 1879, when the English Court of Appeals rendered its decision in *Re Hallett's Estate*, *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696. I do not consider it at all in conflict with the opinion of Sir George Jessell in that case. But it is in conflict with several cases since decided in this country most of which refer to *Knatchbull v. Hallett*.

I look upon these cases as introducing a new principle into an old and well known doctrine of equity, unsound in theory, and which with the greatest deference to the courts deciding them, I do not feel at liberty to follow in advance of any adjudication by the supreme court. The cases are *People v. City Bank*, 96 N. Y. 82; *McLeod v. Evans*, 66 Wis. 401; *Harrison v. Smith*, 88 Mo. 210; *Peak v. Elliott*, 30 Kan. 156; and *Continental Nat. Bank v. Weems* (Tex.) 6 S. W. Rep. 802.

The facts in the case first cited (*People v. City Bank*) are, briefly, as follows: two notes made by the firm of Sartwell, Hough & Ford had been discounted by defendant, a state bank. Sartwell, Hough & Ford had money on deposit with the bank, and, wishing to anticipate payment, they drew checks for the amount of the notes which were thereupon charged to their account, and the notes were entered upon the books of the bank as paid. In fact they had been sold. Thereafter, the bank having become insolvent, a receiver was appointed who refused to pay the notes. The

case as constituted in the court of appeals was an appeal from an order directing the receiver to make such payment. It appeared that at the time a smaller amount of cash than the face of the notes was found in the bank. The court, Danforth, J., delivering the opinion (which is a brief one and does not put the matter upon any well defined principle), held that the receiver must pay the notes in full, out of money received by him after the bank's failure—that is to say, out of its general assets. He cites *Re Le Blanc*, 14 Hun, 8, affirmed, 75 N. Y. 593; and *Libby v. Hopkins*, 104 U. S. 303 [26 L. ed. 789], and says:

"These cases stand upon the ground of a specific appropriation of a particular fund for the payment of the claim brought in question. So does the one at bar."

If the facts of *People v. City Bank* showed the existence of a particular fund there could be no question of the soundness of the decision, but it would not be authority for the cases professing to follow it. The difficulty seems to be that while there once had been such a fund, it had been misappropriated; and neither existed nor could be followed when the bank's assets came to the receiver. *People v. City Bank* is followed in New York by two decisions of the general term: *People v. Bank of Danville*, 39 Hun, 187, and *McColl v. Fraser*, 40 Hun, 111.

In the former, Barker, J., says: "If the identical moneys collected by the bank did not pass into the hands of the receiver, it makes no difference, for in some shape or form they went to swell the assets which fell into his hands."

In *Re Le Blanc*, 14 Hun, 8, affirmed by the court of appeals without an opinion, and cited as authority by Judge Danforth, a particular fund passed into the hands of the receiver, which had been held by the corporation expressly for the payment of petitioner's claim; so the point in controversy did not arise.

The *New York Case* is followed by the Supreme Court of Wisconsin in *McLeod v. Evans*,

with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. *Central Nat. Bank v. Conn. Mut. L. Ins. Co.*, 104 U. S. 54 (26 L. ed. 693). And the deposit of funds commingled with others does not divest the trust fund of its trust character. *Van Allen v. American Nat. Bank*, 52 N. Y. 1; *Moses v. Murgatroyd*, 1 Johns. Ch. 119. If the trustee receives money of a *cestui que trust* and mingles it with his own, so that it cannot be followed, the *cestui que trust* cannot recover it specifically. *Hopkins' App.*, 8 Cent. Rep. 861. The trustee is liable for trust money lost while mingled with his own, or while being used in his own business, no matter by what cause the loss occurs. *Mumford v. Murray*, 6 Johns. Ch. 1; *De Jarnett v. De Jarnett*, 41 Ala. 710. See *Lupton v. White*, 15 Ves. Jr. 432; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Mason v. Morley*, 34 Beav. 471; *Frith v. Cartland*, 2 Hem. & M. 417; *Pennell v. Deffell*, 4 De G. M. & G. 372; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *Ex parte Geaves*, 8 De G. M. & G. 291; *Cook v. Addison*, L. R. 7 Eq. 466; *Hart v. Ten Eyck*, 2 Johns. Ch. 208; *Care v. Aveel*, 1 Paige, 393; *Bobb v. Bobb*, 4 West. Rep. 382, 89 Mo. 411; *Schieffelin v. Stewart*, 1 Johns. Ch. 620 and cases cited in notes. A trustee is chargeable with interest simple or compound as the facts and circumstances developed may require. *Re Commonwealth Fire Ins. Co.*, 32 Hun, 79. See *Manning v. Manning*, 1 Johns. Ch. 527; *Schieffelin v. Stewart*, 1 Johns. Ch. 620; 3 Pom. Eq. Jur. § 1063.

Party obtaining trust property with notice of the trust holds it as trustee for the beneficiary. Wherever property is conveyed or transferred by the trustee not in the course of executing and carrying

into effect the terms of an express trust, or where it devolves from a trustee to a third person who is a mere volunteer, or a purchaser with actual or constructive notice of the trust, the rule is universal that the heir, devise, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. *Mechanics Bank v. Levy*, 3 Paige, 606; *Adair v. Shaw*, 1 Sch. & Lef. 243, 262; *Rolfe v. Gregory*, 4 De G. J. & S. 576; *Leigh v. Macaulay*, 1 Younge & C. Exch. 260, 265, 266; *Smith v. Barnes*, L. R. 1 Eq. 65; *Bournot v. Savage*, L. R. 2 Eq. 134; *Heath v. Crenlock*, L. R. 18 Eq. 215; *Newton v. Newton*, L. R. 6 Eq. 135; *Re European Bank*, L. R. 5 Ch. 358, 362; *Ex parte Cook*, L. R. 4 Ch. Div. 123; *Re Hallett's Estate*, L. R. 13 Ch. Div. 696; *Lane v. Dighton*, Amb. 409; *Mansell v. Mansell*, 2 P. Wms. 678; *Lench v. Lench*, 10 Ves. Jr. 611; *Lewis v. Madocks*, 17 Ves. Jr. 48, 56; *Pennell v. Deffell*, 4 De G. M. & G. 372, 388; *Mayor, etc. v. Murray*, 7 De G. M. & G. 497; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *Griffin v. Blanchard*, 17 Cal. 70; *Sharp v. Goodwin*, 51 Cal. 219; *Scott v. Umbarger*, 41 Cal. 410; *Price v. Reeves*, 38 Cal. 457; *Slemmon v. Schurek*, 20 N. Y. 598; *Swinburne v. Swinburne*, 28 N. Y. 568; 2 Pom. Eq. Jur. 621. Money deposited in the bank is still the money of the depositor. The bank is a mere depository, and while it so remained the plaintiff could compel the bank to restore it to him as the rightful owner. *Stephens v. Board of Education*, 79 N. Y. 186, 35 Am. Rep. 613. See *Pennell v. Deffell*, 4 De G. M. & G. 372.

Trustee holds land purchased subject to the trust. A trustee purchasing land with trust property holds

two of the five Judges dissenting. As the court puts its decision on an intelligible principle I will cite the reasoning of the prevailing opinion. Cole, *Ch. J.*, says:

"The conclusion is irresistible \* \* \* that the proceeds of the trust property found its way into Hodges' hands and were used by him either to pay off his debts or to increase his assets. \* \* \* It is not to be supposed that the trust fund was dissipated altogether and did not fall into the mass of the assignor's property; and the rule in equity is well established that so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. \* \* \* *We do not understand that it is necessary to trace the trust fund into some specific property. \* \* \* If it can be traced into the estate of the defaulting agent or trustee this is sufficient.*"

The sentences which I have italicized contain a modification of the equitable doctrine of following trust property necessarily, as I suppose, underlying the decision of *People v. City Bank*, and adopted by the Supreme Courts of Missouri and Kansas in the cases cited from the reports of those States.

*Continental Nat. Bank v. Weems* (Tex.) 6 S. W. Rep. 802, is placed upon the same doctrine of equity, but without as wide a departure from the form in which it is usually enunciated. In deciding it *Gaines, J.*, says: "It may be that when the entire mass is paid away the right to claim a trust in any money or property is lost. But if, as in the present case, throughout all the trustee's dealings with the funds so mingled he keeps on hand a sufficient sum to cover the amount of the trust money, we think it capable of demonstration that the trust should attach to the balance that is found in his hands. It is shown that after the bank received the money, amounting to about \$6,000, its cash assets were never reduced below

\$6,000 until they went into the receiver's hands. Even admitting that in the course of its transaction this identical money was paid out by the bank to its uttermost farthing, yet we know that every dollar so expended left its representative and exact equivalent in the vault from which it was taken, and that when again the money so left was expended, it left in turn its equivalent behind. We see, therefore, that whatever changes may have taken place in the funds from the receipts and expenditures of the bank, the balance left at the date of its failure was the result of the proceeds of the notes, to the extent to which such balance was increased; and that the cash which went into the hands of the receiver should be deemed the representative of those proceeds and impressed with the trust character."

Before proceeding to examine the English authorities supposed to support this line of decisions, I will give the doctrine of following trust funds wrongfully converted, upon which they were all based, as laid down by Justice Story and Professor Pomeroy:

"Whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner or *cestui que trust*. The general proposition which is maintained both at law and in equity upon this subject is that if any property in its original state and form is covered by a trust in favor of the principal, no change of that state and form can defeat it of such trust or give the agent or trustee converting it, or those who represent him in right (not being *bona fide* purchasers), any more valid claim in respect to it than they had before such change. . . . The right ceases only when the means of ascertainment fail, which of course is the case when the subject matter is

it subject to the trust. *Salinas v. Pearsall*, 24 S. C. 179. He has the option of affirming or rejecting an unauthorized investment by the trustee. *Knight v. Knight*, 75 Ga. 386. But he cannot insist upon opposite and repugnant rights. *Murray v. Lyburn*, 2 Johns. Ch. 441; *Platt v. Oliver*, 2 McLean, 314; *Haugbrout v. Murphy*, 22 N. J. Eq. 551; *Brett v. Yeaton*, 101 Ill. 271; *Kiehl v. Evansville Foundry Assn.*, 1 West. Rep. 885, 104 Ind. 73; *Docker v. Somes*, 2 Myl. & K. 655; 2 Story, Eq. 506, 1262; *Barker v. Barker*, 14 Wis. 142. This doctrine is not limited to trustees, but extends to all other persons in a fiduciary relation to the party, whatever that relation may be. *Wormley v. Wormley*, 21 U. S. 8; *Wheat*, 421, 428 (5 L. ed. 651); *Brown v. Lynch*, 1 Paige, 147; *Fellows v. Fellows*, 4 Cow. 682; *Scott v. Gamble*, 9 N. J. Eq. 218; 2 Story, Eq. 1262. If the trustee, after unlawful conversion of the trust property, should repurchase it, the *cestui que trust* may either hold the original property subject to the trust, or take the substituted property in lieu thereof. *Oliver v. Platt*, 44 U. S. 3 How. 333 (11 L. ed. 622). Where a trustee has abused his trust, the *cestui que trust* may sue for the original or the substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, then he may recover its value in money. *May v. Le Claire*, 78 U. S. 11 Wall. 217 (20 L. ed. 60).

*Following fund into hands of third person.* It is only when money is held in a fiduciary character that the beneficial owner can follow it into the hands of a third person. *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 182. A court of equity may follow the funds coming into an agent's hands from his principal's business, into whatever property or change of form they may have been converted by the agent, if it be possible to identify them, unless they have passed into the hands of a *bona fide* purchaser without notice. *Atkinson v.*

*Ward*, 47 Ark. 533. Whenever a trustee has transferred the property, the *cestui que trust* has a full right to follow such property into the hands of such third person, unless he stands in the position of a *bona fide* purchaser for a valuable consideration without notice. *Oliver v. Platt*, 44 U. S. 3 How. 333 (11 L. ed. 622). So long as trust property can be traced and distinguished it may be claimed by the *cestui que trust* whenever the purchaser purchases with notice of the trust. *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Knight v. Knight*, 75 Ga. 386; *Gilchrist v. Stevenson*, 9 Barb. 16; *Shepherd v. McEvers*, 4 Johns. Ch. 137. See also *Manuf. Nat. Bank v. Continental Bank of St. Louis*, post.

*Trust moneys paid without notice of trust cannot be followed.* Trust moneys paid by a trustee to his creditor in discharge of an antecedent debt, but without notice of the trust, cannot be followed by the beneficiary. *Holden v. New York & E. Bank*, 72 N. Y. 286; *Newton v. Porter*, 69 N. Y. 133, 137, 139; *Dotterer v. Pike*, 60 Ga. 29; *Musham v. Musham*, 57 Ill. 80; *Phelps v. Jackson*, 31 Ark. 272; *Veile v. Biodgett*, 49 Vt. 270; *Dey v. Dey*, 26 N. J. Eq. 182; *Mercier v. Hemme*, 50 Cal. 606; *Boyd v. Brinckin*, 55 Cal. 427; *Planters Bank v. Prater*, 64 Ga. 600; *McVey v. McQuality*, 97 Ill. 93; *Burnett v. Gustafson*, 54 Iowa, 86; *Michigan A. L. R. Co. v. Mellen*, 44 Mich. 321; *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 28 Minn. 179; *Mechanics Bank v. Seton*, 26 U. S. 1 Pet. 229 (7 L. ed. 152); *Russell v. Clark*, 11 U. S. 7 Cranch, 68 (3 L. ed. 271); *Wilson v. Mason*, 5 U. S. 1 Cranch, 100 (2 L. ed. 48); *Powell v. Monson & B. Mfg. Co.*, 3 Mason, 317; *Murray v. Bailou*, 1 Johns. Ch. 508; 2 Pom. Eq. Jur. 621, 622. Where money obtained by fraud is received by an innocent party in the ordinary course of business, in the absence of trust or agency, it is only to the extent of the interest remaining in the party committing the fraud that it can be followed. *Justh v. Com. Nat. Bank*, 56 N. Y. 494.

turned into money, and mixed and confounded in the general mass of property of the same description." Story, Eq. Jur. §§ 1258, 1259.

"If a trustee or other fiduciary wrongfully disposes of his principal's securities . . . equity imposes a constructive trust upon the new form or species of property as long as it can be followed and identified . . . No change in the form of the trust property effected by the trustee will impede the right of the beneficial owner to reach it, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated." Pom. Eq. Jur. §§ 1051, 1058.

The difference between the rule as stated by Story and Pomeroy, and as given in the Wisconsin decision, will be perceived to lie in the fact that according to the former the trust fund must be traced into some specific property, and if this cannot be done the right ceases; while, according to the latter it exists if it can be traced into the estate of the defaulting agent or trustee or has been used in paying his debts. Evidently this practically gives a priority to the beneficiary over all creditors not having specific liens. The Wisconsin and Texas cases differ in that the former gives to a *cestui que trust* whose funds have been wrongfully converted by an insolvent bank an equitable lien on the entire assets of the bank, while the latter gives such lien only upon the cash coming to the receiver, and only at least to the whole extent of the trust money in case such money was never reduced below the amount of the trust fund. In both cases the reason given is that the trust money has gone to swell the amount of the property upon which the lien is given. In neither is it held necessary to follow a distinct fund.

Before passing to the English cases I will quote the (as it seems to me) conclusive answer given to the reasoning of Chief Justice Cole by Cassoday, J., in his dissenting opinion in *McLeod v. Evans*; for I think it applies to the entire line of decisions. After stating that the proposition that the wrongful conversion of a draft, of itself, gave the plaintiff a preference over all other creditors regardless of what became of the draft or its proceeds is supported by no adjudicated case, the judge goes on to say: "It is probable that the proceeds of the draft were used by Hodges" (the insolvent quasi trustee), "in payment of some of his debts. That would in no way swell the volume of his assets. It would merely diminish his indebtedness. This would benefit the estate to the extent that it increased the per cent that the other creditors would receive; but as the estate is badly insolvent, the aggregate amount of the increase would necessarily be very much less than the amount of the draft." The English cases cited in *Continental Nat. Bank v. Weems*, in support of the position taken by the Texas Supreme Court, are: *Taylor v. Plumer*, 3 Maule & S. 574; *Lennell v. Deffell*, 4 De G. M. & G. 872 and *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; and the United States Supreme Court case is *Central Nat. Bank v. Conn. Mut. L. Ins. Co.* 104 U. S. 54 [28 L. ed. 693].

I will examine these decisions and attempt to discover what modification of the doctrine

of following trust funds laid down by Story and Pomeroy, if any, is introduced in them; and whether they support the theory of either the Wisconsin or the Texas case. *Taylor v. Plumer* is one of the celebrated cases of the law noted for a very able opinion delivered in it by Lord Ellenborough. Briefly stated its facts are these: a broker having in his possession bank notes belonging to defendant, which he held for a specific purpose, in breach of his trust purchased with them American Bank stock and gold coin and attempted to escape to the United States. He was pursued by defendant's agents and stock and money taken from him. Held, in trover in an action by the broker's assignee, that defendant was entitled, as against the general creditors, to the money as well as the stock, because the gold coin was specifically the product of defendant's bank bills. The Chief Justice, commenting upon *Whiecomb v. Jacob*, 1 Salk. 160, said that the difficulty of tracing money was "a difficulty of fact, and not of law; and the doctrine that money has no earmarks must be predicated only of an undivided and undistinguishable mass of current money."

*Pennell v. Deffell* was a case in which a trust fund was traced into bank accounts. One Green, an official assignee in bankruptcy, kept accounts with two banks in his own name and had deposited in each, not only parts of the trust funds, but also his private money, and had drawn from each for his individual uses. *Knatchbull v. Hallett* is similar to *Pennell v. Deffell*. A solicitor having bonds belonging to his client sold them and paid the proceeds to his general balance at his bankers. Afterwards he drew checks for his own purposes against, and paid other money of his own into, the account. At his death there was a larger amount to his credit in bank than the proceeds of his client's bonds. It was held, in this as in the preceding case, that the beneficiary had a right to follow the money, and was entitled to a charge on the balance in bank. In the way of this conclusion stood two artificial rules, either of which taken literally would have been fatal to the beneficiary's pursuit of the bank balances. The first was the rule in *Clayton's Case*, 1 Meriv. 572; the second was supposed to be supported by a dictum of Ellenborough in *Taylor v. Plumer*, viz.:

The doctrine that money has no earmarks must be predicated only of an undivided and undistinguishable mass of current money. The rule adopted in *Clayton's Case* was that in a bank account the first drawings out should be attributed to the first payments in. The court held, as an exception to this rule, that when a person holding money in a fiduciary character mixes it with his own and draws out of the mixed fund, the court presumes that he is first drawing out of his own money. It is evident that the rule was adopted because it gave effect to the probable intention of one having a bank account, and that the exception likewise gives effect to the probable intention of a trustee. It is not likely that a trustee would use trust funds while he has money of his own idle in bank; and it would be contrary to well established legal principles to unnecessarily assume a purpose to do a wrong. It was not necessary for the court to go further; but it



may also be true that, even had the trustee such an intent, he had not carried it into effect. To convert the trust fund not only an intent, but some unmistakable act in pursuance of the intent, would be necessary; and the mere withdrawal of a part of the deposit, leaving enough to satisfy the *cestui que trust* would not be such an act. As soon as by the application of this exception it was made to appear that the beneficiary's money remained in the bank account the only other difficulty, the fact that it was mingled with other funds and undistinguishable from them, was easily removed by giving to the client a charge on the balance in bank. Of course no equitable lien could have been enforced in a case at law; and I understand the dictum in *Taylor v. Plumer*, which was an action of trover, to apply only to such a case.

In the supreme court case, *Central Nat. Bank v. Conn. Mut. L. Ins. Co.* 104 U. S. 54 [26 L. ed. 693], it appeared that one Dillon, an agent of an insurance company, deposited collections belonging to his principal with plaintiff, in his own name as "agent," and afterwards paid other money of his own into the account and checked against the account for his private uses. The plaintiff endeavored to enforce a banker's lien upon it for Dillon's individual indebtedness to plaintiff. It was held that the descriptive word "agent" was of itself notice of the character of the deposit, and further that, upon the facts, the bank had express notice.

Dillon was not, as far as appears, a party to the attempt made to appropriate the company's funds to his private debts. In speaking of the fact that the latter had, to some extent, mingled his own funds with those of the insurance company, Matthews, J., quoting *Sir George Jessell* in *Knatchbull v. Hallett*, says: "As regards property disposed of by persons in a fiduciary position, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds whatever be their form, provided only he can identify them. If they cannot be identified, by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it. . . . There is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or money deposited in a bank; and equity will follow money if put into a bag or an undistinguishable mass, by taking out the same quantity.

We are now prepared to see in what, if any, respect the rule announced above and called by *Sir George Jessell* "the modern doctrine of equity," with regard to property disposed of by persons in a fiduciary capacity, differs from that laid down in the days of Story and Ellenborough. The rule as stated by Story or Pomeroi, in the extracts taken (*supra*) from their treatises, is extended by adding a case not specifically put by either of them, of the mingling of the trust money with that of the trustee in the investment made by the latter. Stating the doctrine in the words of Story, with an addition, which I have put in italics, drawn from the late decisions it is as follows:

(1) "Wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced

it will be held in its new form liable to the rights of the original owner or *cestui que trust*. The right ceases only when the subject matter is turned into money and mixed and confounded in a general mass of property of the same description."

(2) *If the property cannot be identified, by reason of the trust money being mingled with that of the trustee, then the cestui que trust is entitled to a charge on the new investment to the extent of the trust money traceable into it. This will be done even if the money is mingled with that of the trustee in a bank account, or in a bag or other mass of money.*

As far as the addition to the rule consists in giving a charge to the *cestui que trust* on a new investment made in part with his own money and in part with that of the trustee, it has no novelty. In *Docker v. Somes*, 2 Myl. & K. 664, Lord Brougham decided that if a trustee mixes trust funds with his private moneys, or employs both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits instead of interest on the amount of the trust fund so employed; and in *Hartford v. Lloyd*, 20 Beav. 310, where a sum of money belonging to a trust fund was, as it seemed, used with other money in the purchase of post-obit securities, the court enforced a lien on such securities for the amount of the trust money so used. Both of these cases are noticed by Story on Equity Jurisprudence, § 465, etc., 1261 a.

The only thing then which can be considered recent in proposition (2), *supra*, is the application of the doctrine to a bank account and the illustration made use of, of the bag of money or the indistinguishable mass thereof. Nor do I understand the Master of the Rolls to announce this as a new principle of equity, but rather as the application of an established rule to a new case. In the case [*Whitecomb v. Jacob*] from Salkeld, the Judge, after speaking of the rights of one who employs a factor and intrusts him with the disposal of merchandise, states that there is an equity to follow the proceeds, attaching to the case of a factor as well as to that of a trustee; but he adds, "If the factor have money it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, etc., for in regard that money has no earmark equity cannot follow that in behalf of him that employed the factor."

Speaking of this remark *Sir George Jessell* says: "There is no distinction between a person occupying one fiduciary position or another fiduciary position, as to the right of the beneficial owner to follow the trust fund." I had not understood the court to have attempted any such distinction in that case. I further suppose the judge who decided *Whitecomb v. Jacob* to have been speaking, not of money in a bag or any particular mass or heap of money which might, conceivably, have been in possession of the factor at his death and into which his employer's money might have been traced—in which case it would have been analogous to money mingled by a trustee with his own, in a bank account; but rather of the ordinary case of money on hand at his death, bearing no marks of being the proceeds of the factor's trust money, any more than of any other transaction in which he might have been engaged. Of

such money it might well have been said in current proverbial phraseology that it had "no earmarks." Such a case does not come within the decision, or the reasoning, in *Knatchbull v. Hallett*. See *Ex parte Hardcastle*, 44 L. T. N. S. 528, S. C. 29 Week. Rep. 615, a case decided since *Knatchbull v. Hallett*.

I do, however, conceive it to come within the decision and argument, in *Continental Nat. Bank v. Weems*. If I considered that case to be law I should add another to the two propositions laid down as the law of tracing, viz.:

(8) And in case trust money received by a trustee is not shown to have been either paid to the *cestui que trust*, preserved *in specie* or invested, the *cestui que trust* shall, upon the death or insolvency of the trustee, have a lien on all moneys coming to the hands of his representative or receiver, on the ground that the same went to swell the decedent's or insolvent's cash assets.

The above proposition being granted, I can see no reason why the additional one necessary to sustain the Wisconsin, Missouri, Kansas, and (as I conceive) the New York cases does not follow. I give it in the words of Cole, *Ch. J.*, in his opinion in *McLeod v. Evans*:

(4) Nor is it "necessary to trace the trust fund into some specific property. If it can be traced into the estate of the defaulting agent or trustee this is sufficient."

It is evident that (8) conflicts with Justice Story's statement, that the right to trace ceases when the subject matter is turned into money, and mixed and confounded with the general mass of the trustee's money (which I have endeavored to distinguish from any *particular fund* or *account* of the trustee, into which it may be traced, according to rule (3)). Proposition (4) contradicts all previous statements of the doctrine, including not only that given in *Knatchbull v. Hallett*, but also that in *Continental Nat. Bank v. Weems*.

The judge who wrote the learned and able opinion of the Supreme Court of Texas in *Continental Nat. Bank v. Weems* dissents in express terms from the last proposition, and declines to follow the list of American authorities cited by me in the first part of this opinion. Nor do I assert that he maintains proposition (8). But I do contend that that doctrine necessarily follows from the position taken by him. The decision in the Texas case relates only to the cash assets of an insolvent bank, and only to a case in which those assets never, from the time of the deposit of the trust fund up to the suspension of the bank, fall below the amount of that deposit. But neither of these facts seems to me to materially distinguish it from the proposition which I have stated to be necessarily involved in it.

As Jessell, *M. R.*, says: "There is no distinction between a person occupying one fiduciary position or another," as to the right to follow trust funds, and it is quite unimportant that the trustee is a bank. Nor can, it make any difference whether the money coming to a receiver's hands is the general cash of a corporation kept in its vaults, or that of an individual kept by him in his pocket, his safe or his chest, or in all or any of these receptacles, as convenience may have dictated. If, indeed, the corporation had kept a deposit with some

other person or corporation, and the trust fund could be traced into it, then the rule in *Knatchbull v. Hallett* would apply. But I am speaking of a case like the Texas one or the one at bar, where there is no special fund, but where the trust money goes into the general cash of the trustee.

The only remaining ground of difference lies in the fact that the cash on hand never fell below the equivalent of the trust fund. But I conceive that if there happened to be enough on hand at the time of the suspension to pay the amount due to the beneficiary, it can make no possible difference whether that amount was at all times kept on hand, or whether the trustee, after spending a part of the trust money, replaced it with money drawn from other sources. If in the imaginary case of 1,000 sovereigns of trust money put in a bag, the trustee had taken out a sovereign and afterwards put one in, there would be no doubt that the whole amount then being in the bag would be the property of the *cestui que trust*; and so, had the amount taken out and replaced been one or 500 sovereigns, certainly in the circumstances supposed the reason why the sum finally left in the bag is the property of the *cestui que trust* is because the trustee, in replacing the sovereigns, intended to restore to the bag coins to fill the place of the ones taken from it. But if it is permissible to suppose that the bank officers, in paying out the money of their beneficiary, intended that the money of their depositors should take its place, I see no difficulty, or difference, in supposing this to be the case when such money comes in after the amount on hand sinks below the total of the trust fund. And if, instead of being a question of actual intention, the intent is assumed, on the ground that it was the duty of the bank to keep the trust fund on hand, and that the corporation cannot allege that it did not perform this duty, then it may be said that it was just as much the duty of the bank to replace any part of the fund withdrawn from its vaults as it had originally been to keep it there, and the court can as well assume one intent as the other.

As I have already said, I do not consider the doctrine (2) formulated from the opinion of Jessell, *M. R.*, as any departure from that always held. He calls the money deposited in bank or put in a bag "a new investment," upon which he allows the beneficiary a charge, and goes upon the idea that there is thus something specific into which he traces the fund. But the proposition (3) resulting from the Texas case seems to entirely depart from the idea of a new investment of the trust money or following it into anything specific.

The money in the vaults of a bank carrying on its ordinary business cannot properly be said to be the result of any one or more of the deposits put in it. If at the time of the insolvency of a bank \$1,000 is found in its safe, and half a dozen deposits of that amount are shown by its books to have been paid in, it is unreasonable to attribute the fund, as is done in *Continental Nat. Bank v. Weems*, to a particular one of them which happens to have been trust money. If, indeed, the suspension of business by the bank should immediately follow the placing the trust money in its vaults, the case

would come within the rule as given by Jessell, *M. R.*, for the money would as a fact be a part of the mass of money in the bank, and equity would give a charge upon it for the amount of the trust fund. It is upon this ground that I understand the court to have disapproved, in *Knatchbull v. Hallett*, of the ruling of Fry, J., in *Ex parte Dale*, L. R. 11 Ch. Div. 772. Dale & Company, on December 5, sent papers for collection to a branch of the West of England Bank. The bank made the collection and deposited its amount in its vaults, in which it was mingled with other moneys. On the 7th it sent a letter to Dale & Company incorrectly stating that the money had been remitted. The 8th was Sunday, and the bank did not open on the 9th, but instead went into liquidation. It is probable that the collection was made on the 7th, when the letter was sent to Dale & Company, and it may be assumed as true that the very money collected went into the hands of the liquidators.

The *Texas Case* is put entirely upon the proposition that the trust fund is traced into specific property that came to the receiver. I wish to examine a little more in detail than I have yet done whether this is true. It would have been impossible, even with access to the books of the bank, to have followed the money which came into its vaults by reason of the collections in litigation, but it is possible to put supposititious cases which would cover every probable use of the money. There is one which is clearly inadmissible, viz.: that the precise money collected remained in the vault. If that had been the case it would have been found separated from the other funds and marked as plaintiff's money. If the bills collected were mingled with the general mass in use for current business, the probability that they remained in the safe for a number of weeks is so infinitesimal that it may be entirely dismissed from consideration. We can suppose that the \$5,000 collected by the Texas bank consisted of five packages of \$1,000 each. One of them may be supposed to have been used in purchasing a safe or some other article of furniture. At the same instant we may suppose that a depositor paid into his account \$1,000.

On the theory of the *Texas Case*, that \$1,000 took the place of the thousand paid out. Why? On the idea of an intent on the part of the bank officers to replace the money paid out? Clearly there was no such intent. Will equity assume, in contradiction of the evident fact, that the bank intended to pay A with B's money? Is the idea of tracing the money the one adopted? But the *cestui que trust's* money was invested in the purchase of a safe, and on the doctrine as laid down in all the books his right was to consider himself either the owner of the safe or, if he preferred, the holder of a lien upon it, or a simple contract creditor of the trustee to the amount of the money misapplied. There is no authority to be found for the statement that he had in addition the right to take a different \$1,000 in the possession of the trustee, but not appropriated by the latter to the trust, on the ground that it ought to have been so appropriated. Another \$1,000 package we may suppose used to pay a check drawn by a depositor. To that extent it diminished the

indebtedness of the bank and increased the dividend to be paid to the other depositors.

The plaintiff, on the doctrine of following trust funds, would be entitled to be subrogated to what would have been such depositor's dividend. Let us suppose now, what did not happen in *Continental Nat. Bank v. Weems*, but did in *People v. City Bank*, and also in the case at Bar—that the officers of the bank made way with the greater part of the cash on hand, leaving just enough to enable business to be carried on until they could reach a place of safety. It may be supposed that they carried away the remaining \$3,000. It would not in that case have been true that “every dollar expended left in turn its equivalent behind,” or that the trust money went to swell the general assets of the bank. This last supposition shows perhaps more completely than any other the artificial character of the assumption that the bank officers may be supposed, as long as they left enough to satisfy the trust fund, to have intended to use only the money which the bank had a right to use.

I think, then, that it must be evident that at the times of the failures the trust fund was not either in the Texas bank, or the one whose case is at bar, unless considered in the banks by reason of some artificial rule. The exception to the rule in *Clayton's Case*, made in *Pennell v. Duffell*, and *Knatchbull v. Hallett*, was not, as I have shown, artificial, but in consonance with the facts of those cases. To apply it, or any rule analogous to it, to the case at Bar would be to make use of a legal fiction. The officers of the bank had no intent to make any difference between the money collected for their correspondents and that passed over the counters of the bank by depositors.

It would be equally objectionable, because equally a false assumption, to say that the money, having been traced into the bank safe and not accounted for, must be presumed to remain there until the contrary can be proved; and that, the contrary not having been proved, the court will presume the money in the safe to contain that of the beneficiary. The contrary is proved, to a moral certainty, by all the facts of the case. To say that it does not lie in the trustee's mouth to assert that it had been wrongfully paid out would be to invoke a doctrine of estoppel not applicable to a receiver who represents creditors, as well as the delinquent trustee, and who must therefore be allowed to show the very truth of the matter.

I have treated this case as one in which the plaintiff is entitled to be considered as a *cestui que trust*. I think that it is not entitled to be so considered, but that it ought to be treated as an ordinary creditor, because the money collected, or at least a large part of it, was allowed to remain for several months with the defendant's bank. As I understand the course of business among banks, in regard to collections of this kind, it is not expected that the same moneys that are collected shall be forwarded. On the contrary, they are uniformly treated as is the money of ordinary depositors, and are remitted by means of the system of exchanges of credit which forms a part of the general mercantile business of the country. The result of giving such a collection a preference over the

ordinary debts of a bank would be to make national banks preferred creditors in every case of insolvency of other national banks.

The statute forbidding preferences in the distribution of assets of insolvent national banks is not believed to prevent a beneficiary from following any trust money held for him by a bank, into any new investment thereof made by the bank. If, however, the doctrine could be carried to the extent claimed in the *Wisconsin* or even in the *Texas Case* it would seem to be an unlawful preference under the Act of Congress.

Since writing the foregoing, my attention has been called to a decision not accessible when the case at Bar was argued. In *Cavin v. Gleason*, 7 Cent. Rep. 285, 105 N. Y. 256, one in whose hands money had been placed to be invested, used the entire amount, excepting \$80, in paying his personal debts, and made an assignment. Held, that the creditor was not entitled to a preference except as to the \$80 which, as it appeared, came into the hands of the assignee. Andrews, J., delivering the opinion of the court, says: "It is clear, we think, that upon an accounting in bankruptcy or insolvency a trust creditor is not entitled to a preference over general creditors of the insolvent merely

on the ground of the nature of his claim . . . We know of no authority for such a contention. . . . If it appears that trust property has been wrongfully converted by the trustee and constitutes, although in a changed form, a part of the assets, it would seem to be equitable that the things into which the trust property has been changed should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property . . . entering into and constituting a part of the assets. This rule simply asserts the right of the true owner to his own property. But it is the general rule that in order to follow trust funds . . . they must be identified . . . The courts below seem to have proceeded upon a supposed equity springing from the circumstance that by the application of the fund to the payment of White's creditors, the assigned estate was relieved *pro tanto* from debts which otherwise would have been charged upon it, and that thereby the remaining creditors . . . will be benefited. We think this is quite" too vague an equity for judicial cognizance.

*Bill dismissed without prejudice.*

## NORTH CAROLINA SUPREME COURT.

Sarah HOUSTON

v.

M. L. SLEDGE *et al.*, Exrs. of R. Don Wilson, Deceased, *Appls.*

(....N. C....)

1. In an action to compel a conveyance of land in performance of a contract, where the defense set up is the insolvency of the vendee, and of plaintiff, his widow, and an abandonment by her of all claim to the land, a reply alleging that the vendor agreed with her to take back the lot and pay her the value of the improvements, and demanding payment of a sum due her under such agreement, is not such a departure from the code system of pleading as to defeat the action.
2. A judicial sale of the equitable interest of a deceased vendee in a contract for land will not bar an action by his widow to recover the value of improvements on an agreement by the vendor to pay her therefor in consideration of rescission of the contract for the land.
3. An agreement by a vendor on rescission of a contract to reimburse the other party for expenditures upon the land is not within the Statute of Frauds.
4. The tender of a deed after verdict for a sum of money claimed as alternative relief by plaintiff, in an action for specific performance of a contract is too late to be effectual.

(December 10, 1888.)

**A** PPEAL by defendants, from a judgment of the Superior Court for McDowell County Clark, J., in favor of the plaintiff in an action to compel specific performance of a contract for the sale of land, executed between R. Don

Wilson, the defendant's testator, as vendor, and J. W. Houston, the deceased husband of plaintiff, as vendee. *Affirmed.*

The questions presented are stated in the opinion.

*Messrs. Batchelor & Devereux* for appellants.

*Smith, Ch. J.*, delivered the opinion of the court:

When this cause was before us upon a former appeal from the ruling sustaining the defendants' demurrer to the replication taken to the answer (98 N. C. 414), this language was used in reference to the alleged departure of the replication from the case made in the complaint: "But the plaintiff may waive the delay and take the money to be paid in reimbursement of the expenditure put upon the premises, and the offer to do this is the substance of the replication." And again: "Nor does the demand for the money, which may be considered but a proposition to abide by that agreement, essentially change the nature and legal effect of the pleading."

The import of this is, that while an unexecuted contract forms no bar to an action for specific performance, for which it was intended to be a substitute and adjustment, the plaintiff may, at her election, proceed upon it, just as, when the Statute of Frauds is interposed, the plaintiff may have an account of moneys paid and improvements put on the land when the promise relied on was not in writing, and the defendant acquiesced in the outlays, and thereby induced the belief that he would in good faith abide by his contract; and so has this suit been considered in the court below since the decision.

2 J. R. A.

Briefly stated, the case is as follows: the plaintiff instituted her suit against the defendants M. L. Sledge and Joshua McCurry, executrix and executor of R. Don Wilson, the first named being also his devisee of the lot which the testator is alleged to have contracted to convey to John W. Houston, the deceased husband of the plaintiff, who claims to be owner of all his estate, to enforce the specific execution of the contract, and the conveyance of the lot on payment of the purchase money; the said vendee having died before any of the notes given to the testator became due. The defendants do not deny that such a contract in writing was made, but in defense set up the total insolvency and inability of both the vendee and the plaintiff to make the required payments, in consequence of which the plaintiff abandoned all claim to the lot, and united in a petition for its sale to make assets to meet the liabilities of the deceased intestate vendee; and the said Wilson entered into possession, and expended a large sum in the construction of a house and putting other improvements upon the lot, making it inequitable now to assert any claim under the contract. To this the plaintiff replies, admitting the rescission of the contract between the plaintiff and the testator, and, as the consideration of such rescinding, alleges that the testator agreed with her to take back the lot at the contract price, and pay her the value of the improvements made by the vendee, and to take, use, and account for all the material then on hand or contracted for by him; and that having demanded payment therefor, and been refused, she now demands payment of \$650 due under said agreement from the defendants, the personal representatives of the vendor, the said R. Don Wilson.

The action thus assumes a new form, being changed from one demanding a specific performance to one for the recovery of the money agreed to be paid upon its rescission, and the restoration of the lot which is a substitute for the surrendered claim first made and asserted. Now, such a change is not such a departure from the code system of pleading as necessarily to defeat the action, and send the plaintiff out of court to pursue her remedy upon the rescinding agreement, for the vital and essential subject matter remains; and such an amendment accords with the new practice, which, ignoring mere forms, aims to adjust and settle controversies about the same matter in a single action, when the other party is not misled to his injury and damage. The defendants, being thus called to answer the new cause of action, though set out in the replication, treated as virtually an amendment of the complaint (and such association of the pleadings, in order to get at the true cause of action, is recognized in *Hughes v. Whitaker*, 84 N. C. 640), were entitled to answer the demand, and were offered by the court an opportunity to plead the Statute of Limitations, of which they refused to avail themselves; their counsel remarking that he knew of no rule of pleading that admitted such a plea to a replication, ignoring its relation to the complaint, as in substance an enlargement of its scope and operation.

Thus considered, the complaint, aided by the subsequent pleadings, presents the claim of the plaintiff in a twofold aspect: (1) a demand for

title to be made by the devisee of the lot, and alternatively for (2) a judgment of the court for expenses incurred, agreed, in lieu thereof, to be paid by the testator against his representatives. The first claim is abandoned, and the suit proceeds upon the second. Now, both grow out of one transaction, and there is not seen any reason why the controversy may not, when presented in proper form, be adjusted and settled in a single action. Nearly, if not quite, all the errors assigned on the appeal grow out of the assumption of the incongruity in the pleadings, while under the present practice the action must be ascertained by an inspection of them all. *Bogett v. Vaughan*, 79 N. C. 523, overruled, but not on this point, on the rehearing, 85 N. C. 363; *Perry v. Adams*, 98 N. C. 167.

1. What has been said is an answer to the exception to the ruling in respect to the issues proposed by the defendants to be submitted to the jury, and refused, and is alike applicable to all the exceptions founded upon the supposed incompatibility of the plaintiff's pleadings.

2. The defendants introduced in evidence the petition of the administrators of J. W. Houston, and the proceedings under it, for the sale and conversion of his interest in the lot arising out of his contract, and, we understand, rely on them as an estoppel or transfer of that interest. The answer describes the suit as one instituted by the testator, Wilson, against the plaintiff and others, for the sale of the equitable interest acquired by the deceased vendee in the lot, and its sale thereunder for the inconsiderable sum of \$5. But, in whatsoever form the action was brought it was intended to divest the said equitable estate; and while not relied on, so far as we can see, as a defense, does not interfere with the assertion of the plaintiff's claim to compensation for improvements by virtue of the testator's alleged undertaking to pay for them.

3. The defendants also insist that the agreement, whereby the vendor recognized his equitable obligation to reimburse the expenditures, falls under the Statute of Frauds, and, not being in writing, cannot be enforced. We are unable to appreciate the force of this objection. When, in a verbal contract for the sale of lands, the vendor repudiates it, and refuses to comply with its terms for this reason, he is required to return the purchase money received, and account for improvements which he permits to be put upon the land, with full knowledge that the vendee does this in expectation that its terms are to be complied with by the vendor, and in full faith in his integrity; and this because the repudiation of the contract, optional with him, and the acquisition of the fruits of the vendee's labor and expenditures, would, if tolerated, be a fraud; and thus the statute, instead of preventing, would become a cover for fraud. The recognition of the equitable obligation growing out of the transaction cannot impair its force and effect. The contract involves no interest in land, but simply assumes to pay a sum of money, because no title or right to land passes from the one to the other party. The statute has no application. *McCracken v. McCracken*, 88 N. C. 272, and cases cited in the opinion and dissenting opinion in the case.

4. The defendant M. L. Sledge, devisee,

after verdict, through her counsel, now tendered a deed for the lot upon payment of \$1,200 admitted to have been expended upon the lot by the vendor, and the purchase money, with interest thereon, until the surrender of possession to the vendor, in January, 1878, consenting to a deduction therefrom of the interest on the sum, \$610, claimed to have been spent on the premises by the vendee. A deed was exhibited, and the plaintiff introduced the regis-

ter's book, showing the title not now to be in said defendant, but to have passed to one Maloney. The court ruled that the offer came too late after verdict, and, the plaintiff not consenting to accept the deed, the tender was ineffectual. We concur in the ruling of the court, and overrule the exception.

From a careful review of the record we find no error, and must affirm the judgment. It is so ordered.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF NEW YORK.

JOHNSON  
v.  
BROOKLYN & C. R. CO.

SAME v. STEINWAY & H. P. R. CO.

(.....Fed. Rep.....)

**The principle that an infringing article or machine made before the expiration of a patent cannot be used after such expiration does not apply to a combination of parts, which, on being held to infringe a patent covering such combination merely, is, *bona fide*, broken up, and, after the expiration of the patent, recombined.**

(October 24, 1888.)

ON motion in equity, to punish for contempt in the alleged violation of an injunction restraining the infringement of a patent. *Motion denied.*

The point raised sufficiently appears from the opinion.

*Messrs. Duncan, Curtis & Page* for complainant.

*Messrs. Frost & Coe* for defendants.

Lacombe, J., delivered the following opinion:

Complainant's patent (Newman, No. 117, 198, July 18, 1871) is for "the combination of an oscillating platform; arranged for operation by the weight of the draught animals (of a horse car) with a (horizontally moving) switch." In the combination only was found novelty and invention sufficient to induce the court to sustain the patent. *Johnson v. Forty-Second St. M. & St. N. Ave. R. Co.* 88 Fed. Rep. 499.

Rocking or oscillating platforms generally and as devices for automatic switches, were known to the art before the date of Newman's invention. Horizontally moving switches were also old. It was only the inventor's "ingenious assembling of known appliances" which Judge Coxe, in the case above cited, recognized as patentable. In the case at Bar the use of several in-

fringing machines in defendants' tracks being shown, injunctions were granted during the life of the patent. Thereupon defendants ceased the use of the patented combination, disconnecting the oscillating tables from the switch tongues, and employing men or boys to operate the switches. Some weeks, however, after the expiration of the patent, they substituted new switch tongues for those in use when the injunction was granted, connected them with the oscillating tables, and are now using the combination of parts thus formed.

Complainant contends that this is a violation of the injunction, and moves to punish defendants for contempt. His motion is based upon the principle that an infringing article or machine made before the expiration of the patent cannot be used after such expiration, and that, upon sufficient cause shown, an injunction against such use will be indefinitely continued. The authorities cited sustain this proposition mainly upon the theory that the court could during the life of the patent order the destruction of the machine or article, and that the injunction forbidding its future use is merely the practical equivalent of such destruction.

The contention of the defendant as to the effect upon this proposition of *Root v. Lake Shore Railway Company*, 105 U. S. 189 [26 L. ed. 975], need not be now considered. The case at Bar is not within those authorities. All the parts of the patented article were old, their manufacture, sale, accumulation or use was free to all. The patentee's monopoly extended only to their combination. The infringing article would be destroyed when the combination of its parts was broken up, and the further destruction of those parts themselves which were not covered by the patent would be an interference with defendants' property not warranted by any of the authorities cited. The combination of parts in the defendants' infringing articles, having been once *bona fide* broken up, a recombination of the old parts after the complainant's monopoly has expired will not be enjoined.

*Motion denied.*

PENNSYLVANIA SUPREME COURT.

PITTSBURGH, CINCINNATI & ST.  
LOUIS R. CO., *Pff. in Err.*,  
v.

James A. LYON.

(.....Pa.....)

1. A regulation of a railroad company by which, although a passenger may himself get off

at a regular station or stopping place of a passenger train, which is just across the street from the station of another railroad, he will not be sold a ticket to that place or his baggage checked to or delivered at that station, but will be compelled to pay for a ticket to another station a mile distant, and go there for his baggage, is unreasonable and invalid.

2. The reasonableness of a regulation by

which a railroad company refuses to check baggage to a regular stopping place of a passenger train is in the province of the court to determine as a matter of law.

3. **Exemplary damages** may be given for the refusal to sell a passenger a ticket or to check his baggage to a regular station of a passenger train in pursuance of an unreasonable regulation of the company, which indicates a wanton disregard of the rights of passengers.

4. **A regulation** which deprives the traveling public of the right to stop and receive their baggage at any regular station or stopping place for the train on which they may be traveling is necessarily arbitrary, unreasonable and illegal.

(January 7, 1889.)

**ERROR** to the Common Pleas of Washington County (Stowe, P. J.), brought by the defendant below to review a judgment entered on a verdict for \$200, in favor of the plaintiff below in an action in case, for damages for the defendant's refusal to deliver plaintiff's baggage to him at a certain station on its road. *Affirmed.*

The facts and questions presented are sufficiently stated in the opinion.

**Mr. A. M. Todd**, for plaintiff in error:

The right of a railroad company to make reasonable rules for its own protection, and for the safety and convenience of its passengers, has been repeatedly recognized.

*Pa. R. Co. v. Langdon*, 92 Pa. 22, and cases cited, p. 27; *Dietrich v. Pa. R. Co.* 71 Pa. 432; *Pa. R. Co. v. Zebe*, 33 Pa. 318.

The question of the reasonableness of the rules of a railway company, affecting third persons, is generally a mixed question of law and fact; and it is always proper to submit such a question to the jury, under the instructions.

*Bass v. Chicago & N. W. R. Co.* 36 Wis. 450. See also *State v. Overton*, 24 N. J. L. 435; *Jencks v. Coleman*, 2 Sumn. 221; 1 Redf. Railways, 88; *Com. v. Power*, 7 Met. 596; *Day v. Owen*, 5 Mich. 520.

**Messrs. A. W. & M. C. Acheson**, for defendant in error:

The recovery of exemplary damages was proper.

*McBride v. McLaughlin*, 5 Watts, 375; *Phillips v. Lawrence*, 6 Watts & S. 154; *McDonald v. Seafie*, 11 Pa. 381; *Blair Iron & Coal Co. v. Lloyd*, 3 W. N. C. 108; *Amer v. Longstreth*, 10 Pa. 145; *Nagle v. Mullison*, 34 Pa. 53; *Lake S. & M. S. R. Co. v. Rosenzweig*, 4 Cent. Rep. 712, 118 Pa. 544; *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660; *Balt. & Y. Turnp. Road Co. v. Boone*, 45 Md. 344.

The reasonableness of a rule or regulation is a question of law for the court to decide.

*Rorer, Railroads*, 227 and note 6; *Taylor, Priv. Corp.* § 348. See also *Kneedler v. Norristown*, 100 Pa. 872; *Lynn v. Freemansburg B. & L. Asso.* 117 Pa. 13; *Hibernia F. Engine Co. v. Harrison*, 93 Pa. 269; *Dietrich v. Pa. R. Co.* 71 Pa. 432; *Leumig v. Wise*, 73 Pa. 176; *West Chester & P. R. Co. v. Miles*, 55 Pa. 210.

**Sterrett, J.**, delivered the opinion of the court:

One of the questions presented for our consideration is whether the regulation of the railway company in conformity to which its

agents refused to sell plaintiff below a ticket to Birmingham Station, and to check or deliver his baggage there, is unreasonable and therefore unlawful.

The facts upon which that and subordinate questions depend are undisputed. It appears from the evidence that the company has five passenger stations within the corporate limits of Pittsburgh, viz.: Temperanceville, Point Bridge, Birmingham, Fourth Avenue and Union Depot, the eastern terminus of the road. Birmingham Station, about a mile south of the latter, and diagonally across the street from the eastern or terminal station of the Pittsburgh & Lake Erie Railroad, is a regular stopping place for passenger trains, and admittedly the most convenient point for transfer of passengers and baggage coming into the city on plaintiff in error's road and proceeding westward by the Pittsburgh & Lake Erie Road. In March last the time between the arrival of morning train on the former and departure of train on the latter road was about twenty-five minutes, amply sufficient to make transfer from one road to the other at Birmingham Station.

At the time above mentioned plaintiff below bought from the Pittsburgh & Lake Erie Company's agent at Washington, Pa., a ticket for passage from Pittsburgh to New Orleans. He then applied to plaintiff in error's agent for a ticket from Washington to Birmingham Station, intending to proceed thence on his journey without any delay at Pittsburgh; but, being informed that it would be necessary for him to buy a ticket to Union Depot Station, he was obliged to accept that or nothing. He then requested that his baggage be checked to Birmingham Station, or so marked that it would be delivered to him there. That was also refused, and he then notified the baggage master that on arrival of train at that station he would demand and expect to receive his baggage. The demand was accordingly made but it was unheeded, and the trunk was carried to the Union Depot. The alternative was thus presented of either waiting in Pittsburgh until he could obtain his baggage or proceeding on his journey without it. He chose the latter, stopped off at Cincinnati and there awaited the arrival of his baggage, which by his direction was obtained and forwarded after him.

The reasonable requests of plaintiff below were refused by the company's agents in obedience to previous orders from their official superiors, and not for the purpose of intentionally subjecting him to the inconvenience and annoyance that necessarily resulted, and which the officer giving the order must have known would result therefrom. The orders that were given were not disowned by the company. On the contrary, it undertook to justify them as a valid and proper exercise of its power to make and enforce reasonable rules and regulations for the transaction of its business.

In view of the undisputed evidence of what occurred, the inconvenience, annoyance and delay to which plaintiff below was arbitrarily and unnecessarily subjected, the learned President of the Common Pleas instructed the jury that the regulation in question was unreasonable and invalid. After reciting the facts he said, among other things:



"The question arises whether or not selling tickets to a certain point, or to the City of Pittsburgh, and allowing parties to get off at any of these stations under a ticket which would take them to the Union Depot Station, they have a right to lay down a rule by which, although the party might get off himself, he would be compelled to go to the Union Station for his baggage. I say such a rule is unreasonable, and one the company had no right to make; and therefore the existence of a rule of that kind with reference to passengers was a violation of its duty. While the inferior officers of the road may be justifiable in obeying the rule, yet it is such a rule that the company had no right to make; and it becomes responsible in damages if it undertakes to enforce it as against passengers. I put it upon the broadest ground. But there is a narrower ground on which it might be put. It seems it did allow parties not only to get off themselves—because that is unquestioned—but it did allow certain parties, commercial travelers, parties holding thousand-mile tickets, and on some other occasions other parties, to get off and take their baggage off at that point. But it is immaterial whether or not the party is going by the Lake Erie Road or going to Birmingham or wherever he may go; it is a question of right so far as the citizen is concerned," etc.

It is contended that the above quoted instructions, and others of like import, were erroneous, in that they entirely withdrew from the consideration of the jury the reasonableness or unreasonableness of the regulation under consideration, and disposed of it as a question of law. While this position is not without the sanction of respectable authority, the better opinion appears to be at the question is generally a mixed one of law and fact.

So far as the reasonableness of a given rule depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court; but, if the facts are undisputed, the question is a proper one for the court. *Old Colony R. Co. v. Tripp*, 6 New Eng. Rep. 866, 33 Am. & Eng. R. R. Cas. 438, 496, notes and authorities there cited.

As was said in *Vedder v. Fellows*, 20 N. Y. 126, 131: "There are strong reasons why the reasonableness of railroad regulations should be submitted to the court as a question of law rather than to the jury as one of fact. Ordinarily jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule . . . What one jury might deem an inconvenient rule another might approve as judicious and proper. There would be no uniformity."

The facts of the case at Bar being indisputable, it was clearly the province of the court to say, as matter of law, whether the regulation in question was reasonable or not; and it was rightly held to be unreasonable and invalid. It was of such an arbitrary and vexatious character that no tribunal, court or jury could well declare it otherwise.

Another question is whether the case, as presented by the evidence, is one in which the jury should have been restricted to actual or merely compensatory damages. We think not. In actions in contract, except promises to marry,

the amount recoverable is limited to the actual damages caused by the breach, the measure being the same whether the defendant fails to comply with his contract through inability, or willfully refuses to perform it. But in torts the rule is different; the motive of the defendant becomes material. In those that are committed through mistake, ignorance or mere negligence, the ordinary rule is mere compensation; but in such as are committed willfully, maliciously or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely. They may, if the evidence justifies it, give vindictive or exemplary damages, such as will not only compensate the injured party, but at the same time tend to prevent a repetition of the wrong, either by the defendant or others.

It is claimed that the regulation complained of was obstructive in its purpose, intended to prevent the transfer of passengers and their baggage from plaintiff in error's road to a rival railroad. The fact may be so, but it is unnecessary in this case to inquire whether it is or not. It is enough to know that the traveling public have some rights, one of which is the transportation of themselves and baggage over any of the railroads of the Commonwealth; and that includes the right to stop and receive their baggage at any regular station or stopping place for the train on which they may be traveling. Any regulation that deprives them of that right is necessarily arbitrary, unreasonable and illegal.

The fact must not be ignored that corporations are artificial persons created for specific purposes and invested with such and only such powers as are conferred by law. While natural persons may do with themselves and their property whatever is not forbidden, artificial persons cannot rightfully do anything that is not expressly or by necessary implication permitted by the law of their being. Plaintiff in error was incorporated as a common carrier of freight and passengers. As such it owes a duty to the traveling public which it cannot arbitrarily and willfully ignore.

It is unnecessary to further consider either of the specifications of error. The case was correctly tried and plaintiff in error has no just reason to complain of the result.

*Judgment affirmed.*

FIFTH NATIONAL BANK OF PITTSBURGH, *Plff in Err.*,

v.

William W. ASHWORTH.

(...Fa....)

1. If a collecting bank surrenders a check to a bank on which it is drawn and ac-

**NOTE.—Banking; relation between bank and depositor.** The relation between a bank and its depositor is not that of bailor and bailee, but of creditor and debtor. *Himstedt v. German Bank*, 46 Ark. 537. Deposits are the sums received by the banks from depositors; they are not capital stock. *Society for Savings v. Coite*, 73 U. S. 6 Wall. 534, 18 L. ed. 397. A bank which receives from one of its customers a check on another bank, indorsed "for deposit," and procures it to be certified by the drawee, becomes

cepts a cashier's check or other obligation in lieu thereof, its liability to its depositor is fixed as much as if it had received the cash.

2. A bank holding a check for collection has no right, unless specially authorized to do so, to accept anything in lieu of money.
3. A bank which has become liable to pay a check sent to it for collection by reason of having accepted a cashier's check instead of cash from the bank on which it was drawn just before the latter suspended payment, cannot claim the benefit of any payment made in the mean time to the payee of the check by the drawer.

(January 7, 1889.)

**ERROR** to Common Pleas No. 2 of Allegheny County (Ewing, J.), brought by the defendant below to review a judgment in favor of the plaintiff below in an action in case, for \$2,622.25, with interest from May 24, 1884. *Affirmed.*

On May 20, 1884, T. J. Watson delivered to Ashworth, the plaintiff below, his check on the Penn Bank of Pittsburgh, for \$2,622.25. On the same day Ashworth indorsed the check and delivered it to the Fifth National Bank of Pittsburgh, the defendant below, with which he kept his account as a depositor. The check was credited, and in due course presented to the Penn Bank for payment, but that bank having shut its doors in the mean time, it was not paid. The Fifth National caused the check to be protested for nonpayment, and charged it back to Ashworth's account. Of this action of the bank Ashworth had full notice. On May 23, 1884, the Penn Bank opened its doors shortly before 3 P. M., but that fact did not come to the knowledge of the Fifth National until the next day. On May 24 (Saturday) the Fifth National sent the Ashworth check, with some other protested checks held

by it, to the Penn Bank, and received in return therefor a cashier's check for the aggregate amount of all the checks sent up. This cashier's check on the same day was deposited in the Tradesmen's Bank, through which the Fifth National cleared, but on Monday, May 26, the Penn Bank closed its doors the second time, without paying any of the checks upon it coming through the clearing house on that morning.

Ashworth's right to recover was resisted upon the ground (1), that the defendant, under all the circumstances of the case, had acted with due diligence; and (2) that he had ratified the action of the defendant. It was also claimed that if he was entitled to recover, he could not recover \$1,025, which had been paid to him by Watson, the maker of the check, on account of it, immediately after the first suspension of the Penn Bank. At the trial, defendant proposed to prove that the Fifth National Bank, as well as other banks of the city, had been requested by the Farmers' Deposit National Bank, through which bank the Penn Bank cleared, to not send the protested checks separately into the clearing house, but to consolidate them in the shape of a cashier's check or memorandum and send that, and in pursuance of that request the Fifth National Bank exchanged the protested checks held by it, including the check sued on, for a cashier's check or memorandum check. This, as bearing on the question of diligence in the matter.

This offer was objected to "because the plaintiff is not a party to the transaction and had no notice of it, and as incompetent and irrelevant."

The objection was sustained and the evidence rejected.

The plaintiff submitted the following point, *inter alia*:

at once liable to the depositor, as for money had and received. National Com. Bank v. Miller, 77 Ala. 168. A collecting bank ordinarily becomes the owner of money collected by it for its correspondent, and, consequently, a debtor for the amount collected, under obligation to pay on demand, not the identical money received, but a sum equal in legal value. Planters Bank v. Union Bank, 83 U. S. 16 Wall. 488 (21 L. ed. 478).

*Bank as collecting agent.* When an obligation is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment. Ward v. Smith, 74 U. S. 7 Wall. 447 (19 L. ed. 207). The collecting bank is the agent of the holder of the note, and in no sense the agent of the maker. Dodge v. Freedman's Sav. & Trust Co. 93 U. S. 379 (23 L. ed. 920). See Bank of Washington v. Triplett, 26 U. S. 1 Pet. 25 (7 L. ed. 37). The deposit in one bank, of a bill to be collected in another, is a common usage, and the duty of the bank receiving such bill is precisely the same whoever may be the owner; and if unwilling to undertake the collection, the duty ought to be declined. Bank of Washington v. Triplett, 26 U. S. 1 Pet. 25 (7 L. ed. 37). No special contract being made, and no special instruction being given, a bank receiving note for collection is bound to make reasonable demand, and give notice of dishonor. Fabens v. Mercantile Bank, 23 Pick. 330. If it fails to demand payment of a bill held for collection, it makes the bill its own, and becomes liable for the amount. Bank of Washington v. Triplett, 26 U. S. 1 Pet. 25 (7 L. ed. 37); Bird v. La. State Bank, 93 U. S. 96 (23 L. ed. 818).

*Agency employed in collection.* Where a bank as a collection agent, receives a note for the purposes of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents, and not the subagents of the owner of the note. Hoover v. Wise, 61 U. S. 308 (23 L. ed. 392). A bank receiving a check for collection is bound to transmit the same to an independent agent for collec-

tion with instructions to present the same for payment, and if not paid to be protested and returned at once. It must not be sent to the bank on which it is drawn. If that is done, and other paper accepted in payment, the bank so undertaking to collect is liable to the depositor. Merchants Nat. Bank v. Goodman, 1 Cent. Rep. 427, 109 Pa. 422. The bank on which it is drawn is not a suitable agent. Drovers Nat. Bank v. Anglo American Packing & Prov. Co. 4 West. Rep. 146, 117 Ill. 100. Proof of custom of banks to transmit checks drawn on other banks to those banks for collection will not justify a bank in sending a certified check for collection to the bank bound to pay such check. Drovers Nat. Bank v. Anglo American Packing & Prov. Co. 4 West. Rep. 148, 117 Ill. 100. Where a bank accepts a draft from a customer for collection, without any special contract as to its liability, and transmits it for collection to an agent, who collects it, and fails to account for the proceeds, the bank is liable to its customer. Power v. First Nat. Bank, 6 Mont. 251.

*Agent can accept only money in payment.* An agent to collect a promissory note cannot, unless thereunto specially empowered, accept in payment anything but money. Graydon v. Patterson, 13 Iowa, 256. A bank receiving an instrument for collection can only accept payment in money without special authority from the principal. Ward v. Smith, 74 U. S. 7 Wall. 451 (19 L. ed. 209). When a check is taken instead of money, by one acting for others, a delay of presentment for any time beyond that within which, with reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and his principal. Smith v. Miller, 43 N. Y. 176. A bank receiving a note indorsed to it "for collection" cannot retain the proceeds to apply to a balance due from the bank sending it, unless authorized by some course of dealing, or by some other matter outside of the indorsement. Sweeny v. Easter, 68 U. S. 1 Wall. 166 (17 L. ed. 681).

"That under all the evidence in the cause the plaintiff is entitled to recover the sum of \$2,622.25 with interest thereon from May 24, 1884, and the jury are instructed to find a verdict in his favor accordingly.

*Answer.* Affirmed, if the jury believe the evidence.

The jury returned a verdict for the plaintiff for \$3,095.15, being the amount claimed, with interest; and judgment having been entered thereon, defendant took this writ, assigning as error the rejection of its offer of evidence and the affirmance of plaintiff's point, as above stated.

*Messrs. Knox & Reed and John S. Ferguson,* for plaintiff in error:

When a check is received on Saturday, the payee has until the close of banking hours on Monday to present it.

*Mead v. Caswell*, 9 Mod. 60; *O'Brien v. Smith*, 66 U. S. 1 Black, 99 (17 L. ed. 64).

Presenting a check and having it certified is not a demand for the money deposited.

*Girard Bank v. Bank of Penn. Top.* 39 Pa. 92.

If the holder of a check present it for the sole purpose of ascertaining whether the signature is genuine, or whether the drawer had funds to his credit, or merely to be identified, and without intending to demand payment, it is not such a demand for payment as will release the drawer.

*Simpson v. Pacific Mut. L. Ins. Co.* 44 Cal. 189.

By the certification of a check the drawer is not discharged.

*Dickford v. First Nat. Bank*, 43 Ill. 288.

Delay in presenting a check does not discharge the maker unless he is damaged thereby.

*Case v. Morris*, 81 Pa. 100.

If the maker has withdrawn from the bank his entire deposit against which the check is drawn he is not injured by any delay in presenting it.

*Emery v. Hobson*, 68 Maine, 82.

*Mr. J. M. Stoner*, for defendant in error:

The law of the case is, that the surrender of plaintiff's check, and acceptance of the other, was followed by all the legal consequences of actual payment and puts the defendant below in just the same predicament as if plaintiff's check had been paid in good current funds, and it had them now in its vault.

See *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss, 193.

Presenting a check for payment and accepting a certificate as good is equivalent to payment.

*Smith v. Miller*, 43 N. Y. 176.

Where the holder of a check presents the same to the drawee when due and procures it to be certified instead of paid, it is as between him and the drawer a payment, and the latter is discharged from liability thereon.

*First Nat. Bank v. Leach*, 52 N. Y. 350; *Morse, Banking*, 2d ed. § 247. See also *Commercial Bank v. Union Bank*, 11 N. Y. 208.

If a holder is a mere agent, he has no right, unless specially authorized so to do, to accept anything else in lieu of money.

*Graydon v. Patterson*, 18 Iowa, 258, and cases cited; *Story, Prom. Notes*, §§ 115, 389. 2 L. R. A.

If the holder of a draft receive payment thereof in the banker's notes instead of cash and the banker fail, the drawer will be discharged.

*Story, Prom. Notes*, § 389, note.

An agent especially employed to receive payment in money cannot vary from his authority in receiving a bill.

*McCulloch v. McKee*, 16 Pa. 294, citing *Ward v. Evans*, 2 Ld. Raym. 980, 2 Salk. 442; *Hays v. Lynn*, 7 Watts, 524; *Story, Agency*, 115, 451.

He can only receive payment in money (*Ward v. Smith*, 74 U. S. 7 Wall. 417, 19 L. ed. 207); and hence any depreciation in specific bills received by a bank are its own loss and not the loss of its customer.

*Marine Bank v. Fulton Bank*, 69 U. S. 2 Wall. 233 (17 L. ed. 785); *Merchants Nat. Bank v. Goodman*, 1 Cent. Rep. 427, 109 Pa. 423.

*Paxson, J.*, delivered the opinion of the court:

It is safe to say, as a general rule, that when a bank receives a check from one of its depositors for collection, it must return him the check or the money. It is also equally clear that if the collecting bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check, or other obligation, in lieu thereof, its liability to its depositor is fixed—as much so as if it had received the cash. It has no right, unless specially authorized to do so, to accept anything in lieu of money. For the latter proposition it is sufficient to refer to *Merchants Nat. Bank v. Goodman*, 1 Cent. Rep. 427, 109 Pa. 423; *Marine Bank v. Fulton Bank*, 69 U. S. 2 Wall. 233 (17 L. ed. 785); *Ward v. Smith*, 74 U. S. 7 Wall. 447 (19 L. ed. 207); *McCulloch v. McKee*, 16 Pa. 289; *Commercial Bank v. Union Bank*, 11 N. Y. 208; *Graydon v. Patterson*, 18 Iowa, 258.

When payment of the check in question had been refused by the Penn Bank, and it had been duly protested, the Fifth National Bank of Pittsburgh, in this case the collecting bank and defendant below, could have relieved itself from liability by returning the dishonored check to the plaintiff below who had deposited it, or it might, perhaps, have called upon the latter for instructions as to any further proceeding; and had it received and followed such instructions, I am unable to see how any liability could have attached to it. Neither of these modes was pursued. The defendant retained the check, and made a further attempt to collect it. The plaintiff alleges that in doing so the defendant failed to use due diligence, and has thereby rendered itself liable to him for the debt.

The check in question was passed through the clearing house on May 21, 1884, but was not paid, the Penn Bank closing its doors on that day. It was opened again on Friday, May 23, at about 8 o'clock P. M. It remained open all the next day (Saturday), but closed finally on the following Monday morning. All the claims presented against it on Saturday were paid; the checks that came through the clearing house on Monday were not paid. The defendant bank sent this check, with others, to the Penn Bank on Saturday, and received what has been called a cashier's check for the aggregate amount.

The check in controversy was for \$2,622.25.

drawn by T. J. Watson, and was delivered to the Penn Bank when the cashier's check was taken. It was charged up again to Mr. Watson's account in the Penn Bank, and was placed on file there with the usual marks of cancellation upon it, and is still retained by that bank. The cashier's check was sent to the clearing house on Monday, and when it reached the Penn Bank the latter had finally closed its doors, and shortly thereafter made an assignment for the benefit of its creditors.

We need not discuss the question whether the defendant failed to exercise due diligence in not sending the dishonored check through the clearing house on Saturday. That it could have been done, and was done by some other parties, distinctly appears by the evidence, and is not disputed. We think the defendant bank fixed its liabilities by surrendering the check to the Penn Bank and accepting the cashier's or teller's check of that bank. As between the defendant and its depositor, this amounted to payment.

The plaintiff has neither his check nor his money. Watson's account with the Penn Bank was good when the check was charged up to him. I am unable to see, therefore, that

the plaintiff has any remedy against either Watson or the Penn Bank.

It was alleged, however, that in any event the defendant should have credit for the sum of \$1,025, which it is said Watson paid the plaintiff on account of this check after the same had been protested. There is no assignment of error which specifically covers this point, nor was the court below asked to so instruct the jury by any point or written request appearing in this record. It is true the second assignment of error is perhaps broad enough to cover it. The fact remains, nevertheless, that there was no request for the specific instruction referred to. Nor are we able to see how it would have benefited the defendant had it been asked for. The equities, if any existed, between the plaintiff and Watson, could not have been settled by their banks. The collecting bank could have demanded no less than the face of the check, and the Penn Bank was bound to honor the check for its full amount, if in funds. It may be Mr. Watson may have a claim against the plaintiff in case the check is paid, but that does not concern the defendant bank.

*Judgment affirmed.*

## MICHIGAN SUPREME COURT.

PEOPLE OF the State of MICHIGAN.

George H. SOULE, *App't.*

(....Mich.....)

**1. A club properly organized** in good faith under Act No. 22 of the Public Acts of 1888, cannot purchase liquors by the quantity and distribute them among its members, receiving pay therefor as they are distributed by the glass, the proceeds to go into the treasury of the club, to be used in purchasing other liquors or in paying expenses, without being liable, under the Laws of Michigan, to pay a retail tax for selling such liquors and exhibit the tax receipt.

**2. The servants, agents and employees** of a club engaged in the business of purchasing liquor by the quantity and selling it to its members by the glass, who are engaged as such in said business, if they have not paid the tax, are equally liable with their principal therefor; and under the Liquor Law of 1887, p. 458, § 24, they may be informed against as principals.

(February 20, 1889.)

**ERROR** to review a judgment of the Kent Circuit Court, convicting respondent of having sold liquor at retail without having first paid the tax and posted up the tax receipt. *Affirmed.*

The facts fully appear in the opinion.

**NOTE.—Social clubs.** In Tennessee a club is liable under the statute for a tax. *Tenn. Club v. Tax. Dist.* 7 Lea, 291. But where liquors were kept for the use of the members and the stock was kept up by monthly dues the club was not liable. *Tenn. Club v. Dwyer*, 11 Lea, 452. Social clubs for legitimate purposes are authorized by the statute; and when approved by a justice of the supreme court of the district in which the club is located, a certificate may be filed and the club incorporated. Under such or-

*Messrs. Eggleston & McBride* for respondent, appellants.

*Messrs. S. V. E. Trowbridge, Atty. Gen., and William J. Stuart, Procs. Atty.,* for the People, appellees.

**Morse, J.**, delivered the opinion of the court:

The respondent was informed against in the Kent County Circuit Court for engaging in the business of selling at retail, spirituous, malt, brewed, fermented and vinous liquors without first having paid to the county treasurer the tax provided by law therefor, and without having received from the county treasurer and posted up in his place of business a tax receipt, the said Soule not being a druggist, etc.

He was tried and convicted of the offense charged, and this case comes to this court for review on exceptions.

The facts admitted in the case, and upon which conviction was had, are as follows:

"On March 5, 1888, the 'New Era Club of Grand Rapids' was duly incorporated, pursuant to Act No. 22 of the Public Acts of 1888, of this State, and during the month of September, 1888, said club occupied rooms in a building at No. 341 South Division Street, in said city, for club purposes; that the rooms were leased by the club at a rent of \$35 per month; that respondent was a member of the club and its treasurer and manager, in the employ of the club; that among the provisions kept by the

organizations the property of the club becomes the joint property of its members, and the furnishing of liquors or wines to the members by the steward is not a violation of the statute, and the entertainment of a guest or friend by a member with wines or liquor at the club house would be no more of a violation of the statute than it would if such entertainment was given at his private residence. *People v. Andrews*, 20 N. Y. S. R. 408, citing to the same effect, *Com. v. Ewig*, 5 New Eng. Rep. 177, 145 Mass. 119.

2 L. R. A.

club for its members was liquor—spirituous, malt, brewed, fermented and vinous—which the respondent, as such employé, purchased for the club, out of the club funds, on the order of the club, and kept in said club room for the club, and that he, as such employé, dispensed said liquors to members of the club, as they called for it, by the glass, the members paying for the same five cents for a glass of beer or poor cigar, and ten cents for a glass of other liquor or a good cigar; and the money so received was by him placed in the treasury of the club and used by the club to pay its current expenses and replenish the stock of the club, and that members claimed and exercised the right—as they were permitted by the rules of the club—to bring with them to the club room friends who were not members, and to buy from the club stock, and give to such friends, any of said liquors by the glass, to be drank in the club rooms; and that respondent, as employé of the club, dispensed such liquors on demand, and that such disposition of liquors and cigars was carried on throughout the whole month of September, 1888, and that neither said club, any of its members nor said respondent paid the tax prescribed by law for engaging in the business of selling at retail, spirituous, malt, brewed, fermented or vinous liquors, nor were any of them druggists, nor was said place where said club was held a drug store.”

The Circuit Judge instructed the jury that a club like this, although legally organized under the laws of this State, engaged in part in purchasing liquors in quantity for the use of the club, and having it dispensed to its members by a servant of the club, they paying for it as they receive it, is as much legally bound to pay the tax and exhibit the receipt as is a retail dealer in such liquors; that the purchase of liquor by a club and selling it out to its members at retail for the usual prices paid therefor in saloons and bars, or the vending of such liquors to members to be presented to friends of members by way of treats, constitutes engaging in the business of selling at retail such liquors, for which the club is obliged to pay the tax and obtain and exhibit the receipt. And that if the club was engaged in the business as aforesaid, without having paid said tax, then its servants, agents and employés, engaged as such in said business, if they have not paid the tax, are equally liable with their principal therefor. And further as follows:

“Under this instruction, if you find that respondent, acting as the treasurer of this club, at the time charged in the information, kept in his possession the liquors of the club, and sold such liquors out to the members at retail, and that such club and respondent did not pay the tax required by law to be paid by persons engaged in selling such liquors at retail, and were not druggists, then the respondent would be guilty of the offense charged.”

The counsel for the respondent contend: *first*, that the club is not liable for the tax; *second*, if the club is obliged, under the law, to pay the tax, the respondent cannot be held under the evidence as principal.

The element of bad faith in the organization of this club which has been made to play an important part in the disposition of the main question involved here, by some of the counts, 2 L. R. A.

seems to be eliminated from this record. The question is fairly raised whether a club, properly organized, and in good faith, under Act No. 23 of the Public Acts of 1883, can distribute liquors among its members, receiving pay for such liquors as they are distributed by the glass, the proceeds to go into the treasury of the club, to be used in purchasing other liquors or in paying expenses, without being liable under the laws of this State to pay a retail tax for selling such liquors.

There is a diversity of opinion among the authorities on this question.

Before examining the same it seems to us to be proper to examine the policy of our present laws on the subject of the sale of intoxicating liquors.

In 1875 the Legislature repealed the Prohibitory Law, which had been on trial for twenty years, and adopted in its stead the principle of restriction and taxation of the liquor traffic.

This method of dealing with the sale of liquors has prevailed up to the present time. This club was formed in March, 1888, while the Local Option Law, since declared inoperative by this court, was upon the statute books, and apparently liable to enforcement. It cannot, however, in the light of this record, be said that this club was organized for the express purpose of evading this law; nor is it to be considered in the determination of this case.

The Local Option Law was never in force for a moment in Kent County, and no election was held or called under that Act. The Tax Law was in full force and effect at the time of the organization of this club, and at the time of the sales of liquor complained of in this prosecution.

The law provides for the payment of a tax by retail dealers in liquors, and a retail dealer is defined as follows: “Retail dealers of spirituous or intoxicating liquors, and brewed, malt and fermented liquors, shall be held and deemed to include all persons who sell any of such liquors by the drink, and in quantities of three gallons or less, or one dozen quart bottles or less, at any one time, to any person or persons.” Sec. 2, Act No. 313, P. A. 1887.

Upon the “business of selling” liquors at retail the tax is fixed at \$500 per annum.

Any person or persons engaged in the business of selling liquors without the payment of the tax in full are deemed to be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more \$200 and costs of prosecution, or by imprisonment in the county jail not less than ten days or more than ninety days, or both such fine and imprisonment, in the discretion of the court. Sec. 8, Act No. 313, P. A. 1887.

This provision of the law was not aimed at saloons or public bars alone; but it is further provided in the Act that “All saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug stores, where any of the liquors mentioned in this Act are sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week,” etc. Sec. 17, Act No. 313, Pa. 1887.

It must be held, I think, that the liquors purchased and kept by this club were, before they were dealt out to the members, the property of the corporation. When the liquor was passed

by the agent of the corporation, the respondent in this case, over to the individual member, it became his property and was a sale to him, as he paid for it when it was delivered to him. He could then do with it as he pleased, drink it himself, give it to a friend to drink or throw it away.

Being sold within the quantity prescribed by statute, it was a sale by retail; and the corporation or its agent making a business of it, the sales constituted the "business of selling" by retail.

The law includes all persons, and the places of sale prohibited without the payment of the tax are not limited. It reaches a club house, or a private house, as well as a saloon or tavern. The object of the law is to tax the business wherever found or by whom carried on.

We are cited to some cases which are supposed to support the contention of respondent, which we will now notice.

The Supreme Court of Massachusetts has twice passed upon similar organizations. In the first case, "Several members formed a club of which the defendant was a member; they advanced a certain sum of money each, which was put into a common fund; the defendant was chosen agent of the club, and under instructions of the club purchased liquors and refreshments for the club; the fund was taken by the defendant and invested for them, and a certain number of checks, of the amount of five cents each, were delivered to each member of the club to the extent of the money advanced by each; these checks were transferable only to other members of the club; upon presentation of the checks by any member to the defendant he would deliver to that member liquor of the club to the amount of the check presented."

Upon distributing the liquor in this manner it was calculated that the liquor would so far overrun the amount to be delivered upon the checks as to leave in undelivered liquor about 25 per cent of the original cost. This the defendant had for his services and the use of his room for the club.

The court held that "If the liquors really belonged to the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute," which declared that the keeping and maintaining of a tenement used for the illegal keeping and illegal sale of liquors should be punished as a common nuisance.

"On the other hand, if the whole arrangement were a mere evasion and the substance of the transaction were a lending of the money to the defendant, that he might buy intoxicating liquors to be afterwards sold and charged to the associates, or if he was authorized to sell or did sell, or keep any of the liquors with intent to sell, to any persons not members of the club, he might well be convicted." *Com. v. Smith*, 102 Mass. 144.

This decision was apparently grounded upon the theory that in the case, as first supposed, there would be no sale of the liquors, but simply a distribution of the common property

equally among the members of the association or corporation club.

This is not the case at Bar. There is no equal distribution of common property here among the members of the club, but a sale by the club to the individual member without any reference to his share in the common fund, or the stock of liquors owned in common by the club.

In the case of the *Commonwealth v. Pomphret*, 187 Mass. 564, the club was organized on a similar basis with the one considered in 102 Massachusetts, except that instead of distributing to each member in the first place checks representing the full value of his share in the common stock, a steward, who was paid for his services, kept checks for sale. Each member, upon joining the club, paid an admission fee of \$1 and received a card certifying his membership. The money thus obtained was used in buying liquors. The steward furnished the checks, each representing five cents, to individual members in such numbers as were called for and received pay for them at five cents each.

The steward was complained against for keeping intoxicating liquors with intent unlawfully to sell the same, and was convicted in the trial court.

The supreme court held that the law had not undertaken to prohibit the drinking or buying of intoxicating liquor, or the distribution of it on severalty among persons who owned it in common; and that if two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. The court assumed "that the liquors were owned in common by the members; that they were furnished only to members; and that they were kept by the defendant as one of the members and as steward of the association," and granted a new trial.

It does not appear that either of the clubs in these cases was incorporated.

In *Tennessee Club v. Dwyer*, 11 Lea, 452, the club was incorporated under the laws of that State for literary and social purposes. In the charter of the club it was provided that "The general welfare of society, and not individual profit," was the object of the association; "and hence the members are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members." The initiation fee was \$50 and the monthly dues \$8. The club was used as a home except for lodgings, and some of its members spent much of their time there every day. No one but members of the club had admission to the same save friends of members living and residing outside of Shelby County in which the club was situated. One of its leading features was musical entertainments by amateurs, at which the daughters and lady friends of the members participated. Periodicals and leading newspapers were taken and kept in the reading room, and a general library of books.

Among other things the club kept a small stock of liquors, wines and cigars, which were dispensed to the members at a price fixed by a governing committee, not with a view, however, of making any profit, which was expressly forbidden by the charter, but simply for the

accommodation and convenience of its members. The money paid for refreshments was reinvested by the secretary of the club in like refreshments used and consumed by its members. The liquors and refreshments were in the charge and custody of an officer and servant of the club, who attended to wait on its members.

The court found that the object of the sale of the liquors was not for the purposes of profit, but merely for the purpose of covering the outlay in the purchase thereof by the corporation, and the expense attending upon the keeping and serving thereof at the club house.

The club was held not liable to pay a tax as a retail dealer in liquors on the ground that the liquors were not kept for sale to the public or as a traffic, being purchased out of the common fund and kept for the exclusive use of the members of the club, and not sold for or at a profit.

It was determined that "the mode of sale," as it is termed, to the members at a rate fixed by the governing committee of the club is only in fact an equitable and convenient mode of distributing refreshments to its members, which are provided by the club for them exclusively. And it was squarely held that such a club had the right to purchase and keep liquors at its club rooms for the use of its members, and to distribute it among them in any method it might deem proper, and to raise funds for the purpose of replenishing by assessments upon its members;" and further that the mode adopted by the Tennessee Club, of the "form of a sale" alone to its members of such a quantity for so much money, could be nothing more than a mode adopted of assessing each member in proportion to the amount he consumed.

Not satisfied, however, with this reason for its decision, the court reviewed the Statutes of Tennessee on the subject and held, from its construction of the same, that the Legislature did not intend to impose a tax as retail dealers upon clubs organized and conducted as was the club in question in the case.

In *Seim v. State*, 55 Md. 566, the court of appeals in that State held that the License Laws for sale of liquors did not apply to social clubs. In this case the corporation was known as the "Concordia" and the persons arrested for violation of a "Sunday Law" were the president, secretary and treasurer of the corporation. The statute provided that no person should "sell, dispose of or barter . . . any spirituous or fermented liquor, cordials, lager beer, wine, cider, or any other goods, wares or merchandise whatsoever" on the Sabbath Day, "commonly called Sunday;" nor should any dealer in any of the articles give away the same on that day, under a penalty.

Seim and the others were indicted under three counts: one charging them with "selling beer;" and one with disposing of "beer to one Springer on Sunday;" and the last count with "giving away" beer as a "licensed dealer." The third count was abandoned on the trial.

The "Concordia" was incorporated under the general incorporation law of the State. By its charter the society was dedicated to the intellectual, moral and social improvement of its members, the refinement of their tastes and the development of good feeling among them. It

is to "transact no business of any kind whatsoever for the purpose of making any profit, directly or indirectly, for itself or its members." Its sources of income were set forth to be: (1) money loaned to build club house by its active members; (2) entrance fee of \$10 for each new member; (3) annual fee of \$30 for each member; (4) money paid by members for what refreshments and liquors they get at the club house; (5) such additional assessments, fines and penalties as may be imposed upon the members.

These moneys are expended in: (1) paying current expenses of the corporation; (2) if there is any balance, in paying the interest on the loan of money to build club house.

Liquors are bought by the corporation and kept in the club house in the charge of a steward, an employé of the corporation. The members of the club, and no other persons, can get what liquors they want on any day, Sundays included, by calling for them and paying a price fixed by the regulations of the corporation. This price is fixed and paid, not for profit, but to cover the outlay for liquors and the expense of keeping and serving them at the club house.

The sale to Springer, who was a member of the club, of a glass of beer, for which he paid five cents, the price fixed, and which he then and there drank, was proven on the day charged in the indictment.

The court held, as before said, that the license laws of the State had never been construed as applicable to social clubs, for the reason that such a transaction as above described is not a sale within the meaning of the license laws; that the society was not an ordinary corporation, but a voluntary association or club united for social purposes—each member must be elected, and each is joint owner of the property and assets, and entitled to the privileges of the society as long as he remains a member. Among these privileges is that of partaking of the provisions and refreshments provided for the use of the members. "These are not sold to him by the corporation, but furnished to him by the steward, upon his paying into the common fund what is equivalent to the cost of the article furnished; and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a barter or sale in the way of trade."

There is also an English case on this subject—*Graff v. Evans*, L. R. 8 Q. B. Div. 373. The question was submitted whether the "Grosvenor Club" was liable under an Act providing that "No person shall sell or expose for sale by retail any intoxicating liquors without being duly licensed to sell the same."

The club was a *bona fide* one properly constituted. The objects were "social intercourse mutual and moral improvement, aided by lectures and rational recreation." One object was also to keep the members away from the public house.

The members could obtain food and refreshments in the club, and wine and spirits on payment. The produce of such sales went into the funds of the club. The club had no license to sell. A member of the club was shown on a certain day to have purchased a bottle of whisky and a bottle of pale ale for which he



paid. The bar man wrapped the bottles up in paper and the member carried them away out of the club openly and without concealment.

It was also shown that liquor to the value of \$200 was sold annually to the members for consumption "off the premises," and that there was a profit on the sales to the amount of 83 per cent on the original cost.

The court held that the member buying the liquor was an owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. "A sale involves the elements of a bargain. There was no bargain here, nor any contract with Graff (the bar man) with respect to the goods." "Foster" (the member who purchased the liquor) "was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price . . . There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods which was not a sale within the meaning of the statute."

On the other hand, the selling or distributing of liquors by similar clubs, or through their agency, has been held by other courts to be in violation of statutes prohibiting the sale of liquors. *State v. Mercer*, 32 Iowa, 405-407; *State v. Lockyear*, 95 N. C. 633; *Martin v. State*, 59 Ala. 35; *Rickart v. People*, 79 Ill. 85; *Marmont v. State*, 48 Ind. 21.

In *State v. Lockyear*, *supra*, the "Capital Club" was organized and carried on almost identically the same as the corporation in *Tennessee Club v. Dwyer*, 11 Lea, 452; liquors were delivered in the same way and procured and paid for, both by the club and its members, upon almost precisely the same plan. It was held to be a sale, and that "all the elements of an executed contract" were present. "The corporate body, a legal entity and the owner of the liquor, through its servant, the defendant, delivers it to the purchaser at his call and receives a fixed compensation in money therefor. The property in the goods passes and vests in the purchaser, and the money paid is received for and becomes the property of the club. Can there be any doubt that a corporation may make contracts and deal with a corporation precisely as with a stranger, and valid obligations, capable of enforcements, be thus formed between the parties?"

The sale was held to be within, and in violation of, the Local Option Act of that State, the county in which this club was located having adopted prohibition under said Act.

In *Marmont v. State*, *supra*, Chief Justice Buskirk in his opinion says: "As the keg of beer when purchased belonged to the society the question arises whether the society by its agent could make a valid sale of such beer to the persons composing the society. We know of no principle of law which forbids it." It was therefore held a sale within the meaning of a prohibitory statute.

2 L. R. A.

I shall not quote further from the cases which support the position that the corporation in the case at Bar was selling liquor at retail, within the meaning of the statute.

It appears to be a simple and unanswerable proposition that the liquor was in the first place owned by the corporation as corporate property, the same as any person might own it; that when it was delivered to a member of the corporation for money paid to the corporation, or its agent, and going into the funds, it was a sale to that member the same as if it had been passed to a stranger to the corporation in the same way; and the liquor by such sale then becomes the absolute property of the member the same as if he had purchased it in a saloon, or at any other place where it is sold.

The reasoning which I have given in the cases cited, by which such a transaction is held not to be a sale, seems to me to be unsound, strained and sophistical.

In only one case, to wit: *Com. v. Smith*, 103 Mass. 144, is there to my mind even the semblance of good reasoning. But in that case the association was not incorporated and the persons uniting together each put in an equal amount of money in the first place, and were given an equal number of checks to represent their share in the liquors, which they could take upon presentation of their checks. This transaction was quite plausibly denominated a distribution of the liquors and not a sale.

But that case is not the one here before us, as heretofore shown.

Counsel for respondent admits that under section 24 of the Liquor Law (P. A. 1887, p. 458) Soule, as clerk, agent or servant of "The New Era Club," would, under the proof in this case, be liable as principal under the statute; but they insist that he should have been informed against as such agent, clerk or servant.

We do not think so. The respondent is found at a place of business engaged in the sale of liquors at retail without having paid the tax. In his defense he shows that he is so selling as agent, clerk or servant of a corporation which has not paid the tax or complied with the statute.

By his own showing, under section 24 he makes himself liable as a principal; and the information is good against him as laid.

*The conviction was proper, and the Court below is directed to proceed to judgment thereon.*

The other Justices concurred.

John S. HANES & Co., a Corporation,  
Appt.,

Edwin WADEY and Neville C. Meier.

(....Mich....)

1. A mechanics' lien, given by statute, is liable always to be modified, altered or repealed by the same power that created it. Being only a means for enforcing the payment of a debt arising from the performance of a contract, it is not a vested

NOTE—See *Best v. Baumgardner*, 1 L. R. A. 356, and note; *Titusville Iron Works v. Keystone Oil Co.*, 1 L. R. A. 301.

right but may be taken away without impairing the obligation of the contract.

2. The special exception in Michigan Public Acts 1887, No. 270, repealing former statutes as to mechanics' liens, by which proceedings pending are saved, shows clearly the legislative intent to save nothing else; and a lien which no steps had been taken to fix or enforce is not saved.

(January 11, 1899.)

**ERROR** to the Circuit Court of Wayne County (Reilly, J.), to review a judgment in an action to enforce a mechanics' lien. *Affirmed.*

The facts and questions presented are stated in the opinion.

**Mr. H. E. Spalding**, for plaintiff, appellant:

The lien arising under the Law of 1885, becomes forthwith a vested right—"a vested interest which it is equitable that the government should protect."

Cooley, Const. Lim. 4th ed. 448.

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.

Id. 449.

A statutory mechanics' lien becomes vested by furnishing the materials and cannot be destroyed by a subsequent repeal of the statute.

*Weaver v. Bells*, 10 Kan. 609; *Re Hope Mining Co.* 1 Sawy. 710. See *Streubel v. Milwaukee & M. R. Co.* 13 Wis. 67; *Wabash & E. Canal Co. v. Beers*, 67 U. S. 2 Black, 448 (17 L. ed. 827); *Wade*, *Retroactive Laws*, § 178.

Frequently either by general law or by special contract provision the stockholders of a corporation are made individually responsible to creditors of the corporation. It is settled that a law repealing such provision is, as to existing creditors, void as impairing the obligation of contracts.

*Hawthorne v. Calif.*, 69 U. S. 2 Wall. 10 (17 L. ed. 770); *Conant v. Van Schaick*, 24 Barb. 87; *Cornier v. McOullough*, 1 N. Y. 47; *Brown v. Hitchcock*, 86 Ohio St. 667; *Provident Sav. Inst. v. Jackson Place Skating & B. Rink*, 52 Mo. 552. See *Bretting v. Lendauer*, 87 Mich. 281, 282.

This doctrine is equally applicable to the case at bar.

**Mr. Willis G. Clarke**, for defendant Meier, appellee:

Mechanics' Lien Laws are in derogation of the common law and are strictly construed.

*Dudley v. Toledo etc. R. Co.* (Mich.) 9 West. Rep. 884.

The lien under the Law of 1885 did not arise until at very least a statement had been filed in the register of deeds' office.

Pub. Acts 1885, § 2, p. 294.

The same construction was given to the Statute of 1879 (being How. Stat. §§ 8377, 8378) in *Stason v. Holcomb*, 58 Mich. 636.

Mechanics' liens not perfected fall with a repeal of the law.

*Bailey v. Mason*, 4 Minn. 550; *Dunwell v. Bitwell*, 8 Minn. 84; *Frost v. Halsey*, 54 Maine, 845; *Woodbury v. Grimes*, 1 Colo. 100. See *Templeton v. Horne*, 82 Ill. 491.

A citizen has no vested right to any particular remedy.

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*Cooley*, Const. L. 828; *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168 (24 L. ed. 423); *Tennessee v. Sneed*, 96 U. S. 69 (24 L. ed. 610).

One lien on several lots is not good.

*Chapin v. Peress & B. Paper Works*, 80 Conn. 461; *Steigleman v. McBride*, 17 Ill. 800; *Dalles Lumber & Mfg. Co. v. Waco Woolen Mfg. Co.* 8 Ore. 527, 530, 531; *Phillips, Mechanics' Liens*, pp. 294, 295, § 203; *Fitzgerald v. Thomas*, 61 Mo. 499; *Fitzpatrick v. Thomas*, Id. 512; *Fitzpatrick v. Thomas*, 76 Mo. 513; *Major v. Collins*, 11 Bradw. 658; *Culver v. Elwell*, 73 Ill. 586; *Rathbun v. Hayford*, 5 Allen, 406; *Morris County Bank v. Rockaway Mfg. Co.* 16 N. J. Eq. 150; *James v. Van Horn*, 39 N. J. L. 858. See 2 Jones, Liens, § 1812, p. 291.

Inchoate rights generally, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute.

*Butler v. Palmer*, 1 Hill, 824; *Watson v. New York Cent. R. Co.* 47 N. Y. 157.

The following cases holding adversely to this defendant are cited that the consideration of this subject by the court may be as complete as counsel can make it.

*Skyrme v. Occidental Mill & Min. Co.* 8 Nev. 220; *Capron v. Strout*, 11 Nev. 304; *McCrea v. Craig*, 23 Cal. 522; *Ainslie v. Kohn*, 16 Ore. 363.

The case in 8 Nevada explains *Re Hope Mining Co.* 1 Sawy. 710, cited by appellant. The later statute is shown to be a consolidation of two older statutes, and not a new one. *Ainslie v. Kohn* is explained by the statutes on which it rests. The Statute of 1874, § 18, p. 112, gives a lien before notice is filed. The new Statute of 1885 (§ 3632, Hill's Ann. Laws of Oregon, p. 1596) saves all liens so acquired. Also, in Nevada, Mechanics' Lien Laws are construed liberally and not, as in Michigan, in derogation of the common law.

*Skyrme v. Occidental Mill & Min. Co.* 8 Nev. 219.

Mechanics' liens not perfected fall with the repeal of the law.

*Donaldson v. O'Connor*, 1 E. D. Smith, 695.

**Morse, J.**, delivered the opinion of the court:

The plaintiff furnished lumber to the defendant Wadley, who had contracted to build two houses upon contiguous lots for the defendant, Meier. All the lumber was furnished before September 17, 1887, excepting one bill, of \$39.30, which was delivered October 6, 1886.

The plaintiff undertook to enforce a statutory lien for the value of the lumber in the Circuit Court for the County of Wayne under and by virtue of Public Acts No. 270 of 1887. The court found that only the last item came under the Act of 1887, which took effect September 28, 1887, and directed a verdict for the plaintiffs in said sum of \$39.30, and gave the defendants full costs. The plaintiff comes to this court on error.

Its counsel admits that only \$39.30 of the lumber was furnished after the Act of 1887 took effect, but claims that the plaintiff obtained a lien for the balance under the statutes in force when the same was delivered to the contractor; that the lien under the two laws is substantially the same, the difference being in the procedure for enforcement; that the lien of

the plaintiff became vested under the Law of 1885 at the time when the lumber was furnished; and, *first*, that this vested lien was not intended to be taken away by the Statute of 1887; and, *second*, that the Legislature could not so take it away if they intended to do so.

It is admitted that at the date of the going into effect of the Law of 1887 no steps whatever had been taken to fix or enforce any lien, and the first notice was filed October 28, 1887.

The Act of 1887 contained a repealing clause, as follows: "Act 258 of the Session Laws of 1879, relative to mechanics' liens, and all Acts amendatory thereof, and all laws inconsistent with the provisions of this Act, are hereby repealed, except as to proceedings now pending, which shall be concluded in the same manner as though this Act had not been passed."

The Statute of 1885 is amendatory of sections 8377 to and including 8381 of Howell's Statutes, which sections are the Statutes of 1879. It needs no argument to show that the exception to the repealing clause, as it reads, declares the intent of the Legislature to save only such liens, then existing, in which notice had been filed, or proceedings for enforcement taken, before September 28, 1887, the day the law took effect. The special exception shows clearly the legislative intent to save nothing else. This is a well known rule of statutory construction. It will also be noted that the Law of 1885 provided for the enforcement of the lien in chancery; and such method of enforcement is retained by this saving clause in all proceedings pending at the time, while the lien under the Act of 1887 is to be enforced in a suit at law.

Nor can it be claimed that the plaintiff acquired a vested right under the Law of 1885. The lien is bestowed, not to create a debt or charge, but to create a remedy—a means to collect a debt. This remedy, that the Legislature has created in derogation of the common law, it can take away, and no one can have a vested right to any particular remedy. The counsel for the appellant cites some cases which sustain his claim that the lien of his clients became vested as soon as the materials were furnished, and could not thereafter be destroyed by the Legislature without impairing the obligation of the contract under which the defendants re-

ceived and the plaintiff furnished the lumber. The most notable case is that of *Weaver v. Sells*, 10 Kan. 609.

But the weight of authority is decidedly against this claim. The lien given by statute is no part of the contract. Without the statute creating the lien, the debtor was bound to pay the creditor the same as he would be with the lien. He had before this the common-law remedies to enforce the collection of his debt. The statute giving him a lien does not take away any remedy under the common law, but adds another, by fixing a lien upon the premises in case he sees fit to enforce it. This lien does not grow out of the contract, but depends entirely upon the statute for its existence. It derives its validity from positive enactment of the Legislature, and is liable always to be modified, altered or repealed by the same power that created it.

It is true, one may contract to furnish the materials, in view of the law as it exists at the time; but he furnishes the same, nevertheless, with notice that the law is subject to the will and control of the Legislature. The lien is but a means for enforcing the payment of the debt arising from the performance of the contract—a remedy given by law; which remedy, not being of the essence of the contract, is entirely within the control of the law-making power by whose authority it was given life. The right to a particular remedy is not a vested right. *Cooley*, Const. Lim. 5th ed. 448; *Rockwell v. Hubbell*, 2 Doug. (Mich.) 197-202; *Woodbury v. Grimes*, 1 Colo. 100; *Bailey v. Mason*, 4 Minn. 546 (Gil. 430); *Templeton v. Horne*, 82 Ill. 491; *Watson v. N. Y. Cent. R. Co.* 47 N. Y. 157; *Frost v. Haley*, 54 Maine, 345; *Hall v. Bunte*, 20 Ind. 304; *Martin v. Hewitt*, 44 Ala. 415-435.

As the defendants did not appeal, it is not necessary that we should examine the claim made by their counsel that the lien is not enforceable against one lot alone, because of the materials furnished being used indiscriminately in the buildings on both lots, and no separate account being kept, or ascertainable of the amount going into either one of the buildings.

*The judgment must be affirmed, with costs of this court to defendants.*

The other Justices concurred.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

William J. NEFF

v.

Town of WELLESLEY.

(....Mass....)

**1. A town which maintains a farm for the support of its paupers and from the surplus prod-**

uce thereof boards paupers of other towns for pay, and also boards persons engaged to work upon its highways, is liable for injuries resulting to third persons from negligence in conducting it.

**2. An employe on a town farm, maintained for the support of paupers and under the management of the overseers of the poor, is so far the servant of the town that it is liable for injuries**

**NOTE.**—Municipal corporation, liable for injuries by negligence in care of its property. A town owning a town hall larger than it actually needs for municipal purposes is not bound to keep the part it does not use wholly unoccupied, but may derive a revenue therefrom by renting, or allow the same to be used gratuitously. *French v. Quincy*, 3 Allen, 13. But if it assumes to rent out such unoccupied portion it thereby becomes liable, in the same manner, and to the same extent, that a private

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owner would be. *Worden v. New Bedford*, 131 Mass. 24. If, however, the corporation let its building, not for profit but gratuitously, no liability arises. *Larrabee v. Peabody*, 128 Mass. 561. A city which has undertaken, voluntarily and gratuitously, the care of its shade trees, is liable to a person injured by the falling of a dead limb negligently allowed to remain on the tree, the duty thus undertaken being not strictly governmental but rather private and ministerial. *Jones v. New Haven*, 34

resulting from the negligent performance of his duties, where the overseers are also highway surveyors and selectmen, and where the surplus income is used for town purposes and the whole operations of the farm are approved by the town.

2. **A blind person walking unattended** upon a public street is bound to use only ordinary care to avoid accidents; but in determining what is ordinary care the jury must consider his blindness and other infirmities and all the circumstances which bear upon the question—What care is reasonably necessary to insure his safety?

(February 28, 1889.)

**ON** defendant's exceptions. *Overruled.*

This was an action of tort to recover damages for personal injuries.

At the trial in the superior court before Brigham, *Ch. J.*, it appeared, among other things which are set forth in the opinion, that one Swift, master at defendant's almshouse, employed one Crawford to work at the almshouse, and that on February 1, 1887, he directed said Crawford to go to Boston with a two-horse team to haul manure for the town farm; that while returning through Newton, an adjoining town, the plaintiff was knocked down and injured at the corner of two streets by the team driven by Crawford; plaintiff, who was blind, seventy-three years old and infirm, was coming down the street with which locality he was familiar, when he was hit by the horses. The defendant asked the court to rule, among other things: "9, that the plaintiff, being blind and infirm and going about the streets unattended, took more than ordinary risks, and was bound to exercise more than ordinary care to avoid danger from passing vehicles; 10, that if plaintiff's negligence contributed in part to cause the accident, plaintiff cannot recover even if it appears that defendant was also negligent; 11, if the plaintiff could by reasonable care have ascertained before attempting the crossing that a team was approaching, and its direction, he should have done so, and waited until the danger was past."

The court refused these instructions; the jury found for the plaintiff; and the defendant excepted.

**Mr. C. Everett Washburn** for defendant.

**Mr. Curtis Abbott** for plaintiff.

**Knowlton, J.**, delivered the opinion of the court.

To determine whether the defendant town is liable for the negligence of Crawford in driving its team, we must answer two questions: *first*, Was the business in which Crawford was employed such that engaging in it would subject a city or town to liability for negligence in conducting it? *secondly*, Was he a servant of the town, or was he a representative of a board

of public officers acting independently, merely in the performance of a public duty?

It is a general rule that a town is not liable for the negligence of its agents or servants in a matter in which it has no interest, and which has no direct or natural tendency to injure any individual in person or property, and which it has in charge solely in the performance of a public duty imposed upon it by law. *Tindley v. Salem*, 137 Mass. 172; *Hill v. Boston*, 123 Mass. 844. Whether this rule should be held to apply to the use of a farm for no other purpose than the support of paupers who are a charge upon the town, it is unnecessary to decide. For the jury have found that paupers whose support was chargeable to another town, and to the Commonwealth, were boarded for pay upon the defendant's farm, and that persons employed to work upon the highways were also boarded there, and that horses were kept there principally for use in repairing the highways.

When property is used or business is conducted by a town principally for public purposes, under the authority of the law, but incidentally and in part for profit, the town is liable for negligence in the management of it. *Wornden v. New Bedford*, 131 Mass. 28; *Oliver v. Worcester*, 102 Mass. 489; *Tindley v. Salem*, *supra*.

This case clearly does not fall within the rule which we have stated. Nor can it be held that the use of the farm by the defendant was illegal, so as to exonerate the town from liability on account of it. It was not an appropriation of public money to a commercial enterprise, conducted primarily for profit. The income received from the farm was, apparently, incidental to the use of it in the support of paupers having a residence in the town, and in boarding horses and men employed upon the highways which the town maintained.

A city or town may make any reasonable provision for the support of paupers, or for sustaining other public burdens imposed upon it, and for that purpose may manage a farm which produces more crops than are needed for the food of the paupers, and may sell or exchange the surplus. It may transact business outside of the authority expressly given it, if the business is incidental to the performance of its public duties.

Overseers of the poor are public officers who commonly act under the authority of the law, and not as agents of a town. But in some matters they may represent the town as its agents. *New Bedford v. Taunton*, 9 Allen, 307.

They have the care and custody of the paupers in their respective cities and towns, and are to see that they are suitably relieved, supported and employed; but the city or town is to direct the manner and provide the means of supporting its paupers. Pub. Stat. chap. 84, § 2.

Conn. 1. A city is liable for the negligent management of property held by it for gain or profit, either wholly or partially, as where some portion of its municipal building is rented out, and injury results to an individual from the negligence of workmen employed by the city to repair such building. *Oliver v. Worcester*, 102 Mass. 490.

*Not liable for misfeasance or neglect of its officers.* A town is not liable for the act of its highway surveyor, in employing a negligent assistant, he being a public officer strictly speaking, who can neither be controlled nor removed from office by the town. *Walcott v. Swampscott*, 1 Allen, 101. As between

a town and its health officers, neither the relation of principal and agent, nor that of master and servant, exists, and it is not liable for their negligence; otherwise it would become surety to the public for the conduct of all town officers. *Mitchell v. Rockland*, 52 Maine, 118. A town is not liable for the negligence of a physician, who, being placed in charge of its pest house by its selectmen during an epidemic of small pox, permits a nurse to go forth without disinfection, and the disease is communicated. *Brown v. Vinalhaven*, 65 Maine, 402. See note to *Hines v. Charlotte*, 1 L. R. A. 844.

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If a town sees fit to buy a farm, and cultivate it in connection with an almshouse, there is nothing in the statute which gives the overseers of the poor a right to manage it without authority from the town.

In the case at bar, the same persons held the offices of overseers of the poor, highway surveyors and selectmen. In one capacity they had the care and oversight of the paupers, in another of the roads and bridges, and in the third of many of the other prudential affairs of the town.

The farm was used in part for the support of the paupers, of whom they had charge as overseers of the poor, in part for a purpose which was connected with the maintenance of the highways, which were in charge of the highway surveyors, and in part for the production of income, a use which was outside of the express authority of any board of public officers, and was under an assumption of authority that seems to have been approved and ratified by the town. The three persons who managed the farm in the interest of the town for these several purposes cannot be deemed to have been acting merely as a single board of public officers; but they represented the defendant in different capacities, such as to make them in that business the defendant's agents.

The facts which the jury were required to find in order to return a verdict for the plaintiff conclusively established the town's liability for Crawford's acts, and the defendant's requests for instructions upon this point were rightly refused; and the instructions given were sufficiently favorable to the defendant.

It is not, under all circumstances, negligence for a blind person to walk unattended upon a public street. *Smith v. Wildes*, 8 New Eng. Rep. 744, 143 Mass. 556; *Sleeper v. Sandown*, 52 N. H. 244.

There was evidence proper for the consideration of the jury upon the question whether the plaintiff was in the exercise of due care.

The ninth and tenth requests for rulings were rightly refused, and the jury were properly instructed upon the subjects to which the requests referred. The plaintiff was only bound to use ordinary care; but in determining what was ordinary care the jury were called upon to consider his blindness and other infirmities, and all the circumstances which bore upon the question that care was reasonably necessary to insure his safety.

The eleventh request assumed as a hypothesis merely that the plaintiff could have ascertained "that the team was approaching, and its direction;" it called for an instruction as to the effect of only a part of the evidence bearing upon a single fact in issue, and the judge might properly refuse it. *McDonough v. Miller*, 114 Mass. 94.

*Exceptions overruled.*

Halbert G. LITTLEJOHN, Admr.,

FITCHBURG R. CO.

SAME v. SAME.

(....Mass....)

# 1. Under the provisions of Public Stat-

\*That section is as follows: "If by reason of the negligence or carelessness of a corporation operating a railroad or a street railway, or of the unfitness or gross negligence or carelessness of its serv-

utes, chap. 112, § 212,\* that in certain cases of death occasioned by the negligence of a corporation, etc., the damages shall be "assessed with reference to the degree of culpability of the corporation or of its agents or servants," the corporation is not rendered liable by showing that it had assumed a contractual or quasi contractual responsibility for third persons who were not its servants but through whose negligence the injury happened.

2. Although a railroad corporation must be taken to have known, at the time of a disaster, the facts which subsequently pointed out the cause thereof, yet it is entitled to go to the jury on the question whether or not those facts would, before the accident, have indicated to a competent person, considering them with the care which is necessary when human life is involved, that the road was unsafe.

3. If a railroad company is using tracks belonging to a third party, and the dangerous character of such tracks might have been discovered by the exercise of due care, it will be liable for an accident occasioned thereby and resulting in the death of a passenger, whether the defect was in the original construction of the road or was due to the failure of the owner to make repairs, or however otherwise it may have been caused.

(February 27, 1899.)

## ON defendant's exceptions. Sustained.

These are two actions tried together brought to recover damages under section 212 of chap. 112 of the Public Statutes, for the death of two minor children of the plaintiff, aged respectively one and three years. They were traveling with their parents from Shelburne Falls to Greenfield, upon a free pass. At a point intermediate between these stations the train, owing to a defect in the railroad, was precipitated down a high embankment into the Deerfield River, and the said children were instantly killed. The accident was caused by a defect in the original construction of the embankment, and by the filling up of the ditches, which appear by the evidence to have been filled for about two months prior to the accident.

The railroad was owned by the Commonwealth of Massachusetts, and was operated by the defendant in accordance with a contract, by virtue of which the Commonwealth was to keep said railroad in repair, and the Fitchburg Railroad Company was to operate the same at cost, without any profit or any compensation beyond the actual amount expended in said operation.

At the trial before Mason, J., at the close of the testimony the defendant moved that the case be taken from the jury on the ground that the evidence was not sufficient to warrant a verdict. This motion having been overruled, defendant asked the court to rule: "first, the defendant is not responsible for the originally defective construction of the road at this point; second, the defendant is not responsible for the defective condition of the road unless the defendant had notice of the same, or might have had notice by the exercise of due care;" which requests were refused, and the Judge ruled that the defendant would be responsible for the defective condition of the road, although it had no notice of the same, and could not obtain such notice with the exercise of due care.

The third ruling requested was that "The deceased were not passengers of the defendant in such sense as to render the defendant liable for the defective track, without other negligence on the part of the defendant." This ruling was also refused.

The defendant also requested the presiding Judge to instruct the jury that "The defendant is liable only for its own negligence; and the negligence of the Commonwealth and its agents cannot be imputed to it;" which request was refused.

The jury found for plaintiff, damages being assessed at \$2,500 in each case; and defendant alleged exceptions.

*Mr. Geo. A. Torrey* for defendant.

*Messrs. I. R. Clark and F. Ranney*, for plaintiff:

As a carrier of passengers, defendant was bound to exercise the highest degree of care which it could reasonably, to prevent such injuries to its passengers as human care and forethought could avert.

*White v. Fitchburg R. Co.* 136 Mass. 324.

Its duty is the same whether running on its own track or the track of another company, which it is using by virtue of a contract.

*McElroy v. Nashua & L. R. Co.* 4 Cush. 400; *Eaton v. Boston & L. R. Co.* 11 Allen, 505; *Richardson v. Gt. Eastern R. Co.* L. R. 10 C. P. 486; *Stellor v. Chicago & N. W. R. Co.* 46 Wis. 502; *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534.

Deceased were free passengers, and defendant's duty toward them and to passengers having tickets was one and the same.

*Todd v. Old Colony & F. R. R. Co.* 3 Allen, 18; 3 Wood, *Railway Law*, 1440, note 3.

*Holmes, J.*, delivered the opinion of the court:

If this were an action to recover for personal injuries, brought by a passenger who had paid his fare, it would make no difference in the defendant's liability whether the injuries were caused by the negligence of those who were in a strict sense the defendant's servants, or by that of a third person who managed the road over which the defendant had undertaken to carry the plaintiff. *McElroy v. Nashua & L. R. Co.* 4 Cush. 400; *Eaton v. Boston & L. R. Co.* 11 Allen, 500; *White v. Fitchburg R. Co.* 136 Mass. 324, 325; *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 90, 104 [18 L. ed. 591, 594].

The case would not be altered by the fact that the person in charge was the Commonwealth. *Peters v. Rylands*, 20 Pa. 497.

There are weighty decisions, also, to the effect that in such an action the defendant is liable, not only for negligence at the time of the accident, but for any defect in its appliances which might have been discovered at the

time when they were made, although the defendant did not make them and the defect could not have been discovered afterwards. *Hegeman v. Western R. Co.* 13 N. Y. 9; *Pendleton v. Kinsley*, 3 Cliff. 410, 421; *Phila. & R. R. Co. v. Anderson*, 94 Pa. 351, 359; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Grote v. Chester & H. R. Co.* 2 Exch. 251, 255. Compare *Ingalls v. Bills*, 9 Met. 1, 11. See *Pa. Co. v. Roy*, 102 U. S. 451 [26 L. ed. 141]; *Hutch. Carriers*, §§ 509-512. And see *Grand Rapids & I. R. Co. v. Huntley*, 83 Mich. 587, 546, citing *Richardson v. Great Eastern R. Co.* L. R. 1 C. P. Div. 342. Compare *Wright v. Midland R. Co.* L. R. 8 Exch. 187.

In some of the cases it is intimated that the negligence of the third person is imputed to the carrier. *White v. Fitchburg R. Co.*, *Peters v. Rylands*, and *Pa. Co. v. Roy*, *supra*; *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534, 540. And in some instances at least the declaration has alleged negligence on the part of the defendant only. See *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987; *Buxton v. Northeastern R. Co.* L. R. 8 Q. B. 549; *Thomas v. Rhymney R. Co.* L. R. 5 Q. B. 226; *S. C. L. R. 6 Q. B. 266*; *Peters v. Rylands*, *ubi supra*; *Hegeman v. Western R. Co.* 13 N. Y. 9, 10.

In an early case it was said: "Everything is a negligence in a carrier which the law does not excuse." *Dale v. Hall*, 1 Wilson, 281, 282.

On the other hand, the extreme liability imposed by the foregoing decisions very frequently has been referred to the carrier's implied contract, or to what the passenger reasonably may understand that the carrier assumed. *Thomas v. Rhymney R. Co.*, *Francis v. Cockrell*, *Peters v. Rylands*, *Eaton v. Boston & L. R. Co.*, *ubi supra*; *Norton v. Western R. Co.* 15 N. Y. 444, 447. Compare *Buxton v. Northeastern R. Co.* *supra*; *Austin v. Great Western R. Co.* L. R. 2 Q. B. 442, 446. And some judges have pointed out that the liability could not stand on the carrier's negligence, and have suggested that the declaration ought to be varied accordingly. *Thomas v. Rhymney R. Co.* L. R. 6 Q. B. 266, 275; *S. O.* 40 L. J. Q. B. 89, 95.

These distinctions are not of much importance in actions at common law brought by the passenger himself; but the present action is statutory and penal in its character. The statute does not extend the liability for personal injuries to those injuries which cause death, as in *Little v. Dusenberry*, 46 N. J. L. 614 (where also, so far as appears, the defendant may have been negligent). It creates a liability of a different nature. The action which it gives to the administrator is merely a substitute for the indictment also provided for, and it is expressly enacted that the damages shall be "assessed with reference to the degree of culpability of the corporation or of its agents or servants."

ants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger, or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than \$500 nor more than \$5,000, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties, or, if there are no children, to the use of the widow, or, if no widow, to the use of the next of kin; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or be-

ing upon its road contrary to law or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation, it shall also be liable in damages, not exceeding \$5,000 nor less than \$500, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the persons hereinbefore specified in the case of an indictment. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by this section.

Pub. Stat. chap. 112, § 212. See *Carey v. Berkshire R. Co.* 1 Cusb. 475, 480; *Com. v. Vermont & M. R. Co.* 108 Mass. 7, 12.

This language imports that there must be some degree of culpability on the part of the corporation or of its servants, and is not satisfied by showing that the corporation assumed a contractual or quasi contractual responsibility for third persons, who were not its servants. Suppose, for instance, that the defect in the construction of the road was unknown both to the defendant and to the Commonwealth, and could not have been discovered by either through the use of any degree of care; the fact that it was known to the private corporation that originally built the road could not be said to show culpability on the part of the defendant except by a willful misapplication of words.

We go one step further. Supposing that the defect was known to the Commonwealth and was not known and could not have been known to the defendant; the defendant was not negligent, whatever might have been its liability at common law, in this case or the last. We do not mean to intimate that the facts show any ground for this last supposition. The defendant was bound to know the visible facts concerning the track over which it carried its passengers. So far as appears, therefore, it must be taken to have known the facts which with our present knowledge we see pointed out the cause of or a part of the causes of the disaster. But it was entitled to go to the jury on the question whether these facts before the accident would have indicated to a competent person considering them with the care which is necessary when human life is involved, that the road was unsafe; and, under this statute, it was entitled to the second ruling asked.

The plaintiff does not contest the correctness of the ruling asked, but suggests that it was unnecessary because it was asked only as one ground for taking the case from the jury, and because it was undisputed that the improper condition of the road was visible. The two reasons offered are inconsistent with each other. We do not find any warrant for the first in the bill of exceptions, and with more hesitation we construe the exceptions to mean only that the filling of the ditch and the escape of

water by working under the track were visible, and not that it was also manifest that they constituted a danger.

The defendant now contends that not only was it entitled to the second ruling asked, but the evidence disclosed no indications of danger, and that the case should have been taken from the jury on that ground. We cannot go so far as to decide what inferences the defendant ought to have drawn from the visible condition of the road in the situation where the accident happened.

If the danger might have been discovered by the exercise of due care, the defendant will be liable whether the defect was in the original construction of the road or was due to a failure on the part of the Commonwealth to make necessary repairs, or however otherwise it may have been caused. If the defendant carried its passengers into a place which it knew or ought to have known was dangerous, it was negligent, although it did not create and had no right to remove the danger.

Whether or not there would be any difference between the defendant's common-law liability for the negligence of third persons, not its servants, in the construction or maintenance of the road, to passengers who had paid fares, and its liability to those who were being carried lawfully but without consideration, may depend upon the true ground of liability so far as it exists, when the defendant is itself free from blame, and perhaps is still open to argument. *Todd v. Old Colony & F. R. Co.* 3 Allen, 18, 20; *Flint & P. M. R. Co. v. Weir*, 87 Mich. 111, 114, 115; *Hutch. Carriers*, § 567, note.

But the defendant would be liable at common law for injuries caused by its own negligence to passengers carried gratuitously; and the statute makes no distinction between gratuitous and paying passengers, if the person killed is a passenger. There is no doubt that the plaintiff's children were passengers. See *Todd v. Old Colony & F. R. Co. supra*; *Wilton v. Middlesex R. Co.* 107 Mass. 108; *Wilton v. Middlesex R. Co.* 125 Mass. 130; *Com. v. Vermont & M. R. Co. ubi supra*; *Austin v. Great Western R. Co.* L. R. 2 Q. B. 442

*Exceptions sustained.*

## FLORIDA SUPREME COURT.

George G. McWHORTER *et al.*, *Appts.*,

*v.*

PENSACOLA & ATLANTIC R. CO.

(....Fla....)

**1. The rule which forbids suit against officers of a State**, because, in effect, a suit against the State, seems to apply only where the interest of the State is through some contract or some property right of hers, or where her interest is in a suit in her own name, brought or threatened by her officers, to enforce some alleged claim of hers.

\*Head notes by the COURT.

NOTE.—See *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744 and note.

2 L. R. A.

**2. Railroad commissioners being authorized by statute to make reasonable rules and regulations for all railroads in the State as to charges for transportation of passengers and freights, and to furnish each company with a schedule of charges made for its observance, and having fixed certain rates for one of the companies which it deems not reasonable and just, said company filed a bill against the commissioners to enjoin them from promulgating said rates, or any other rates substantially the same. Held, that this is not, in effect, a suit against the State; but the statute having prescribed a penalty for violation of the rates fixed, and authorized the commissioners to institute action in the name of the State to recover the penalty, in so far as the bill seeks to enjoin them from doing this, it is in effect a suit against the State.**



3. Where the law invests an officer with discretion in the performance of an act, the courts will not interfere with or control his action by injunction. If injustice is done by his action, some other remedy must be sought. The statute gives these commissioners discretion in making rates for railroads, and they are entitled to the benefit of this rule.

4. Whether rates made by the commissioners are reasonable and just or not, even if subject to judicial control, is not open to inquiry in a suit to enjoin their discretionary action.

5. A statute conferring on a commission authority to regulate the charges of railroads for transportation of passengers and freights is not a delegation of legislative power forbidden by the Constitution of this State.

(November 21, 1888.)

**A** PPEAL by defendants, from a decree of the Circuit Court of Santa Rosa County (McClellan, J.), overruling demurrer to bill against State Railroad Commissioners to enjoin them from promulgating rates for transportation, etc. *Bill dismissed.*

The case is fully stated in the opinion.

The Attorney-General for appellants.

Mr. W. A. Blount for appellee.

Maxwell, *Ch. J.*, delivered the opinion of the court:

Appellants are commissioners under an Act of the Legislature of Florida of 1887, "to provide for the regulation of railroad freight and passenger tariffs in this State; to prevent unjust discrimination in the rates charged for transportation of passengers and freights, and to prohibit railroad companies, corporations and lessees in this State from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to appoint commissioners, and to prescribe their powers and duties in relation to the same."

They bring this case here for a reversal of the decree overruling their demurrer to the bill of the Pensacola & Atlantic Railroad Company against them, which also enjoins them from "promulgating, as binding upon the complainant, the rates for transportation of freight and passengers heretofore prescribed by the defendants for the complainant, or other rates substantially the same as said rates, and from procuring or permitting the institution of any suits against the complainant for any alleged charges by the complainant in excess of the said rates heretofore fixed, or in excess of any other rates which may be fixed by the defendants for the complainant, substantially the same as the said rates."

The gravamen of the bill is that the Pensacola & Atlantic Railroad Company is a corporation of the State of Florida empowered to construct and operate a railroad from some point on the Apalachicola River to the City of Pensacola; that the road was completed and began to operate in April, 1888, and has been operated ever since; that the defendants were appointed commissioners, under the Act above mentioned; that they have fixed rates for freight and passenger transportation on the railroads of the State, including that of complainant, which they have determined to be just and reasonable

charges to be made by said railroads, and have ordered the several companies, including complainant, not to make any charges greater than the rates so fixed; that they have fixed three cents per mile as the uniform rate to be charged by complainant for passengers, and have fixed rates for freight, varying with the distance of transportation, and with certain classification of the various kinds of freight, which they have arbitrarily adopted; that the rates thus fixed were made in spite of facts hereinafter stated, and argument thereon before defendant; and, as authorized by the Act, complainant protested to defendants against the enforcement of said rates, but the defendants refused to change the same, and thereupon complainant appealed to the board of revisers provided by the Act, but that board confirmed the action of defendants; that complainant, for reasons hereinafter stated, declined to adopt the rates thus prescribed, and have charged for passengers and freight more than said rates, but the rates so charged were just and reasonable, and in no instance has it made a charge that was not just and reasonable, never having charged for passengers more than five cents per mile, the rate authorized by its charter; that consequent upon such charges by complainant, which defendants allege to be in violation of the Act and of their order, they demanded that complainant restore to the persons so charged the excess over the rates fixed by them, and upon complainant's refusal they have procured the Attorney-General of the State to bring several suits (naming them) to recover the penalties prescribed by the Act for charges in excess of rates so fixed; that numerous persons who have been charged by complainant more than the rates fixed by defendants, relying on the authority of defendants to fix rates, have brought suits against complainant to recover damages for said alleged excessive charges; that said suits of the State, and of the said persons, are now pending, and the defendants announce their intention to procure other suits to be brought by the Attorney-General for every case of a charge by complainant in excess of the rates fixed by them, and that there are numerous cases of such excess, and complainant will continue to so charge until it be judicially determined that it has not the right to do so; that defendants have not the power to determine the justice or reasonableness of complainant's charges, because that involves a judicial function which they are inhibited from exercising by the Constitution of the State; that if not judicial, it is legislative, and cannot be exercised by defendants; that if defendants have any power whatever in the premises, it is restricted to fixing rates that are in fact just and reasonable, and they cannot require complainant to reduce its rates to charges which are not reasonable and just to it; and that the rates prescribed by defendants are much less than those heretofore charged by complainant for the same services, and are neither just nor reasonable; for though its charges have been much greater than is allowed by the rates fixed by defendants, and have brought a much larger gross income than would be realized from said rates, yet complainant has not only failed to realize any interest upon its investment, but has failed to realize enough to meet the necessary ex-

penses connected with the operation and ownership of its road.

The bill then proceeds to give figures and statements as to the cost of construction and equipment of the road, and its actual value, and as to earnings and expenses of its operation, going to show excess of expenses over earnings, and actual loss from the operation of the road during the more than five years of such operation to date, and alleges facts in regard to the condition and business of the country through which the road runs to show that such loss, even on the basis of its charges, will probably continue for some years. It further alleges that the rates prescribed by defendants are also unreasonable and unjust when compared with those permitted by them to other roads in the State, giving figures to show the difference; and that a reduction of its charges to the rates prescribed by defendants would compel complainant to forego any possibility of earning any interest on its investment, or any income from the operation of its road, and that to continue the operation at an actual loss would render its road valueless; and that defendants cannot, under the law, so act as to produce this result, for thereby complainant would be deprived of its property without due process of law, contrary to provision of section 1, art. 14, Const. U. S.

The prayer of the bill was for the relief which was granted by the injunction.

On the argument of the demurrer to the bill the commissioners filed an affidavit, intended mainly to show that in their dealings with complainant they were not led to expect such complaints as the bill makes; and they say that if application had been made to them for a change or increase in the rates, and it had appeared to them reasonable and just, they doubtless would have made proper changes, as they did in cases of application by other roads.

The preliminary question raised by the demurrer arises on two of its grounds, the third and fourth, viz.: (3) that the court has no jurisdiction of the matters set forth in complainant's bill, or to grant relief in the premises; and (4) that this is in effect a suit against the State.

We will consider first whether this is, in effect, a suit against the State. If it is, it is well understood that it cannot be sustained, unless by consent of the State. The objection springs from the rule that a suit against officers of the State founded on any claim or complaint the adjudication of which against the officers would be, in effect, an adjudication against the State, is a suit against the State.

In *Osborn v. Bank of U. S.* 23 U. S. 9 Wheat. 788 [6 L. ed. 204], and *Davis v. Gray*, 88 U. S. 16 Wall. 203 [21 L. ed. 447], the court announced that it would look only to the record to determine whether the State was a party. But in subsequent cases this test is treated as too narrow, and cases against officers were held to be cases against the State, although not named on the record. See *La. v. Jumel*, 107 U. S. 711 [27 L. ed. 448]; *Cunningham v. Macon & B. R. Co.* 109 U. S. 448 [27 L. ed. 992]; *Hagood v. Southern*, 117 U. S. 52 [29 L. ed. 805]; and *Re Ayers*, 123 U. S. 448 [31 L. ed. 216].

In the *Virginia Coupon Cases*, 114 U. S. 270-338 [29 L. ed. 185-210], the State being interested,

but the court holding she was not a necessary party, it was nevertheless said in its opinion "that the question whether a suit is within the Eleventh Amendment is not always determined by reference to the nominal parties on the record."

And conversely, in the cases of *New Hampshire and New York v. Louisiana*, 108 U. S. 76 [27 L. ed. 656], the court refused to sustain a suit of one State against another, although the Constitution of the United States authorizes such a suit; because it appeared that while on the record the States suing were the nominal parties, yet they were acting for some of their citizens, who were the real parties in interest, and who could not themselves sue the State, being within the prohibition of the Eleventh Amendment.

It cannot be said, therefore, that the case under consideration is not a case against the State simply because the record does not bear her name, and indeed there has been no contention to that effect. So the question is whether the case comes within any class in which a suit against officers is of such a character that a judgment or decree cannot be given in it without affecting some right or interest of the State, so that the effective operation of the judgment or decree is really against the State, rather than the officers sued. In other words, Would a decree against these commissioners be a decree against the State as the actual party?

The only cases in the Supreme Court of the United States in which it has been held that a suit against officers or others is a suit against the State are *Louisiana v. Jumel*, *Cunningham v. Macon Railroad Company*, *Hagood v. Southern*, and *Re Ayers*, all cited above. We need only analyze these so far as to show the nature of the question involved in each.

The first, *Louisiana v. Jumel*, was an attempt of bond creditors of the State to protect and enforce their rights under the Law of 1874, which provided for the issue of the bonds they held, and under an amendment to the Constitution of the same year, which ratified the law, as against an ordinance of the new Constitution of 1879 which stopped the further levy of the tax that this law authorized for the purpose of raising revenue to pay interest on the bonds, and also prevented the disbursing officers from using funds in the treasury derived from previous levies for paying such interest. The suits were against officers of the State. It was not denied that this ordinance was unconstitutional because impairing the obligation of a contract of the State; but the court held that the suits could not be sustained for the reason that the execution of her contract could not be enforced by a suit against her officers to which she was not a party.

The case of *Cunningham v. Macon Railroad Company* was for the foreclosure of a mortgage to secure bonds issued by the company. Prior to its institution, the State of Georgia had gone into possession of the road, and was still in possession under purchase at a sale made on account of her lien to secure her indorsement of other bonds of the company. The court held that her interest in the property made her a necessary party, and it refused to entertain jurisdiction of the case as she could not be sued without her consent.

The case of *Hagood v. Southern* was a suit against officers of the State of South Carolina, on bond scrip issued by the State, which declared on its face that it was receivable "in payment of all taxes and dues to the State", to compel its receipt for taxes. This was held to be a suit that could not be maintained, because the State could not be compelled to perform her contract by a suit against her officers.

The case of *Re Ayers* was on a writ of habeas corpus. A bill had been filed to enjoin officers of the State of Virginia from prosecuting suits in the name of the State against the taxpayers reported to be delinquent for the recovery of their taxes—the gravamen of the bill being that they refused to receive coupons of the State for taxes, though made receivable by law, and that this was a violation of the contract of the State, but that under a subsequent law suits were threatened against those who tendered the coupons, and would not otherwise pay their taxes. An injunction was granted, which the officers disobeyed, and they were put into custody for contempt. The writ of habeas corpus was for their relief. The court discharged the parties, holding that though the suits threatened might be a breach of the contract of the State, yet the injunctions should not have been granted, because the actual party upon whom it operated was the State, and not the officers who were sued, and there being no jurisdiction against the State the injunction was void, and did not furnish legal ground for the imprisonment. The court refused jurisdiction of two of these suits, because they involved state contracts; of the third, because it involved property of the State; and of the fourth, because although the foundation of the suit involved a contract of the State, the immediate proceeding was to relieve her officers from punishment for doing in her name that which, when done, would be her own act.

Looking to cases we find in the state courts, they are substantially of the same nature. That of *State v. Durke*, 83 La. Ann. 498, was a suit presenting in part the same questions as those in *Louisiana v. Jumel*, and was decided adversely to the plaintiff, on the ground that if he had contract rights against the State they could not be enforced by a suit against her officers, she not being a party. In *Weston v. Dane*, 51 Maine, 481; *Marshall v. Clark*, 22 Tex. 28; and *Houston Railroad Co. v. Randolph*, 24 Tex. 817, similar decisions were given, the cases being against officers on pecuniary claims against the State; and similar decisions in *Printup v. Cherokee Railroad Company*, 45 Ga. 365; and *Hosner v. DeYoung*, 1 Tex. 764, being cases in which property claimed by the State was involved.

It appears, so far as we can find in the reported cases, that the rule which forbids a suit against officers, because in effect a suit against the State, applies only where the interest of the State is through some contract or some property right of hers, or where her interest is in a suit brought or threatened by her officers in her own name to enforce some alleged claim of hers. And it is important to observe the character of the interest. It is not enough that the State should have a mere interest in the vindication of her laws, or in their enforcement

as affecting the public at large, or as they affect the rights of individuals or corporations, but it must be an interest of value to herself as a distinct entity—of value in a material sense. She has an interest in the success of the policy of her laws, and in the just administration and execution of those laws; yet it is not an interest on which she can be said to be a party affected by any private suit arising under them, when it is not another and more direct interest inhering in some separate right or claim of right of her own.

With this distinction in mind, how stands the present case?

The fifth section of the Act constituting the office of the commissioners provides that they shall "make and fix reasonable and just rates of freights and passenger tariffs, to be observed by all railroad companies doing business in this State, on the railroads thereof; shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State as to charges at any and all points for the necessary handling and delivering of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads in this State; shall make reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroads, no matter by whom owned or carried; and shall make just and reasonable rules and regulations, to be observed by said railroad companies on said railroads, to prevent giving of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers."

The sixth section authorizes and requires the commissioners to "make, for each of the railroad companies doing business in this State, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads, and said schedules shall, in [any suit] brought against any such railroad corporations wherein is involved the charges of any such railroad corporations for the transportation of any passengers, or freight, or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as sufficient evidence that the rates fixed therein are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads; and said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules."

There are other provisions in these sections, which it is needless to recite.

The principal complaint of the bill against the commissioners is that, in performing the duty imposed on them, they exceeded the authority given by the Act, and fixed rates for the road of the complainant that were not reasonable and just; that if said rates are enforced the road will be operated at a loss, to such extent as will render the property valueless; and that this amounts to a violation of the State Constitution, which forbids the taking of private property without just compensation.

and also of the Constitution of the United States, in that it deprives complainant of its property without due process of law.

There is here nothing that affects the State in any valuable interest of her own, or affects her otherwise than as she is concerned in having a law of a public nature carried out. Clearly, then, according to the test we think the law applies, the State bears no such relation to the subject matter of this suit as renders her, in effect, a party to it; and if the injunction sought had been limited to staying the action of the commissioners in regard to rates only, the objection that she is a party would not obtain. But the bill goes further, and founds a complaint against the commissioners in connection with section 17 of the Act, which provides a penalty against any railroad company for violating the rules and regulations prescribed by them, and directs that they shall institute action through the Attorney-General to recover the penalty. Admitting violation of the rate regulations prescribed for it, the company, resting on alleged want of authority in the commissioners to fix for it the rates they did, prays that they be enjoined from instituting the action authorized. A further direction of the Act is that the suit "shall be in the name of the State of Florida." It needs no argument to show that in such a suit the State is a party, and that the injunction asked against the commissioners to stay the suit would be an injunction in fact against her. It is precisely the case which led to *Re Ayers*, where officers were enjoined from bringing suits in the name of the State, which was held to be void because in fact an injunction against the State, the court saying, if "officers, attorneys and agents are personally subjected to the process of the court so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

There is a class of cases against officers in which suits are held to be allowable, although the officers were acting under orders or authority of the Government. This is where they exceed their authority, and in their action commit a tort. "In these cases [the officer] is not sued as or because he is the officer of the government, but as an individual." *Cunningham v. Macon & B. R. Co. supra*.

There is another large class of cases in which suits against officers of the State have been sustained, though it was to enforce obligations of the State, or to compel performance of some act authorized by law of the State in behalf of anyone who may have had a substantial interest in its performance as an act on the part of the State. Thus, where a statute makes an appropriation of money out of the treasury of the State, for a certain defined purpose, and directs its payment by the proper officer, leaving in him no discretion to be exercised in regard to its payment, the party entitled may, on refusal of the officer to pay him, have a writ of mandamus against him to compel the payment, and the State need not be a party. High, Extr. Rem. §§ 101, 104.

So, as to the performance by an executive officer of any ministerial act for the State not requiring the exercise of discretion. Id. §§ 107, 110, 127. This is sometimes treated in the 2 L. R. A.

discussion of cases as if connected with the non-liability of a State to be sued, and as an exception to the rule which forbids a suit against her through her officers; but we think this is not strictly correct, and that in this country, at least, in regard to executive officers, an entirely different question is involved—to wit: the authority of one department of the Government, as constituted here, to interfere with the functions appertaining to another—and we treat the case before us in this view so far as it depends on the point raised by counsel growing out of this doctrine.

The point referred to is, that while, in the class of cases just mentioned, a suit against an officer refusing to act will be sustained, on the ground that the law speaks to him as a ministerial officer without discretion as to the thing directed to be done; on the other hand, if the law invests him with discretion in doing it, the courts will refuse to interfere with that discretion. *Towls v. State*, 8 Fla. 202; High, Extr. Rem. §§ 42, 80.

This is not contested by the opposing counsel, but he meets it on the ground that "The whole gist of the railroad company's case is that the commission has no discretion which authorizes it to fix rates in the manner fixed in this case; [and] admits that if the Act of the Legislature gives it such scope, its discretion is absolute between the nether limits of a living interest upon the investment and the upper limit of attainable profit; but it cannot go below the nether limit, for then it trenches upon constitutional rights. When there is no power there can be no discretion; and the commission reaches the limit of its power when in its downward course of reduction it reaches the point where a further descent would deprive the railroad company of a just compensation for its property."

There is no denial, and could be none, as will be evident from a slight consideration of sections 5 and 6 of the Act quoted above, that it gives discretion to the commissioners in the fixing of reasonable and just rates; and hence this qualified denial is but saying that the commission exercised its discretion to a wrongful extent. It may be granted that if, by enforcing the rates complained of, the company would have its property taken without just compensation, or would be deprived of its property without due process of law, the first would be a violation of the Constitution of the State, the second a violation of the Constitution of the United States, and that neither the Legislature nor the commission under her law could do either. But we are not at this point called upon to say whether such would be the effect of those rates, or whether the court has authority to adjudicate upon the reasonableness of the rates, or whether the judgment of the commission as to reasonableness is to be taken as conclusive. These are questions excluded from our consideration by the fact that the law refuses authority to enjoin the discretionary action of executive officers. It does not matter that the exercise of the discretion works an injustice or wrong.

In many of the reported cases (that of *Towls v. State* for one) the inhibition was held to apply, though the officer was legally wrong in the conclusion reached as to the rights of the

party whose case was brought within his discretion; and we do not see that it makes any difference whether those rights are founded on mere legal protection or on constitutional protection. The simple test is whether the decision of the officer is one his discretion authorizes him to make; and if it is, the court is powerless to control him. Where this discretion exists, mandamus does not lie to direct the manner of its use, nor will injunction step in to control or intercept its use.

It is proper to say, however, that this restraint upon proceedings by the court does not intend a denial of the legal or constitutional rights of any person, but only that the party aggrieved must seek his redress in some other way than by a suit against the officer in fault. In the present case, for instance, if the commissioners have exercised their discretion in a manner to invade the legal or constitutional rights of the complainant, that will be available for defense in any action against said complainant founded on the violation of the regulations of the commissioners. This is clearly recognized in the case of *Re Ayers*, where the court, though holding the injunction against state officers restraining them from bringing suits in the name of the State to be void, intimated that rights which could not be thus enforced could be protected in defense of suits against the injured party. See opinion, 128 U. S. 494, 495 [31 L. ed. 226].

If the Act creating the commission was unconstitutional and void, it may be that the commissioners, not in such case being officers, but only individuals really unclothed with office, would be subject to suit, as a void Act could not confer any discretion on them; but its constitutionality is not contested, except against the extent of power claimed for the commission—"the power of the Legislature to create a commission with power to make schedules which shall be *prima facie* evidence of reasonableness of rates fixed by it," not being doubted by the company's counsel, save that "it cannot make them conclusive." In regard to this it is said that a conclusive determination of the reasonableness of rates by the commission would be the exercise of judicial power, which is prohibited by the Constitution of the State. But if this be so, it does not affect the question of the liability of those officers to the present suit. It does not remove the protection which they have by virtue of the discretion given to them to fix reasonable and just rates; a wrong exercise of that discretion, as we have said before, not varying the rule which relieves them from suit.

It is said, further, that if the power claimed is not a judicial one, then it is one that involves legislative power, and for that reason is prohibited by the Constitution of the State. If this has reference to the conclusiveness of rates, as the connection would seem to indicate, what we have just said respecting the exercise of judicial power applies equally here. But if it is meant that the power to fix rates is so far legislative that it cannot be delegated to a commission, that presents a more vital question, and, without considering whether it may be similarly disposed of, we go to its independent merits. It may be remarked *in limine* that the power of the Legislature to regulate and fix

the charging rates of railroad companies chartered by the State, where the charter itself in a contractual view does not surrender the right to exercise the power, is not disputed; but that it is a power the Legislature may forego exercising; and when it does that it leaves its exercise to some other agency authorized by its law to act, to wit: the corporation. In many instances this is done as to all rates; and for the company before us it is done, except as to the maximum passenger rate. The regulating and fixing of rates, therefore, is not an inalienable, exclusive function of the Legislature, and if it may leave that to the corporation, why may it not delegate it to a different body? The public interest involved is the same, whether reached by the corporation or by a supervisory commission.

We are not without authority on the question. Our Act is taken almost entirely from an Act of the State of Georgia. In the case of *Georgia Railroad Company v. Smith*, 70 Ga. 694, the constitutionality of the latter Act was attacked, and on this subject of the delegation of authority to the commission was held not to be unconstitutional. The Georgia Constitution, like ours, gave authority to the Legislature to regulate rates. By the former, the Constitution "conferred upon the Legislature the power of regulating railroad freight's and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs." By ours "The Legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties and forfeitures."

There is no material difference. The court says in its opinion in the case cited above that "It certainly was not contemplated that the details of rates to be fixed over the many miles of railway in the State should be settled and determined by the Legislature. The many influences that combine to cause changes in the ever varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of preparing, by the Legislature, just and proper schedules for the various railroads, with their differences of length, locality, and business, appears to us to be so clear and manifest as that to have entertained it would have been absolutely absurd. And especially so, when it is remembered that schedules, just and right where arranged for the months of winter, might be ruinously unjust and wrong for the months of summer; or that such as were proper for the year of the meeting of the General Assembly might the succeeding year well nigh bankrupt every railroad corporation in the State."

In *Tilley v. Savannah Railway Commissioners*, 4 Woods, 427, the same question as to the constitutionality of the Georgia Act was passed upon; the court discussing more fully the subject of delegation of authority to the commission to fix rates, and reaching the same conclusion. The reasons given are on the line of those in the Georgia case. Thus "The fixing of just

and reasonable maximum rates for all the railroads in the State is clearly a duty which cannot be performed by the Legislature, unless it remain in perpetual session and devote a large portion of its time to its performance.

"The question, 'What are just and reasonable rates?' is one which presents different phases from month to month, upon every road in the State, and in reference to all the innumerable articles and products that are the subject of transportation. This question can only be satisfactorily solved by a board which is in perpetual session, and whose time is largely given to the consideration of the subject. It is obvious that to require the duty of prescribing rates for the railroads of the State to be performed by the General Assembly, consisting of a Senate with forty-four members, and a House of Representatives with 175, and which meets in regular session only once in two years, and then only for a period of forty days, would result in the most ill advised and haphazard schedules, and be productive of the greatest inconvenience and injustice in some cases to the railroad companies, and in others to the people of the State. It is impracticable for such a body to prescribe just and reasonable rates. To insist that this duty must be performed by the General Assembly itself is to defeat the purpose of that clause of the Constitution under consideration."

Under a Mississippi Statute, creating a commission with supervisory powers over railroad

rates, it was held to be constitutional by the supreme court of the State, and also by the Supreme Court of the United States, although there was vested in the commission authority to regulate and change rates. *Stone v. Yazoo & M. V. R. Co.* 62 Miss. 607; *Stone v. Farmers Loan & Trust Co.* 116 U. S. 307 [29 L. ed. 638].

The question of delegation of legislative power was not directly discussed in these cases, but was necessarily involved; and the authority given to the commission by the Act to regulate rates could not have been sustained, except upon the conclusion that such authority was constitutionally given. Other cases announcing the same conclusion are *State v. R. Co.* 87 N. W. Rep. 782, and *Chicago & N. W. R. Co. v. Dey*, published in 35 Fed. Rep. 866.\* We find no decision, and think there is no good reason to the contrary. There are cases upon similar statutes of other States where this question has been passed *sub silentio*, but this being only indirect support of our conclusion, these need not be cited. We hold that the Legislature, in the Act under consideration, did not delegate to the commission any power so far its own, exclusively, that it could not be delegated.

Under the views on which we decide this case, it is unnecessary to determine the other questions appearing in the record.

*The bill should be dismissed, and it is so ordered.*

\*See same case annotated, 1 L. R. A. 744.

## INDIANA SUPREME COURT.

Frank J. HORNING, *Appt.*,

STATE, *ex rel.* Josiah S. GAMBLE.

(....Ind.....)

1. A township trustee is the agent of his township in the transaction of its business, and acts in a fiduciary as well as an official capacity, and is amenable to the rule which forbids an agent or trustee to place himself in such an attitude towards his principal or *cestui que trust* as to have his interest conflict with his duty.
2. A vote by a township trustee in Indiana for himself for the office of county superintendent of schools is contrary to public policy, and for that reason an utterly illegal vote.
3. Where the announcement is made that a township trustee who has voted for himself for the office of county superintendent of schools has been duly elected, and is made upon the mistaken assumption that he had a right to vote for himself, the failure of those who had not voted for him to interpose further objection is not such an acquiescence in and tacit consent to the announcement of his election as amounted to an appointment of him to such office.

(December 15, 1883.)

**A**PPEAL by defendant, from a judgment of the Circuit Court of Fayette County (Borrv, J.), in favor of the relator in a proceeding in the nature of *quo warranto* to test the title to the office of county superintendent of schools. *Affirmed.*

2 L. R. A.

The case is stated in the opinion.

*Messrs. Conner & Frost* and G. C. Florence for appellant.

*Messrs. L. L. Broadbuss* and Daniel W. McKee, for appellee:

1. It is contrary to public policy for an officer having an appointing power to exercise it in his own behalf.

*State v. Hoyt*, 2 Oreg. 246; *Com. v. Douglass*, 1 Binney, 77; 1 Dillon, Mun. Corp. 8d ed. § 444; *State v. Taylor*, 12 Ohio St. 180; 7 Bacon, Abr. 813; 8 Bacon, Abr. 60, 61.

2. A public officer is an agent within the rule "that an agent cannot act for himself and his principal at the same time."

*People v. Overysel Twp. Board*, 11 Mich. 223; 5 Wait, Art. & Def. 1; *Atlantic & N. O. R. Co. v. Cowles*, 69 N. O. 59; *Pt. Wayne v. Rosenthal*, 75 Ind. 156.

3. As declarations of the above rule of agency, see—

Story, Agency, §§ 210, 211, 218; 2 Bouv. Inst. §§ 8861, 8862; 5 Field, Briefs, § 641; Greenwood, Pub. Policy, 292-342; *Stroper v. Greene County*, 72 Ind. 42; *Abbot v. American Hard Rubber Co.* 83 Barb. 578, 590.

4. Statutes specifically prohibiting a public officer having an appointing power, from appointing himself to office, are but declaratory of the common law; therefore, where the common law is in force, the prohibition is in force, in the absence of statute.

*Pt. Wayne v. Rosenthal*, 75 Ind. 156.

**Niblack, J.**, delivered the opinion of the court:

The proceedings in this case were based upon an information in the name of the State on the relation of Josiah S. Gamble, and against Frank G. Hornung, which caused the court below to be informed that on the first Monday in June, in the year 1885, the trustees of the several townships of the County of Fayette met at the office of the county auditor for the purpose of appointing a superintendent of the public schools for that county, and thereupon appointed the relator such superintendent; that the relator, who was at the time a citizen of the county, immediately qualified and entered upon the duties of the office; that on the 6th day of June, 1887, which was the first Monday of that month, the trustees of the several townships of said County of Fayette again met at the office of the county auditor for the purpose of appointing a superintendent of the public schools as the successor of the relator; that there were, at the time, nine, and only nine, townships in said County of Fayette, the trustees of all of which were present; that the defendant, Hornung, was then the duly elected and acting trustee of Connorsville Township, one of the townships of said county, and as such trustee was present at the last-named meeting, being also at the same time an applicant for the office of superintendent of public schools, to succeed the relator; that the trustees proceeded on the same day to determine by ballot who should be appointed to the office in question; that in casting their ballots four of such trustees voted in favor of the relator, and that the remaining four trustees other than the defendant, voted for him, the defendant; that in casting his ballot the defendant voted for himself; that the ballot so cast for himself by the defendant was counted for him by the trustees, which gave him an apparent majority of one vote; that the ballot thus cast by the defendant was an illegal vote, and ought not to have been counted for any purpose whatever; that the county auditor did not give the casting vote in favor of either one of the parties so voted for by the trustees; that the trustees thereafter adjourned, without taking any further action in the matter of the appointment of a superintendent of public schools; that by reason of the foregoing facts the defendant assumed that he had been appointed such superintendent of public schools, known as county superintendent, for, said County of Fayette, and took an oath of office, and executed an official bond, as the law required of persons appointed to that position; that on the 18th day of June, 1887, the defendant demanded the possession of the office of such superintendent, and deformed him, the relator, from the same; that the defendant had ever since intruded himself into said office, and wrongfully usurped the powers and duties pertaining thereto.

Wherefore, the defendant was required to answer by what authority he claimed to hold the possession of such office, and all other appropriate relief was invoked.

A demurrer to the information being first overruled, the defendant answers: *first*, in general denial; *secondly*, giving a history of the cause substantially the same as stated in the information, up to the time when the town-

ship trustees were about to commence to ballot for a county superintendent of schools, on the first Monday in June, 1887, and then averring that such trustees, before proceeding to ballot, selected Richard W. Sipe, one of their number, to act as chairman of their meeting, who acted accordingly, and the county auditor attended the meeting and acted as the clerk of the election; that the relator and the defendant and one other person were all applicants for the office which the trustees had met to fill; that without any formal agreement as to the manner of conducting the election, the trustees proceeded to express their individual choice as between the several applicants for the office of county superintendent of schools, by voting written ballots; that throughout thirty-five ballots the chairman, Sipe, and three others of such trustees voted for the relator, and that the defendant and three other of such trustees voted for him, the defendant; that the remaining trustee voted all the time for the other applicant above referred to; that on the thirty-sixth ballot all of the trustees voted as they had before, except that such remaining trustee voted for the defendant; that during all of the balloting the chairman and other trustees, including the county auditor, had full knowledge that the defendant was voting for himself; that after such thirty-sixth ballot was taken, Sipe, as chairman of the meeting, in the presence and hearing of all the other trustees, announced that the defendant was duly elected and appointed to said office of the county superintendent of schools; that none of the trustees made any objection to this announcement, and all acquiesced in and consented to the same; that said meeting thereupon adjourned without day; that immediately after such adjournment the county auditor, in a book kept for that purpose, made a proper record of the proceedings had by such trustees, showing that the defendant had been duly elected and appointed as such superintendent; that pursuant to such election and appointment the defendant on the 18th day of June, 1887, and after resigning the office of township trustee, took and subscribed the oath required by law, and executed an official bond, with approved freehold security, in the penal sum of \$1,000, conditioned as the law prescribed; that immediately thereafter the county auditor reported to the superintendent of public instruction that the defendant had been appointed county superintendent of schools for Fayette County; that the defendant has ever since been recognized as such last named superintendent by the superintendent of public instruction; that, after executing a bond and qualifying as above stated, the defendant entered upon the discharge of his duties as such county superintendent, and has since continued in the discharge of such duties.

A demurrer was sustained to this second paragraph of answer, and a trial resulted in a finding in favor of the relator, assessing his damages at \$425, and in the award of judgment accordingly.

The errors assigned upon the proceedings below, and the argument submitted in favor of the reversal of the judgment, present two questions for our decision: first, had Hornung, while acting as a township trustee, the lawful



right to vote for himself for the office of county superintendent of schools, and to have his vote counted for himself in determining the result of the balloting? If not, was there such an acquiescence in, and tacit consent to, the announcement by the chairman of the meeting that he (Hornung) had been duly elected as such county superintendent, as amounted in law to an appointment to that effect?

A township trustee is the agent of his township in the transaction of its business, and hence in the performance of his duties he acts in a fiduciary, as well as an official, capacity. Therefore the rule which requires fair dealings and disinterested conduct on the part of an agent or trustee towards those he represents applies with full force to a township trustee. The law will not allow an agent or a trustee to place himself in such an attitude towards his principal or his *cestui que trust* as to have his interest conflict with his duty; and a township trustee is as much amenable to that rule as any other agent or trustee. As applicable to private rights, the enforcement of such a rule is imperatively necessary; and as a matter of public policy, the recognition of such a rule is of equal if not greater importance. Greenhood, Public Policy, 302.

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence, and primarily for the benefit of the public. It is also the duty of a public officer having an appointing power to make the best available appointment, and, in such a case, the right of appointment is not in any sense the property of the officer possessing the appointing power. It is the policy of the law to secure the utmost freedom from personal interest or undue influences in the selection of public officers, whether elective or appointive. Hence it is that the sale or absolute transfer of an office is prohibited, and that threats, bribery and other kindred influences used to obtain an office are made criminal; also that all contracts in restraint of the appointing power or of the elective franchise are void.

*State v. Hoyt*, 2 Oreg. 246, was based upon the following facts: in June, 1866, Hoyt was elected marshal of the City of Portland by the common council of that city, and entered upon the duties of the office. In July, 1867, the common council took proceedings for the purpose of electing a successor to Hoyt. That body consisted of nine members, and under the charter of the city five votes were required to elect a marshal. Rosenheim was at the time a member of the common council, and was voted

for as a candidate for the office of marshal, receiving five, and only five, votes, one of which was cast by himself, and for himself. Rosenheim, claiming to have been lawfully elected marshal of the city, proceeded by information against Hoyt to obtain possession of the office. Previous to the time of the meeting at which Rosenheim claimed to have been elected, the common council had adopted a rule which was recognized as still in force, as follows: "Every member who shall be present when a question is put shall vote for or against the same, unless he be immediately interested, in which case he shall not vote." On behalf of Hoyt it was, among other things, contended that, under the operation of this rule as well as upon principles of public policy, Rosenheim voted for himself, which was an illegal vote, and that hence he did not receive the requisite number of legal votes to elect him as marshal. The court held that the rule in question was a binding rule upon the common council, and that in consequence Rosenheim's vote for himself was a nullity. Also that it is contrary to the policy of the law to permit a public officer having an appointing power to use such power as a means of conferring an office upon himself. We concur in both of the conclusions reached as above by the Supreme Court of Oregon; and consequently feel constrained to hold that Hornung's vote for himself for the office of county superintendent was contrary to public policy, and for that reason was an utterly illegal vote.

The announcement, by the chairman of the meeting at which Hornung was voted for, that the latter had been duly elected as county superintendent, was evidently made upon the mistaken assumption, but in the belief, that Hornung had the right to vote for himself if he chose to do so; and the reasonable inference from the antecedent facts is that no objection was made to, and that there was a seeming acquiescence in, that announcement by those who had voted for the relator only because Hornung had received an apparent majority of the votes cast on the last ballot.

The failure of those who had not voted for Hornung to interpose further objection to his selection ought not, under the circumstances, to be construed either into an implied or an informal vote in favor of his appointment. *State v. Kilroy*, 86 Ind. 118; *State v. Sutton*, 99 Ind. 300; *State v. Porter*, 12 West. Rep. 634, 118 Ind. 79; *State v. Edwards*, 14 West. Rep. 68, 114 Ind. 581.

*The judgment is affirmed, with costs.*

## ILLINOIS SUPREME COURT.

Henry H. GAGE, *Appt.*,

v.

Thaddeus HAMPTON.

(...ILL...)

### 1. Payment of taxes may be shown by parol.

**NOTE.—Tax titles.** Where the statute makes a tax deed *prima facie* evidence of title, possession under it will be sufficient with such a conveyance. *Dawley v. VanCourt*, 21 Ill. 460; *Fell v. Cessford*, 26 Ill. 3 L. R. A.

2. Parol evidence is admissible to show that taxes were in fact paid by a person other than the one named as payer in the tax receipts.

3. Title acquired by taking actual possession of vacant land after having paid taxes thereon for seven years under color of title made in good faith is, by force of the Illinois Statute of Limit-

525; *Holloway v. Clark*, 27 Ill. 433; *Dickenson v. Broeden*, 30 Ill. 325; *Morrison v. Norman*, 47 Ill. 477; *Webster v. Webster*, 55 Ill. 325; *Hardin v. Crate*, 60 Ill. 215. Where the purchaser takes possession of

ations, such a fixed title as will enable one not only to defend his possession, but to recover possession from another who has subsequently taken it.

4. When possession has been taken of vacant land, after payment of taxes for seven years under color of title, another person, having notice of such reduction to possession, has no right, although claiming title, to take possession except by due legal procedure; and if he takes possession by any other means he is a mere trespasser and has no standing to maintain a suit to quiet title.

(January 25, 1889.)

**A** PPEAL by defendant, from a judgment of the Superior Court of Cook County (Shepard, J.), in favor of the plaintiff in a bill in equity to remove cloud on title. *Reversed.*

The facts are stated in the opinion.

**Mr. Augustus N. Gage** for appellant.

**Mr. H. S. McCartney** for appellee.

**Craig, Ch. J.**, delivered the opinion of the court:

This was a bill in equity, brought by Thaddeus Hampton, in the Superior Court of Cook County, against Henry H. Gage, to set aside three tax deeds as clouds on the titles to lots 86 and 87 on west half of block 1 in a certain subdivision of a certain eighty acre tract of land in Cook County.

The first tax deed named in the bill was exe-

cuted on the 10th day of February, 1877, the second was executed on February 16, 1881, and the third on February 18, 1881.

The defendant, Gage, put in an answer to the bill, in which he denied complainant's title and possession and set up title and possession of the premises in himself. He alleged that he acquired color of title in good faith in 1877 while the property was vacant and unoccupied, and while it remained vacant he paid all taxes accrued on the property for more than seven years, to wit: for the years 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885 and 1886; and that afterward, and before the bill was filed, he took actual possession of the premises; and that since he took possession thereof he has continuously held the same and is now in the possession thereof.

Replication was filed to the answer, and the defendant also filed a cross bill in which substantially the same facts were set up as are contained in the answer. The complainant answered the cross bill and the cause proceeded to a hearing on the pleadings and proofs, and the court decreed in favor of complainant and dismissed defendant's cross bill.

The tax deed executed February 10, 1877, purporting to convey the premises in question to Henry H. Gage was color of title, and it is not questioned that the deed was made in good faith. When the deed was executed the premises were vacant and unoccupied, and the prop-

the premises, the older the tax title under which he claims the stronger is his title; but where he has not taken possession, the older the tax title the weaker is the presumption in his favor. *Alexander v. Bush*, 46 Pa. 62; *Read v. Goodyear*, 17 Serg. & R. 350. Presumptions will not arise in favor of the validity of the tax deed merely from proof of adverse possession, short of the period prescribed by the statute. *Townsend v. Downer*, 32 Vt. 183. A party claiming under a tax deed holds adversely, and must rely on his title. *Sessions v. Irwin*, 8 Neb. 5. The holder of a tax deed to unoccupied land has constructive possession thereof. *Rice v. Hadcock*, 70 Iowa, 318. Where a party in possession has color of title, and pays the taxes on the property for seven years, it will be presumed he holds under color of title. *Holbrook v. Gouverneur*, 2 West. Rep. 89, 114 Ill. 623. The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of the law. *Gomer v. Chaffee*, 6 Colo. 314. A judgment, under Minnesota Laws 1881, chap. 135, for taxes in and prior to 1879, charging lands not described in the published delinquent tax list, being void, does not set in motion the nine months' limitation of actions provided in chapter 135, § 7, of said laws. *Feller v. Clark*, 36 Minn. 338. A tax deed for lands, which is void for want of compliance with the statute, is not admissible in evidence. *Shutre v. Thompson*, 82 U. S. 15 Wall. 151 (21 L. ed. 123). A deed of land sold for taxes cannot be read in evidence, under the Law of Ohio prior to 1824, without proof that the requisites of the law which subjected it to taxation and sale had been complied with. *Games v. Dunn*, 39 U. S. 14 Pet. 322 (10 L. ed. 476). Under the Arkansas Law a tax deed, insufficient as proof of title, is evidence, in connection with proof of possession, to establish a defense under the Statute of Limitations. *Pillow v. Roberts*, 54 U. S. 13 How. 472 (14 L. ed. 228). Where a tax deed in Iowa, regular in form, recited that land was sold January 4, the deed was valid, although the land was not sold upon the 4th, but at some time between the 4th and 18th. *Callanan v. Hurley*, 93 U. S. 387 (23 L. ed. 931). The provisions of a statute of limitations will not run in favor of a tax deed that is void upon its face, even when the land intended to be conveyed by the tax deed has been in the actual, open and notorious possession of the holder of the void deed during the whole of the statutory period. *Waterson v. Devoe*, 18 Kan. 223; *Hall v. Dodge*, 18 Kan. 277; *Moore v. Brown*, 4

*McLean*, 211; *Sheehy v. Hinds*, 27 Minn. 259; *Shoat v. Walker*, 6 Kan. 65; *Black, Tax Titles*, § 233.

*Color of title, what is.* Color of title is that which in appearance is title, but which in reality is not a perfect title. It is apparent title, as a deed purporting to convey the land, regular on its face. *Pugh v. Youngblood*, 69 Ala. 296; *Beverly v. Burke*, 9 Ga. 443; *Phillips v. People*, 11 Bradw. 340; *Busch v. Huston*, 75 Ill. 343; *Foster v. Letz*, 86 Ill. 415; *Stubblefield v. Borders*, 82 Ill. 279; *Cain v. Hunt*, 41 Ind. 466; *Buckley v. Taggart*, 62 Ind. 236; *Shoat v. Walker*, 6 Kan. 65; *Carithers v. Weaver*, 7 Kan. 110; *Sapp v. Morrill*, 8 Kan. 677; *Seigneuret v. Fahy*, 27 Minn. 60; *Kilpatrick v. Sisneros*, 23 Tex. 114; *Edgerton v. Bird*, 6 Wis. 527. One may gain title to premises by adverse possession under a tax deed fair on its face, though illegally issued. *Cowly v. Monson*, 10 Biss. 182. To constitute possession under color of title, the instrument must on its face give title and right to possession. *O'Mulcahy v. Florer*, 27 Minn. 449. A tax deed though void, if regular on its face, is color of title—the element of an adverse possession. *Ladd v. Dubroca*, 61 Ala. 25; *Rivers v. Thompson*, 43 Ala. 641; *Dillingham v. Brown*, 38 Ala. 311; *Hardin v. Crate*, 78 Ill. 535; *Childs v. Shower*, 18 Iowa, 261; *Stevens v. Johnson*, 55 N. H. 405; *McMillan v. Wehle*, 55 Wis. 685; *Worford v. McKinna*, 23 Tex. 36; *McCoy v. Dickenson College*, 5 Serg. & R. 254; *Osterman v. Baldwin*, 73 U. S. 6 Wall. 116 (18 L. ed. 730). A tax deed, though invalid as a muniment of the title, may give color of title, and operate to fix and define the boundaries of an actual possession. *Doe v. Anderson*, 73 Ala. 209; *Doe v. Clayton*, 81 Ala. 391. Deed which are insufficient to convey a good title may be sufficient to show color of title, in favor of which, when joined with adverse possession, the statute may be invoked. *Sater v. Meadows*, 68 Iowa, 507. A tax deed void for uncertainty, or not purporting to convey the land to which the plaintiff has proved title, does not afford defendant a basis of five years' limitation. *Berrendo Stock Co. v. Kaiser*, 66 Tex. 352. In Wisconsin a tax deed, informal and defective, is admissible to show color of title in the defendant. *Leffingwell v. Warren*, 67 U. S. 2 Black, 599 (17 L. ed. 261).

*Adverse possession under tax title.* To constitute adverse possession, entry must be made with defined claim of title and possession; and after entry such claim cannot be enlarged except by act equivalent to a new entry and new claim of possession. *Pepper v. O'Dowd*, 39 Wis. 538. A possession,

erty remained vacant and unoccupied until September, 1887, when it was fenced by appellant.

As to the payment of taxes while the land was vacant, it is conceded that Gage proved payment for the years 1882, 1883, 1884, 1885 and 1886—five successive years; but it is insisted that the evidence fails to show payment for the years 1880 and 1881 by Henry H. Gage. We do not concur in this view. The receipt introduced in evidence for the tax of 1880 reads: "Received of Asahel Gage by H. H. Gage;" while the receipt for the taxes of 1881 reads, "Received of Asahel Gage." If the proof of payment rested alone on the words of the two receipts the position of appellee, that Henry H. Gage had failed to prove payment of taxes for the two years in question, might be sustained; but such is not the case.

Asahel Gage testified that he never paid any taxes on the property, that he never had in his possession any tax receipts for taxes paid on the property. And Henry H. Gage testified that he paid the taxes on the property from 1879 to 1886 both inclusive; that for the years 1880 and 1881 he paid the taxes. Upon cross examination the witness was asked:

"How did it happen that two of the tax receipts which were offered in evidence recited the payment of taxes by Asahel Gage, and two of them by Asahel Gage by Henry Gage?"

A. "I cannot state how the mistake occurred,

or how the receipts were made out in that way. I paid, at the same time I paid these, over \$1,000 for other taxes to the same collector of the West Side, and, until this case was called up, I did not find that there was any difference in the receipts—in the method of making out the receipts." Witness continues: "He has had the receipts in his possession since they were issued, paid for them with his own money."

The payment of taxes may be proven by parol evidence. Tax receipts may be explained, and if a mistake has been made in the description of the land or in the name of the person who actually made the payment, resort may be had to parol evidence to rectify such mistake. Here is the evidence of Asahel Gage, that he never paid any tax on the property; and that of appellant, who testified that he paid the taxes for the years in dispute with his own money. If these witnesses testify to the truth—and it nowhere appears that they are unreliable—the fact is beyond dispute that appellant paid the taxes for seven successive years.

In *Hinchman v. Whetstone*, 23 Ill. 185, it was held that proof of payment of taxes may be made otherwise than by the production of tax receipts. It is there said: "No reason is perceived why the payment of taxes may not be proved . . . by the verbal evidence of a witness as well as the payment of money in any other case."

In *Coleman v. Billings*, 89 Ill. 185, where the

to be adverse, must be under a claim of title hostile to the right of the true owner. *Pease v. Lawson*, 33 Mo. 38. Title to land, under the Statute of Limitations, cannot be acquired by one who has never been in actual possession or paid taxes. *Bernhard v. Beecher*, 71 Cal. 38. Under the Code of Civil Procedure, the title to a piece of land forming part of a larger tract, which is assessed as an entirety to the real owner, cannot be acquired by adverse possession unless the adverse claimant pays or offers to pay the taxes on the land in his possession. *McNoble v. Justiniano*, 70 Cal. 385. The Amendment of April 1, 1878, to Civil Code, § 325, requiring the adverse possessor of land to pay all taxes assessed thereon, in order to acquire a title by adverse possession, does not affect adverse holdings prior to the date of its passage. *Heilbron v. Heinlen*, 72 Cal. 378. The amendment was not retroactive, and did not at all affect adverse holdings prior to the date of its passage. *Sharp v. Blankenship*, 59 Cal. 288; *Johnson v. Brown*, 63 Cal. 391; *Heilbron v. Heinlen*, 72 Cal. 378. The payment of taxes on land, taken in connection with an actual possession by the taxpayer and other facts in evidence, tended to show both a claim of ownership and the extent of the claimant's possession. *Baucum v. George*, 65 Ala. 259; *Jay v. Stein*, 49 Ala. 514; *Angell, Lim.* § 390, note 6; § 397; *Green v. Jordan*, 58 Ala. 224. The fact that taxes had been paid, if essential to the plaintiff's claim through adverse possession, is only a matter of evidence, and not necessary to be pleaded. *Ball v. Nichols*, 73 Cal. 195. An adverse possession of the premises by the defendant, under claim and color of title made in good faith, with payment of the taxes assessed thereon, after the title of the heirs was perfected by congressional confirmation and before the patent issued, continued for the period prescribed by the Statute of Limitations of the State, was a bar to any recovery by the heirs upon the patent. *Langdeau v. Hanes*, 88 U. S. 21 Wall. 521 (22 L. ed. 606).

**Limitation of actions to overturn tax titles.** Within the proper and constitutional bounds, it is entirely competent for the Legislature to prescribe a short period—e. g., three, five or seven years—within which the courts may take cognizance of actions brought to overturn tax titles. *Thomas v. Stickles*, 32 Iowa, 71; *Sheik v. McElroy*, 50 Pa. 25; *Edgerton v. Bird*, 6 Wis. 532; *Sprocker v. Wakeley*, 11 Wis. 432; *Lassiter v. Lee*, 68 Ala. 287; *Black, Tax Titles*, § 280. A statute requiring suit against a tax purchaser for recovery of land to be commenced

within three years from recording of the deed is not unconstitutional. *Hill v. Atterbury*, 4 West. Rep. 408, 88 Mo. 114. A statute requiring that "Any suit against the tax purchaser, his heirs or assigns, for the recovery of the land sold for taxes, or to defeat or avoid a sale or conveyance of land for taxes, shall be commenced within three years from the time of recording the tax deed," does not apply where the owner is in possession. *Spurlock v. Dougherty*, 81 Mo. 171; *Black, Tax Titles*, § 281. The Mississippi Code of 1880, § 539, which provides that "actual occupation for three years, after one year from the day of sale, of any land held under a conveyance by a tax collector, in pursuance of a sale for taxes, shall bar suit to recover such land or assail such title, because of any defect in the sale of such land for taxes, or in any precedent sale to said sale," cannot be availed of where the occupant could not, if his tax title were perfect, assert it against the claimant of the land. *McGee v. Holmes*, 63 Miss. 50. Three years' possession of land under color of title gives a complete title. *Cunningham v. Frandzen*, 38 Tex. 38. If, during a part of the three years next after the recording of a tax deed, the former owner openly occupies it for mining purposes, this will be such an adverse possession as will interrupt the running of the Statute of Limitations in favor of the tax title claimant. *Stephenson v. Wilson*, 37 Wis. 482. To stop the running of the Statute of Limitations against the former owner, it is sufficient that he be in actual and open possession during any considerable portion of the statutory period. *Smith v. Sherry*, 54 Wis. 114; *Spurlock v. Dougherty*, 81 Mo. 171; *Monk v. Corbin*, 58 Iowa, 503; *Black, Tax Titles*, § 281. Where the statutes are so framed that the owner of land may bring his action for its recovery although no one is in possession, the short Statute of Limitations will establish a complete bar to his suit against the tax title claimant, the tax purchaser may rely upon the lapse of the period of limitation without taking possession. *Sprocker v. Wakeley*, 11 Wis. 432; *Hill v. Krickle*, Id. 442; *Bullis v. Marsh*, 56 Iowa, 747; *Black, Tax Titles*, § 282. The nine months' limitation prescribed in Revised Statutes § 1210 c. applies when the taxing officers had general authority to levy the taxes, and the lands were subject to taxation. *Wisconsin Cent. R. Co. v. Lincoln Co.*, 67 Wis. 478.

**Periods in the various States.** A Kansas Statute required the holder of a tax title to bring suit within two years from the recording of his deed; he delayed to record it for eight years. It was held

receipts showed payment by Billings and Parsons, it was held that it would have been competent to prove (if such was the fact) that the taxes were in fact paid by Billings and the name of Parsons was by some inadvertence included in the receipt.

As the law has heretofore been settled by this court, we regard the evidence sufficient to establish seven successive years' payments of taxes by appellant. The appellant Gage having established color of title made in good faith, and seven successive years' payment of taxes on the property while it was vacant and unoccupied, the next question to be considered is whether, after the completion of the seven years' payment of taxes, he acquired possession of the land so as to bring him within the provision of section 7 of chapter 83 of the Statute entitled *Limitations*, which reads as follows:

"Whenever a person having color of title, made in good faith to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven (7) successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her proper title."

It is clear from the evidence that the property was vacant until July, 1887; and on the

12th day of that month Henry H. Gage employed the surveyor of Cook County to survey the lots and put a post and four-board fence around the property. On July 28 the surveyor notified appellant that the work was done. Within a few days after appellant received the notice he went to see the property and found that the surveyor had made a mistake and fenced lots 36 and 37 on the east half of the block 1 instead of lots 36 and 37 on the west half of the block. The surveyor then made a new survey and removed the fence and put it around the lots in controversy. The fence was completed by the 10th day of September, 1887, and appellant then paid the surveyor for his labor.

Thus far there is no controversy between the parties; and it is an undisputed fact that on the 10th day of September, 1887, appellant Gage had the property in controversy inclosed with a post and four-board fence. This act of appellant gave him possession of the property under color of title, by taking possession after he had paid taxes for seven successive years while the lots were vacant; he did all the law required and his title to, and rights in, the property became fixed. He then had, not only a title which he could invoke as a shield or defensive title to protect him in the possession of

that he then had two years in which to bring suit. *Estes v. Stebbins*, 25 Kan. 315. But where no right is given to the owner to sue for the land when the possession is vacant, the owner cannot be cut off without giving him an opportunity to show cause against the tax title. Where the actual possession of land sold for taxes was in no one, and after two years the original owner entered, it was held that the holder of the tax title could maintain ejectment, notwithstanding the lapse of the two years. *Myers v. Coonradt*, 28 Kan. 211. The Iowa five years' Statute of Limitations applies to an action brought by one claiming under a tax deed. The party holding under the tax deed must, within five years, either himself take actual possession of the property, or bring a suit to recover possession. *Barrett v. Holmes*, 102 U. S. 651 (26 L. ed. 231). One who has for five years had constructive possession of unoccupied land, under a tax deed based on a good notice to redeem, but on defective proof of service thereof, may successfully plead the Statute of Limitations (Code, § 902) as a defense to an action assailing his title on the ground of such defect. *Rice v. Haddock*, 70 Iowa, 313. While a sale of land for delinquent taxes of preceding years, not carried forward on the tax books, as required by Code, § 845, is invalid (*Gardner v. Early*, 69 Iowa, 42), yet, it is not void; and the owner of the patent title cannot question it five years after it has been executed and recorded. *Griffin v. Bruce*, 73 Iowa, 126. The holder of a tax deed is deemed in possession of unoccupied land; and if his possession is not interrupted during five years from the date of execution and recording of the tax deed the title acquired thereby becomes perfect and complete. *Molingano Coal Co. v. Blair*, 51 Iowa, 449; *Barrett v. Love*, 48 Iowa, 103; *Dean v. Early*, 15 Wis. 100. Where, under the state statute, the purchaser at a tax sale can bring no suit for possession after the lapse of five years from the time of the sale, nor can the owner after that time question the validity of the sale, where such purchaser has been prevented from asserting his legal rights in a court of law by unfounded and protracted litigation until the statute has run against him, he is not without remedy in a court of equity. *Union Mut. L. Ins. Co. v. Dice*, 14 Fed. Rep. 523. Where the purchaser goes into possession, continues to hold the land, and pays taxes thereon for seven years, he will be protected, although the deed is void on its face. *Dalton v. Lucas*, 63 Ill. 397. Under the Illinois Statutes, a defendant in ejectment who has been in possession of the land by actual residence thereon, having a connected title in law or equity, deducible from the State or the United States, or from any person authorized to sell the land for nonpayment of

taxes, may defend himself by pleading possession, as aforesaid, for seven years. *Moore v. Brown*, 32 U. S. 11 How. 414 (13 L. ed. 751); *Meehan v. Forsyth*, 65 U. S. 24 How. 175 (16 L. ed. 730).

*When statute begins to run.* But in some States the period of limitation does not commence to run until the delivery and recording of the tax deed. *Douglas v. Tullock*, 34 Iowa, 235; *Edgerton v. Bird*, 6 Wis. 627; *Black, Tax Titles*, § 230. A claim of title under a tax deed makes his possession under color of title date from the date of the deed. *De Graw v. Taylor*, 37 Mo. 310. And in Alabama it begins to run from the time the tax deed is executed. *Jones v. Randle*, 68 Ala. 258; *Pugh v. Youngblood*, 69 Ala. 236. In Pennsylvania it has been held that the statute begins to run from the time the purchaser takes possession, not from the day of sale (*Wain v. Shearman*, 8 Serg. & R. 357; *Cranmer v. Hall*, 4 Watts & S. 38), nor from the date of the record of the deed. *Baldwin v. Merriam*, 16 Neb. 199. But since the Act of 1824, which provides a remedy for the owner in case of a vacant possession, the limitation commences from the day of the sale. *Robb v. Bowen*, 9 Pa. 71; *Rogers v. Johnson*, 67 Pa. 43; *Johnston v. Jackson*, 70 Pa. 164. So in Arkansas, it begins to run from the date of the sale, whether such purchaser is in possession or not. *Mitchell v. Etter*, 22 Ark. 178. In Wisconsin, a tax deed of unoccupied lands, duly recorded, draws after it constructive adverse possession of land. *Coleman v. Peshtigo Lumber Co.* 30 Fed. Rep. 317. The special statute (*Wag. Stat. 1277, §§ 221, 222*) has no application except where the tax deed is valid upon its face. Although void tax deeds have been held good as color of title under the general statute, the question of the color of title does not arise under the special statute, which is based upon the recording of the tax deed. *Pearce v. Tittsworth*, 5 West. Rep. 378, 37 Mo. 635. In Wisconsin a void tax deed will not set the statute running in favor of the holder unless his possession is actual, open and notorious. *Lain v. Shepardon*, 18 Wis. 59; *Cutler v. Hurlbut*, 29 Wis. 152; *Lindsay v. Fay*, 25 Wis. 460. In Iowa the occupant who has been in possession under claim of title for the requisite period, with or without a deed, is protected. *Hamilton v. Wright*, 30 Iowa, 485. Where one, having entered upon land as a mere intruder, records a tax deed, it is equivalent to a new entry under claim of title and from that time his claim is adverse and the statute runs in his favor. *Blakeley v. Bestor*, 13 Ill. 708; *Moss v. Spear*, 25 Cal. 38; *Bowman v. Cockrill*, 6 Kan. 311; *Blackwood v. Van Vleet*, 30 Mich. 118; *Link v. Doerfer*, 42 Wis. 396; *Jones v. Davis*, 24 Wis. 222; *Whitney v. Gunderson*, 31 Wis. 359; *Frentz v. Klotsch*, 28 Wis. 312.



the lots, but, if another should, by some means, obtain possession of the property, he had a title under which he might sue and recover the possession of the property.

This is not a new question in this court. In *Hale v. Glatfelder*, 52 Ill. 91, a title acquired in the same manner as appellant acquired his title was fully considered, and it was there held that where the bar of the statute has become complete, under the second section of the Act of 1839 (which is section 7 of our present Limitation Act), by the concurrence of claim and color of title acquired in good faith, payment of taxes for seven successive years under such color of title and the actual taking of possession of the premises, such bar can be used as a shield to protect the possession against everyone; and if the possession be invaded or the premises again become vacant and another make entry, even if the latter hold the paramount title, the holder of the color of title may sue and recover his lost possession.

The bar of the statute having become complete, the right of the person entitled to its benefits to have and enjoy the possession is as perfect as though he were actually invested with the title; and as against him the holder of the paramount title cannot use it for the purpose either of recovery or defense.

The same doctrine was announced in the late case of *McDuffee v. Sinnott*, 7 West. Rep. 695, 119 Ill. 450. It is there said: "In view of the repeated decisions of this court it would be a fruitless consumption of time to enter upon a discussion of the cases decided outside of this State, for, whatever the rule may be elsewhere, it is now well settled in this State that whenever the bar of the statute has become absolute and the party entitled is in possession under it, it is thereafter just as available for attacking as for defensive purposes; and its availability in this respect will not depend at all upon the occupant continuing in the actual possession of the property. His rights in that respect are precisely the same as those of any other absolute owner of land. He can vacate it or occupy it, just as convenience or interest may dictate." It will not be necessary to cite other cases in this State on the question as the law is too well settled to admit of controversy.

It appears, however, from the evidence, that in the latter part of December, 1887, appellee or his agent visited the property and, as they claim, found the most of the fence on the north and east side of the lots gone, but on the south and west sides the fence was mainly standing as originally erected. Finding the property in this condition appellee refenced it, using that portion of the fence and material which had been put on the property by appellant, and supplying enough other material to make a good and substantial fence.

The act of refencing the property conferred no rights upon appellee. As has been heretofore said, when Gage, in September, 1887, fenced the property he lawfully acquired the possession thereof; that possession was never relinquished or abandoned, and no person had any right to invade that possession. When the agent of appellee visited the property in December, 1887, although some of the fence had been torn down by some unauthorized person, there was enough to notify him that the prop-

erty had been reduced to possession by another.

It is not necessary that a man should live on property in order to obtain or hold possession of it. Possession of land may be acquired and held in different modes; by inclosure, by cultivation, by the erection of buildings or other improvements, or in fact by any use that clearly indicates an appropriation to the use of the person claiming to hold the property. *Trucedale v. Ford*, 87 Ill. 210.

When appellee saw that the property had been reduced to possession by another, by inclosing it with a fence, he had no right to interfere in any manner whatever with the possession of the property. His entry was that of a wrong-doer; he was a trespasser. *Lee v. Mound Station*, 6 West. Rep. 829, 118 Ill. 819.

If he claimed the title when he found the lots in the possession of another, his remedy was ejectment. Where the title could be settled in a court of law, surely he could not lay a foundation for a bill in equity by unlawfully invading the possession of another; equitable rights cannot be acquired in that way.

In *Comstock v. Henneberry*, 66 Ill. 218, where a bill in equity was filed by one in the actual possession of the land for equitable relief, as it appeared that the possession was obtained unlawfully and forcibly it was held that he could not be allowed to take advantage of his own wrong, and that he would be treated in equity as out of possession.

In *Hardin v. Jones*, 86 Ill. 818, where a bill was filed to quiet title, the doctrine of the case *supra* was approved and it was held that the possession that confers jurisdiction must have been acquired in a lawful way. If obtained by violence or by the use of unfair or corrupt means a court of equity will not lend its aid.

*Gage v. Williams*, 6 West. Rep. 477, 119 Ill. 564, is cited and relied upon by appellee as an authority to sustain his position. The facts in that case, however, are so different from the facts shown here that the decision can have no bearing. There the property was in possession of Goslee through whom the complainant derived title as early as 1869, and one Ben Allen had charge of the property for Goslee from 1869 to the winter of 1885. In 1881, while Ben Allen occupied the relation of tenant, he took a lease from the appellant in the case; a leasing by the tenant of Goslee from a stranger could not lawfully deprive Goslee of his possession. Moreover, if the appellant in the case cited ever had possession there was evidence that such possession was abandoned.

Reliance is, however, placed by appellee on the case of *Fort Dearborn Lodge v. Klein*, 2 West. Rep. 83, 115 Ill. 177. We do not think that case has any bearing here. There is but one question decided in that case; that is, the plea of *liberum tenementum* is a proper plea in an action of trespass *quare clausum fregit*, and that it was error to instruct the jury to disregard such a plea. As a technical rule of pleading the doctrine of the opinion may be sustained; but it was not intended by that decision to overrule the former decisions of this court where questions similar to the one involved in this record were presented, nor was it supposed that the case had any bearing upon such cases. The doctrine of this court is uniform that a

man cannot take the law into his own hands and regain by force a possession on which he may be entitled to recover in an appropriate action.

*Allen v. Tobias*, 77 Ill. 169, is a case in point. It was there held, where a party's land is in the actual possession of another, even though unlawfully, he has no right forcibly to repossess himself, but must resort to the action of forcible entry and detainer or the action of ejectment.

It is there said the fence inclosing the disputed ground was placed there by appellant, and by the structure he was in the actual possession of the premises and entitled to hold the possession until a better title should be shown.

It was this fence the defendants in a forcible manner broke down and destroyed, and the plea is, it was their property. This may be; and if it was, the law has provided abundant means through and by which they could assert their rights.

They could have brought an action of forcible entry against appellant, or ejectment, and had no right to use force to repossess them-

selves. It was to prevent such conduct as is here recorded against appellees that the Statute of Forcible Entry and Detainer was passed.

In *Reeder v. Purdy*, 41 Ill. 279, upon a careful review of the authorities, it was held that the common-law right to enter and use all necessary force to obtain possession from him who may wrongfully withhold it has been taken away by our Statute of Forcible Entry and Detainer. It was also held that any entry was forcible, within the meaning of the statute, that is made against the will of the occupant. See also *Page v. Du Puy*, 40 Ill. 506, and *Dearlove v. Herrington*, 70 Ill. 251.

When appellee found that appellant had fenced the property and had thus reduced it to possession he had no right, against the will of appellant, to invade that possession; but if he claimed title and the right of possession it was his duty to bring an appropriate action in which the title or right of possession might be determined.

*The judgment of the Superior Court will be reversed, and the cause remanded for further proceedings consistent with this opinion.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Della MCINTIRE  
v.  
William LEVERING.

(....Mass....)

1. A plaintiff in a suit for malicious prosecution upon a criminal charge may show his general good reputation known to the defendant when the prosecution was commenced as tending to show that the prosecution was without probable cause.

2. Testimony of statements tending to show the guilt of accused, made by witnesses to the justice who issued the warrant in a criminal case in the absence of the one making the complaint, is not admissible in favor of the latter in a subsequent suit brought against him for malicious prosecution by the person arrested.

3. Evidence in an action for malicious prosecution, that defendant had stated before the complaint was made that he had heard that the person upon whose statements he acted in commencing the prosecution had been in jail, may properly be allowed to go to the jury as tending to show how far defendant was warranted in believing the statements and how far he did in fact believe them.

(February 23, 1899.)

ON defendant's exceptions. *Overruled.*

This was an action for malicious prosecution. Defendant's premises were forcibly entered and a quantity of his wines and liquors feloniously stolen and carried away. Defendant made oath to a complaint before Emery Grover, Esq., a trial justice, charging plaintiff with said larceny. She was arrested and afterwards found not guilty and discharged, after which she brought this action.

At the trial in the superior court before Thompson, J., plaintiff was permitted to show, 3 L. R. A.

against defendant's objection, her general reputation in the community for honesty of character.

The defendant's evidence tended to show that on July 27 he was absent, and that upon his return on the morning of July 28, one Madden, his hired man, informed him that his, Madden's, wife had confessed to him that she, in company with the plaintiff and another, had broken into the premises and stolen the said wine; that one Hewett, a boy, also informed him that he saw an axe, which was found on the premises, in the hands of the plaintiff's daughter on said day; that said Madden and Hewett went to the office of said justice on said July 28, and related said facts and confession, and that said justice informed Madden that the defendant was the proper person to make complaint, which Madden communicated to the defendant; whereupon he appeared, July 29, before said justice and swore to the said complaint, said Madden and Hewett being present.

The defendant offered to introduce as testimony, and to show by said Emery Grover, Esq., as part of his case, the statements of said Madden and Hewett to the said justice on said July 28, but such statements were excluded by the court, not being made in the presence of the defendant; whereupon the defendant excepted thereto.

In rebuttal, and against the defendant's objection, the plaintiff was allowed to put the following question to the plaintiff's husband, who was a witness:

Q. In conversation with Levering, defendant, before the complaint, did he say that he had heard that Mrs. Madden had been in Dedham jail? A. Yes.

To which question and answer the defendant excepted.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

**Mr. T. J. Morrison** for defendant.  
**Mr. Henry F. Naphe** for plaintiff.

**Knowlton, J.**, delivered the opinion of the court:

There is some conflict of authority as to the competency of evidence of the reputation of the plaintiff in a trial of an action for malicious prosecution. There are many cases in which it is held that in actions of this kind, as in actions of slander, the general bad reputation of the plaintiff may be shown in mitigation of damages. There are also decisions that in suits for malicious prosecution such reputation may be shown to meet the allegation of want of probable cause. *Bacon v. Towne*, 4 Cush. 241; *Pullen v. Glidden*, 68 Maine, 559; *Barron v. Mason*, 31 Vt. 189; *Rodriguez v. Tadmire*, 2 Esp. 721; *Gregory v. Thomas*, 2 Bibb (Ky.) 286; *Boatick v. Rutherford*, 4 Hawks (N. C.) 83; *Gregory v. Chambers*, 78 Mo. 294; *Rosenkrans v. Barker*, 115 Ill. 831, 3 West. Rep. 483.

But the cases do not go so far as to permit proof of particular instances of bad conduct. In determining whether there is probable cause for a prosecution for the commission of a crime, the known character or general reputation of the person suspected is always an element of some importance; for, as was said by *Chief Justice Shaw* in *Bacon v. Towne*, *ubi supra*: "The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression, if they tended to throw a charge of guilt upon a man of good reputation."

In a suit of this kind, where the prosecution complained of was for an offense implying moral turpitude, the plaintiff's general reputation at the time of the prosecution, if the defendant was where he would be likely to know it, is always involved in the issue, and the defendant may properly be permitted to show that it was bad. We see no good reason why the plaintiff should not be permitted, on the other hand, to show affirmatively that it was good. It is true that everyone is presumed to be of good character until the contrary appears, and this presumption ordinarily saves the necessity of proof. Indeed, in civil cases, as a general rule, evidence of reputation is not competent upon a question as to liability for a particular act. But whenever character is in issue the rule is different.

One charged with a crime is not obliged to rest upon a presumption of good character. *In favorem libertatis* he may prove the fact, if he can, by a weight of evidence far more effective than any mere presumption. A plaintiff in a suit for a malicious prosecution upon a criminal charge has the burden of proving that the prosecution was without probable cause. In defending against the prosecution he would have had the right to show his good reputation although his character was not attacked otherwise than incidentally by the prosecution itself. The same incidental attack upon his character necessarily appears in the suit for the malicious prosecution. To prove that the attack was originally made without probable cause, we think he should be permitted to show

his good reputation known to the defendant when the prosecution was commenced.

In several of the States there are adjudications to this effect. *Woodworth v. Mills*, 61 Wis. 44; *Blizzard v. Hays*, 46 Ind. 166; *Israel v. Brooks*, 28 Ill. 575; *Miller v. Brown*, 3 Mo. 127; *Scott v. Fletcher*, 1 Overton (Tenn.) 483. The defendant's exception to the admission of this kind of evidence must be overruled.

Testimony of statements by *Madden* and *Hewett*, to the justice who issued the warrant, made in the absence of the defendant, was rightly excluded. The statements cannot be treated as facts tending to show the plaintiff's guilt and competent as evidence for that purpose, which the defendant may be presumed to have known, even though his knowledge of them is not distinctly shown: See *Bacon v. Towne*, *ubi supra*. They are mere declarations of third persons, which do not appear to have been communicated to the defendant, and which have no bearing upon either of the questions at issue in the case.

The third exception presents a question of more difficulty. To show that the prosecution was not without probable cause, the defendant relied upon a statement of *Mrs. Madden*, communicated to him by her husband, that she, accompanied by the plaintiff and another, broke into the defendant's premises and stole his wine. It became a question for the jury to determine how far the defendant was warranted in believing her statement, and how far he did in fact believe it.

It is quite clear that it would not be competent to attack the credibility of a witness in a trial, or that he had been guilty of any unlawful or criminal act. Nothing less than proof of conviction of a crime would be admissible. But this rule rests upon considerations of public policy which forbid the introduction of evidence of particular acts, involving a trial of new and unexpected issues, for which the opposing party could not be expected to be prepared. There can be no doubt that one's known acts of misconduct, indicating his character, may properly be considered in determining his credibility.

A witness was permitted to testify that the defendant, before the complaint was made, said "that he had heard that *Mrs. Madden* had been in Dedham jail." If that statement tended to show, as against the defendant, that she was less credible than other persons, it was competent evidence upon the question whether there was probable cause for the prosecution. If it had no proper bearing upon his credibility, but at the same time indicated distrust of her on the part of the defendant, it was competent on the question whether the prosecution was malicious.

It may be argued with much force that one who should say colloquially of another, that he had been in jail, would probably mean that he had been there under such circumstances as to affect his reputation, and to indicate that he was untrustworthy. So, to say of another that one has heard that he has been in jail implies some degree of credence in the story.

The evidence in the present case seems to have been of little importance. Yet it purport-



ed to show what was in the defendant's thoughts before the complaint was made. Upon the facts disclosed we cannot say that the jury might not properly consider it.

*Exceptions overruled.*

Charles H. LORD *et al.*

v.

Ogden E. EDWARDS *et al.*

(.... Mass. ....)

1. A contract for the sale of sugar of a certain standard of test and color, to be shipped from a foreign port, is performed by delivering sugar of the required standard on board the vessel at the port of shipment, if the title then passes to the purchaser and the seller does not expressly assume any risk of damage by the perils of the sea.

2. The words, in a contract for the sale of sugar to be shipped from a foreign port, "the sugars to be thoroughly sampled and tested on arrival" will not imply a stipulation on the part of the sellers to assume any risk as to its condition or quality upon arrival at the port of destination.

(February 27, 1880.)

ON plaintiffs' exceptions. *Overruled.*

The action was contract to recover damages for an alleged breach of warranty as to the test and color of 1200 tons of Manila sugar, sold by defendants to plaintiffs. Trial was had in the Supreme Judicial Court before Allen, J., where the jury returned a verdict for defendants; and plaintiffs alleged exceptions.

NOTE.—*Sale; completion of contract by delivery.* Delivery is complete upon execution of contract. *Gatzmer v. Moyer (Pa.)* 12 Cent. Rep. 459. Where the goods are to be forwarded by a carrier, the vendor must enter them so that the carrier may be responsible for their value if lost. *Clarke v. Hutchins*, 14 East, 475. If the goods are to be delivered at a stipulated place, the vendor before suing for the price must tender them there (*Neill v. Whitworth*, 18 C. B. N. S. 435, L. R. 1 C. P. 684; unless, indeed, the vendee has refused, or put it out of his own power to complete his contract. If there be no stipulated place, it is the vendee's business to fetch them. *Glazebrook v. Woodrow*, 3 T. R. 393; *Jones v. Barkley*, Doug. 637. See *Rawson v. Johnson*, 1 East, 213; *Callonel v. Briggs*, 1 Salk. 115. Where a person buys wheat in a warehouse and leaves orders for its delivery on board the cars placed on a side track waiting transportation, it constitutes a delivery so as to transfer the title to the purchaser. *Allen v. Agce*, 15 Oreg. 551. When the delivery of the property is to be made by its shipment, delivery on board of the vessel as directed by the purchaser will, in judgment of law operate as a delivery to him; and if the property, at the time of such delivery, is in the condition of the quality which the purchaser is entitled to receive, that will constitute a performance of the agreement of sale. *Gutwillig v. Zuberbier*, 41 Hun. 351. Where the defendant gave a valid order for goods to be paid for after a particular trial and test to be made by the defendant, and the goods were forwarded and delivered upon that order, and the defendant refused to make the trial or test, the refusal could not defeat payment of the price. *Thomson-Houston Electric Co. v. Brush-Swan Electric Light & P. Co.* 31 Fed. Rep. 535. Where parties to a contract for the shipment of sugars made a special agreement as to the mode of delivery, and fixed by the agreement the amount which the owner or consignee should pay for landing and wharfinger's charges, it was held that the agreement was valid and binding on such owner & L. R. A.

The facts appear in the opinion.

Mr. Chas. Theo. Russell, Jr., for plaintiffs.

Mr. L. S. Dabney for defendants.

Morton, Ch. J., delivered the opinion of the court:

The contract between the parties is in the form of a letter written at Boston by the agents of the defendants, addressed to the plaintiffs. The material parts of it are as follows: "We have made sale to you of 1200 tons extra Manila sugars, about No. 9, D. S. in color, at 10.10 per ton f. o. b.; and we understand it is your intention to load same on The Republic on her arrival at Manila. It is further understood that the sugar is sold on a basis of 88° pol'r with 8 d per cwt per degree downward and fractions of a degree in proportion. The sugars to be thoroughly sampled and tested on arrival. In due season we shall expect satisfactory banker's credits at 6 mos. to be forwarded to our friends at Manila by cable."

Under this contract the defendants delivered free on board The Republic at Manila 1200 tons of sugar which, as the jury have found, was equal to the test and standard required in the contract, if that test and standard is to be applied to the sugar at Manila. But, upon the arrival of the ship in New York the sugar was sampled and tested and it was found that it failed to test 88 degrees by the polariscope, and was not equal in color to extra Manila sugar about No. 9 Dutch standard.

There was evidence tending to show that most cargoes of sugar coming from Manila lose some weight during the voyage and are more or less sweetened even if there is no actual contact with salt water, and that in this case the sugars were sweated and some salt water

and consignee. *Woodruff v. Havemeyer*, 7 Cent. Rep. 776, 103 N. Y. 129.

*Duties of purchaser of goods under contract of sale.* The duties incumbent on the vendee are, first, to accept the goods, and, secondly, to pay for them. *Pom. Merc. L. Smith's ed.* § 608. He has a right to inspect and compare before receiving them, and may, if prevented from doing so, rescind the contract. *Lorymer v. Smith*, 1 Barn. & C. 1; *Isherwood v. Whitmore*, 10 Mees. & W. 757, 11 Mees. & W. 347; *Toulmin v. Hedley*, 2 Car. & K. 157. If the goods were to be of a particular description they must be such as to correspond with that description. *Azamar v. Casella*, L. R. 2 C. P. 431, 677; *Tye v. Fynmore*, 3 Camp. 462. Where a contract of sale in writing requires that goods be shipped from a foreign country by the seller, the buyer is not required to take goods shipped by another person; but the requirement of shipment by the seller, being unimportant, should not be imported into the contract by construction. *Cunningham v. Judson*, 1 Cent. Rep. 274, 100 N. Y. 179. Under a contract to deliver potatoes of a certain kind and size and in good shipping order, a receipt of part by vendee in bad shipping order is not a waiver as to quality. *Hollfield v. Black*, 2 West. Rep. 601, 20 Mo. App. 328. The purchaser of goods abroad on credit, at a gross fixed price which includes cost, freight and insurance, the vendor only having to ship the goods in a specified manner, has the risk of damage at sea. *Mee v. McNider*, 12 Cent. Rep. 776, 103 N. Y. 500. If he refuses to accept the goods, the vendor having performed all conditions precedent on his part, may sue him, either specially on the contract (*Boorman v. Nash*, 9 Barn. & C. 145; *Greaves v. Ashlin*, 3 Camp. 426; *Boyce v. Warburton*, 2 Camp. 426; *Spaeth v. Hare*, 9 Mees. & W. 327; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Gragnano v. Long*, 4 Barn. & C. 219; *Gower v. Von Dedalzen*, 3 Bing. N. C. 717; *Stanton v. Wood*, 18 Q. B. 638); or for goods bargained and sold. *Hankey v. Smith*, Peake. 42, note.

penetrated through the deck of the ship; that they were exposed to wet when discharged, and thereby lost in strength and color.

The only question now presented to us is whether the standard guaranteed in the contract is the standard and quality of the sugar as it was upon its delivery on board the ship in Manila, or the standard in New York after its arrival. The question is not free from difficulty; but upon the whole we are of opinion that, as was ruled at the trial, the defendants fulfilled their contract when they delivered at Manila, sugar of the color and strength specified therein, and that they are not responsible for any risks of the voyage which caused a deterioration of the sugar. Both parties agree, and it is clear that upon the delivery of the sugar on board the ship and the payment for it the property in it passed to the plaintiff.

It is equally clear that the defendants did not assume any risks of damage to the goods by the perils of the sea. It was a sale of certain goods of a specified quality at Manila and not at New York. The nature and scope of the transaction being that of a completed sale of goods which were to be exposed to the perils of the sea and other risks of a long sea voyage, and which were taken entirely out of the custody or oversight of the sellers, it is not to be presumed that they assume any risks of its

future condition, unless there be an express and clear stipulation to that effect.

The plaintiffs contend that such a stipulation is implied in the words, "the sugar to be thoroughly sampled and tested on arrival." This is certainly not an express stipulation that the sugar, upon arrival in New York, shall be of a specified quality. It cannot be claimed under this clause that if the goods were damaged by a peril of the sea, the defendants would be responsible. It does not import a warranty against damage by perils of the sea; and we cannot see that it necessarily or reasonably imports a warranty against damage from wet weather or from sweating or other causes of deterioration operating during a long voyage. The clause in question seems to be an independent clause, inserted probably because it was thought important or desirable that the parties should know the condition of the sugar upon its arrival. Such knowledge might be important in case of any controversy as to the condition of the sugar when shipped. But whatever the reasons for its insertion we cannot reasonably construe it as importing a stipulation which is contrary to the spirit and scope of the contract which contemplated a sale and delivery at Manila.

*Receptions overruled.*

## INDIANA SUPREME COURT.

### LOUISVILLE, NEW ALBANY & CHICAGO R. CO., *Appt.*,

v.

James BUCK, Admr. of George H. Bennett, Deceased.

(....Ind....)

#### 1. In an action for damages for causing the death of a person, a general averment

**NOTE.**—*Damages for death caused by negligence; action statutory.* In England and Pennsylvania the action is given for the benefit of the immediate family of the deceased, to the exclusion of the next of kin, and includes only husband and wife, parents and children. Pa. R. Co. v. Keller, 67 Pa. 800. As the remedy exists, and is created only by statute, it follows that it can only be pursued in the mode and under the conditions specified therein. 3 Wood, Railway Law, 1531. If the statute provides that the action shall be brought by the executor or administrator of the deceased, no other person can maintain an action; Wilson v. Bumstead, 12 Neb. 1; Nash v. Tousey, 28 Minn. 5. And if the damages recovered are for the benefit of the husband, widow, parent or next of kin, the declaration must allege the fact, and the existence of such beneficiary, as, if no beneficiary survives the deceased, no recovery can be had. Schwarz v. Judd, 28 Minn. 371. Where the statute is for the benefit of the husband, widow, parents, and the children of the parents killed, only one action can be maintained. Houston & T.C. R. Co. v. Moore, 49 Tex. 31; Galveston, H. & S. A. R. Co. v. LeGierse, 51 Tex. 189. In order to uphold an action, the injury must have been inflicted under such circumstances that the deceased, if he had survived the injury, could have maintained an action. Quincy Coal Co. v. Hood, 77 Ill. 63. There can be no recovery of substantial damages in the absence of any evidence of any considerable expense, loss or damage incurred between the time of the injury and the death. Tully v. Fitchburg R. Co. 134 Mass. 499. The fact that death and the injury were not simultaneous must be proved by the plaintiff; and

that his widow and child, for whom the action is prosecuted, sustained damages in a specified sum, is not insufficient in respect to their pecuniary loss, where the complaint alleges that the deceased was in the employ of the defendant, which was a railroad company, as a brakeman, that he left a widow and one child four years old; as it is an unavoidable inference that he was in the vigor of manhood and at the time engaged in earning money for their support.

#### 2. A railroad company cannot defend against

it seems that survival must be shown by something more than a mere spasmodic twitching of the muscles of the body, which is consistent with the extinction of life. Hearing v. N. Y. & R. R. Co. 13 Barb. 9; 3 Wood, Railway Law, 1531. The same rules of evidence prevail that would if the action was brought by the deceased himself, and the negligence of the company must be established as fully in the one case as in the other. State v. Grand Trunk R. Co. 58 Maine, 176; Hendricks v. Western & A. R. Co. 52 Ga. 467; Louisville & N. R. Co. v. Conner, 2 B. & L. 882; Baltimore & O. R. Co. v. Whittington, 30 Gratt. 805; Safford v. Drew, 8 Duer, 627; Woodward v. Chicago & N. W. R. Co. 23 Wis. 400; State v. Consolidated European & N. A. R. Co. 67 Maine, 479; Com. v. Eastern R. Co. 5 Gray, 473; Terry v. Jewett, 17 Hun, 396; Creed v. Pa. R. Co. 86 Pa. 159; 3 Wood, Railway Law, 1535.

*Duty of master to provide safe machinery, implements, etc.* It is the duty of the master to provide his servants with a safe working place and with safe machinery and appliances, and to keep them in repair. Indianapolis & St. L. R. Co. v. Watson, 12 West. Rep. 236, 114 Ind. 20; Gillen v. National Sheet Metal Roofing Co. 46 Hun. 562, 12 N. Y. S. R. 506; Rice v. King Phillip Mills, 4 New Eng. Rep. 59, 144 Mass. 229; Atchison etc. R. Co. v. McKee, 37 Kan. 552; Thorn v. New York City Ice Co. 46 Hun. 497, 11 N. Y. S. R. 845; Nelson v. Allen Paper Car Wheel Co. 29 Fed. Rep. 840. And the master should exercise care in furnishing and maintaining reasonably safe machinery and appliances, and should give notice to the employé of defects unknown to him. Hammond v. Schweitzer, 11 West. Rep. 621,

an action for negligently causing the death of a brakeman by failure to furnish safe appliances, on the ground that he was killed on Sunday while working in violation of the Sunday Law.

2. A railroad company is liable for negligence in permitting a car to be used from which the reach rod was absent from the brake beam in front of the wheels, causing the beam to hang lower and more forward than it otherwise would have done, making it dangerous to brakemen going between cars to uncouple them, where the absence was known, or might have been known, to the company.

3. A brakeman on a railroad train is not chargeable with contributory negligence in going between cars to uncouple them, by reason of the absence of the reach rod from the brake beam on one of them, which was not known to him and was not obvious, and could not have been discovered except by stooping down and looking under the car.

4. Where the material facts to show the liability of a railroad company were a hidden or latent defect in a car by the absence of a reach rod from a brake beam, which increased the ordinary and obvious perils of the service of a brakeman, and its agency in producing an injury, a special verdict which shows the manner in which the accident and injury occurred and the condition of the car and appliances, need not be required to describe the appliances.

5. If a special verdict is silent concerning any of the facts in issue the court will assume, upon motion for a new trial, that the party upon whom rested the burden of proof in respect to those facts failed to prove them.

7. Failure of a special verdict to find some facts in issue will not necessarily render it objectionable, if the failure to find the facts was not contrary to the evidence.

8. Declarations which are the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, are admissible as part of the act or transaction itself.

9. Declarations of a brakeman within two minutes after he was thrown under a car while attempting to uncouple it, made while remaining in presence of the train and of the alleged defective machinery, which he declared was instrumental in producing his hurt which caused his death in about six hours afterwards, and before he had been removed from the spot, are admissible as part of the *res gestæ*.

(January 10, 1889.)

**A PPEAL** by defendant, from a judgment of the Circuit Court of Benton County (La Rue, *Special Judge*), in favor of the plaintiff in an action for damages for the death of plaintiff's intestate, alleged to have been caused by defendant. *Affirmed*.

The case is stated in the opinion.

*Messrs. Geo. W. Easley, Geo. W. Friedley and Geo. E. Eldridge* for appellant.  
*Messrs. J. R. Coffroth, W. B. Austin,*

113 Ind. 246; *Tabler v. Hannibal & St. J. R. Co.* 11 West. Rep. 462, 68 Mo. 79. As to the care required of the master, see *Mo. Pac. R. Co. v. Lewis, ante*, 67; *Griffin v. Boston & A. R. Co.* 1 L. R. A. 698.

*Liability for neglect.* A neglect, by the master, of his duty to use ordinary care to provide safe machinery is an actionable wrong. *Krueger v. Louisville etc. R. Co.* 9 West. Rep. 249, 111 Ind. 51. It is liable to its servants for injuries resulting from defects which ought to have been known and could have been remedied. *Guttridge v. Mo. Pac. R. Co.* 13 West. Rep. 644, 94 Mo. 468. A railroad company is liable for an injury to a brakeman, caused by the defective condition of the timbers of which a car was composed, whereby the car was broken apart upon collision with stationary cars, the force of which collision was not sufficient to have broken the car if its timbers had been sound. *Parsons v. Mo. Pac. R. Co.* 12 West. Rep. 615, 94 Mo. 286. In an action by the widow of a switchman who was killed while climbing upon the switch engine, by the breaking of a rod alleged to have been negligently allowed to get out of repair, it is not error for the court to instruct the jury that if defendant was negligent plaintiff should recover such damages as the jury deem a fair and just compensation, having reference only to pecuniary injuries, other instructions negating the right to recover if deceased was guilty of contributory negligence. *Chicago, etc. R. Co. v. Dowd*, 2 West. Rep. 882, 115 Ill. 659. See *Sherman v. Menomonee River Lumber Co.* 1 L. R. A. 173.

*Contributory negligence of servant not presumed.* Contributory negligence is a defense which must be affirmatively proved by the defendant. The party injured is presumed to have been duly careful until the contrary is proved. *Little Rock & Ft. S. R. Co. v. Bubanks*, 48 Ark. 460. The question of contributory negligence, in an action for damages against a railroad company, is generally a question for the jury under proper instructions; and when so submitted the verdict is conclusive on that point. *Herbert v. Northern Pac. R. Co.* 3 Dak. 88.

*Recovery defeated by violation of Sunday Law; Massachusetts rule.* In Massachusetts, and some of the other States, under statutes prohibiting labor and all secular employment upon the Sabbath, it is held that no recovery can be had of a railway company for an injury received by a passenger upon

its trains upon that day, or by an employé who is injured while engaged in running its cars. *Day v. Highland St. Co.* 135 Mass. 113; *Com. v. Sampson*, 97 Mass. 407; *Com. v. Josselyn*, 1d. 411; 2 Wood, *Railway Law*, 1245. An employé on a train running on Sunday, previous to Statute of 1884, chap. 37, unless the running was a work of necessity or charity, could not recover damages for injury to his person. *Read v. Boston & A. R. Co.* 1 New Eng. Rep. 300, 140 Mass. 199; following *Day v. Highland St. R. Co.* 135 Mass. 113. The illegal act in working upon the Lord's Day prevents the maintenance of a suit for damages for injuries sustained in doing the work. *McGrath v. Merwin*, 112 Mass. 467. It has been uniformly held in numerous decisions, from *Bosworth v. Swansey*, 10 Met. 363, to *Davis v. Somerville*, 128 Mass. 504, 35 Am. Rep. 399, that a person traveling on the Lord's Day in violation of law cannot recover in an action against a city or town for injuries sustained from a defect in a highway. 2 Wood, *Railway Law*, 1246. The act of traveling in violation of law on the Lord's Day, with no evidence of any other negligence, has been held to be necessarily contributory to the injury sustained by the plaintiff, in *Stanton v. Metropolitan R. Co.* 14 Allen, 485; *Smith v. Boston & M. R. Co.* 130 Mass. 490; *Lyons v. Desotelle*, 124 Mass. 387; *Buohor v. Fitchburg R. Co.* 131 Mass. 156. There can be no recovery from the owners of a steam boat for running down a yacht upon the Sabbath, unless it was wantonly or maliciously done by those in charge. 2 Wood, *Railway Law*, 1248, citing *Wellace v. Merrimack River Nav. & Ex. Co.* 134 Mass. 95.

*Exception to rule.* Where the work done was fairly and justly a work of necessity, and injury was sustained while in its progress and operation, the case was excepted from the operation of the statute. *Flagg v. Millbury*, 4 Cush. 243; *Powhatan Steamboat Co. v. Appomattox R. Co.* 65 U. S. 24 How. 247 (16 L. ed. 682); *Johnson v. Midland R. Co.* 4 Exch. 367. The pursuit of ordinary avocations and the transporting of a traveler, or the pursuit of such employments as must result from the necessary practical wants of trade are distinguishable. 2 Wood, *Railway Law*, 1247; citing *State v. Baltimore & O. R. Co.* 15 W. Va. 352; *Smith v. N. Y. S. & W. R. Co.* 46 N. J. L. 7. The transmission on Sunday of a telegram announcing the death of the sender's wife and child, and soliciting "help" was a work of necessity and charity. 2 Wood, *Railway Law*, 1248,

2 L. R. A.

**T. A. Stuart and E. P. Hammond, for appellee:**

If appellant would not have been liable if the injury causing the death of the deceased occurred on Sunday unless it appeared that he was engaged in a work of necessity or charity, the burden would have rested upon appellee to show that he was engaged in such work; and the failure of the jury to so find was equivalent to a finding that he was not so engaged.

*Stitz v. Sadler*, 7 West. Rep. 412, 109 Ind. 254.

When a defect causing an injury to an employé is shown to exist, it then devolves upon the master to show that in the selection and operation of the machinery which caused or contributed to the accident, he used due care, prudence, skill and watchfulness.

*Tuttle v. Chicago, R. I. & P. R. Co.* 48 Iowa, 286; *Brann v. Chicago, R. I. & P. R. Co.* 58 Iowa, 595, 28 Am. Rep. 243.

The duty of a railroad company as to the frequent inspection of machinery applies to draw bars (*Whitcomb v. Wisconsin & M. R. Co.* 58 Wis. 408, 12 Am. & Eng. R. R. Cas. 214); also to couplings.

*Lawless v. Conn. River R. Co.* 136 Mass. 1, 18 Am. & Eng. R. R. Cas. 96; *Toledo, W. & W. R. Co. v. Fredericks*, 71 Ill. 294; *Ellis v. N. Y. L. E. & W. R. Co.* 95 N. Y. 546; *Atchison, T. & S. F. R. Co. v. Ledbetter*, 35 Kan. 320; *Atchison, T. & S. F. R. Co. v. Wagner*, 33 Kan. 660.

If the declaration is immediately influenced

and suggested by the principal transaction and follows it so closely as to leave no reasonable ground for suspicion that it was framed for future use, it is competent evidence.

*Lund v. Tyngsborough*, 9 Cush. 41; *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 888; *Whart. Ev. §§ 258-267*; *Greenl. Ev. § 108*. See *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185, 190; *Com. v. McPike*, 3 Cush. 181, 50 Am. Dec. 727; *Travelers Ins. Co. v. Mosley*, 75 U. S. 8 Wall. 397, 403 (19 L. ed. 437, 439); *People v. Simpson*, 48 Mich. 474, 479; *Kirby v. Com.* 77 Va. 681, 48 Am. Rep. 747; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *State v. Horan*, 82 Min. 894, 50 Am. Rep. 589; *Keyser v. Chicago & G. T. R. Co.* (Mich.) 10 West. Rep. 646; *Grand Rapids & I. R. Co. v. Diller*, 7 West. Rep. 244, 110 Ind. 223; *State v. Ah Loi*, 5 Nev. 99; *Hanover R. Co. v. Coyle*, 55 Pa. 396, 402; *Durkee v. Central Pac. R. Co.* 69 Cal. 533; *Lambert v. People*, 29 Mich. 71; *Hill v. Com.* 2 Gratt. 594; *Jordan v. Com.* 25 Gratt. 945; *Harriman v. Stowe*, 57 Mo. 97; *Entwistle v. Feigner*, 60 Mo. 215; *Elkins v. McKean*, 79 Pa. 501; *Hart v. Powell*, 18 Ga. 639; *Driscoll v. People*, 47 Mich. 413; *Cassidy v. New York Cent. & H. R. R. Co.* 78 N. Y. 518; *McLeod v. Gt. N. R. Co.* 80 Ky. 399; *Little Rock M. R. & T. R. Co. v. Leerecht*, 48 Ark. 338.

**Mitchell, J.**, delivered the opinion of the court:

Buck, as administrator of the estate of George

Gulf etc. R. Co. v. Levy, 39 Tex. 542. So the running of railway trains on Sunday has been held a work of necessity. *Com. v. Louisville & N. R. Co.* 80 Ky. 291.

*Doctrine repudiated in other States.* The Massachusetts rule has been opposed in other States. See Bigelow v. Reed, 51 Maine, 335; Hamilton v. Goding, 55 Maine, 423; Baker v. Portland, 58 Maine, 199; Johnson v. Mo. Pac. R. Co. 18 Neb. 690; Woodman v. Hubbard, 35 N. H. 67; Norris v. Litchfield, 35 N. H. 271; Corey v. Bath, 35 N. H. 330; Kerwacker v. Cleveland, C. & C. R. Co. 3 Ohio St. 172. The doctrine that a person by traveling in a railway car upon the Sabbath is guilty of contributory negligence—as, if he had not been traveling contrary to the statute, he would not have been injured—is generally repudiated by the courts even in those States where similar statutes exist. *Baldwin v. Barney*, 12 R. I. 302; 2 Wood, Railway Law, 1248. Carriers of passengers having their boats in use on Sunday, and receiving persons on board, are liable for personal injuries suffered by them from the negligence of the carrier's servants notwithstanding the statutes respecting travel on Sunday. *Landers v. Staten Island R. Co.* 13 Abb. Pr. N. S. 338; *Carroll v. Staten Island R. Co.* 65 Barb. 32, 1 Lacey, Railway Dig. 735. One violating the statute prohibiting travel on Sunday is not without the protection of the law. *Carroll v. Staten Island R. Co.* 58 N. Y. 134. An action against a common carrier for damages for injuries inflicted through his negligence is not founded on contract, but upon a breach of duty to convey and carry safely and securely. *Bretherton v. Wood*, 3 Brod. & B. 54. The duty of a common carrier does not result alone from the consideration paid for the service. It is imposed by law even when the service is gratuitous. *Phila. & R. R. Co. v. Derby*, 55 U. S. 14 How. 483 (14 L. ed. 502); *Allen v. Sewall*, 2 Wend. 338; *Bank of Orange v. Brown*, 3 Wend. 158; *Nolton v. Western R. Co.* 15 N. Y. 444; *Gillenwater v. Madison & L. R. Co.* 5 Ind. 339; *Farwell v. Boston & W. R. Co.* 4 Met. 49. In New York a person who was injured while traveling on the Sabbath, by reason of defects in the streets, was held entitled to recover therefrom from the municipal corporation whose duty it was to keep the streets in repair. *Carroll v. Staten Island R. Co.* 58 N. Y. 136; *Platz v. Cohoes*, 80 N. Y. 219; *Wood v. Erie R. Co.* 72 N. Y. 196; *Merritt v. Earle*, 29 N. Y. 115. See also *Phila. W. & B. R. Co. v. Phila. & H. de G. Steam Towboat Co.* 64 U. S. 23 How. 209 (16 L. ed. 433); *Mohney v. Cook*, 26 3 J. R. A.

Pa. 342; *Norris v. Litchfield*, 35 N. H. 271; *Baker v. Portland*, 58 Maine, 199, 4 Am. Rep. 274; *Sutton v. Wauwatosa*, 29 Wis. 21; *Kerwacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172. A traveler has the right to pass over a town-line road on Sunday, as well as on any other day, for any lawful purpose; and the duty of the township in case of injury, through its neglect, to persons or property, is the same on that day, under such circumstances, as on any other, under the statute. *Sharp v. Evergreen* (Mich.) 11 West. Rep. 549.

*Violation of Sunday Law not a defense to an action for damages for breach of duty.* Wrong-doers, though answerable to the State or parties injured by them for their own acts, are entitled to the protection of the laws against the wrongful acts or culpable negligence of others. *Carroll v. Staten Island R. Co.* 58 N. Y. 136; *Phila. W. & B. R. Co. v. Lehman*, 56 Md. 200; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 130. The fact that one sustaining an injury by the negligent act of another may have been, at the time of such injury, acting in disobedience of the Sunday Laws of the State, will not prevent recovery from one whose negligent act was the proximate cause of such injury. *Louisville, etc. R. Co. v. Frawley*, 7 West. Rep. 44, 110 Ind. 18. Even upon the supposition that the plaintiffs were violating the law in having their cattle transported on Sunday, the defendant could not avail itself of such infraction of the law by the plaintiffs, as a defense to an action for the consequences of a wrong or negligence of its own. *Phila. W. & B. R. Co. v. Phila. & H. de G. Steam Towboat Co.* 64 U. S. 23 How. 209 (16 L. ed. 433); *Mohney v. Cook*, 26 Pa. 342; *Sutton v. Wauwatosa*, 29 Wis. 21; *Bird v. Holbrook*, 4 Bing. 628. The fact that the accident causing death took place on Sunday while the defendants were violating the law in carrying passengers is not a defense on the ground that the intestate was *particeps criminis*. 2 Wood, Railway Law, 1249. Although a collision with an obstruction took place on Sunday, and a Statute of Maryland—where it occurred—forbids persons "to work on the Lord's Day," and the master and mariner of a ship or steamboat are liable to the penalty of the Act for commencing their voyage from a port in Maryland on Sunday, defendant cannot protect itself for that reason, from paying the damages suffered in consequence of the obstruction, for the existence of which it is responsible. *Phila. W. & B. R. Co. v. Phila. & H. de G. Steam Towboat Co.* 64 U. S. 23 How. 209 (16 L. ed. 433).

H. Bennett, deceased, commenced suit against the Louisville, New Albany & Chicago Railway Company, alleging that the company had wrongfully caused the death of the decedent, to the damage of his surviving widow and child.

The complaint was in three paragraphs. It is charged in the first two paragraphs that the intestate was in the employ of the railway company as brakeman, and that he was fatally injured while uncoupling cars, on account of dangerous and defective appliances and machinery which the company negligently supplied. The same facts, substantially, were stated in the third paragraph, with the addition that the accident and fatal injury to the plaintiff's intestate was caused by the careless and negligent habits and by the incompetency of the engineer who had control of the engine at the time the accident happened, and that the incompetency and negligent habits of the engineer were known to the company and unknown to the intestate.

No question is made as to the sufficiency of the complaint, except it is urged that it does not sufficiently appear by any averment therein that the widow or child of the decedent sustained damage in any wise on account of the defendant's negligence.

The averments in the complaint relevant to the point thus made are that Bennett was in the employment of the defendant as brakeman at the time of his death, and that he left surviving him, as his next of kin and only heirs, his widow, Fidella J. Bennett, and his daughter, Longretta May Bennett, both of whom are still living—the latter being four years of age. It is also averred that "Said administrator brings this action for the use and benefit of said widow and child, who, by reason of the death of said decedent, as aforesaid, have sustained damages in the sum of \$10,000."

For the appellant it is insisted that the general averment that the widow and child of the decedent had sustained damages in a specified sum was not sufficient, but that the pecuniary loss, either present or prospective, resulting to them from the intestate's death should have been specially pleaded. *Reagan v. Chicago etc. R. Co.* 51 Wis. 599, is relied on to sustain the view thus contended for.

Without pointing out the distinction between the case cited and that under examination in respect to the question involved, it is sufficient to say it appears in the complaint in the present case that the decedent was at the time of his death in the employ of the railroad company as a brakeman, and that he left a widow and one child four years old. It is an unavoidable inference, therefore, that he was in the vigor of manhood, and that he was at the time engaged in earning money for the support of his wife and child. *Kelley v. Chicago etc. R. Co.* 50 Wis. 881.

Section 284, Revised Statutes 1881, gives a right of action to the personal representative for the benefit of the widow and children or next of kin of one whose death has been caused by the wrongful act or omission of another, provided the former could have maintained an action against the latter had he lived. While there is some discord in the decisions of courts in respect to the right to maintain the action,

even for nominal damages, without averring and proving actual pecuniary loss by those for whose benefit the suit is brought, there can be no doubt but that, within the rule generally prevailing, the law will imply substantial pecuniary loss in some amount to the wife and child from the death of one who sustained the relation of husband and father to them, and who was at the time presumably receiving wages, and who was therefore possessed of the ability to discharge his obligation to support those dependent upon him. *Atchison etc. R. Co. v. Weber*, 83 Kan. 543; *Houghkirk v. Delaware & H. Canal Co.* 93 N. Y. 219; 1 Shearm. & Redf. Neg. 4th ed. § 187.

Whatever the rule may require as applied to other cases, and in respect to the quantum or character of proof on the subject of pecuniary loss, there can be no doubt but that a general averment of damages in a case like the present is sufficient as against a demurrer to the complaint. It may be well to observe here, as applicable to this question, which is presented in another aspect later on in the record, that no precise rule for estimating the loss recoverable under the statute can be laid down. When the relation of the party whose death has been caused, to those for whose benefit the suit is being prosecuted, has been shown, and his obligation, disposition and ability to earn wages or conduct business, and to care for, support, advise and protect those dependent upon him, the matter is then to be submitted to the judgment and sense of justice of the jury. *Howard Co. v. Legg*, 98 Ind. 523; *Tilley v. Hudson River R. Co.* 29 N. Y. 282; *Castello v. Landwehr*, 28 Wis. 522.

The jury returned a special verdict, which so far as they are material to the questions for decision, exhibited the following facts:

The deceased, a man about thirty years of age, in good health, and of industrious habits, was in the employment of the defendant railway company as brakeman on a freight train. On Sunday night, November 25, 1883, the train of which he was one of the crew left Michigan City for LaFayette. Between 9 and 10 o'clock the train was stopped at the crossing of the Pan Handle Railroad for the purpose of taking on more cars. It was part of the duty of the decedent to couple and uncouple cars which were to be attached to or detached from the train. Soon after the train stopped, he went in between the engine and the car attached to it for the purpose of uncoupling the car from the engine. The car was loaded with lumber, and belonged to the defendant company, but the decedent had never seen it until after it was loaded, when starting from Michigan City. The reach rod which, when properly adjusted, held the brake beam in place, was, and had been for several days, absent from the brake beam, in front of the wheels on the car next the engine. The absence of this rod was unknown to the decedent, but the jury find that it was or might have been known to the defendant. Its absence caused the beam to hang lower and more forward than it otherwise would have done; but the fact that the rod was gone was not discoverable except by one stooping down and looking under the car.

While attempting to uncouple the car, being for some reason unable to get the coupling pin

out of the draw bar, the decedent held the pin up as far as he could get it, and then signaled the engineer to move the engine forward. The engineer obeyed the signal, but immediately, and without warning, reversed the lever, and threw the engine back, crowding the decedent against the car, and then again moved forward. While so crowded back, and before he could recover or extricate himself from his position, the decedent's feet were caught by the defectively attached brake beam, and he was thrown under and run over by the car, which was moving forward. In this way he received injuries which are particularly described, and which resulted in his death the following morning. It was found that the decedent left a widow and child, as alleged in the complaint, and that they were damaged by his death in a specified sum. There was judgment for the plaintiff accordingly.

The appellant insists that the judgment ought to be reversed, and urges as one of the reasons that the jury found that the injury which resulted in the intestate's death was received on Sunday, while he was engaged at common labor in pursuance of a contract with the railway company, and that it was not made to appear that the work about which he was engaged was a work of necessity.

We had occasion to consider this question in *Louisville Railway Company v. Frawley*, 7 West. Rep. 44, 110 Ind. 18, where it was presented in substantially the same manner as in the present case. Our conclusion there was that a person injured by the negligent omission of another to perform a legal duty would not be denied a recovery even though it appeared that the injured person was, at the time of receiving the injury, acting in disobedience of his collateral obligation to the State, which required of him the observance of the Sunday Law. If the railway company violated its duty by furnishing machinery and appliances which it knew were defective, the danger to an employé who was required to use the appliances in ignorance of their defective condition, was the same on one day as on another. That they were being used on Sunday rather than on Monday neither contributed to, nor was it the efficient cause of, the injury which gave rise to this action; nor can the railroad company now interfere and become the champion of the Sunday Law as an excuse for its wrong, or to defeat a recovery. *Button v. Wauwatosa*, 29 Wis. 28.

It is quite true that a plaintiff will in no case be permitted to recover when it is necessary for him to prove his own illegal act or contract as a part of his cause of action, or when an essential element of his cause of action is his own violation of law. *Hot v. Green*, 73 Pa. 198; *Coppel v. Hal*, 74 U. S. 7 Wall. 558 [10 L. ed. 248]; *Steele v. Burkhardt*, 104 Mass. 59; *McGrath v. Merwin*, 112 Mass. 467.

But where he can prove his cause of action without proving that he was violating the law, even though it appears incidentally that he was at the time acting in disobedience of some statute, unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery may be sustained nevertheless. *Cooley, Torts*, 2d ed. 178, 179.

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Whoever travels about from place to place for the purpose of gaming, with cards or otherwise, acts in violation of a criminal statute. It would hardly be claimed that a recovery against a common carrier would be denied if it appeared incidentally in evidence that a passenger injured through the carrier's negligence was traveling in violation of the statute against gaming. Why should a brakeman who is required to work in violation of the Sunday Law be denied a recovery? The gist of the action in the present case is the negligent failure of the railway company to furnish safe and suitable appliances, whereby the death of the plaintiff's intestate was wrongfully caused while he was in the company's service as a brakeman. The contract of employment and the time when the injury occurred were mere incidents to, and were in no respect the foundation of, the action. *Louisville, N. A. & O. R. Co. v. Frawley*, *supra*; *Frost v. Plumb*, 40 Conn. 111, 13 Am. Law Reg. N. S. 537.

It may be conceded that the decisions in some of the States are not all consistent with the conclusions above stated; but in our opinion these conclusions are in accord with the better view of the subject, and have the support of the weight of authority.

The defendant presented to the court forty-three separated instructions, and asked that they be given the jury. Of these, twenty were given and the balance refused. The refusal to give these instructions is made the ground of complaint. It has frequently been ruled that where the jury has been required to return a special verdict, general instructions as to the law of the case are not proper. The court should explain to the jury distinctly what facts are material to be found within the issues, and give them such instructions as will enable them to find and settle the facts, so that the law may be applied to the facts found by the court. *Louisville, N. A. & O. R. Co. v. Frawley*, *supra*; *Louisville, N. A. & O. R. Co. v. Flanagan*, 12 West. Rep. 190, 113 Ind. 488.

Within this rule, an examination of the instructions given by the court leaves no doubt that the jury were adequately directed in respect to the facts necessary to be covered by the special finding. Leaving out of view all of the facts found relating to the alleged negligence and incompetency of the engineer, and eliminating from the special verdict everything in the nature of conclusions of law, and it seems to us the facts found make a case justifying a recovery. They show that the railroad company failed in its obligation to supply its employé with safe and suitable appliances and machinery to do the work required of him, and that it required him to use machinery which it knew to be defective. This established the company's negligence. The special verdict also shows that the defect in the machinery was unknown to the decedent; that it was not obvious, and could not have been discovered except by stooping down and looking under the car. This showed that the employé was not guilty of contributory negligence in going in between the cars to uncouple them, notwithstanding the defective condition of the appliances. It is settled beyond controversy that railroad employés are presumed to understand the nature and hazards of the employment when

they engage in the service, and that they assume all the ordinary risks and obvious perils incident thereto. Such risks are presumably within the employé's contract of service. *Jennet Electric Light & P. Co. v. Murphy*, 18 N. E. Rep. 80 (present term).

This does not mean, however, that the latter may not repose confidence in the prudence and caution of the employer, and rest on the presumption that he has also discharged his duty by supplying machinery free from latent defects which expose the employé to extraordinary and hidden perils. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Hough v. Texas & P. R. Co.* 100 U. S. 218 [25 L. ed. 612].

While the employer may expect that an employé will be vigilant to observe, and that he will be on the alert to avoid, all known and obvious perils, even though they may arise from defective tools and machinery (*At's Engine Works v. Randall*, 100 Ind. 293), yet the latter is not bound to search for defects, or inspect the appliances furnished him to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master, and unless the defects are such as to be obvious to anyone giving attention to the duties of the occasion, the employé has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished. *Braubury v. Goodwin*, 6 West. Rep. 500, 108 Ind. 286; *Litt's Rock etc. R. Co. v. Leverett*, 48 Ark. 333; *Fl. Wayne, J. & S. R. Co. v. Gildersleepe*, 38 Mich. 138; *Hughes v. Winona & St. P. R. Co.* 27 Minn. 187; *Wood, Master & S.* § 376.

The facts found very clearly furnish a basis for the application of the foregoing principles; and these principles, when applied to the facts found, sustain the judgment of the court upon the special verdict. Many of the instructions asked would, if they had been given, necessarily have required the jury to return very much of the evidence as part of their special verdict, while others would have required the statement of mere conclusions which the jury could not properly draw. For example, in one of the instructions the court was asked to require the jury to find what was the proximate cause of the death of Bennett. In another, the court was asked to require the jury to describe in their verdict the appliances attached to the car for the purpose of braking it. The facts showing the manner in which the accident and injury occurred, and the condition of the car and the appliances attached having been particularly found and set out in the special verdict, it became a question for the court to determine whether or not the intestate's death was proximately caused by the negligent omission of duty on the part of the railroad company.

We are unable to perceive how the court would have been aided in arriving at a correct conclusion, if the jury had been required to describe the appliances in their verdict. The material facts in that connection were that there inhered in the appliances a hidden or latent defect, which increased the ordinary and obvious perils of the service in which the intestate was engaged, and which made them an efficient agency in producing the fatal injury.

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We have examined the other instructions asked and refused, and, without commenting upon them in detail, we need only say the court committed no error in refusing them.

It is contended that the court erred in overruling a motion made by the appellant for a *venire de novo*. In this we do not concur. It must now be accepted as settled that a special verdict will not be considered as so uncertain, ambiguous, or defective as that no judgment can be rendered thereon, because some of the issues in the case are not affirmatively or expressly settled or determined thereon one way or the other. If the verdict is silent concerning any of the facts in issue, the court will assume, upon a motion such as that under consideration, that the party upon whom rested the burden of proof in respect to those facts failed to prove them. If the failure to find the facts was contrary to the evidence, it may furnish a sufficient reason for a new trial; but the failure does not render the special verdict objectionable, nor does it afford any ground for a *venire de novo*. *Glantz v. South Bend*, 3 West. Rep. 648, 106 Ind. 305; *Deeter v. Sellers*, 102 Ind. 458; *Mitchell v. Colglazier*, 4 West. Rep. 476, 106 Ind. 464.

It may be conceded that there are some merely evidentiary facts found in the special verdict, and that it also embraces many statements which are essentially conclusions of law. Notwithstanding all this, it seems clear to us that, stripped of all these, the verdict is yet sufficient to lead up to and support the judgment, and that the motion cannot be successfully urged on that account.

Questions are made and discussed concerning the propriety of rulings of the court in admitting evidence tending to show that the engineer who had the engine in charge at the time the decedent was injured was negligent and incompetent. According to our view of the case, there was no reversible error in any of these rulings, for the reason that the special verdict sustains the judgment, even though all the facts pertaining to the competency or conduct of the engineer be eliminated from the case. While we have discovered no error in the rulings, we do not regard them as of sufficient materiality to justify us in prolonging the opinion by setting them out separately, and examining them in detail.

The only other question which requires consideration relates to the ruling of the court in admitting in evidence certain declarations of the decedent which were made immediately after he was injured, and substantially while he was being extricated from under the wheels of the car which had passed over him. The conductor of the train testified that he was on the caboose when he received notice that the decedent was hurt, and that he immediately ran forward and found him under the rear end of the second car from the engine.

The following is the testimony of the conductor upon which the objection is predicated: "When I took him out I asked him, 'How did this happen?' He told me that he was uncoupling the engine from the first car, but could not get the pin clear out of the draw bar, and had to hold it up, and hallooed to the engineer to go ahead. He started, and by some cause 'threw the engine over' and came back against



him before he could get out, and crowded him back against the car, and the brake beam, catching his leg, pulled him down, and the cars ran over him."

It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gesta*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said: that declarations which are the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself. *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185; *Lund v. Tyngsborough*, 9 Cush. 41; *Com. v. McKee*, 3 Cush. 181; *Augusta Factory v. Barnes*, 72 Ga. 217; *Travelers Ins. Co. v. Mosley*, 75 U. S. 8 Wall. 397 [19 L. ed. 437]; *People v. Simpson*, 48 Mich. 474; *Keyser v. Chicago & G. T. R. Co.* 10 West. Rep. 646; *Kirby v. Com.* 77 Va. 681; *Galveston v. Barbour*, 62 Tex. 172; *State v. Horan*, 82 Minn. 394; *Little Rock etc. R. Co. v. Leavitt*, *supra*; *State v. Ah Loi*, 5 Nev. 99; *Hanover R. Co. v. Coyle*, 55 Pa. 396-402; *Durkee v. Central Pac. R. Co.* 69 Cal. 533; *Lambert v. People*, 20 Mich. 71; *Hill v. Com.* 2 Gratt. 594; *Jordan v. Com.* 25 Gratt. 945; *Harriman v. Stowe*, 57 Mo. 97; *Entwistle v. Feigener*, 60 Mo. 215; *Elkins v. McKean*, 79 Pa. 501; *Ilart v. Powell*, 18 Ga. 639; *Driscoll v. People*, 47 Mich. 413; *Casey v. N. Y. Cent. & H. R. R. Co.* 78 N. Y. 518; *McLeod v. Gintner*, 80 Ky. 399; 1 Whart. Ev. §§ 258-267.

Any other rule would, in many instances, operate to defeat the accomplishment of justice by excluding evidence of the most trustworthy character. While some of the cases cited above carry the doctrine to its extremest length, they all illustrate and apply the general principles consistent with the conclusions we have heretofore enunciated.

The declarations under consideration were made within not to exceed two minutes of the occurrence, while the declarant remained in the presence of the train, and the alleged defective machinery which was instrumental in producing his hurt, and before he had been removed from the spot where he received his fatal injury. The surrounding circumstances, in the presence of which the declarations were uttered, were therefore silent witnesses in corroboration of his statement. This, taken in connection with the condition of the decedent, who was suffering under the shock of an injury from which he died in about six hours afterwards, necessarily excludes the idea of calculation or ability to manufacture evidence for future purposes. The court committed no error in admitting the evidence.

There are a number of incidental questions of minor importance presented and discussed by counsel; but, so far as they are material to the case as we have felt constrained to consider

it, they have all been disposed of by what has preceded.

Without entering upon a detailed examination of the evidence which tends to support the verdict, we content ourselves with saying that, while some of the criticisms of counsel seem plausible, and carry with them much force, we are nevertheless constrained to hold, since there was some evidence which the court and jury, whose duty it was to judge of its weight and credibility, accepted as sufficient, that the judgment cannot now be disturbed.

*The judgment is therefore affirmed, with costs.*

Rebecca ROYAL

v.

THE AULTMAN-TAYLOR CO. *et al.*

(....Ind....)

1. **A condition in a deed**, made upon the consideration of yearly payments during the life of the grantor, that, in default of payment for three consecutive years, the conveyance might be revoked by repaying the amount already paid, and recording a written declaration revoking the deed, is not opposed to public policy nor repugnant to the estate granted.
2. **A demand of each annual payment** on the day it becomes due is not necessary, in order to make a forfeiture of the estate in accordance with the terms of a deed containing such conditions.
3. **Where the continuance of an estate depends** upon the performance of a specific act which is to be done at a fixed time, no demand is necessary because the party bound has equal knowledge of the thing to be done and of the time when it is to be done.
4. **While a condition may be waived** by a party who has a right to avail himself of it, mere

**NOTE.—Deed, forfeiture of estate by breach of conditions.** The possibility of a reverter merely is not an estate in lands; and until the contingency happens the whole title is in grantees. *Vall v. Long Island R. Co.* 8 Cent. Rep. 671, 106 N. Y. 233; *Craig v. Wells*, 11 N. Y. 315; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121; 4 Kent, Com. 370; *Kennedy v. Wallace*, 24 Hun. 478. Conditions subsequent are not favored, and grantors seeking forfeitures thereon cannot ask that intendments shall be made in their favor. *Elkhart Car Works Co. v. Ellis*, 12 West. Rep. 742, 113 Ind. 215; *Raley v. Umatilla Co.* 15 Oreg. 172. A condition "that this deed is to have effect and be operative only upon the express condition and understanding" that certain things shall first be done, is a condition precedent. *Tennessee & C. R. Co. v. East Alabama R. Co.* 78 Ala. 436; 2 Devlin, Deeds, § 664. A condition that a failure to pay the purchase money shall render the deed void is not void as repugnant to the grant. *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682. It is now the custom to insert the conveyance and all conditions to which it is subject in the same instrument; and hence the use of deeds of defeasance as separate acts has practically ceased. *Deane, Conv.* 304; *Devlin, Deeds*, § 21. To create a condition subsequent in a deed, apt words are necessary, such as "on condition," "provided always," etc. *Raley v. Umatilla Co.* 15 Oreg. 172. If conditions subsequent to the vesting of an estate are broken, that does not *ipso facto* produce a reverter of the title. The estate continues in full force until the proper step is taken to consummate the forfeiture. This can be done only by the grantor during his lifetime, and, after his death, by those in privity of blood with him. *Ruch v. Rock Island*, 97 U. S. 808 (24 L. ed. 1101); *Davis v. Gray*, 83 U. S. 16 Wall. 246 (21 L. ed. 447); *Schulenberg v. Harriman*, 88 U. S. 21 Wall. 44 (23 L. ed. 551); *Schow v. Harriman*, 23 L. ed. 552.

indulgence or silent acquiescence in the failure to perform, is never construed into a waiver, unless some element of estoppel can be invoked.

(December 22, 1888.)

**A**PPEAL by plaintiff from a judgment of the Fountain Circuit Court (Robb, J.), sustaining a demurrer to the complaint in an action to enjoin the sale of certain real estate. *Reversed.*

The facts are fully stated in the opinion.

*Messrs. J. E. Schoonover and J. McCabe & Son* for appellant.

*Mr. G. W. McDonald* for appellees.

**Mitchell, J.**, delivered the opinion of the court:

This was an action by Rebecca Royal against the Aultman-Taylor Company, of the State of Ohio, and Perry Glascock, Sheriff of Fountain County, to enjoin the defendant from selling certain real estate alleged to belong to the plaintiff.

It appears from the complaint that on the 11th day of November, 1881, the plaintiff was the owner of a tract of land in Fountain County, and that she conveyed it by warranty deed to George W. Hyatt on the date above mentioned, subject to certain conditions, which are recited in the deed. The conditions were, in effect, that Hyatt should pay to the grantor the sum of \$50 on the first day of March of each year, for and during the term of her natural life. It was further stipulated that, in case Hyatt thereafter failed, for the period of three consecutive years, to pay the sum of \$50 annually, then the grantor might revoke the conveyance by repaying the amount theretofore paid, and by executing and placing upon record in the recorder's office of Fountain County a written declaration revoking the deed.

It was further recited in the deed that, upon the making and recording of such declaration, and the repayment of the money paid, the conveyance was to become null and void, and the title was to revert to the grantor. It is averred that while Hyatt so held the title, the Aultman-Taylor Company recovered a judgment against him, upon which execution had been issued and placed in the hands of Glascock, as Sheriff of Fountain County. It was also averred that the sheriff had levied upon and advertised the land conveyed to Hyatt by the plaintiff, upon the conditions above mentioned, for sale, and that the sale was fixed for the 4th day of April, 1885.

The complaint charged that Hyatt had wholly failed to make any payments, as required by the terms of the deed, and that the plaintiff had demanded of him "more than once a year each year after the date of said deed" that he make payment of the money due her on account of the provisions written in the deed. It is averred, further, that the plaintiff, on the 16th day of March, 1885, executed and placed upon record a written revocation of the deed to Hyatt, agreeably to the stipulations therein written. A copy of the deed, and the subsequent revocation thereof, are made part of the complaint.

The only question involved in the present appeal relates to the propriety of the ruling of the court below in sustaining a demurrer to the complaint. It is conceded that the deed cre-

ated in the grantee an estate upon condition subsequent, and that the estate created was liable to be defeated upon the failure of Hyatt to pay according to the condition in the deed.

The contention in support of the ruling below is that, inasmuch as by the stipulation in the deed the grantee was required to pay the grantor \$50 annually on the first day of March, and since it was further stipulated that in case he should fail, for three consecutive years, to make payment, "then the said Rebecca Royal may revoke this deed," it was therefore necessary, in order to render the condition available, that the grantor shall have gone upon the land on the first day of March each year, and demanded payment of the amount due, and that upon the third successive default she must then have revoked the deed. In short, the argument is that there could be no forfeiture without making a demand of payment on the day each payment fell due, and that the right of revocation was limited by the word "then," so that if it was not exercised immediately after the third consecutive demand and refusal the right was forever waived. We do not concur in this view.

It is quite true that it may be regarded as in some sense a general rule that a forfeiture cannot be insisted upon, unless the party entitled to take advantage of the condition first demands performance of that upon which the continuance of the estate depends. *Lindsay v. Lindsay*, 45 Ind. 552; *Cory v. Cory*, 86 Ind. 587; *Ellis v. Elkhart Car Works Co.* 97 Ind. 247.

This rule applies in the class of cases where the performance of the condition depends upon something to be done by the party entitled to insist upon performance, or upon his election or pleasure, or upon facts or circumstances peculiarly within his personal knowledge. In other words, where it in any way depends on the pleasure of the party for whose benefit the condition is to be performed in what manner or at what time a thing shall be done, or whether it shall be done at all, the party to be benefited must request performance. *Whitton v. Whitton*, 88 N. H. 127.

Where, however, the continuance of an estate depends upon the performance of a specified act, which is to be done at a fixed time, no demand is necessary; because the party bound has equal knowledge of the thing to be done, and of the time when it is to be done. He must therefore tender performance at his peril, or make it appear that performance has been expressly waived. *Ellis v. Elkhart Car Works Co. supra*; *Rouell v. Jewett*, 69 Maine, 298; *Whitton v. Whitton, supra*; 1 Shars. & B. Lead. Cas. Real Prop. 145.

While a condition may be waived by a party who has the right to avail himself of it, mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver, unless some element of estoppel can be invoked. *Carbon Block Coal Co. v. Murphy*, 101 Ind. 115, and cases cited.

It is apparent that the inducement or consideration upon which the deed in the present case was made was the agreement of Hyatt to pay the grantor a specified sum of money annually, during the period of her natural life. The estate of the grantee was dependent upon the condition that he pay a certain sum on a

fixed date each year; and it was stipulated that, in the event of failure for three consecutive years, the conveyance might be revoked, and the estate reverted in the grantor in a specified manner. This agreement was neither unreasonable nor opposed to public policy, nor was it repugnant to the estate created. The parties had therefore the right to make it. It was written in the deed, which was presumably in the grantee's possession. It was not necessary, therefore, that there should have been notice or a demand for payment in order to apprise the grantee of the thing to be done, or of the

time when it was to be done. If there was a waiver of performance by express agreement, or if the plaintiff is in any way estopped to avail herself of the forfeiture, the facts must be made to appear by answer.

The judgment of the Aultman-Taylor Company was a general lien on the actual interest of Hyatt in the real estate in question. It cannot stand in the way of the enforcement of whatever rights the plaintiff may have had as against her grantee. The complaint stated facts sufficient to entitle the plaintiff to relief.

*The judgment is reversed, with costs.*

## VERMONT SUPREME COURT.

### ST. JOHNSBURY & LAKE CHAMPLAIN R. CO.

v.

Andrew J. WILLARD.

1. Where a railroad company took title to a portion of mortgaged premises, from one who acquired title by adverse possession subsequently to the execution of the mortgage, and the mortgage was thereafter foreclosed by a suit in which the validity of such title could have been litigated but was not,—held, that the company was estopped by the decree of foreclosure, from setting up the title so acquired by it, in a proceeding thereafter instituted by it to condemn the mortgaged land to railroad uses.
2. Improvements made for a public use by a railroad company lawfully in possession with the right to condemn for such use at any time, do not belong to the owner of the land, and the value thereof will not be allowed him as damages on condemnation.
3. The maxim *Quicquid plantatur solo, solo cedit*, does not apply in such a case.

(February 1, 1880.)

**P**ETITION for the appointment of commissioners to assess the value of land taken for railroad purposes. Heard on commissioners' report at the June Term of the Caledonia County Court, 1886, Ross, J., presiding. Judgment for the defendant to recover of the petitioner the sum of \$60 with interest from July 1, 1880. Exceptions by the defendant. *Judgment reversed and amended.*

The commissioners reported that the value of the entire five and one fourth acres taken for railroad purposes was, at the time of the hearing in 1885, \$125; that the value of the smaller parcel, being five and one fourth acres less the three and one fourth acres conveyed by Hovey, was \$60; and that the value of both parcels was the same July 1, 1880, when the petitioner took possession.

*Mr. Andrew J. Willard, defendant, pro se:*

1. The commissioners have no jurisdiction to determine the title to the premises.

*Cent. Vt. R. Co. v. Woodstock R. Co.* 50 Vt. 452, 459.

The petitioner is estopped by the foreclosure proceedings.

2. When the decree in those proceedings became absolute the petitioner lost all its rights of all kinds in the premises; and the defendant

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was entitled to recover as damages the value of the premises as they stood, including the betterments, at the time of the appraisal in 1885.

*Meriam v. Brown*, 128 Mass. 391; *U. S. v. Land in Monterey County*, 47 Cal. 115; *Hunt v. Mo. Pac. R. Co.* 76 Mo. 115; *Preston v. Briggs*, 16 Vt. 124; *Graham v. Connersville & N. C. J. R. Co.* 86 Ind. 463; *Van Sice v. L. I. R. Co.* 3 Hun. 618; *King v. Minneapolis Union R. Co.* 32 Minn. 224; *Dupuis v. Chicago & N. W. R. Co.* 1 West. Rep. 656, 115 Ill. 97; *Russell v. St. Paul, M. & M. R. Co.* 33 Minn. 210; *De Buol v. Freeport & M. R. Co.* 111 Ill. 499.

*Mr. S. C. Shurtleff*, for petitioner:

The land owner could only have recovered actual damages. If under the statute the defendant is entitled to damages at all, it is only to his actual damages, and not to the improvements made by the railroad company.

*Severin v. Cole*, 38 Iowa, 463; *Preston v. Sabins & E. T. R. Co.* (Tex.) 7 S. W. Rep. 825; *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 541; *Texas & P. R. Co. v. Hays*, 5 Tex. Law Rev. 771; *Justice v. Nequahoning Valley R. Co.* 87 Pa. 28; *Morgan's App.* 59 Mich. 679; *Dietrich v. Murdock*, 42 Mo. 279; *Lyon v. Green Bay & M. R. Co.* 42 Wis. 589; *Northern Cent. R. Co. v. Canton Co.* 80 Md. 854; *Cal. Pac. R. Co. v. Armstrong*, 46 Cal. 90; *Toledo etc. R. Co. v. Dunlap*, 47 Mich. 456; *Cal. South. R. Co. v. South. Pac. R. Co.* 67 Cal. 59; *Hendry v. Trinity & S. R. Co.* 24 Am. & Eng. R. R. Cas. 287; *Daniels v. Chicago etc. R. Co.* 41 Iowa, 52; *Wagner v. Cleveland & T. R. Co.* 23 Ohio St. 576; *Jones v. N. O. & S. R. Co.* 70 Ala. 228.

*Rowell, J.*, delivered the opinion of the court:

In 1869 Trudell mortgages to Brown. In 1871, the mortgage being overdue, but the mortgagor being still in possession, the Essex County Railroad Company, by virtue of some arrangement with the mortgagor, the terms of which do not appear, and with the knowledge of the mortgagee, but, as far as appears, without any agreement with him, enters upon the land in question, and surveys, locates and constructs a railroad across the same, and puts it in operation.

In 1864 Hovey is in adverse possession of three and one fourth acres of the five and one fourth acres in question, parcel of the mortgaged premises, and continues in such possession until he thereby acquires title thereto, which title he

conveys to the Essex County Railroad Company; all which is after the execution of the mortgage, and before the St. Johnsbury & Lake Champlain Company succeeds to the rights, title and privileges of the Essex County Company on July 1, 1880, and goes into the possession and operation of the road. In 1883 the defendant becomes the owner of the mortgage, and forecloses it against the mortgagor and the St. Johnsbury & Lake Champlain Company, and obtains a final decree in December, 1884, and is put into possession in February, 1886, by virtue of a writ of possession; whereupon the St. Johnsbury and Lake Champlain Company brings this petition to condemn the land.

No question is made in argument as to the validity of the original mortgage in respect to the three and one fourth acres, on the ground that at the time of the execution of the mortgage they were in the adverse possession of Hovey; but the question of defendant's right to damages therefor is left to stand upon the effect of the decree irrespective of that consideration; and the question is, Does that decree, excluding that consideration, estop the petitioner from now setting up the title acquired from Hovey? The petitioner does not really claim that it does not. It certainly does if the validity of that title could have been litigated in the foreclosure suit. And it could have been; for, as the original validity of the mortgage as to this land is not questioned, the case stands in this behalf, and perhaps would stand any way, like the ordinary case of a title acquired after the execution of a mortgage that extinguishes the mortgage lien; and such titles may be the subject of adjudication in a suit to foreclose. *Wilson v. Jamison*, 36 Minn. 59, 1 Am. St. Rep. 635, with note.

The remaining question relates to the amount of damages.

The defendant claims that inasmuch as his decree became absolute, it was effective to give him the title to the *corpus* of the railroad itself; and that in this proceeding he is entitled to its value as damages as well as to the value of the land taken for its construction. He also claims that the Essex County Company was a trespasser when it entered and constructed its road, and invokes the doctrine of the common law, that structures placed upon land by a trespasser inure to the benefit of the owner of the land.

But the company was not a trespasser as to either the mortgagor or the mortgagee—not as to the mortgagor, for he consented to the entry

and construction of the road; not as to the mortgagee, for as to third persons a mortgagee in possession is regarded as the owner, and the mortgagee as having only a lien or security. *Cooper v. Cole*, 88 Vt. 185.

The effect of the decree of foreclosure was to cut off the right of redemption and thereby convert defendant's conditional title into an absolute title; but in other respects the rights of the parties were left to be determined by the deed. *Carpenter v. Millard*, 88 Vt. 9.

Hence, as far as the defendant's title is concerned, the case stands as it would had the mortgage been an absolute deed when it was given, with the mortgagor's consent to entry and construction effective to shield the company from being a trespasser as to anyone.

It comes to this, then: a railroad company, instead of exercising its right of condemning land for its road, enters upon it by consent of the owner and constructs its road, but never acquires title or pays for the land damages or makes any agreement in respect thereto, and, with matters standing thus, operates its road for more than fifteen years without objection by anyone, and now for the first time institutes proceedings to have the land condemned to public use.

In the circumstances it is clear that the owner is not entitled to the improvements, and cannot have their value as damages. He has no claim in justice to have expenditures for such a purpose inure to his benefit. He is entitled to be paid the damages he has sustained, and nothing more. The maxim, *Quicquid plantatur solo, solo cedit*, does not apply. That maxim has always had exceptions, and they increase with the ever varying necessities and exigencies of society.

The improvements in question were made for a public use by one lawfully in possession with the right to condemn to such use at any time; and herein lies the distinction between this case and *Price v. Weehawken Ferry Co.* 81 N. J. Eq. 81, relied upon by the defendant. In that case the company had no right to take the land on compensation; and the court said that therefore the maxim above referred to applied, but said it does not apply when the right to take exists. *N. Hudson Co. R. Co. v. Booraem*, 28 N. J. Eq. 454; *Chief Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28, and *Jones v. N. O. & S. R. Co.* 70 Ala. 227.

*Judgment reversed, and judgment for the defendant for \$125, and interest thereon from July 1, 1880, the time when the petitioner took possession.*

## IOWA SUPREME COURT,

Aaron MCCLEREY

v.

J. A. WAKEFIELD and Henry COOPER,  
Apprs.

(.... Iowa.....)

L'A vendor who has executed and acknowledged

a deed with the name of the grantee left blank, and delivered it to his vendee who fills up the blank, cannot question the title of an innocent purchaser for value.

2. Relinquishing other security in consideration of a transfer of land by a deed absolute in form, but in reality as security, is sufficient to

NOTE.—Deed; name of grantee omitted, third person may be authorized to fill blank. A grantor in a deed conveying real property signed and acknowledged, with a blank for the name of the grantee, 2 L. R. A.

may authorize another party, by parol, before or at the time of the delivery of the deed to the grantee, to fill up the blanks. *Allen v. Withrow*, 110 U. S. 119 (28 L. ed. 90); *Schintz v. McManamy*, 38 Wis.

entitle the grantee to protection as a *bona fide* purchaser against defects in the grantor's title.

2. A purchaser of land, although bound to take notice of the right under which one in possession of it claims, is not chargeable with notice of a right or claim not asserted, or one which may subsequently accrue.

(January 18, 1889.)

**A**PPEAL by defendant, Cooper, from a judgment of the District Court of Monona County (Lewis, J.), in favor of the plaintiff in an action in equity for the cancellation of a conveyance and to quiet title. *Reversed.*

The facts, and questions presented, are stated in the opinion.

*Messrs. Joy, Wright & Hudson* and **T. B. Lutz** for appellant.

*Messrs. McMillan & Kindall* and **J. E. Selleck** for appellee.

**Reed, Ch. J.**, delivered the opinion of the court:

Plaintiff and defendant Wakefield entered into a contract for the sale by the former to the latter of the real estate in question, it being a farm of 200 acres in Monona County. By the terms of the agreement Wakefield assumed an indebtedness of \$1,400, which was secured by a mortgage on the premises. He also agreed to convey to plaintiff 820 acres of land in

Woodbury County, and to pay him \$1,700 in three payments, which he was to secure by a deposit of collaterals.

At the time of the transaction plaintiff and his wife executed a deed of the premises, which they acknowledged before Wakefield, who was a notary public. No person was named in the deed as grantee, the agreement being that Wakefield should fill the blank by inserting the name of the person to whom he might sell the place.

At that time Wakefield was indebted to Charles Tabor in the sum of \$1,700, and, being unable to pay the amount on the day it was due, he inserted Tabor's name in the deed, and delivered it to him as a security. In a few days, however, he paid the indebtedness, and Tabor delivered the deed to him. He then erased Tabor's name and inserted that of defendant Henry Cooper and delivered the deed to him. The transaction between him and Cooper will be more fully noticed hereafter. On the day of the transaction he delivered to plaintiff three notes of one L. L. Scott, amounting to \$1,700, which were secured by a second mortgage on real estate; and some days afterwards, plaintiff being dissatisfied with the security, he gave him a bond, by which he undertook to convey to him an additional eighty acres of land, the object of the transaction being to give plaintiff additional security for the

290. See *Van Etta v. Evenson*, 28 Wis. 33; *Villet v. Camp*, 13 Wis. 198; *Field v. Stagg*, 52 Mo. 534; *Swartz v. Ballou*, 47 Iowa, 188; *Clark v. Allen*, 31 Iowa, 190. And see *Hurnside v. Wayman*, 49 Mo. 356; *McDonald v. Eggleston*, 26 Vt. 161, 60 Am. Dec. 303; *South Berwick v. Huntress*, 53 Maine, 30; *Speake v. U. S.* 13 U. S. 9 *Cranoh*, 23 (3 L. ed. 645); 1 Dev. Deeds, § 441. An agent may make a lawful delivery of a deed by parol authority, and may be given a deed to fill up blanks with directions to deliver it to the grantee; or it may be delivered to the grantee with the parol authority to fill up the blanks. *South Berwick v. Huntress*, 53 Maine, 30; *McDonald v. Eggleston*, 26 Vt. 161; *Drury v. Foster*, 60 U. S. 2 Wall. 24 17 L. ed. 730; *Wiley v. Moor*, 17 Serg. & R. 438; *Field v. Stagg*, 52 Mo. 534; *Van Etta v. Evenson*, 28 Wis. 33; *Devin v. Himer*, 29 Iowa, 301; *Owen v. Perry*, 25 Iowa, 412; *Cooper v. Paige*, 62 Maine, 192; *Bridgport Bank v. New York & N. H. R. Co.* 30 Conn. 231; *Gourdin v. Commander*, 6 Rich. L. 497; *Schintz v. McManamy*, 38 Wis. 293; *Am. & Eng. Encyclopedia of Law*, 424. The fact that, at the time the grantor in a quitclaim deed executed it and left it with his agent for delivery, the name of the grantee and the amount of the consideration were not written in does not render the deed void, where the agent had the authority to fill out the blanks in a certain way, and did so fill them out before the deed was delivered. *McClung v. Steen*, 32 Fed. Rep. 373. In Iowa the court said the doctrine that authority cannot be conferred by parol rests largely, if not entirely, on the common-law doctrine in relation to instruments under seal; and that as the rules of law as to seals have been abolished in the State, and a seal was unnecessary to the validity of the deed, it would seem that as the reason for the rule had ceased the rule itself should no longer prevail. *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470. And see *Simms v. Hervey*, 19 Iowa, 297; *Owen v. Perry*, 25 Iowa, 412; *Clark v. Allen*, 31 Iowa, 190. But see *Arguello v. Bours*, 67 Cal. 447; *Upton v. Archer*, 41 Cal. 85.

*Grantor estopped to deny proper execution.* The grantor may, by his acts, be estopped from asserting that the deed was not properly executed. *Ragsdale v. Robinson*, 48 Tex. 379. See *Tisher v. Beckwith*, 30 Wis. 55; *Pence v. Arbuckle*, 22 Minn. 417; *Knaggs v. Mastin*, 9 Kan. 533; 1 Devlin, Deeds, 443. A grantee or mortgagee who thus claims that the grantor or mortgagor is estopped must himself have been careful in the protection of his rights. *Ayres v. Probasco*, 14 Kan. 175, 190; 1 Devlin, Deeds, 443.

*Relinquishment of security, in consideration of*  
2 L. R. A.

*transfer by deed.* The surrender or relinquishment of an existing legal right is a valuable consideration (*Westbrook v. Gleason*, 79 N. Y. 23; as giving up or canceling a security. *Padgett v. Lawrence*, 10 Paige, 170, *Goodman v. Simonds*, 61 U. S. 20 How. 343 (15 L. ed. 934); *Youngs v. Lee*, 12 N. Y. 551; *Struthers v. Kendall*, 41 Pa. 214; *Lewis v. Anderson*, 20 Ohio St. 236. Where a person by accepting a deed parts with his equitable title to the land which had precedence of the mortgage and thereby lost the priority, he was a purchaser for value (*Williams v. Shelly*, 37 N. Y. 375; *Reed v. Gannon*, 3 Daly, 414; *McLeod v. First Nat. Bank*, 42 Miss. 69; so where he gives up or cancels a security. *Goodman v. Simonds*, 61 U. S. 20 How. 343 (15 L. ed. 934); *Youngs v. Lee*, 12 N. Y. 551; *Meads v. Merchants Bank*, 25 N. Y. 143; *Struthers v. Kendall*, 41 Pa. 214; *Pickett v. Barron*, 29 Barb. 508; *Wood v. Chapin*, 13 N. Y. 509; *Curtis v. Leavitt*, 15 N. Y. 9.

*Valuable consideration construed.* The term "valuable consideration" necessarily requires something of actual value capable in estimation of law of pecuniary measurement, the parting with money or money's worth or an actual change of the purchaser's legal position; but the amount is not material if the transaction is otherwise in good faith. *Brown v. Welch*, 18 Ill. 343; *Keyes v. Test*, 33 Ill. 316; *Palmer v. Williams*, 24 Mich. 328; *Aubuchon v. Bender*, 44 Mo. 560; *McLeod v. First Nat. Bank*, 42 Miss. 69; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Wood v. Chapin*, 13 N. Y. 509; *Lawrence v. Clark*, 36 N. Y. 128; *Williams v. Shelly*, 37 N. Y. 375; *Weaver v. Burden*, 49 N. Y. 236; *De Lancy v. Stearns*, 66 N. Y. 157; *Westbrook v. Gleason*, 79 N. Y. 23; *Cary v. White*, 52 N. Y. 133; *Reed v. Gannon*, 3 Daly, 414; *Feward v. Jackson*, 8 Cow. 403; *Pickett v. Barron*, 29 Barb. 505; *Webster v. Van Steenberg*, 46 Barb. 211; *Penfield v. Dunbar*, 64 Barb. 233; *Roxborough v. Messick*, 6 Ohio St. 448; *Munn v. McDonald*, 10 Watts, 276; *Union Canal Co. v. Young*, 1 Whart. 410; *Spurlock v. Sullivan*, 30 Tex. 511; *Tourville v. Naish*, 3 P. Wms. 306; *Story v. Windsor*, 2 Atk. 630; 2 Pom. Eq. Jur. 206.

A mortgage misdescribed the property intended to be covered by it. Subsequently, and before any proceedings for its reformation, another mortgage was given thereon to a third person, having no knowledge of the prior mortgage, the consideration being an antecedent debt, and the extension of time for one day as to accrued interest. Such extension was sufficient to support the contract, and the second mortgage being duly recorded was paramount. *Sullivan Sav. Inst. v. Young*, 55 Iowa, 132; *Coddington v. Ray*, 20 Johns. 637.

\$1,700. At the time of the transaction he also gave him a bond binding himself to convey the Woodbury County land on the first of March, 1885, at which time plaintiff was to surrender possession of the premises in question. He held title bonds for the Woodbury County land, and the purchase price had not all been paid at that time.

These facts were known to plaintiff when he entered into the contract; and it was the understanding that Wakefield should pay the balance due on the land, and obtain a conveyance before the time agreed upon for the execution of the deed to plaintiff. Wakefield, however, had deposited the title bonds with a bank as collateral security for a debt he was owing it; and some time after the transaction with plaintiff, by an arrangement between him and the bank and Cooper, the latter assumed the indebtedness to the bank, and the bonds were transferred to him as collateral security. Wakefield was indebted to him at the time in a considerable sum, and the principal object he had in view was to obtain security for that debt—the value of the collaterals being in excess of the debt to the bank assumed by him.

Wakefield also held a title bond for the eighty acres, which he undertook to convey to plaintiff as additional security, and the bond was transferred to Cooper in the same transaction. Cooper subsequently either sold the bonds or paid the money due thereon, and obtained conveyances of the property, and has disposed of it; so that Wakefield is not now able to perform his undertaking to convey to plaintiff. Neither has he paid the mortgage on the farm, or any part of the \$1,700, which he agreed to pay plaintiff. The Scott notes also were worthless, and Wakefield is understood to be insolvent. These facts afford the ground for plaintiff's claim for a rescission of the conveyance.

It was practically conceded on the argument that if there were no intervening rights they would, as against Wakefield, afford ground for rescission. At least the claim was not disputed by counsel, and for the purposes of the case its correctness may be conceded. But Cooper claims to be an innocent purchaser of the property; and in view of this claim it becomes necessary to consider the transaction in which the deed from plaintiff was delivered to him. Before doing that, however, it is proper to say that the transaction between plaintiff and Wakefield was an absolute sale of the property. It was only as to the undertakings of the latter that the contract remained executory, and as against him plaintiff is entitled to rescission on the ground solely that he has put it beyond his power to perform the undertakings on his part which were the consideration for plaintiff's agreement.

It may be conceded that the deed, while it remained in the condition in which it was when delivered to Wakefield, was not effective, and did not convey the title. But it was the distinct understanding of the parties that Wakefield might fill the blank by inserting the name of the purchaser from him, and deliver it to such purchaser; and when he inserted Cooper's name, and delivered the instrument to him, he acted in pursuance of that agreement, thus performing the very act which the parties intended

should be done, with the object of accomplishing the purpose they had in view when they made the agreement, viz.: the transferring of the title to the purchaser. This court has frequently held that the vendor will not be permitted, under such circumstances, to question the title of an innocent purchaser for value. *Owen v. Perry*, 25 Iowa, 412; *Clark v. Allen*, 84 Iowa, 190; *Swartz v. Ballou*, 47 Iowa, 188.

It is true that in each of those cases the defendant was a subsequent grantee, claiming under the one whose name was inserted in the deed after it passed from the hands of the grantor; and he was protected on the ground that he was an innocent purchaser from one who, as a consequence of the plaintiff's act, was apparently clothed with a title. But in a case like the present, where there was an express authority to insert the name of a subsequent purchaser, and deliver the instrument to him for the purpose of passing the title to him, and that authority was unrevoked, the equities in his favor, if he is a purchaser without notice and for value, are equally as strong.

We come, then, to the question whether Cooper stands in that position. Some time before the transaction between plaintiff and Wakefield the latter had purchased a tract of land from Cooper. A conveyance of the land was executed and delivered by Cooper, and Wakefield gave him a mortgage back to secure \$2,800 of the purchase price, but neither of these instruments had been recorded. Wakefield sold the land to one Smith, and, under an arrangement entered into by the parties, the deed from Cooper to Wakefield, and the mortgage from the latter, were destroyed, and Cooper deeded directly to Smith, who paid the purchase price to Wakefield. It was in that transaction that the deed from plaintiff was delivered to Cooper. There is a conflict in the evidence as to the purpose of that delivery. Cooper claims that the transaction was an absolute sale of the property in question to him, and so testified. Plaintiff pleaded that the deed was delivered as a mere security, and Wakefield testified that the transfer was intended merely as a security for the \$2,800 due for the land sold to Smith, and the other indebtedness he was owing Cooper.

So far as the principal question in the case is concerned, viz.: as to whether the deed should be canceled, it would make no difference which of these claims is correct; for, as Cooper relinquished the security he then had for the \$2,800 due him from Wakefield, in consideration of the transfer, he will be protected, if he had no notice of plaintiff's claim, whether it was intended as an absolute sale or merely as a security. In the latter case he is a mortgagee for value, the surrender of the former security constituting the consideration, and is entitled to the same protection as an absolute purchaser. But in view of the fact that in a cross petition he demanded judgment for possession of the property, and for the rents and profits, plaintiff having refused to surrender possession, we are required to determine the question.

It must be admitted that upon the evidence the question is not free from doubt. But upon a careful consideration we have reached the conclusion that there is a fair preponderance in favor of the claim that the transfer was in-

tended as a security; and we deem it unnecessary to do more than to state our conclusion. A discussion of the evidence would not be profitable, nor would such discussion be a matter of any interest, either to the parties or the profession.

Having reached that conclusion, the only question remaining is whether Cooper had notice of the circumstances out of which plaintiff's right arises when he accepted the security; and it is only necessary to say that the evidence is overwhelming that he did not. Indeed, plaintiff did not learn that Wakefield had pledged the title bonds as security to the bank until after the transfer of the land to Cooper, and he took no steps to terminate the transaction until after that. The transfer of the bonds to Cooper was a subsequent transaction, and was entirely distinct from that in which the land was conveyed to him. He probably had

knowledge of the terms of the contract between plaintiff and Wakefield when he accepted the bonds, but the prior transaction with reference to the land is not affected by that knowledge. Neither is he chargeable by plaintiff's possession of the property with notice of the right he is now asserting; for when he took the land plaintiff was entitled to possession under his contract with Wakefield, and he was then asserting no other right.

A purchaser is bound to take notice of the right under which one in possession claims; but that is the extent of the rule. He is not chargeable with notice of a right or claim not asserted, or one which may subsequently accrue. As Cooper is but a mortgagee, he is not entitled to possession, or the rents and profits, but is entitled to have his lien preserved.

*Reversed.*

## MAINE SUPREME JUDICIAL COURT.

William WEEKS

v.

Abial TRASK.

(.....Maine.....)

**Making a claim to land and erecting a fence thereon**, after an award by arbitrators as to the boundary line, finding that the land belongs to the adjoining owner, does not constitute a breach of a stipulation in the submission "to abide by and perform the award," for which assumpsit will lie; but the remedy is by an action of tort.

(December 27, 1888.)

ON defendant's exceptions, from the Supreme Judicial Court, Lincoln County. *Sustained.*

This was an action of assumpsit brought by William Weeks against Abial Trask, in which the plaintiff declared on an agreement entered into by him and the defendant, to refer their differences as to the true boundary line between adjoining lands and mutual claims of trespass thereon, to arbitrators. After setting out the agreement, and the making and publishing of the award, the declaration alleges:

"Said defendant then and there neglected and refused to abide by and perform said determinations and awards of said referees, and still neglects and refuses . . . whereby said defendant has become liable to pay to said plaintiff the sum of \$300 as liquidated damages," etc.

The plaintiff set out the following breaches of the award: "1. That heretofore, to wit: on the 8th day of September, A. D. 1883, and after the said award was made to the parties thereto agreeably to the terms of the submission, and notice thereof had been duly given to and received by them, the said defendant, without the consent and against the will of the plaintiff, entered upon the land of the plaintiff easterly of and bordering upon the division line between the plaintiff's land and the defendant's land, as established by said award, and about four rods easterly of said division line, and then and there upon the plaintiff's

said land built a fence about 180 rods long, and the defendant then and there claimed that the land upon which said fence was so built was his own land, in violation and disregard of the award aforesaid, by which award said land upon which said fence was so built was determined and decided to be the land of said plaintiff; and in violation and disregard of the division line between the lands of the plaintiff and the defendant as determined and established by said award. 2. That defendant joined in a deed to a third party of a portion of the land which had been decided by the award to belong to plaintiff. 3. That the defendant heretofore, to wit: on the 8th day of September, A. D. 1883, ignored and disregarded the division line determined and established by said award as aforesaid, by then and there crossing easterly over and across said line, and claiming that the division line was to the eastward of the line established by said award, in violation of said award."

The defendant filed a special demurrer, assigning, among others, the following causes:

1. That in and by said declaration the said Abial Trask is not charged with doing any act which by the alleged agreement and awards set forth in said declaration he was restrained or prohibited from doing, nor with neglecting or refusing to do any act which he was by said alleged agreement or awards required to do.

2. That it appears by said declaration that if the said William Weeks has any cause of action against the said Abial Trask, as therein alleged, the same is by an action of trespass or writ of entry, and not in assumpsit.

3. That the alleged agreement set forth in said declaration is unconscionable, without consideration, and void.

5. That the controversy related to the title and possession of real estate not described or located in the agreement or awards.

6. That the boundary line was not so defined and described as to be capable of location upon the face of the earth, and was not designated by any permanent, definite and ascertainable monuments or objects.



"8. That the said alleged agreement and award as sought by the said declaration to be applied to the alleged causes of action therein set forth is against public policy, in restraint of the legal and constitutional rights of the parties, and in derogation of the authority and jurisdiction of the courts."

The demurrer, having been joined, was overruled by the court; and defendant alleged exceptions.

**Mr. G. B. Sawyer**, for defendant:

This award did not settle the boundary any more effectually, or give to the parties any greater rights, than would be done and given by deeds of conveyance or partition.

*Goodridge v. Dustin*, 5 Met. 868.

That being accomplished the submission and award have performed their office and the parties are left to their ordinary remedies at law for the protection of their several possessions.

*Jackson v. Gager*, 5 Cow. 888; *Sellick v. Addams*, 15 Johns. 197.

A submission covers only matters in dispute, doubt or controversy between the parties at the date of its execution.

*Thrasher v. Haynes*, 2 N. H. 429.

**Messrs. H. Ingalls and W. H. Hilton** for plaintiff.

**Virgin, J.**, delivered the opinion of the court:

Assumpsit to recover \$300 as liquidated damages for the alleged breach of a written agreement "to abide and perform an award" by which the arbitrators found and established the division line between the adjoining tracts of lands of the parties. It is well settled that a published award, made under a written submission giving authority "to find and establish the boundary line between the adjoining lands of different proprietors, is conclusive on the parties, and they are estopped thereby to dispute it when thus established." *Tyler v. Dyer*, 18 Maine, 46; *Swamy v. Miller*, 84 Maine, 888; *Buck v. Spofford*, 85 Maine, 526; *Goodridge v. Dustin*, 5 Met. 868; *Thayer v. Bacon*, 8 Allen, 163; *Searle v. Abbe*, 18 Gray, 409; *Shaw v. Hatch*, 6 N. H. 162; *Russell v. Allard*, 18 N. H. 222; *Orr v. Hadley*, 36 N. H. 575; *Marshall v. Reed*, 48 N. H. 86.

Moreover a controversy as to the location of the division line between adjoining lands necessarily involves the title of the strip of land lying between the two lines claimed by the respective parties. And though the award does not attempt in terms to transfer from one party to the other the intervening strip, nevertheless, without making any new line, it does "find and establish"—that is, ascertain and confirm what was before doubtful—the pre-existing line, on the respective sides of which the parties had held the title ever since they became the proprietors of the adjoining lots. *Searle v. Abbe*, *supra*.

Furthermore, the particular locality of the line upon the face of the earth having been thus ascertained and fixed, *transit in rem arbitratum*. *Duren v. Gatchell*, 55 Maine, 241, 249.

Thenceforth, relying upon the finality of that line through the estoppel of the parties to deny it and its necessary consequences, a writ of entry might be maintained by either party

against the other who should disseise the defendant of his land bordering on it (*Goodridge v. Dustin*, *supra*); or trespass would lie against whichever of the parties committed acts of trespass on the other side of the line. *Sellick v. Addams*, 15 Johns. 197; *Shaw v. Hatch*, *supra*.

Assuming, then, that the declaration sufficiently alleges that the defendant's acts complained of were committed upon the land, the title to which was in controversy until the award virtually determined it to be in the plaintiff, the demurrer directly presents the question whether the defendant's going upon the land after the publication of the award, and then and there, in disregard of the award, erecting the fence and claiming the land as his own, constitute a breach of his stipulation in the submission "to abide by and perform the award" for which assumpsit will lie; or whether the plaintiff must resort to his action of tort for remedy. This precise question has been decided in New Hampshire, where it was held that entering upon the disputed land, removing the stone monuments erected by the arbitrators to designate the division line found and established by their award, and denying that to be the true line, did not constitute that to be a breach of the arbitration bond conditioned "to abide by and perform the award."

*Richardson, Ch. J.*, said the words "abide by" did not mean to acquiesce in, but simply to await the award without revoking the submission, adding: "The award is conclusive between the parties, and the defendant may be liable in trespass for what he has done." *Shaw v. Hatch*, *supra*.

A like view was adopted in *Marshall v. Reed*, 48 N. H. 86.

Doubtless a revocation of the authority of the arbitrators before the award is made is a breach of such a stipulation. *King v. Joseph*, 5 Taunt. 452; *Brown v. Leavitt*, 26 Maine, 251.

So is putting it beyond the power of the arbitrators to make an award—as the marriage of the female party. *Charnley v. Winstanley*, 5 East, 266; or preventing one of the arbitrators from taking part in an award as to costs which were a part of subject referred. *Quimby v. Meloin*, 35 N. H. 198.

So is refusing to pay money in accordance with the award. *Thompson v. Mitchell*, 85 Maine, 281; *Plummer v. Morrill*, 48 Maine, 184.

Also refusing to do any act other than the payment of money required by the award, such as transferring a piece of a vessel; and when the submission is not under seal, assumpsit will lie. *Gerry v. Eppes*, 62 Maine, 49, 51, 53.

To "abide the order of the court," in a bastardy proceeding, said *Shaw, Ch. J.*, means "to perform," "to execute," "to conform to." *Hodge v. Hodgdon*, 8 Cush. 294, 297.

A docket entry under an action at law "to abide the decision" in a certain equity suit has been held to mean, not that the action at law should be dependent on the final determination of the suit in equity, but that so much of the issue as was common to both should be decided in the former the same as in the latter. *Hodges v. Pingree*, 108 Mass. 585.

The debtor's stipulation in his bail bond "to abide, do and perform" the judgment, "means," said *Peters, J.*, "to submit to; to stand to; or to abide. The words are an useless iteration,

employed to add force and expression to the idea conveyed by the words "to abide." *Hewins v. Currier*, 62 Maine, 236, 237.

While these illustrations show that these words take some shade of meaning from the subject matter with which they are connected, our opinion is that in cases of this sort they mean in substance that the parties will not in any wise revoke or prevent the making and publication of the award; that when made and published it shall be final; and that they will perform any act required by the award, which is within the scope of the authority conferred

on the arbitrators by the submission. The award in this case having been made in pursuance of the submission, leaving nothing to be done by either party, the submission and the award, like a deed of partition, have performed their office; and whatever controversy the parties may have subsequently had in relation to the premises, the ordinary remedies at law afford to each ample redress. *Exceptions sustained.*

**Peters, Ch. J., and Walton, Danforth, Emery, and Haskell, JJ., concurred.**

## VIRGINIA SUPREME COURT OF APPEALS.

James A. MARSHALL, *Appt.*,  
v.

THE FARMERS & MECHANICS SAVINGS BANK OF VIRGINIA *et al.*

(.... Va. ....)

1. **Directors of savings banks are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust.**
2. **Where the directors of a savings bank met, in some years, but once or twice, instead of meeting every week as required by their by-laws, and never caused the books of the bank to be examined, or called for a statement of their accounts with other banks, while their vaults and cash drawer were emptied by illegal abstrac-**

tions and insolvent loans; and while one of them was president of an insolvent railroad company and knew its condition and secured himself, but its notes to the bank for a large sum were allowed to become worthless, although there was nothing to show dishonesty or bad faith, they were held guilty of such negligence as held them liable for losses to depositors occasioned by the insolvency of the bank.

(January 24, 1889.)

**A** PPEAL by plaintiff, from a decree of the Circuit Court of Alexandria City, in favor of defendants in an action to render the officers and directors of a bank personally liable for its liabilities. *Reversed.*

The facts are fully stated in the opinion.

**NOTE.—Directors are trustees of stockholders.** The directors are the trustees or managing partners, and the stockholders are the *cestui que trust*, and have a joint interest in all the property and effects of the corporation; and no injury the stockholders may sustain by a fraudulent breach of trust can, upon the general principle of equity, be suffered to pass without a remedy. *Greaves v. George*, 49 How Pr. 52, 16 Abb. Fr. N. S. 381. In *Koehler v. Black River Falls Iron Co.*, 67 U. S. 2 Black, 715 (7 L. ed. 539), such officers were adjudged to be trustees. *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616 (22 L. ed. 492); *Hun v. Cary*, 82 N. Y. 65; *Bliss v. Matteson*, 45 N. Y. 22; *Butts v. Wood*, 37 N. Y. 317; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Ex parte Bennett*, 18 Beav. 339. The trust is a peculiar one. *Williams v. Page*, 24 Beav. 661; *Thomp. Liability of Officers*, 238. The character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for the trustees' own private interests. *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314; *1 Waterman, Corp.*, 441. A director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature, and is subject to the obligations and disabilities incidental to that relation. *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. 571; *Bach v. Pacific M. S. S. Co.*, 12 Abb. Pr. N. S. 367; *Butts v. Wood*, 37 N. Y. 319; *Angell & Ames, Corp.*, 258, 260; *Percy v. Millaudon*, 3 La. 568; *Hodges v. New Eng. Screw Co.*, 1 R. L. 321; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 34; *Redfield, Railways*, 494; *Benson v. Heathorn*, 1 Young & C. Ch. 238; *York & N. M. R. Co. v. Hudson*, 16 Beav. 485; *Aberdeen R. Co. v. Blaikie*, 1 MacQ. H. L. Cas. 461. Directors and managers of corporations are within the rule which guards and restrains the dealings and transactions between trustee and *cestui que trust*, and agent and principal, such directors or managers being in fact trustees and agents of the bodies represented by them. *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 568.

**Duty and obligation on accepting the trust.** Directors, by accepting the trust, are obliged to execute it with fidelity—not for their own benefit, but for the common benefit of the stockholders of the corporation. *Koehler v. Black River Falls Iron Co.*, 67 U. S. 2 Black, 715 (7 L. ed. 539); *Thomp. Liability of Officers*, 238. And it is no excuse to say that they

had no benefit from it, but that it was merely honorary; and therefore they were within the case of common trust. *Coggs v. Bernard*, 1 Sal. 53. Directors are not allowed to derive from their position any profit or advantage whatever, except with the full knowledge and concurrence of the corporation represented by others than themselves. *Booth v. Robinson*, 55 Md. 419. See *Benson v. Heathorn*, 1 Young & C. Ch. 236; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. 563; *1 Waterman, Corp.*, 441. The rule provides against the probability in many cases, and the danger in all cases, that the dictates of self interest will exercise a predominant influence, and supersede that of duty. *Michoud v. Girod*, 45 U. S. 4 How. 513 (11 L. ed. 1076); *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426; *Simons v. Vulcan Oil & Min. Co.*, 61 Pa. 232; *Rice's App.*, 79 Pa. 168; *Ryan v. Leavenworth, A. & N. W. R. Co.*, 21 Kan. 365; *Blair Town Lot & Land Co. v. Walker*, 50 Iowa, 376; *Farmers & M. Bank v. Downey*, 53 Cal. 466; *Bain v. Brown*, 56 N. Y. 288; *Koehler v. Black River Falls Iron Co.*, 67 U. S. 2 Black, 715 (7 L. ed. 539); *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477; *People v. Overysse*, 11 Mich. 225. If a director enters into a contract for the company, he cannot personally derive any benefit from it. *European & N. A. R. Co. v. Poor*, 59 Maine, 277; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. L. 505. A director of a plank road company, who is likewise the secretary and treasurer of the company, cannot as director vote himself compensation, without infringing the principle that one holding a position of trust cannot use it to promote his individual interests. *Butts v. Wood*, 4 Trans. App. 433; *Aberdeen R. Co. v. Blaikie*, 1 MacQ. H. L. Cas. 461; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. 571.

**Directors of corporations liable for frauds and breaches of trust.** The directors of a corporation are liable in equity to the corporation for gross frauds and breaches of trust, whereby the assets of the corporation have been wasted. *Charitable Corp. v. Sutton*, 2 Atk. 400; *Thomp. Liability of Officers*, 238. See *Tirquand v. Marshall*, L. R. 6 Eq. 127, L. R. 4 Ch. 386; *Overend v. Gubb*, L. R. 5 H. L. 494. They are liable to the parties injured by a fraudulent breach of trust. *Smith v. Rathbun*, 66 Barb. 405. If they willfully abuse their trust or misapply the funds of the company by which a loss is sustained, they are personally liable as trustees to

**Mr. Francis L. Smith, for appellant:**

The directors of a corporation are liable to the corporation or its representatives for negligence and breach of trust.

See *Morse, Banks & Banking*, 113, 183, 189, 233, 234; *Thomp. Liability of Officers*, 226, 256, *et seq.*

The capital stock of a corporation, especially when insolvent, is a trust fund for its creditors, and the directors are deemed trustees of all the beneficiaries of this fund, of whom the creditors are first.

*Thompson, Liability of Officers*, pp. 395-398 *et seq.* See also *Morawetz, Priv. Corp.* 2d ed. §§ 509-574; *Pom. Eq. Jur.* §§ 1066-1070; *Charitable Corp. v. Sutton*, 2 Ark. 400.

Where the directors are treated as mandataries—that is, bailees who have undertaken the performance of special duties requiring skill—the same conclusion is also reached as to their obligations and as to their liabilities.

*Edw. Bailm.* 2d ed. pp. 76, 77, §§ 92, 93; *Bank Comrs. v. Bank of Buffalo*, 6 Paige, 497.

The duty and responsibility of directors does not end with the election of officers or the employment of agents of good character. In addition, they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs.

*Cutting v. Marlor*, 78 N. Y. 454, 460. See also *Martin v. Webb*, 110 U. S. 7, 15 (28 L. ed. 49, 52); *Robinson v. Smith*, 3 Paige, 222; *Brinck-*

*erhoff v. Bostwick*, 83 N. Y. 52, 99 N. Y. 185; *S. C.* 106 U. S. 3, 4 (27 L. ed. 73, 74); *Hun v. Cary*, 82 N. Y. 65; *Delano v. Case*, 17 Brdwd. 536; *Delano v. Case*, 10 West. Rep. 625, 121 Ill. 247; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *United Society of Shakers v. Underwood*, 9 Bush, 609; *Percy v. Millaudon*, 3 La. 593; *Shea v. Mabry*, 1 Lea, 342.

Directors of a banking corporation accepting securities in payment of its stock not authorized by its charter are personally liable for the whole amount so accepted in breach of their trust.

*Moses v. Ocoee Bank*, 1 Lea, 405.

The directors who fraudulently abuse their trust and misapply the funds of the corporation are personally liable as trustees to make good that loss.

*Smith v. Poor*, 40 Maine, 415, 68 Am. Dec. 674. See also *Atty-Gen. v. Aspinwall*, 2 Mylne & C. 625; *Atty-Gen. v. Kell*, 2 Beav. 575; *Atty-Gen. v. Leicester*, 7 Beav. 176; *Bank of St. Marys v. St. John*, 25 Ala. 611.

It follows from the fiduciary position occupied by directors of a corporation, whether regarded as strict trustees or not, that good faith in the management of the affairs committed to their charge is a primary requisite.

*Bank of St. Marys v. St. John*, 25 Ala. 611; *Smith v. Prattville Mfg. Co.* 29 Ala. 503; *Ryan v. Leavenworth A. & N. W. R. Co.* 21 Kan. 365; *Shea v. Mabry*, 1 Lea, 319; *Vance v. Phantia Ins. Co.* 4 Lea, 385.

make good that loss, and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. *Spering's App.* 71 Pa. 11, 10 Am. Rep. 692; *Wilkinson v. Dodd*, 2 Cent. Rep. 245, 40 N. J. Eq. 142; *Mutual Bldg. Fund & Dollar Sav. Bank v. Bossicux*, 3 Fed. Rep. 835; *Lewis v. St. Albans L. & S. Works*, 30 Vt. 451; *Ackerman v. Halsey*, 37 N. J. Eq. 262; *Citizens Loan Assn. v. Lyon*, 29 N. J. Eq. 110; *Citizens Bldg. L. & S. Assn. v. Coriel*, 34 N. J. Eq. 383; *Brinckerhoff v. Bostwick*, 83 N. Y. 52; *Taylor v. Miami Exporting Co.* 5 Ohio, 132; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84; *St. Marys Bank v. St. John*, 25 Ala. 596; *Butts v. Wood*, 38 Barb. 181, 37 N. Y. 317; *Tippecanoe Co. v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 251. If they applied the property of the company in a manner which would not bear the light, they must suffer the consequences; and being charged with the receipt of the money, they cannot discharge themselves by the suggestion of such an application. *York & N. M. R. Co. v. Hudson*, 16 Beav. 495; *Williams v. Page*, 24 Beav. 661.

**Bound to manage affairs of corporation with care and prudence.** Directors or trustees of a corporation are bound to manage the affairs of the company with the same degree of care and prudence which is generally exercised by business men in the management of their own affairs. *Hun v. Cary*, 82 N. Y. 65. See also *Charitable Corp. v. Sutton*, 2 Ark. 405; *Litchfield v. White*, 3 Sandf. 545; *Scott v. Depeyster*, 1 Edw. Ch. 513, 543; *Hodges v. New Eng. Screw Co.* 1 R. I. 312; *Percy v. Millaudon*, 3 Mart. N. S. 68; 1 *Morawetz, Priv. Corp.* § 552. If they willfully neglect or fail, without sufficient excuse, to use as much attention and care in performing the duties of their office as the proper performance of these duties necessitates, they are liable to the corporation for any resulting loss. *Hun v. Cary*, 82 N. Y. 71; 1 *Morawetz, Priv. Corp.* § 551. They are answerable, not only for any fraud and gross negligence which they may be guilty of, but also for all faults that are contrary to the care required of them. 1 *Domat*, b. 2, tit. 3, § 2, art. 1. See *Guild v. Parker*, 43 N. J. L. 430; *Parker v. Nickerson*, 112 Mass. 195; 1 *Waterman, Corp.* 441. If they willfully abuse their trust or misapply the funds of the company by which a loss is sustained, they are personally liable as trustees to make good that loss, and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. *Robinson v. Smith*, 3 Paige, 222; *Lexington & O. R. Co. v.*

*Bridges*, 7 B. Mon. 550; *Taylor v. Miami Exporting Co.* 5 Ohio, 132; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84; *United Society of Shakers v. Underwood*, 9 Bush, 617; *Bank of St. Marys v. St. John*, 25 Ala. 596; *Butts v. Wood*, 38 Barb. 181, 37 N. Y. 317; *Percy v. Millaudon*, 3 La. 575; *Franklin F. Ins. Co. v. Jenkins*, 3 Wend. 130; *Thomp. Liability of Officers*, 240; *Field, Corp.* 186. If they are guilty of gross nonattendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. *Charitable Corp. v. Sutton*, 2 Ark. 400. But a director of a corporation is not liable to make good a loss occasioned by the fraud or misconduct of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge. *Movius v. Lee*, 30 Fed. Rep. 307; *State v. Willis*, 1 New Eng. Rep. 663, 78 Maine, 70; *Ackerman v. Halsey*, 37 N. J. Eq. 350, 38 N. J. Eq. 501; *Hodges v. New Eng. Screw Co.* 1 R. I. 312, 3 R. I. 9. Directors are liable for money embezzled by their secretary, on the ground of their negligence. *Scott v. Depeyster*, 1 Edw. Ch. 513. It seems that a trustee, in an action against him to recover the penalty, under the statute cannot avoid liability because the manner of voting, and of recording the vote prescribed by the statute was not followed; he can waive the direction, as it was made for his benefit, but cannot take advantage of the omission. *Van Dyck v. McQuade*, 86 N. Y. 46.

**Directors of savings banks.** The directors of a savings bank are but agents of a corporation, and each is liable for all damages by violation of duty whether from misconduct, negligence or omissions. *Van Dyck v. McQuade*, 87 How. Pr. 65; *Potter, Corp.* §§ 34, 331; *Cunningham v. Pell*, 5 Paige, 607; *Franklin F. Ins. Co. v. Jenkins*, 3 Wend. 130; *Austin v. Daniels*, 4 Denio, 290. Every departure from the proper course on the part of directors or managers of a savings fund is a breach of trust of which equity will take cognizance and hold them individually and personally responsible. *Oakland Sav. Bank v. Wilcox*, 60 Cal. 142; *Leffman v. Flannan*, 5 Phila. 153; *Robinson v. Smith*, 3 Paige, 231. But directors of a bank are not responsible for an injury to the bank caused by their act, originating in an error of judgment, unless the act be so grossly wrong as to warrant the imputation of fraud or the want of the necessary knowledge for the performance of the duty assumed by them on accepting the agency. *Godbold v. Branch Bank at Mobile*, 11 Ala. 191; *Thomp. Liability of Officers*, 240.

They must exercise the highest and most scrupulous good faith.

*Ryan v. Leavenworth, A. & N. W. R. Co. and Vance v. Phoenix Ins. Co. supra.*

They must, furthermore, exercise reasonable diligence or ordinary care; that care, in other words, which an ordinarily prudent man takes in the management of his own concerns.

*Smith v. Prattville Mfg. Co.* 29 Ala. 508; *Percy v. Millaudon*, 8 Mart. N. S. 68; *Bank of Mutual Redemption v. Hill*, 56 Maine, 385; *Scott v. Depeyster*, 1 Edw. Ch. 547; *Hun v. Cary*, 82 N. Y. 72; *Matich v. Saving Fund*, 5 Phila. 80; *Shea v. Mabry*, 1 Lea, 819; *Angell & A. Corp.* § 814; *Land Credit Co. v. Fermoy*, L. R. 5 Ch. 768; *Leffman v. Flanigan*, 5 Phila. 155.

The directors of a bank are bound to use diligence in acquiring knowledge of its business; and they cannot be heard, when sued, to say that they were not apprised of facts the existence of which is shown by the books, accounts, and correspondence of the banks.

*German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Merchants Bank v. Rudolf*, 5 Neb. 527; *Corbett v. Woodward*, 5 Sawy. 416, 417; *United Society of Shakers v. Underwood*, 9 Bush, 609; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23; *Martin v. Webb*, 110 U. S. 7, 15 (28 L. ed. 49, 52).

*Messrs. S. Ferguson Beach, C. E. Stuart, G. A. Mushbach, and John M. Johnson*, for appellees:

Upon the facts of this case the directors cannot be held to account for the losses of the institution, either to the corporation, or to the stockholders, or to the creditors.

*Whart. Neg.* § 510; *Wood's Field, Corp.* §§ 152-156; *Thomp. Liability of Officers*, pp. 400, 401; *Angell & A. Corp.* §§ 812-815; *Spring's App.* 71 Pa. 11, 10 Am. Rep. 684; *Hun v. Cary*, 82 N. Y. 65, 87 Am. Rep. 546; *Hodges v. New Eng. Screw Co.* 1 R. I. 812, 58 Am. Dec. 624; *Fuss v. Spaunhorst*, 67 Mo. 258, 264; *Matich v. Saving Fund*, 5 Phila. 80; *Watkins v. Stewart*, 78 Va. 111.

**Lacy, J.**, delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the City of Alexandria, rendered on the 30th day of March, 1887.

The suit was brought by the appellant, James A. Marshall, for himself and on behalf of the other creditors of the appellee corporation, "The Farmers & Mechanics Savings Bank of Virginia," a broken bank, to reduce into possession and distribute amongst said creditors the assets of the said bank, and to charge the individual defendants, who were the officers and directors of said bank, with the difference between the assets and liabilities of the said bank, upon the ground that the said directors had not had a meeting for at least one year prior to the first day of December, 1876, the date of the suspension and failure of the said bank, and for at least one year prior to the ascertainment of the embarrassed condition of said bank, which occurred some time before its said suspension; and that they did not give that care, supervision and attention to the business affairs of said corporation which the duties of the office and the nature of the trust reposed in them required, but, on the contrary, neglected the same § L. R. A.

and intrusted entirely the business concerns of the bank to the president and one, and possibly two, directors, who recklessly and improvidently loaned the money and securities of the said defendant corporation to various embarrassed and insolvent corporations, firms and individuals without taking proper and sufficient security for the protection of the depositors and creditors of the said bank, and being themselves connected with or interested in said embarrassed and insolvent corporations; by reason of which said conduct upon the part of said directors the appellant insists that heavy losses had fallen upon the bank, and that the said directors are individually and personally liable to the depositors and creditors of the said bank for the losses so occasioned by the neglect of the duties of their office as directors.

The bank answered the bill of the plaintiff through its president, and the directors answered individually, wherein negligence is denied; and it is also denied that the business of the bank was intrusted wholly to the president, but it is admitted that "instead of regular formal weekly meetings of the board, as prescribed by the by-laws of the bank, informal meetings were substituted, it being proved, soon after the bank went into operation, that formal weekly meetings were unnecessary."

The questions involved were referred to a commissioner in chancery for examination and report.

The commissioner reported that the said directors not only did not exercise ordinary care and diligence, but that they were guilty of gross negligence:

*First*, that the board of directors only met in 1878 three times; in 1874 twice; in 1875 once; in 1876 twelve times; in 1877 five times; in 1878 once. *Second*, that from the organization of the bank down to its suspension, December 1, 1876, there never was an examination made by the board of directors, or by any committee appointed by them, of the books, papers, funds, stocks or bonds of the bank, or statement called for from other banks of the account of the said The Farmers & Mechanics Savings Bank with them. *Third*, that, notwithstanding the fact that a committee was twice appointed for the purpose, an examination was never made of the books, and no report ever made or called for from the committees appointed. *Fourth*, that the president, without authority, took from the cash drawer, from time to time, sums of money aggregating \$2,187.83, leaving nothing but tickets for the said sums of money; that in 1874 the said president caused McKim & Co., of the City of Baltimore, to sell the coupon bonds issued by the said The Farmers & Mechanics Savings Bank and deposited with the said McKim & Co., and appropriated the proceeds to his own private use, and never made any entry on the books of the bank prior to September, 1876, overdraw his account \$241.64, and in other ways converted to his own use the property of the bank—said several sums aggregating \$11,713.97. That the directors negligently failed to look at the books, into the cash drawer, or exercise any care whatever to discover these things; and when at last the facts did come to their knowledge, they did not remove, but continued, this president, and allowed him to manage the books of the



bank almost alone. *Fifth*, the account of the Alexandria Passenger Railway Company, which had this same president of the bank for a time, and a director of this bank for its president afterwards, whose treasurer was the cashier of this bank, was overdrawn \$11,841.91, which was decreased by crediting notes aggregating \$6,500, which were neither paid nor renewed; and the overdraft continued to increase until the suspension of the bank, which was at that time \$7,530.45, but was manipulated so as to make it appear to be only \$674.58. *Sixth*, that one P. B. Stilson, borrowed \$2,000 by depositing the notes of one J. A. Clark for \$4,000, secured by a deed of trust in Maryland, and also the notes of one B. G. Daniels. The Clark note was perfectly good, and in November, 1873, Stilson was allowed to withdraw it, and only leave the Daniels notes, which were perfectly worthless. *Seventh*, that the Washington & Ohio Railroad Company, whose president was for some years one of the directors of this bank, was loaned, on May 8, 1872, \$5,000, without a meeting of the board; and when the whole balance on hand was \$9,373.98; July 5, 1873, \$3,000 was lent, when only \$6,396.71 was on hand; and on July 17, 1872, \$5,000 was lent, when only \$3,238.47 was the balance on hand. That nothing was ever paid on these notes until the appointment of a receiver. There were numerous other notes aggregating large sums, for the security of which the bank held second mortgage bonds of the road, which proved to be worthless. The commissioner says that from the testimony it may be possible to class the original transaction of making the loan to this company as an error of judgment; but it was more than an error of judgment to sit idly by when the said company did not have the means to pay its renewals, nor take the trouble to renew the notes when they became due, and make an effort to collect the debt or to regain additional security, especially when the testimony discloses that nearly everyone else who had loaned money to the road was demanding and receiving additional security, and that the said The Farmers & Mechanics Savings Bank was almost the only holder of the notes of the said company; that the dividends on the collaterals were not sufficient to pay the notes. The evidence shows that the bonds of the company were sold to pay interest, and that the published statements of the condition of the company disclosed the fact that the earnings of the company were not sufficient to pay the operating expenses and interest on the debt. *Eighth*, that Jamieson & Collins owed the bank at suspension \$3,311.62, for which there was no security, and no indorser except one of the makers, and that a new note was discounted for them amounting to \$1,211.62, a few months before the suspension of the bank—to wit: on the 30th of August, 1876—this Jamieson being the brother of the president. *Ninth*, Robert Jamieson, himself not solvent, and the brother of the president, with indorsers both worthless, was loaned thousands of dollars, and at the suspension owed \$2,300, some of his paper being altogether without an indorser; and the books of the bank showed that a note of Jamieson for \$500, deposited for collection by W. F. Vincent, was protested November 8, 1873.

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And he reports the names of the directors and their several periods of service.

The capital stock of this bank was only \$10,000, and of that only \$6,200 was paid at the time of the suspension of the bank. The bank closed its doors and ceased to do business December 1, 1876. An assignment of assets was made September 18, 1877. A receiver was appointed May, 1878. The commissioner classifies the directors and their period of service, and ascertains the amount for which the several classes are in his judgment liable. He ascertained that Robert Bell, Jr., William Cogan, Andrew Jamieson, and the estate of John W. Stewart are severally liable for principal and interest to March 15, 1886, \$38,574.82; that said Robert Bell, Jr., Emanuel Francis, William Cogan, Andrew Jamieson, and John W. Stewart were directors of the bank from its organization to the appointment of a receiver; that Lewis Stein, John P. Agnew, and John C. Graham's estate are severally liable for the amount of \$35,917.09, the said Lewis Stein, John P. Agnew, and John C. Graham having been directors from May 13, 1873, to the appointment of a receiver; that Lewis McKenzie and Jefferson Tacey's estate are severally liable for \$21,692.71.

This report was excepted to: *first*, to the amount of principal ascertained by the commissioner to be due to the depositors and allowing 6 per cent interest thereon; *second*, to the amounts ascertained by the commissioner to be due from the several debtors of the defendant bank, and also to the amount of the overdraft of the Alexandria Passenger Railway Company; *third*, to the special commissioner finding the facts proved; *fourth*, to the conclusions of the said report, by which they are held responsible for the several sums reported as respectively chargeable to them on account of alleged negligence or improper conduct in the discharge of their duties as directors, evidence taken in the cause being wholly insufficient, as these defendants allege, to show any negligence or improper conduct which show either of said defendants so liable.

On the 30th of March, 1887, the Circuit Court of Alexandria City rendered a decree in the cause, whereby the said report, so far as it finds the directors of the Farmers & Mechanics Savings Bank, or any of them, personally responsible for the losses sustained by the bank, be and the same is overruled, it appearing to the court that no such dereliction of duty on their part is shown as to fix upon them such personal liability; and that as to the said directors and personal representatives of such as are dead the plaintiff's bill be and the same is hereby dismissed, with costs. It is further adjudged, ordered and decreed that the said report be and the same is hereby confirmed and ratified in all other particulars. From this decree the plaintiff applied for and obtained an appeal to this court.

By the appellees no error is assigned, so the question involved here does not raise any other question than the single inquiry, Was there such negligence on the part of the directors of this bank as to make them, or any of them, personally liable for its losses? There is no dispute as to what the losses have been and their several

amounts, and of the terms or periods as to which each director is liable, if at all.

The appellees insist, through their learned counsel, that, while there have been errors of judgment and unfortunate loans made, there has been no negligence.

The liability of directors for losses growing out of their mismanagement of the concerns of the bank, and their negligence in the discharge of their duties, has been often the subject of judicial investigation and decision. It is a question at this day well understood by the profession, and is not controverted to any degree by the learned counsel in this case. We find the settled rule upon this subject well stated in a recent work of great practical usefulness.

The American & English Encyclopedia of Law, under the head "Banks," speaking of directors, says: "The directors of a bank have the general control and government of its affairs, and constitute the bank. They are bound to exercise ordinary skill and diligence, and are liable for losses resulting from mismanagement of the affairs and business of the bank"—citing *United Society of Shakers v. Underwood*, 9 Bush, 609, which appears to have been criticised in *Zinn v. Mendel*, 9 W. Va. 580, 597, and by Mr. Redfield in 18 Am. Law Reg. N. S. 216. *Dunn v. Kyle*, 14 Bush, 184; *Brinckerhoff v. Bontwick*, 88 N. Y. 52; *Chester v. Halliard*, 84 N. J. Eq. 341; *Spring's App.* 71 Pa. 11.

Then it is further said: "But for excusable mistakes concerning the law, and for errors of judgment, when acting in good faith, they are not liable"—citing *Spring's App.* and *Dunn v. Kyle*, *supra*; *Godbold v. Branch Bank at Mobile*, 11 Ala. 191; *Hodges v. New Eng. Screw Co.* 1 R. I. 812. See 2 Am. & Eng. Encyclop. of L. 114-116.

Morse, in his work on Banks and Banking, says: "If bank directors do not manage the affairs and business of the bank, according to the directions of the charter, and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either their stockholders or creditors, or both. [*Hodges v. New England Screw Co. supra.*] They may be held to account to an injured party in a court of chancery [*Bank of St. Marys v. St. John*, 25 Ala. 566]; or they, or any one of their number who shared in the wrong doing, may be sued at law for damages. [*Conant v. Seneca Co. Bank*, 1 Ohio St. 298.] They are required simply to show a reasonable capacity for the position they accept, to use in it their best discretion and industry, to show the scrupulous *bona fides* and conscientiousness in every matter, however minute, which is exacted rigorously of all trustees of the property of others, and to obey accurately the requisitions of the charter or of the general law under which they are organized." Morse, Banks & Banking, 133.

Mistakes as to what is the law serve to excuse cases where correct knowledge could be reasonably expected only from a professional man; and even in such cases, if the directors feel any doubts, they may be guilty of neglect if they fail to seek and be guided by competent legal advice. But ignorance of any fact in the bank's affairs, which it is their duty to know, can never be set up by them in defense or ex-

culpation for any act which the existence of that fact should have prohibited. *Id.* 185.

"The high degree of confidence and responsibility resting upon directors of corporations has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and *cestuis que trustent* respectively. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations. The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors. The law is, as it ought to be, very jealous in exacting the strict and thorough performance of these duties; and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied. It is not enough to exculpate a director that no actual dishonesty can be shown; that he cannot be positively proved to have been influenced by interested motives." *Id.* pp. 113, 114.

Mr. Morawetz, in his work on Private Corporations, says, as to the degree of care to be exercised (§ 552): "Attempts have been made to define the degree of care and prudence which directors must exercise in the performance of their duties. In some of the cases it has been said that, inasmuch as directors are usually not paid for their services, they are to be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties—and are bound to exercise only ordinary care and prudence, and that they are liable to the corporation only for what is called *craes negligentia*, or gross negligence. But all this is at the most misleading. The plain and obvious rule is that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact which must be determined in each case in view of all the circumstances. The character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution."

Directors or trustees of a corporation are bound to manage the affairs of the company with the same degree of care and prudence which is generally exercised by business men in the management of their own affairs. *Hun v. Cary*, 82 N. Y. 65; *Charitable Corp. v. Sutton*, 2 Atk. 405; *Litchfield v. White*, 8 Sandf. 545; *Hodges v. New Eng. Screw Co. supra.*

Directors are not merely bound to be honest; they must also be diligent and careful in performing the duties they have undertaken. They cannot excuse imprudence on the ground of their ignorance or inexperience or the honesty of their intentions; and if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences. See the case of *Hun v. Cary*, 82 N. Y. 65, Earl, J., saying in delivering the opinion in that case: "One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a

mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men, and to mechanics; and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that that service is to be rendered gratuitously. The defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust."

Directors can never set up as a defense that they were ignorant of a provision of the company's charter or by laws. See *Sperling's App. supra*, and the opinion of Chief Justice Green in *Hodges v. New Eng. Screw Co.* 1 R. I. 182.

We cannot better close the discussion upon this question than by citing the case of the *Mutual Building Fund & Dollar Savings Bank v. Bossieux*, 4 Hughes, 887, much relied on by the learned counsel for the appellant, who says: "This question has been the subject of investigation and judicial determination by the United States Circuit Court for the Eastern District of Virginia."

Judge Hughes, in an elaborate opinion, stating the law with great force and clearness, exhibiting a thorough and patient examination of all the authorities, held the defendant directors liable upon this ground: "Gross inattention and negligence allowing fraud or misconduct on the part of agents, officers, or codirectors, which could have been prevented if they had given ordinary care and attention to their duties." Indeed, this opinion is not only the most thorough examination, but the ablest exposition of the law upon the subject the writer has been able to find, after examining many authorities, and he might well be content to rest the law of this case upon the opinion of Judge Hughes. In it he reviews the case of *Sperling's Appeal*, and shows that the very principle was declared in that case upon which he found the directors of the Dollar Savings Bank liable. He declares that "Negligence may be of such a character as to amount to fraud"—citing *Jones v. Clark*, 25 Gratt. 655, and *Neal v. Clark*, 95 U. S. 707 [24 L. ed. 586].

In that case Judge Hughes says: "It will abundantly appear, from authorities and reported cases to be cited in the sequel, that the managing officers of corporations are personally liable for the results of gross negligence, or what the jurists call *crassa negligentia*. If, by reckless inattention to the duties confided to them by their corporation, frauds and misconduct are perpetrated by officers, agents and codirectors, which ordinary care on their part would have prevented, then I think it may be said with truth that it is now elementary law, to be found in all the books, that directors are personally liable for the losses resulting. More-  
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over, all authorities now tend to the conclusion that directors of banks and other moneyed corporations hold the relation to stockholders, depositors, and creditors of trustees to *cestui que trust*, and, as such, are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust." *Mutual Bldg. Fund & Dollar Sav. Bank v. Bossieux*, 4 Hughes, 888, and the authorities cited in the opinion.

We will now proceed to briefly review the facts of this case, to which this well established rule of law is to be applied. The question arises in this case as between the directors and the depositors, and not between the directors and the stockholders. The by-laws of this bank prescribed weekly meetings. It is conceded that these were scarcely ever held, the answer admitting that formal meetings were not held.

The decree of the Circuit Court of Alexandria City that "It appears to the court that there has been no such dereliction of duty on the part of the directors or any of them, as to fix upon them personal responsibility" cannot be sustained upon any sound principle whatever. Upon what principle can Andrew Jamieson be held not to be personally liable for the acts already detailed concerning him? The commissioner reports that he took \$2,187.88 out of the cash drawer; that he withdrew, without authority, the bonds of the bank deposited elsewhere, caused their sale, and appropriated the money to his own use; overdraw his account \$341.64, and in other ways converted to his own use the property of the bank aggregating \$11,718.97.

The passenger railway was allowed to overdraw its accounts to the amount of thousands—\$11,814.91 at one time. The notes of the company were discounted to the amount of \$6,500, and at maturity neither protested, renewed, collected nor sued on; and the overdraft was allowed to increase for a year and more, without security, until it reached \$7,530.45, which was entirely lost to the bank; he being the president of this company part of the time, and one of the bank directors being president of the company the other part of the time in question, while the treasurer of the railway company was the cashier of this savings bank. Stillson was allowed to withdraw the sole valuable security for his note of \$2,000, and that was lost. He lent his brother \$3,311.62, practically without any security, and that was lost; and actually lent him \$1,211.62 a few months before the bank closed its doors—lending to Robert Jamieson, with no security except worthless indorsers, \$2,800, when he had already gone to protest on a note of \$500.

But the codirectors seek to escape responsibility for all this, including the large loss to the Washington & Ohio Railroad, by claiming to have no actual knowledge of it all. Did they exercise ordinary diligence to inform themselves, as their duty certainly required that they should? They were required to meet weekly by their own by-laws. They did not always meet semi-annually, meeting sometimes once a year, as we have stated. They were in duty bound to cause the books of the bank to be examined at regular intervals. This they never did at all throughout their whole career.



nor did they ever call for a statement of their accounts with other banks. Their vaults and their cash drawer were emptied by illegal abstractions and insolvent loans; and they admit that they never knew it, and plead this as their exculpation.

The stock subscribed for was not paid up, as has been stated, and yet such part as was paid up was treated as a loan and interest paid on it, and a large part had never been paid up at the time of the suspension, and some of it has not yet been paid up. Having a bank with so small a nominal capital, with empty vaults and despoiled cash drawer, they owed, at the suspension of the bank, to depositors who had intrusted to them their money, \$58,063.68, on which they have been able to pay only 10 per cent. If these directors had any duty to perform whatever toward their depositors, the records of this case do not show its performance. They plead ignorance. One of their number was the president of the Washington & Ohio Railroad in its last hours, and knew its condition, and secured himself, but the notes due the bank were allowed to sleep unprotected, unsecured, unrenewed, uncollected and unsued on. One of their number was the president of the Alexandria Passenger Railroad Company, and knew its condition. One of their number was the brother of their defaulting debtor, Jamieson, who was insolvent at the time of the loan of thousands to him without security.

It is difficult to concede that they could have been ignorant of all this; but, suppose they were, their duty required that they should have looked well into all these matters; and if they have negligently trusted them to others, and loss has occurred, should it fall on them or upon the depositors who had trusted them, and whose trust they had accepted, and to whom they had solemnly promised such care and attention as was to be expected of good business men?

We think the record shows that these directors and all of them have been guilty of such negligence in the premises as makes them personally liable for the losses caused by their negligence; and we are of opinion that the Circuit Court of Alexandria City erred in holding them exonerated. While this is true, there is nothing in the record which shows any bad faith, or tends to show any dishonesty on the part of some of these gentlemen, who appear to have confided their duties to others, and to have been betrayed by them; but this was such negligence as will fix liability upon them. Their act in assuming this attitude of trust and confidence was voluntary, and led to the confidence which has resulted in loss.

We are of opinion to reverse the decree of the Circuit Court of Alexandria City appealed from, and to render such decree here as the said court ought to have rendered.

*Decree reversed.*

## KENTUCKY COURT OF APPEALS.

**GREEN & BARREN RIVER NAV. CO.,**  
App't,  
v.  
**CHESAPEAKE, OHIO & SOUTHWEST-  
ERN R. CO.**

(....Ky.....)

**1. A State Legislature may authorize the building of a bridge or other structure tend-**

ing to obstruct the navigation of a navigable river which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions that its will must be obeyed so far as may be necessary to insure free navigation.

**2. The Green & Barren River Navigation Company, by the Kentucky Act of March 9, 1868, leasing to it the "Green & Barren River line of navigation and their tributaries, together with the grounds, houses, waterworks, rents, profits,**

*NOTE.—Navigable waters; power of Congress to regulate commerce.* The power of Congress to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all the navigable waters of the United States which are accessible from another State than that in which they lie. *Gilman v. Phila.* 70 U. S. 3 Wall. 713 (18 L. ed. 36). The paramount power of regulating bridges over the navigable waters of the United States—as the Ohio River—is in Congress and free from the interference of the States. *Newport & C. Bridge Co. v. U. S.* 105 U. S. 470 (23 L. ed. 1143). The power of Congress to build a bridge, or authorize a bridge to be built, across water dividing two States, is altogether independent of the consent and concurrence of the state governments. *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9. Congress can authorize a private corporation to occupy navigable waters and construct a bridge across the same, for purposes of interstate commerce, without consent of any State. *Decker v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 434, 30 Fed. Rep. 723; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9. The Ohio is a navigable stream and subject to the commercial power of Congress; and if the Act of a State authorized the creation of an obstruction, it would be no justification. *Pa. v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518 (14 L. ed. 249). The Act of Congress, approved June 16, 1896, authorizing the construction of a bridge across Staten Island Sound,

known as "Arthur Kill," is within the power of Congress to regulate commerce, and is valid. *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9. When Congress declares a bridge across a navigable river an unlawful structure, no state legislation can make it lawful. *Cardwell v. American River Bridge Co.* 113 U. S. 205 (23 L. ed. 959).

*Congress may legalize a bridge constructed over navigable waters.* Congress can legalize a bridge over a navigable river under the power to regulate commerce. *Gray v. Chicago, I. & N. R. Co.* ("The Clinton Bridge") 77 U. S. 10 Wall. 454 (19 L. ed. 909). It may declare that, upon a certain fact being established, a bridge over a navigable river shall be deemed a lawful structure, and employ the secretary of law as an agent to ascertain that fact. It thereby abdicates none of its authority. *Miller v. Mayor of N. Y.* 109 U. S. 385 (27 L. ed. 971). An Act of Congress to legalize a bridge across a navigable river, passed pending a suit to remove the bridge as a nuisance, gives the rule of decision for the court at the final hearing. *Gray v. Chicago, I. & N. R. Co.* ("The Clinton Bridge") 77 U. S. 10 Wall. 454 (19 L. ed. 909). An Act of Congress declaring a bridge over the Ohio River a lawful structure supersedes a previous decree of the court declaring it an obstruction to navigation and directing its removal. *Pa. v. Wheeling & B. Bridge Co.* 50 U. S. 18 How. 421 (15 L. ed. 435). Where Congress gave a license to erect and maintain a bridge across the

tools, machinery, implements and appurtenances, and all the franchises thereunto belonging or appertaining," acquired only the improvements belonging to the State in its corporate capacity, as distinguished from what was subject to public use under common right, and did not acquire any exclusive right of navigation; therefore it has no right of action against a railroad company for the obstruction of navigation by repairing a bridge, where this was done under a license which was valid against the public, and the improvements included in the lease were not injured or interfered with.

8. **The obstruction of navigation by the repairing of a bridge** over a river in replacing a draw span, which bridge is maintained under lawful authority, creates no right of action in favor of parties entitled to navigate the river, if the repairs are made in such a manner as not unreasonably to obstruct the navigation, although it was possible to have opened the draw and constructed the new one upon the edge of the river, thus avoiding all obstruction to navigation, but which would have involved unreasonable delay and expense.

(December 11, 1888.)

**A**PPEAL by plaintiff, from a judgment of the Louisville Law and Equity Court (Harris, J.), in favor of the defendant in an action for damages for obstructing Green River. *Affirmed.*

The facts as found are stated in the opinion.

*Messrs. Wright & McElroy* and *Alex. P. Humphrey* for appellant.

*Messrs. John Mason Brown* and *George M. Davie* for appellee.

**Holt, J.**, delivered the opinion of the court: The Legislature of Kentucky chartered the Memphis, Paducah & Northern Railroad Com-

pany on March 25, 1878. It also incorporated the Chesapeake, Ohio & Southwestern Railroad Company on January 19, 1882. The last named corporation was at the time of its creation the owner of so much of the first named road as had then been constructed from Memphis, Tenn., to Paducah, Ky.; and its charter conferred upon it certain powers and privileges that had been granted to the Memphis, Paducah & Northern Railroad Company.

The charter provision of the last named corporation, which was, by reference to it in the appellee's charter, made a part of it, and which is material to the proper consideration of the questions now presented, is as follows: "Sec. 19. The board may provide for the construction of telegraph lines, workshops, warehouses, bridges (so as not unreasonably to obstruct the navigation of any navigable stream) and other buildings and erections, and for conducting them, and such other operations as may be necessary and convenient to the most efficient operation of the railroad of the company for the common carriage of freights and passengers."

Prior to 1883 the appellee's road had, in conformity to its charter, been extended from Paducah northward to Louisville; and as a part of this extension, and under its legislative grant, the company had erected across the Green River, at Rockport in this State, a bridge, with a revolving or draw span, so as to admit of the passage of boats and other craft navigating the river. In November, 1883, it became necessary to replace this draw span with a new and more improved one; and to this end the appellee caused notice to be published that it would close the channel of the river under the span from December 5 to about December 31, 1883. It also had notice of its intention to do so, served

Ohio, the bridge company, by accepting its provisions, became subject to the reservation of power in Congress to withdraw the license and to direct necessary alteration of the bridge. *Newport & C. Bridge Co. v. U. S.* 105 U. S. 470 (26 L. ed. 1143).

*Erection of bridge not necessarily a nuisance.* Every bridge over a river is not necessarily a nuisance. (Circuit court decision affirmed on equal division.) *Minor v. N. J. R. R. & Transp. Co.* 70 U. S. 3 Wall. 721 (46 L. ed. 799). The obstruction to navigation must be plainly a nuisance, before it can be removed by decree. *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485 (17 L. ed. 311). Temporary inconvenience to private parties, in common with the public in general, occasioned by the exercise of a right conferred by law for the benefit of the public, gives them no right to damages. It is *damnum absque injuria*. *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 289 (30 L. ed. 303). If the erection was for a public purpose, and produced a public benefit, and was in a reasonable situation, and a reasonable space was left for the passage of vessels, then it was not an unreasonable obstruction. *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485 (17 L. ed. 311). The distance of 160 feet between the piers of the bridge across the Missouri River at Kansas City, required by the Act of Congress of July 25, 1836, is obtained by measuring along a line between the piers, drawn perpendicularly to their faces and the current of the river. *Hannibal & St. J. R. Co. v. Mo. River Packet Co.* 125 U. S. 290 (31 L. ed. 731); *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. Rep. 755.

*Removal of cause to federal court.* A suit by the State against a railroad company, to procure the removal of a railroad bridge across a navigable river, in which the defendant invokes the protection of Congress, is a case arising under the Laws of the United States, and is removable into the federal court. The state court was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal. *New Orleans, M. & T. R. Co. v. Miss.* 102 U. S. 135 (26 L. ed. 96).

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*Jurisdiction of United States Courts.* The compact between Virginia and Kentucky, providing that the navigation of the Ohio should be free, was sanctioned by Congress, and is obligatory, and can be enforced by the supreme court. *Pa. v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518 (14 L. ed. 249). In the exercise of its original jurisdiction, the supreme court may, on complaint by a State of the erection of a bridge, refer the case to a master to take proof. *Pa. v. Wheeling & B. Bridge Co.* 50 U. S. 9 How. 647 (13 L. ed. 204). In a suit brought in a federal court, where jurisdiction depends on citizenship of the parties, for the abatement of a bridge across a navigable river which is the boundary of the judicial district, relief cannot be granted unless the part of the bridge which is on that side of the middle of the river is in itself a serious obstruction to navigation. The court has no greater authority than a court of the State in which it is sitting. *Miss. & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485 (17 L. ed. 311). As to whether or not the circuit court has the power to restrain the erection of a bridge across the Hudson River, this court is equally divided in opinion. *Silliman v. Hudson River Bridge Co.* 66 U. S. 1 Black, 532 (17 L. ed. 81).

*Bridges constructed under state authority.* The States within which navigable streams lie may authorize the construction of bridges over them until Congress intervenes and supersedes their authority. Congress may so intervene so far as is necessary to secure free navigation. *Cardwell v. Am. River Bridge Co.* 113 U. S. 205 (28 L. ed. 959); *Gilman v. Phila.* 70 U. S. 3 Wall. 713 (18 L. ed. 98); *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 3, 678 (27 L. ed. 442); *Willson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 (7 L. ed. 412). The power to authorize the building of bridges over navigable streams within the State is not to be found in the Federal Constitution. It has not been taken from the States. *Gilman v. Phila.* 70 U. S. 3 Wall. 713 (18 L. ed. 98). Except as against the action of Congress, the power of a State is plenary over the form and character of a bridge, irrespective of its effect up-

upon the appellant, the Green & Barren River Navigation Company, a lessee from the State under an Act approved March 9, 1868, of the locks, dams and other improvements erected by it upon Green and Barren Rivers, and the owner of a line of steamboats plying upon these waters between Bowling Green, in this State, and Evansville, Ind.

There is no complaint of want of proper notice. Accordingly the railroad company, over the protest of the navigation company, closed the draw span by the erection of false work under it, and it thus remained until January 22, 1884, a period of forty-seven days. No unnecessary time was consumed, however, in the erection of the work, and during fifteen of the forty-seven days navigation was prevented upon the appellant's line by ice in the Ohio River.

The lower court in its finding of facts found that the obstruction of navigation might have been altogether avoided by throwing open the draw span, and erecting the false work along the river bank, upon the edge of which the draw pier stood. Doubtless this would have been possible; but it would not only not have served the railroad, but have been an unusual mode of erecting such structures, requiring more time for its completion, and involving 50 per cent, or at least a much greater, cost. While the navigation was thus obstructed the navigation company continued the operation of its line, save when prevented by ice, by running one of its boats upon the upper and the other upon the lower end of it, and by transferring its passengers and freight from one boat to the other over the deck of a barge anchored under the bridge. It brought this action to recover damages consequent upon the obstruction.

on navigation. *Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 230 (80 L. ed. 398). An Act of Congress, admitting a State, which provides that a river shall be a common highway and forever free, does not affect the power of the State in respect to bridges over it. *Hamilton v. Vicksburg, S. & P. R. Co. supra*. The erection of a bridge over the Willamette River at Portland is not a violation of the Admission Act of Oregon. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 131 (31 L. ed. 629). A bridge constructed over a navigable river, in accordance with the legislation of both the State and Federal Governments, must be deemed a lawful structure, however much it may interfere with the public right of navigation. *Miller v. Mayor of N. Y.*, 109 U. S. 385 (27 L. ed. 971). Under the Rhode Island Act authorizing the construction of a bridge over a river, in such place and manner as commissioners might determine, they could erect a bridge high above the river, and extending beyond the bank to an avenue, there establishing an abutment. *Sullivan v. Webster*, 5 New Eng. Rep. 331, R. I. Index B11, 33. The Statutes of New York authorize boards of supervisors, upon the application of one town legally, to require a stream forming the boundary between two towns to be bridged at the joint expense of said towns, and compelling each town to raise money to pay its share of the expense by an issue of bonds. *Kirkwood v. Newburg*, 45 Hun, 323, 12 N. Y. S. R. 420. Where a bridge was originally constructed, and has for a number of years been maintained, by two adjoining towns, upon a highway running along the line between the towns, it is the duty of both towns to keep it in repair; and both are liable for injuries sustained by reason of its being out of repair. *Getty v. Hamlin*, 46 Hun, 1, 11 N. Y. S. R. 93.

*Railroad bridges over navigable streams.* Where a railroad company has been granted the right to build a bridge over a navigable stream, the proper and necessary repair of such bridge without negligence cannot subject the company to liability for damage caused thereby; and injuries suffered by the driving of piling in the making of such repairs,

The lower court found that it caused one of the appellant's boats to remain idle and partially manned at Rockport during the closing of the span, at an expense of \$1,585.25.

We fail to understand why this was either a necessary or a reasonable result. The bridge was not far from the middle point upon its line of navigation. It seems to us that one boat could have been constantly plying between the bridge and one end of the line, and the other between the bridge and the other end, the two meeting at the bridge, thus avoiding the detention of one boat at the bridge while the other went from it to the other end of the line and returned. As it was a finding of fact, however, we will regard it as well founded. The judge below also found that a reasonable rent of the barge, etc., was \$1,551, thus fixing the entire damage at something over \$3,000; but he dismissed the claim, upon the ground that the legislative grant to the railroad company to make the improvement was valid, and that it in doing so had kept within its terms.

The Green and Barren Rivers are navigable streams, and entirely within the boundary of this State. They are public highways by nature or of common right. They exist by common law, and the public can only be deprived of their free use by legislation. Although they are national as well as state highways, and besides serving the purposes of internal commerce also facilitate commerce between the States, yet it is well settled that in the absence of legislation under that clause of the Constitution of the United States giving to Congress the power to regulate commerce between the States, a State has plenary power over a navigable stream altogether within its borders. In such a case, until Congress intervenes, the Legisla-

by a person rafting the logs on the stream, is *damnum absque injuria*. *Central Trust Co. v. Wabash etc. R. Co.*, 32 Fed. Rep. 568. A railroad company chartered in another State may be obliged, by the condition of a state statute which recognizes it as a corporation of that State, to construct and maintain a drawbridge in the channel of a river which is crossed by the company's road, on the line between two States. *New Orleans etc. R. Co. v. Miss.*, 112 U. S. 12 (28 L. ed. 619). If by the Act of the Government subsequent to the building of the bridge, or by any other means not within the control of the company erecting the bridge, the currents were so radically changed as to materially obstruct the navigation and make the passage of the draw dangerous, it would have been incumbent on the bridge company to change the piers in conformity to the new condition of things; but if the change in the current to the draw by the excavation was slight, the failure to exercise proper skill in such erection will constitute such negligence, though ever so much care is used in its erection. The failure to build the bridge in the manner prescribed by law is negligence *per se*. *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.*, 31 Fed. Rep. 755. Where, before a bridge over a navigable stream, authorized under a general Act, was built, a canal was ordered by the Government to be constructed, it became the duty of the bridge company to plan and build their bridge with reference to the canal through which the principal traffic of the river would pass; but the company were only required to use reasonable diligence and skill in forming and executing their plans, and were not required to foresee and absolutely anticipate the effect upon the current of the river of a factor not yet in existence; and if the piers of the bridge were made parallel, as far as possible, with the currents of the river and the necessities of the canal, with the result that the passage of the draw is reasonably safe, negligence cannot be imputed to the company. *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.*, 31 Fed. Rep. 755.

ture of the State is sovereign. It may, as to such a stream, and in the absence of national legislation, enact a law which incidentally may have a material influence upon commerce between the States. Such a river is not outside of state jurisdiction so long as Congress does not interfere. The mere grant of the power to the national Legislature to regulate commerce between the States is not *per se* an inhibition upon state legislation as to a navigable river entirely within its boundary. It is quite proper that it should in such a case regulate its internal commerce as a part of its internal police.

The Supreme Court of the United States, speaking upon this subject in the case of *Hamilton v. Vicksburg Railroad Company*, 119 U. S. 280 [80 L. ed. 893], said: "As has often been said by this court, bridges are merely connecting links of turnpikes, streets and railroads; and the commerce over them may be much greater than that on the streams which they cross. A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public than the obstruction to navigation caused by a bridge with proper draws. In such cases the local authority can best determine which of the two modes of transportation shall be favored, and how far either should be made subservient to the other."

We regard it as now settled beyond question that a State Legislature may at least authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river, which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions that its will must be obeyed so far as may be necessary to insure free navigation. *Willson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7 L. ed. 412]; *Cardwell v. American River Bridge Co.* 118 U. S. 205 [28 L. ed. 959]; *Northern Transp. Co. v. Chicago*, 99 U. S. 635 [25 L. ed. 336]; *Hamilton v. Vicksburg R. Co.* *supra*. In fact, many of the cases hold that the obstruction may go to the extent of entirely destroying the navigation of the stream.

The appellant contends, however, that it stands in a different attitude from the general public as to the right of the State to obstruct Green River, or to authorize it to be done by the building or repairing of a bridge. It insists that the Legislature had no right, after making, and during the continuance of, the thirty years' lease to it, to pass any law repealing or abridging the privileges conferred by it, because to do so would impair the obligation of the contract; and that the State cannot obstruct its navigable streams, or authorize it to be done, if Congress has legislated as to it under the commerce clause, or if to do so would violate a contract made by the State with an individual or a corporation. It becomes necessary, therefore, to ascertain what rights the appellant did in fact acquire by its lease.

The rights of the parties to this controversy are not to be determined by the relative importance of river or railroad transportation to the commerce of the country. We have no right to compare benefits, or contrast injuries. Whether one, and, if so, which one, is to be subservient to the other is a question addressed

to the Legislature, and not to the judiciary. Prior to March 9, 1868, the State had improved the navigation of Green and Barren Rivers by means of locks and dams, and tolls were charged for their use. The money thus realized proved inadequate to maintain and operate the improvements, and the enterprise was a losing one to the State. The Legislature, by an Act of the date last named, incorporated the appellant, and, in the language of the second section of the Act, leased to it the "Green & Barren River line of navigation, and their tributaries, together with the grounds, houses, waterworks, rents, profits, tools, machinery, implements and appurtenances, and all the franchises thereunto belonging or appertaining."

The Act requires the company to keep "the line of navigation" in repair, and to permit all water craft to navigate the rivers upon the payment of certain rates of toll prescribed by it. The constitutionality of this Act, and the validity of the lease based upon it, were maintained by this court in the two cases of *McKeynolds v. Smallhouse*, 8 Bush, 447; and *Sinking Fund Comrs. v. Green Navigation Company*, 79 Ky. 78.

What, then, was the extent of the property right thus acquired by the appellant? Manifestly it did not confer upon it an exclusive right of navigation. It was not a lease of the rivers themselves. The company did not during the term of the lease acquire such a right in them as it would have obtained under a lease of a canal or turnpike. The public had a natural right to use them before the State improved them. They were not the subjects of private ownership. The company acquired no exclusive right of fishing in them, or using the water for motive or irrigating purposes. What, then, was intended by the expression "line of navigation," as used in the Act? The history of the matter, and the existing circumstances, will serve to explain it.

The rivers themselves were navigable streams, open to public use by common right. The State had, however, erected locks and dams, and other subsidiary improvements. Tolls were being charged for their use, by the State, when the lease was made. These improvements belonged to it, and not to the public by any common right. They constitute its line of navigation; and it leased what belonged to it in its corporate capacity, as distinguished from what was subject to public use under common right. Properly speaking, these improvements were all the State had to lease; and although the grant should be construed strictly, yet a fair interpretation of the Act of the Legislature confines its operation to the property of the State. The fourth section requires the company "to use due diligence in keeping up said line of navigation in good repair." These words certainly refer to the improvements only, and aid us in reaching a conclusion as to what was meant by the words, "the line of navigation."

The company acquired no peculiar right in the navigation of these rivers under its lease. As to it the appellant occupied the same attitude as the general public; and as none of the improvements have been injured or interfered with, and as the license to bridge the river was

valid against the public, it results that the appellant cannot complain if the appellee in repairing its bridge has kept within the grant. It is not a case of two interfering franchises, because the contract between the State and the navigation company invested the latter with the exclusive proprietorship, during the lease, of the improvements only, and not the navigation of the river.

This court, in effect, so held in the case of *Green Navigation Company v. Palmer*, 88 Ky. 640, and it is unnecessary to consider the question of the power of the State to barter away the control of its navigable streams, which is a part of its internal police power, because it has not attempted to do so in this instance. It is reasonable to suppose that the parties so understood the contract. If the bridge had not been constructed when the lease was made, then the acquiescence of the appellant in its construction under legislative grant, and the knowledge that it would necessarily need repair, show how it regarded the contract. Upon the other hand, if it had already been constructed, then the company knew that its repair and renewal would follow as a duty to the traveling

public, and as necessary to its convenience and safety; and it is unreasonable to suppose that the parties intended to enter into a contract for bidding such repair.

The work was done at a season of the year when it was likely to interfere with navigation the least. Ample notice was given that it would be done, and it was done as expeditiously as possible. In fact it is not claimed that there was any unreasonable delay, or that the obstruction continued longer than was necessary. It is plain that nothing was done negligently or wantonly, but that the appellee acted in good faith, and with proper precaution. While it was possible to have opened the draw and constructed the new one upon the edge of the river, and thus have avoided all obstruction to navigation, yet the railroad company was not required to take an unusual course in constructing its improvement, and one which would involve unreasonable delay and expense. It was done in such a manner as "not unreasonably to obstruct the navigation;" and the appellee is entitled to the protection of the rule of *damnum absque injuria*.

*Judgment affirmed.*

## NEW JERSEY SUPREME COURT.

William CHISM

v.

Charles SCHIPPER.

**1. When a building contract** provided that the decision of the architect should be conclusive on the question whether work done in the course of the erection of the building was within the specifications or not—*held*, that it was an implication indispensable to the effectuation of the purpose of the parties that such decision should be an honest one.

**2. Fraud in the decision of the arbiter** may be set up in a suit on the contract in avoidance of his decision, even though it does not appear that the party who would benefit by it has colluded.

(*Magie, J., dissents.*)

(December 10, 1888.)

**C**ASE certified from the Circuit Court for Union County (Van Syckel, J.). *Judgment for plaintiff on demurrer.*

Statement by **Beasley, Ch. J.:**

The declaration was founded on a building contract, under seal, whereby it was alleged the plaintiff agreed to "erect and finish" a certain dwelling-house "agreeably to the drawings and specifications by Oscar S. T., architect, within the time aforesaid, in a good, workman-like, and substantial manner, to the satisfaction, and under the direction, of said architect, to be testified by a writing or certificate under the hand of said architect; that the plaintiff was to furnish all materials, etc.; and that for his work and materials he was to be paid the sum of \$6,050; that, if the defendant requested, alterations, additions or omissions, at a reasonable valuation, were to be deducted from or

\*Head notes by **BRASLEY, Ch. J.**

2 L. R. A.

added to the contract price; that the defendant did request certain alterations (which were specified), which were made, to the value of \$600; that it was further provided that, in case of a dispute arising as to the true construction or meaning of the drawings or specifications, the said architect was to decide the same, whose decision should be final and conclusive.

Full performance on the part of the plaintiff is alleged. The breach is that the said architect "willfully and fraudulently decides that the aforesaid alterations, deviations and additions are within the true construction of said drawings and specifications referred to in the said contract, and that the plaintiff is not entitled to be paid the fair and reasonable value thereof, and willfully and fraudulently withholds from the plaintiff, and refuses to sign, the certificate required by said contract for the fifth and last payment called for thereby; which fraudulent and willful decision of the architect, and fraudulent and willful withholding of the said certificate, have been brought to the knowledge of the said defendant by the said plaintiff, but the said defendant, though often," etc., "hath not paid the said sum of \$600" etc.

This count was demurred to, and the issue thus raised was certified for the opinion of the supreme court.

**Mr. Craig A. Marsh**, for defendant, for the demurrer:

The production of the certificate of the architect is made a condition precedent by the contract sued on.

See *Barton v. Hermann*, 11 Abb. Pr. N. S. 579; *Morgan v. Birnie*, 9 Bing. 672; *Westwood v. Secretary of State for India*, 11 Week. Rep. 261, 7 L. T. N. S. 786.

The condition precedent being shown by plaintiff's own pleading not to have been performed, action cannot be maintained.

*Morgan v. Birnie*, 9 Bing. 672; *Byrne v. Sisters of Charity*, 45 N. J. L. 218; *Westwood v. Secretary of State for India*, 11 Week. Rep. 261.

The allegation of fraud on the part of the architect does not dispense with the necessity of performance of the condition precedent. The builder may compel the architect to deliver the certificate by bill in equity, or he may sue him for the fraud. Even if the defendant were a party to the alleged fraud it would be more logical to sue the guilty parties for the tort or to proceed in equity to compel the production of the certificate; and in the absence of any direct precedent on the point in this State, that rule should be adopted in preference to the illogical rule obtaining in some States where courts of equity and of law are combined, and the code system of pleading prevails.

*Kimberley v. Dick*, L. R. 13 Eq. 1; *Pawley v. Turnbull*, 3 Giff. 70; *Ormes v. Beadel*, 2 Giff. 166, cited in note to *Atwell v. Atwell*, 1 Moak, 584; *Milner v. Field*, 5 Exch. 829.

The plaintiff must show either performance of the condition precedent, or that the defendant wrongfully prevented such performance by his willful or fraudulent act.

Bishop, Cont. §§ 586, 1422; *Hinds v. Henry*, 86 N. J. L. 828.

Respecting building contracts, Addison clearly recognizes the principle contended for: that where the certificate is withheld there must be shown the collusion of the employer, to entitle the builder to recover on the contract.

Add. Cont. Morgan's ed. p. 395, § 861, Abbott & Wood's ed. p. 578. See also *Clarke v. Watson*, 18 C. B. N. S. 278; *McAndrews v. Tippet*, 89 N. J. L. 109; *Byrne v. Sisters of Charity*, 45 N. J. L. 218.

If the plaintiff has any cause of action it is in tort for the fraud.

6 Wall's Act. & Def. p. 515, § 5 and cases cited; *Del. & H. Canal Co. v. Pa. Coal Co.* 50 N. Y. 250.

*Mr. Edward M. Collie*, for plaintiff, *contra*:

Collusion by the owner is not necessary—the fraudulent and willful withdrawing of the certificate by the architect is sufficient to charge the owner.

*Byrne v. Sisters of Charity of St. Elizabeth*, 45 N. J. L. 214, relied on by defendant, does not decide the question.

Any confusion that exists, as to the law, results from statements of text writers; notably, 2 Addison, on Contracts, 3d Am. ed. § 861, where the law is stated to be: "But the employer is not responsible for any misconduct of the architect or surveyor in refusing to certify, not brought about by his instrumentality or interference," citing *Clarke v. Watson*, 18 C. B. N. S. 278; but the statement is not supported by the citation.

Fraud on the part of an engineer or architect who was to certify as to the performance of a contract, as a condition precedent to a recovery, will allow the contractor to recover, upon proof of the quantity and value of the work done.

*Lynn v. Balt. & O. R. Co.* 60 Md. 404, 45 Am. Rep. 741; *Balt. & O. R. Co. v. Polly*, 14 Gratt. 447; *Wilson v. York & M. L. R. Co.*, 11 Gill & J. 58; *Balt. & O. R. Co. v. Rensley*, 7 Md. 297; *Hudson v. McCartney*, 83 Wis. 831. 2 L. R. A.

See also *Tetz v. Butterfield*, 54 Wis. 242; *Snell v. Brown*, 71 Ill. 183; *Schenke v. Rowell*, 7 Daly, 286; *Thomas v. Fleury*, 26 N. Y. 26; *Bowery Nat. Bank v. New York*, 83 N. Y. 839; *Martin v. Leggett*, 4 E. D. Smith, 255; *Batchelor v. Kirkbride*, 26 Fed. Rep. 899; and *Ormes v. Beadel*, 2 Giff. 166.

*Beasley, Ch. J.*, delivered the opinion of the court:

A comprehension of the facts stated in the summary of the declaration prefixed to this opinion will make it manifest that the question to be decided is, Can the defendant cheat the plaintiff by due course of law? The case, in brief, is this: the plaintiff has done work for the defendant to the value of \$600, which work was additional to that specified in the written contract. The money was payable on the certificate of the architect, whose decision was to be final. Such architect fraudulently decided that the work in question was not additional, but was embraced in the contract; and, the defendant being notified of the facts, refused to pay the demand. As the demurrer confesses the truth of this statement, it will be observed that the defendant stands now before the court, saying: "I admit that this money is due for additional work; I admit that the architect fraudulently certifies to the contrary; and I claim that, by a correct application of legal principles, I have the right to take advantage of this fraud, and to appropriate to myself the moneys that are its fruits." The inquiry is, Does the law, in reality, justify this immoral attitude?

It should be premised to the inquiry that, if this action will not lie, neither will any action lie against the defendant founded on the facts stated, either at law or in equity. As such a result would be one much to be deprecated, and would stand as a blot on the jurisprudence of the State, it would seem that the most cogent reasons should be forthcoming to afford a satisfactory answer to the interrogatory, Why should a man be permitted to take advantage of the fraud of another? The only known reply is that the plaintiff has covenanted to that effect; that he has agreed that the action of the architect, whether honest or dishonest, shall be conclusive.

It is proper to say, *in limine*, that it is not by any means deemed certain that this contract, if to be read in the sense just specified, is sustainable in law. It is assumed that a man cannot contract that he himself may commit a fraud. For example, this defendant could not have agreed that this money should not be payable except on his own written certificate, and that he might fraudulently withhold such certificate. If such a stipulation would, as it is thought, be expunged from the instrument on grounds of public policy, how can the party legally stipulate that another may commit this same crime for him?

The capacity of parties to a contract to provide that one or the other, as the case turns out, may be cheated, does not appear to be a faculty requisite in the transaction of any legitimate business; while, at the same time, its existence is palpably offensive to good morals, and consequently may well be said to be adverse to the public welfare. The consequence is that it is,

in my opinion, doubtful whether such an agreement can be legally made; but it is not deemed necessary to pursue the inquiry, inasmuch as, by proper rules of construction, applied to the facts set forth in this record, the proper conclusion is that the contract existing between these parties does not contain this stipulation so highly questionable. The inquiry is, What did these parties mean? Did they intend, or, by reason of the language employed, must it be concluded *de jure* that they intended, to be bound by the award of the architect, even though such award was the creature of fraud?

The clause thus referred to is in the common form that has long been in frequent use, and yet it may be safely said that it is most improbable that it would have been adopted in a single instance, if it had expressed in plain terms the meaning that it is now contended lies latent in its expressions. It is hard to believe that any self-respecting man would put his name to an agreement that a third party might do in his favor a fraudulent act; nor does it seem probable that to the ordinary mind any suggestion of so extraordinary purpose would be made by the generality of the expressions of this clause of the contract under criticism; and this last is an important consideration, for it is truly remarked by Chief Justice Gibson in *Navigation Company v. Moore*, 2 Whart. 491, that in the interpretation of contracts "The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it."

Tested by this standard, it would seem to be certain that the construction of this term of the contract insisted on by the defense in this case cannot prevail.

But the adverse argument is that the agreement of the parties is to be ascertained from the plain language used by them, and such agreement is to be enforced, no matter what the intention may have been. This is the general rule, beyond a doubt; but such required literalism is not to be pushed to the preposterous length of requiring that by its operation the general intention of the parties as evidenced by their contract itself, shall be frustrated or perverted, either in whole or in part. The terms employed are *servants*, and not *masters*, of a perspicuous intent; they are to be interpreted so as to subserve, and not to subvert, such intent.

As an illustration it plainly appears on the face of this instrument that it was the evident and sole purpose of the provision in question to provide for the fair and definite decision of certain matters; and it is now said that, by force of the terms used, the decider is empowered to cheat either party at will; and yet it is obvious that the existence of such a power in the agent has no tendency to effectuate the object in view, but, so far as it can operate, is destructive of it. The stipulation giving the quality of finality to the action of their agent is part of a contrivance of these parties to insure fair dealing between them in certain particulars; there seems to be no reason why they should impart to such a contrivance a fraudulent potency. It was quite reasonable for these parties to say to their agent, "Decide honestly

between us, and your decision shall be final;" but it was utterly unreasonable for them to agree to abide by such award, if it were fraudulent.

For my own part, I do not believe that in the history of the human race the transaction has occurred in which a man has consciously agreed that another should be clothed with the power to cheat him, and that the decision of the fraud doer should be conclusive on the subject; and in the present instance such a stipulation can be constructed only by an abstract interpretation of the conventional terms; for if such language be construed as a part of an integer, and in view of the purpose in hand, it can be made to produce no such result. There is no more important rule of construction than that which requires that words shall be interpreted in the reflected light of the context in which they are found; and applying this rule to the case in hand, it is not perceived how it can be reasonably said that these parties have given to the provision in question that noxious efficacy that is sought to be imparted to it.

That the clause under discussion cannot be, out and out, construed literally, appears to be undeniable. This and similar engagements are never so read. Undoubtedly, if we construe these terms with entire literalness, the builder is required to produce, before he can claim the money due him, the certificate of the architect. There are no exceptions provided for nor indicated, if the language is thus alone regarded. But suppose the money be earned, and the architect die before the signing of the certificate, is the claim lost or forfeited? Such a result, it is presumed, would not be claimed; and yet it is avoidable only in one way, and that is, to construe the terms of the contract reasonably, as applied to their subject, and not literally. The exception can stand on no other ground than this, for the maxim, *Actus Dei nemini facit injuriam*, is never applied in violation of a contract.

Looking to the letter alone, these parties have said that under all possible circumstances the certificate shall be a condition precedent to the right to payment. Admitting this as the true construction, the impossibility of the performance of such condition would not avoid it; and that such an effect has never been judicially given to such provisions shows conclusively that they have been interpreted according to their spirit, and not in subservience to their very letter.

And, indeed, in my view, the entire legal course that has been pursued in the construction of submissions to arbitration, in the common-law form, can be explained only on the ground that they have been construed liberally, and not with literal narrowness. In all these submissions the stipulation is in the most unqualified form that the award shall be final and conclusive, but if such award be tainted with fraud, it is set aside on the application of the party; and yet it is plain that such party could not be permitted to make such application, if its submission is to be read by its letter, and thus made to mean an engagement on his part to abide by the award, whether honest or dishonest. In such cases it has never been pretended that the parties, by the terms of their



submission, reasonably understood, meant anything of the kind. The grounds of decision in that entire class of cases would seem to be precisely applicable to the present case.

As another illustration of the principle that a literal interpretation is out of place, when its adoption will run counter to the expressed general object of the contract, reference may be made to the familiar case of clauses so frequent in leases, that if the rent is in arrear for a certain time the instrument shall become void. In all these instances the courts have declared, notwithstanding the literal meaning of the terms, that the lease, on the happening of the event, is not absolutely vacated, but only becomes voidable at the option of the lessor.

In looking to the authorities, I do not find that the point in question has ever been put under the consideration of any of the courts of this State. The subject was not discussed nor considered in any of the three cases cited in the brief of the counsel of the defendant in the decision of which I participated. With respect to the English Law touching this topic, I am inclined to think that it is still in a fluent condition and that the last word in reference to it has not yet been spoken.

In *Clarks v. Watson*, 18 C. B. N. S. 278, the allegation was that the arbiter had "wrongfully and improperly" neglected and refused to make his certificate—a form of allegation that manifestly did not involve the question of fraud on his part—so that this decision has no place in the present inquiry.

*Milner v. Field*, 5 Exch. 829, goes beyond the requirements of the present case, for it maintains that even the collusion of the party in the fraud of the arbiter will not dispense with the production of the latter's certificate. The decision of the court is contained in four lines, and has no reference to either legal principles or authority; and in *Clarks v. Watson*, just referred to, which was decided ten years subsequently, in the opinions expressed a different doctrine is stated; and in *Butterbury v. Vyee*, 2 Hurl. & C. 41, this latter view appears to be the one sanctioned.

Even the gross misconduct of the arbiter, without the imputation of fraud, in the case of *Pawley v. Turnbull*, 7 Jur. N. S. 792, was declared by *Vice-Chancellor Stuart* to dispense with the production of the certificates, and the payment of the money due was decreed notwithstanding their absence.

This attitude of the authorities, it is deemed, fully justifies the remark already made, that the principal question has not been definitely settled by the courts at Westminster. The matter has been more definitely treated by the American tribunals, and the results reached seem to be very generally in accord with the views propounded in this opinion. Of this line of cases the following are leading illustrations: *Balt. & O. R. Co. v. Polly*, 14 Gratt. 447; *Lynn v. Balt. & O. R. Co.* 60 Md. 404; *Herriek v. Belknap*, 27 Vt. 678; *Snell v. Brown*, 71 Ill. 133; *Wyckoff v. Meyers*, 44 N. Y. 143; *Thomas v. Fleury*, 26 N. Y. 26; *Bovary Nat. Bank v. New York*, 63 N. Y. 836; *Martin v. Leggett*, 4 E. D. Smith, 255.

In *Batchelor v. Kirkbride*, 26 Fed. Rep. 899, the question present in this case was put directly in question, and was pointedly decided; 3 L. R. A.

for the inquiry was whether the plaintiff was dispensed from producing a certificate, if it had been refused by the fraud of the arbiter without collusion with the defendant. The jury was instructed at the trial by *Mr. Justice Bradley* that, if such fraud was shown, the plaintiff was entitled to recover, and that ruling was upon reconsideration declared to be right, both by the distinguished judge before whom the case had been tried, and by his associate, *Mr. Judge Nixon*. This case in itself is of great weight, and appears to be supported by the general current of American authority. Nor does it seem to me that by the adoption of the foregoing theory of exposition these arbitration clauses will be shorn of any beneficial efficacy. The awards authorized by them will, for all useful purposes, be in truth finalities. They cannot be impeached for the want of skill or knowledge of the arbiter, nor on the ground that his judgments do not square with the judgments of other persons—such awards can be vitiated by fraud alone, which must be proved to the satisfaction of a jury, under a watchful, judicial supervision. In fine, it appears to me that the foregoing construction of the clause of the contract in question rests upon the triple ground of legal principle, authority, and public policy. I think on this issue *the plaintiff should have judgment*.

#### **Magie, J., dissenting:**

It is conceded that the contract sued on does not impose on the owner an absolute obligation. By its terms his obligation to pay arises only upon the performance of a condition precedent, viz.: the production by the builder of the specified certificate by the architect named. A count on such a contract must show performance of the condition precedent, or a valid excuse for nonperformance. Unless one or the other is shown, the count will be bad on demurrer. Since the count in question admits nonperformance of the condition precedent, the sole question presented by the demurrer is whether it shows a valid excuse for nonperformance. Whether the builder, in such a case, has or has not a remedy in some other action or court is unnecessary to settle. If he has been defrauded by the architect or the owner, or both, it is inconceivable that he should be without remedy. If, in the absence of fraud, his contract deprives him of a resort to an action, he cannot complain, for courts can only construe and enforce his own contract voluntarily made.

The excuse alleged in this count for nonperformance of the condition precedent is that the architect willfully and fraudulently withheld his certificate. There is no allegation that the owner was connected with the act or omission of the architect other than the averment that the willful and fraudulent conduct of the architect has been brought to the owner's knowledge, but that he had not paid, and had refused to pay, the sum claimed. The argument in support of the count was principally directed to the maintenance of the proposition that an architect's fraud in withholding such a certificate, with which fraud the owner was in no way connected, excused its production, and fixed the owner's liability. The contention is that where the refusal is fraudulent the contract does not require production.

But the terms of the contract make no exception whatever. Its stipulations require the production of the certificate as a prerequisite to liability. It is insisted, however, that an impossibility of performance, occasioned by the death of the architect, would excuse performance, and that, on similar grounds, an impossibility occasioned by his fraud will also excuse. It is a familiar doctrine that one who has contracted to do an act will be excused, if performance has become impossible by the act of God or of the law. But this doctrine has never been extended to impossibilities not created by *vis major*. He who engages that an act shall be done by another must procure that act to be done, or submit to the consequences of failure. *Doughty v. Neal*, 1 Saund. 215; *Lamb's Case*, 5 Coke, 23 b; 5 Vin. Abr. 239; *Campbell v. French*, 6 T. R. 200; *Hesketh v. Gray*, Sayer, 185.

The contract before us, however, is, not that the architect shall make a certain certificate, but that the owner shall be liable only in case he does make such a certificate. The architect's act is thus made a condition precedent.

Professor Langdell, in his summary of principles established by the cases on contract selected by him (Vol. 2, p. 1075), shows that an act of God will not excuse the nonperformance of a condition precedent, although it would excuse the performance of the same act when regarded as a covenant or promise. This doctrine obviously applies whenever the act to be done as a condition precedent furnishes the *quid pro quo* for the liability to arise on performance. *Poussard v. Spiers*, L. R. 1 Q. B. Div. 410; *Storer v. Gordon*, 3 Maule & S. 308; *Wells v. Calnan*, 107 Mass. 514.

*Mr. Justice Drake* considered that the doctrine was also applicable to cases where the condition precedent is the performance of an act which will protect him who is to become liable from undue liability. *Roumagne v. Mechanics Ins. Co.* 13 N. J. L. 116.

But it need not be determined whether the death of the architect would have excused the production of his certificate. In my judgment, an impossibility arising from such an intervention of higher power would have furnished such an excuse. But it cannot be argued therefrom that an impossibility produced, not by the intervention of superior power, but by the misconduct of the very person whose act is stipulated for, will furnish a like excuse; for, if it be admitted that the true theory of the doctrine which excuses performance, when rendered impossible by *vis major*, rests rather on a construction of the contract as not including performance under circumstances not contemplated by the parties, than on a destruction of the obligation by a superior and resistless force subsequently intervening (as was suggested by *Sir James Hannen* in *Bailey v. De Crespigny*, L. R. 4 Q. B. 180), yet the conclusion argued for does not follow. No violence is done to the contract if the case of the death of the architect be treated as excepted, because both parties must have known that such an event would render performance impossible. But when the parties expressly stipulate for an architect's certificate it is obvious that they had in contemplation his conduct, including his ability to do the act, his willingness to do

it, and his honesty in doing it. His conduct was thus expressly stipulated for, and to eliminate any part of that stipulation does violence to the contract.

It may be true that the builder would not have entered into this contract if it had expressed that the owner would not become liable if the architect fraudulently withheld a certificate. It is probably equally true that he would have refused to sign, if it had expressed that the owner would not become liable if the architect became unable or unwilling to make a certificate. Yet it is well settled that he has made precisely such a contract and it seems to me to be a novel mode of discovering the construction of a contract, plain upon its face, which evades its direct meaning, on the ground that if the parties had understood that meaning they would not, in the judgment of the court, have made such a contract.

That the inability or unwillingness of the architect to make the certificate will not excuse its production has been established in the analogous case of insurance contracts, where the insurer's liability does not arise until the production of a certificate by some person designated or described in the contract. In the leading case in this State, the person thus designated was a clergyman, who declined to certify to the amount of loss, because he had no such knowledge of the property consumed as would justify him in so doing. All the judges concurred in holding that the procuring of the required certificate was a condition precedent, and that its nonproduction was not excused by reason of the inability or unwillingness of the clergyman to make the certificate. *Roumagne v. Mechanics Ins. Co.* 13 N. J. L. 110.

The case was afterwards overruled upon another point, but the doctrine for which I have cited it has not been questioned. In that case the court approved and followed *Worsley v. Wood*, 6 T. R. 710, where it was held, in an action on such an insurance contract, that the "unjust and wrongful" refusal of the minister and church wardens (who by the terms of the contract were to certify to the loss) to make the certificate would not excuse its nonproduction. This doctrine generally prevails in reference to such conditions contained in insurance contracts. *Johnson v. Phoenix Ins. Co.* 113 Mass. 49; *Columbian Ins. Co. v. Lawrence*, 27 U. S. 2 Pet. 25 [7 L. ed. 835]; 35 U. S. 10 Pet. 507 [9 L. ed. 512]; 2 Wood, Ins. § 416, and cases in note.

Had courts applied to these analogous cases the rule of construction contended for here, it is obvious they might have discovered other exceptions from the contract.

So it is to be noted that when courts thus construe conditions precedent contained in building contracts they have not limited the exception to the case of fraud on the part of the certifying architect. Thus, in *Bowery Nat. Bank v. New York*, 68 N. Y. 886, the Court of Appeals of New York held an unreasonable withholding of such a certificate a sufficient excuse for its nonproduction; and in *Batchelor v. Kirkbride*, 26 Fed. Rep. 899, *Mr. Justice Bradley* is reported to have charged a jury, in an action involving such a contract, that if the architect withheld his certificate fraudulently or unreasonably, and without collusion with the owner, its production would be excused.

Such constructions obviously deprive the owner of the protection he sought to secure; for he required the builder to stipulate that no liability should exist until a person in whom he had confidence should certify to certain facts necessary to his protection. The builder, being master of the contract he should make, chose to submit to the requirement. But, as now construed, the owner is made liable, not on the expressed judgment of the person selected by him, but on the verdict of a jury determining whether that person withheld his judgment honestly or fraudulently, reasonably or unreasonably. The owner may well say, *Non in hæc fœdera veni*. It is urged that the architect in such cases occupies a position like that of an arbitrator whose award may be set aside for fraud. But it is settled that an award cannot be thus dealt with, except where the submission has been made a rule of court, in which case the court exercises an equitable jurisdiction. *Sherron v. Wood*, 10 N. J. L. 7.

The result is that I cannot yield to the construction of this contract, which finds an exception to its terms in the case of an impossibility arising from the mere act of the architect, with which the owner had nothing to do.

The remaining question is whether the count exhibits any other excuse for nonproduction of the certificate. Such an excuse would exist if the owner had prevented its production. Where performance of such a condition precedent has been prevented by the party who is to become liable on performance, prevention takes the place of performance and the liability will arise. 2 Langd. Cas. Cont. 1087; Add. Cont. § 326; Bull. N. P. 161; *Hoatham v. East India Co.* 1 T. R. 688; 1 Benj. Sales, 105, and note.

If, therefore, the owner has procured or induced the architect to fraudulently withhold the required certificate, his liability will arise without its production; for his act has thus prevented performance, and he will not be per-

mitted to thus defeat his liability. This was the view of Mr. Justice Knapp in *Byrne v. Sisters of Charity*, 45 N. J. L. 314.

There has been some vacillation in the English decisions with respect to this doctrine. In *Milner v. Field*, 5 Exch. 829, the withholding of such a certificate by fraud and collusion with the owner was held only to give a right to a cross action.

In *Clarke v. Watson*, 18 C. B. N. S. 278, it was intimated that, if an owner colluded with a surveyor to withhold such a certificate, he could shelter himself from liability under such wrongful act.

But in *Batterbury v. Vyse*, 2 Hurl. & C. 42, a declaration on a building contract which stipulated for the production of an architect's certificate before liability should attach was held to be good, because it averred that its nonproduction was caused by the neglect of the architect in collusion with, and by the procurement of, the owner. The doctrine of the case last cited must, in my judgment, prevail, for it imposes a just obligation on the owner, and prevents his gaining advantage from his own wrong. Does the count in question show such an excuse? The contention is that the owner's collusion with the architect may be inferred from the averment that the owner refused to pay after the conduct of the architect had been "brought to his knowledge." It is not averred upon what ground his refusal was put, and since it may have been on other grounds, the charge does not necessarily import collusion or procurement. In my opinion, the demurrer was properly interposed to this count.

It is proper to point out that the case before us does not show the relation between the owner and the architect. When the latter is so employed as to become the agent of the owner with respect to the building, a new element is introduced which may require a different result. The adverse cases in other courts show, in some instances, the existence of such a state of facts.

## ILLINOIS SUPREME COURT.

### CHICAGO MUTUAL LIFE INDEMNITY ASSOCIATION *et al.*, Appts.,

v.

George HUNT, Attorney-General.

#### 1. Jurisdiction to decree the dissolution of a corporation may be conferred upon courts of equity by statute; and such jurisdiction

is so conferred by the Illinois Act of 1883 (1 Starr & C. 1248) in reference to mutual benefit societies.

2. A proceeding to dissolve a mutual benefit society, or to remove its officers, for failure to make proper reports, or for improperly conducting its business, instituted under § 10 of Act of 1883, is not a criminal prosecution within the meaning of section 83, article 6, Illinois Constitution which requires criminal prosecution to

NOTE.—*Corporation Dissolution of.* A corporation will not be dissolved by a sale of the franchise, or of all the corporate property; nor by a settlement of all its concerns, and division of the surplus; nor by a cessation of all corporate acts; nor by any abuse of corporate powers; nor by the doing of acts which constitute a forfeiture of the charter—without a judgment to that effect by a competent court. *Wilke v. Jenkins*, 4 Paige, 481; *Morley v. Thayer*, 3 Fed. Rep. 748; *Boston Glass Manufactory v. Langdon*, 21 Pick. 49, 52; *Slee v. Bloom*, 5 Johns. Ch. 386, 379; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1, 121; *Niagara Bank v. Johnson*, 8 Wend. 645, 652. Such dissolution can take place only: (1) by an Act of the Legislature, where, as in this State, power is reserved for that purpose; (2) by a surrender, which is accepted, of the charter; (3) by a loss of all its members, or of an integral part,

so that the exercise of corporate functions cannot be restored; (4) by forfeiture, which must be declared by judgment of the court. *Penobscot Boom Co. v. Lamson*, 18 Maine, 224, 33 Am. Dec. 660. As a general rule, to constitute a dissolution of a corporation by a surrender of its franchise, or misuser or nonuser, the surrender must be accepted by the government, or the default must be judicially ascertained and declared. *Bradt v. Benedict*, 17 N. Y. 99. The power to dissolve corporations for cause was always legal, and not equitable. This is familiar doctrine and never disputed. *Cady v. Centreville Knit Goods Mfg. Co.* 48 Mich. 183. See *Atty-Gen. v. Bank of Michigan*, Harr. Ch. (Mich.) 815; *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 871; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84, 2 Paige, 428; *Gaylord v. Fort Wayne, M. & C. R. Co.* 6 Ills. 286; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 239;

3 L. R. A.

be carried on "in the name and by the authority of the People of the State of Illinois," but is a civil proceeding to protect property rights, and may be brought in equity, by the Attorney-General in his own name.

2. **Minors** are not, merely because of their minority, disqualified from becoming members of mutual benefit societies, in the absence of any statute on the subject; and their admission is not such a violation of the policy of the law as will subject such a society to dissolution.
4. **The use of advance mortuary assessments** to pay current expenses is such a violation of law as will warrant the dissolution of a mutual benefit society, where the statute provides that no part of the funds collected for the payment of death benefits shall be applied for any other purpose.
5. **The creation of a Tontine Reserve Fund**, to be distributed among permanent members after a certain period, out of moneys collected for death benefits, is a violation of the statute which requires such moneys to be devoted to payment of death benefits only, and will warrant a dissolution of the society.
6. **A promise to members to refund to them, at the expiration of a certain period, all the reserve fund to which they would be equitably entitled, is a violation of the statutory prohibition against the receipt by members of mutual benefit societies of any money as profit.**
7. **Limiting and perpetuating the administration of the society in the hands of the manager and secretary, by means of a system of blank proxies unadvisedly signed by applicants for membership, is a violation of the provision of the statute requiring the affairs of mutual benefit societies to be managed by not less than five trustees.**
8. **Numbering certificates of membership much higher than the actual number issued operates as a fraud upon those becoming members in reliance upon such false numbers, and is an improper practice, whether or not done with an actual intent to deceive and defraud.**
9. **It is a breach of official duty for the officers of a mutual benefit society to fail to keep correct and intelligible books of account, whether such failure results from design, carelessness or want of skill.**

(January 25, 1899.)

*Bayless v. Orne* (Miss.) 1 Freem. Ch. 161; *Bangs v. McIntosh*, 23 Barb. 591; *Howe v. Deuel*, 43 Barb. 501; *Doyle v. Peerless Petroleum Co.* 41 Barb. 210; *Belmont v. Erie R. Co.* 52 Barb. 637; *Buffalo & A. R. Co. v. Cary*, 24 N. Y. 75; *D-nike v. New York & R. L. & C. Co.* 80 N. Y. 549; *Baker v. Backus*, 32 Ill. 79; *Neill v. Hill*, 18 Cal. 145; *State v. Merchants Ins. Co.* 8 Humph. 235; *Strong v. McCagg*, 55 Wis. 624; *Atty-Gen. v. Clarendon*, 17 Ves. Jr. 491. The jurisdiction of chancery did not extend to the sequestration of the property of the corporation by means of a receiver, or to the winding up of its affairs, or to control or restrain the usurpation of franchises by corporate bodies, or by persons claiming without right to exercise corporate powers. *United States Trust Co. v. New York, W. S. & B. R. Co.* 2 Cent. Rep. 406, 101 N. Y. 478; *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371. The corporation is not the trustee of the stockholders; nor do the parties stand in the relative situation of partners, and the court of chancery had no power to interfere with the chartered rights and franchises of a corporation at common law. *Hodges v. New England Sewer Co.* 1 R. I. 352, 53 Am. Dec. 634; *Atty-Gen. v. Bank of Niagara*, Hopk. Ch. 354.

**Remedy of stockholder of corporation.** In no case could a stockholder, except of a moneyed corporation, have a receiver appointed to take possession of the property of a corporation, and thereby cause a forfeiture of the charter. *Bliven v. Peru Steel & I. Co.* 9 Abb. N. C. 970; *Howe v. Deuel*, 43 Barb. 505; *Ramsey v. Erie R. Co.* 7 Abb. Fr. N. S. 156; *Gilman* 2 L. R. A.

**APPEAL** by defendants, from a judgment of the Circuit Court of Cook County dissolving a mutual benefit society, on an information in equity by the Attorney-General. *Affirmed.*

The questions presented are stated in the opinion.

*Messrs. Joseph N. Barker and Arthur W. Windett* for appellants.

*Messrs. George Hunt, Atty-Gen., Campbell & Custer and Joseph A. Griffin* for appellee.

**Bailey, J.**, delivered the opinion of the court:

This is a proceeding instituted by the Attorney-General under the 12th section of the Act of 1848, providing for the organization and management of mutual benefit societies. 1 Starr & Curtis, Stat. 1848.

That section provides that whenever any corporation, association or society, organized or having transacted business under the provisions of said Act, shall neglect or refuse to make its annual statements as required by the Act, or whenever the auditor shall find, upon examination, as provided in section 10 of the Act, that any willfully false or untrue statements in any material respect have been made, or that the business of the corporation, association or society has been conducted fraudulently, or in willful violation of any of the provisions of the Act, or that the corporation has transacted business different from that authorized by its certificate of incorporation, "he shall communicate the fact to the Attorney-General, whose duty it shall be to apply to the circuit court where its principal office is located, for an order requiring the officers, or directors, trustees or managers of such corporation to show cause why they should not be removed from office, or its business closed; and the court shall thereupon hear the allegations and proofs of the respective parties; and if it shall appear to the satisfaction of the said court that any one or more of them have been guilty of fraud or any material irregularity or violation of law to the injury of said corporation, association or society,

*v. Greenpoint Sugar Co* 4 Lans. 483; *Galwey v. U. S. Steam Sugar Ref. Co.* 38 Barb. 256; *Denike v. New York & R. L. & C. Co.* 80 N. Y. 509. The stockholder's remedy for any violation of acts binding on the corporation is by causing the district attorney to sue for the penalty. *Fisher v. World Mut. L. Ins. Co.* 15 Abb. Pr. N. S. 306.

**Benefit associations.** Like other corporations, benefit societies, if incorporated, may be dissolved and their existence wholly terminated. *Bacon, Ben. Societies*, § 58. They may be dissolved and ended by consent of the members. *Bacon, Ben. Societies*, § 57. And a corporation which by its articles of association is to continue a certain number of years cannot dissolve itself until that period has expired unless all the shareholders consent. *Barton v. Enterprise Loan & Bldg. Assn.* 13 West. Rep. 816, 114 Ind. 229; *Von Schmidt v. Huntington*, 9 Cal. 55, 78. A court will not enjoin a society from dissolving itself where a great majority of the members agree to such dissolution, notwithstanding a rule that "if three agree to hold the society it shall not be dissolved." *Waterhouse v. Murgatroyd*, 9 L. J. Ch. 272; *Bacon, Ben. Societies*, § 57. They may also be terminated by implied abandonment because of failure to hold meetings for a protracted period. *Strickland v. Prichard*, 37 Vt. 324; *Pentfield v. Skinner*, 11 Vt. 206. An association may still be a corporation *de facto* though *not de jure*, and vice versa. *Morawetz, Priv. Corp.* § 1002; *Bacon, Ben. Societies*, § 58. When the operations of a voluntary association have been discontinued, their objects and pur-

or of noncompliance with any of the provisions of this Act, the court shall decree a removal from office of the guilty party or parties, which decree shall forever debar him or them from holding a similar office, and shall substitute a suitable person or persons to serve until the regular annual meeting, or until a successor or successors are regularly chosen or elected; or if it shall appear to said court that the interests of its members or the general public so require, the court may decree a dissolution of such corporation, association or society, and a distribution of its effects."

Counsel for the association insist that the Attorney-General was without authority to institute the present proceeding, because, as they allege, no sufficient report was made to him by the auditor of public accounts. The contention is that such report was jurisdictional, or rather a condition precedent, and that until it was made, the Attorney-General had no power to act. And it is further argued that, to justify the institution of proceedings, the report of the auditor should have contained, not merely the conclusions at which he arrived from an examination of the affairs of the association, but also the facts upon which those conclusions were founded.

We are of the opinion that the power of the Attorney-General to file the information in no way depended upon the communication made to him by the auditor, but came within the purview of those powers which are inherent in his office. See *Hunt v. Chicago Horse R. Co.* 20 Ill. App. 282; *S. C.* 11 West. Rep. 41, 121 Ill. 638.

The section of the statute under consideration conferred no new powers upon him, but vested the auditor with the supervision of associations organized under the statute, and made it the duty of the Attorney-General to take proper legal proceedings whenever the auditor should communicate to him the fact that an association or its officers had so conducted as to give occasion for the removal of the officers from their offices, or the closing of the business of the association.

poses being abandoned by common consent, a court of equity has jurisdiction to decree a dissolution, and to distribute the common fund among the several contributors in proportion to the amount contributed or paid by them respectively. *Burke v. Roper*, 79 Ala. 138. They may be dissolved by forfeiture of their franchises and judgment of dissolution obtained in a proper judicial proceeding. *Morawetz, Priv. Corp.* § 1004.

*Jurisdiction of courts of equity.* Chancery has jurisdiction to enjoin a corporation from abuse or excess of franchise, or other violation of public law to public detriment, on information in equity, filed *ex officio* by the Attorney-General. *Atty-Gen. v. Bank of Niagara*, *Hopk. Ch.* 354; *Atty-Gen. v. Chicago & N. W. R. Co.* 36 Wis. 549. But it cannot take cognizance of any case involving the determination of the question of the existence or nonexistence of a corporation, when the suit is by information, on behalf of the State, for the purpose of procuring a judgment of ouster, or of inflicting punishment, or enforcing a forfeiture. *Jersey City Gas. Co. v. Dwight*, 29 N. J. Eq. 250; *Atty-Gen. v. Stevens*, 1 N. J. Eq. 369, 377; *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 239. Although a court of equity may not decree a dissolution of the corporation, yet, in virtue of its general jurisdiction over trusts, and to afford remedies in cases where courts of law are inadequate to grant relief, it has jurisdiction to grant relief against a corporation upon the same terms it might against an individual under similar circumstances. *Cramer v. Bird*, L. R. 6 Eq. 143; *Re Subur-*

But even if this were otherwise, the communication by the auditor to the Attorney-General was sufficient to answer the requirements of the statute. The principal objection urged to it is that it stated conclusions, and not facts. In this counsel are clearly mistaken. The auditor's communication transmitted to the Attorney-General the report of an examination of the books, papers and affairs of the association by an expert employed for that purpose by the auditor, and requested him to institute proceedings under the section of the statute above quoted. The examiner's report consisted in part of a detailed statement of the facts ascertained on the examination, and copies of forms and documents used by the association in the management of its business, and in part of deductions and conclusions drawn by the examiner therefrom. It is perhaps not altogether formal in its statement of conclusions, but when considered either in relation to the facts stated or the conclusions drawn, it is clearly sufficient to show the existence of one or more of the grounds enumerated by the statute upon which it became the duty of the Attorney-General to institute proceedings against the association.

It should be observed that no particular form is prescribed by the statute for the communication by the auditor to the Attorney-General. It is only provided that when the auditor, on examination, finds either that the annual statement of the association is willfully false in some material respect, or, that the business of the association has been conducted fraudulently or in violation of some provision of the statute, or that the association has transacted business different from that authorized by its certificate of incorporation, "he shall communicate the fact,"—that is, the fact of having so found—to the Attorney-General. The mode of making the communication is left entirely with the auditor. It doubtless may be made by communicating the finding alone; but we see no objection to the mode adopted in this case, viz.: by transmitting to the Attorney-General the entire report of the examiner, so long as it shows one or more of the necessary findings.

*ban Hotel Co.* L. R. 2 Ch. 737, 743, 750; *Marr v. Union Bank*, 4 Coldw. 494; *Bradt v. Benedict*, 17 N. Y. 93; *Slee v. Bloom*, 19 Johns. 454, 10 Am. Dec. 273; *Bacon, Ben. Societies*, § 59. In such cases the general rules of equity jurisprudence and partnership apply. *Gorman v. Russell*, 14 Cal. 531; *Bacon, Ben. Societies*, § 57. The jurisdiction of courts of equity over such voluntary associations and their funds is maintained, independent of the Statute of Uses, or of any prerogative power, on the ground of the trust nature of the fund, the charitable uses for which it is designed, and the inadequacy of legal remedies. *Burke v. Roper*, 79 Ala. 138. Courts of equity will always interfere with all voluntary associations wherever necessary in the interests of their members, or society, or to prevent injustice, imposition or fraud, and will act on the same general principles invoked and practiced in partnership cases. *Lowry v. Stotzer*, 7 Phila. 397; *Toram v. Howard Ben. Assn.* 4 Pa. 519; *Bacon, Ben. Societies*, § 57. A new association being formed on the dissolution of the old, composed of some of the members with other persons, members of the same church, and made subject to such laws and restrictions as the church might prescribe, while an unauthorized dismissal of some of the members by the arbitrary act of the minister in charge, without a trial or hearing, might afford grounds for legal proceedings to compel their restoration, such nugatory act would not authorize a court of equity, at their instance, to decree a dissolution of the association, or a distribution of the common fund among the members. *Burke v. Roper*, 79 Ala. 138.

It is urged that a court of chancery has no jurisdiction. This contention is based upon the theory that the proceeding is in the nature of a *quo warranto* to remove the officers of the association from office and impose upon them the penalty prescribed by the statute, viz.: that of debarring them from afterward holding a similar office, or, to oust the association of its corporate franchise and distribute its effects. It is said that the proceeding, so far at least as it relates to the officers of the association, is highly penal, and so not within the proper jurisdiction of a court of equity.

It will be noticed that the relief provided by the statute is in the alternative, viz.: the removal of the officers from office and the appointment of others in their places, the decree to operate, as a legal consequence, to debar the persons removed from office from afterward holding a similar office, or the dissolution of the association and the distribution of its effects. As the court saw fit to apply the latter remedy only, we have nothing to do with the question of its jurisdiction to administer the former, and the case may be decided precisely as though the dissolution of the association and the distribution of its effects was the only mode of relief provided by the statute.

It is doubtless the rule that, in the absence of statutory provisions, courts of equity have no jurisdiction to decree the dissolution of a corporation by forfeiture of its franchises, either at the suit of an individual or at the suit of the State. *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; *Bee v. Bloom*, 5 Johns. Ch. 306; *State v. Merchants Ins. & T. Co.* 8 Humph. 236; *Atty-Gen. v. Bank of Niagara*, 1 Hopk. Ch. 354; *Doremus v. Dutch Reformed Church*, 8 N. J. Eq. 332; *Doyle v. Peerless Petroleum Co.* 44 Barb. 239; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 88; *Strong v. McCagg*, 55 Wis. 624; 2 Morawetz, Corp. § 1040.

But in the cases holding this rule it is uniformly admitted, whenever the question has arisen, that jurisdiction to decree the dissolution of a corporation may be conferred upon courts of equity by statute.

In this State statutes have been passed vesting courts of equity with jurisdiction to decree the dissolution of corporations in a great variety of cases. Thus, by the twenty-fifth section of the statute in relation to corporations, courts of equity are given full power, on good cause shown, as a portion of the relief provided for by that section, to dissolve or close up the business of a corporation organized under that Act, and to appoint a receiver of its effects. 1 Starr & Curdiss, Stat. 618.

Similar power is given by the twenty-fifth section of the statute in relation to fire, marine and inland navigation insurance companies (Id. 1324); also by the Act of February 17, 1884, in regard to the dissolution of insurance companies. Id. 1353.

Under neither of these statutes has the power of courts of equity to decree the dissolution of corporations in proper cases been seriously questioned; but when properly invoked, it has been uniformly exercised. *St. Louis & S. Coal & Min. Co. v. Sandoval Coal & Min. Co.* 2 West. Rep. 520, 116 Ill. 170; *Life Association of America v. Fassett*, 102 Ill. 315. Such power was directly affirmed by this court, after full

and elaborate consideration, in *Ward v. Farwell*, 97 Ill. 593, and *Chicago Life Ins. Co. v. Auditor*, 101 Ill. 82; and the question therefore is no longer an open one.

The point made by counsel, that, by transferring jurisdiction of suits to dissolve corporations from courts of law to courts of equity, the corporations affected are deprived of the right of a trial by jury guaranteed by the Constitution, is fully and satisfactorily answered by the opinion of the court in *Ward v. Farwell*, *supra*; and the argument there made need not be repeated here.

Nor is the position well taken that the present suit is in the nature of a criminal prosecution, and therefore required by section 83, article 6, of the Constitution, to be carried on "in the name and by the authority of the People of the State of Illinois." It is true a *quo warranto* has been held to be a criminal proceeding within the meaning of the Constitution, but this is neither a *quo warranto* nor its equivalent. It is a civil proceeding of a special statutory character, and is brought for the purpose of protecting and enforcing property rights. Its primary object is not to punish the corporation or its officers for an abuse of the corporate franchise, but to enforce a due administration of the trust reposed by the corporation in its officers. Accordingly, when those officers have been guilty of fraud or some material irregularity or violation of law, to the injury of the corporation, or some noncompliance with the provisions of the statute under which the corporation was organized, a court of chancery is authorized to interpose for the preservation of the property rights of members and creditors and for the protection of the general public, by taking the administration of the affairs of the corporation from the hands of the delinquent officers and placing it in the hands of other suitable persons, or, if the interests of the members or the general public so require, by winding up its business and distributing its effects, and, as incidental to such relief, by decreeing a dissolution of the corporation. It will thus be seen that the proceeding partakes of none of the elements of a criminal prosecution, but is purely a civil remedy, and one which falls directly within the proper domain of chancery jurisdiction.

The information contains a large number of charges against the association and its officers, of acts and modes of proceeding which are alleged to be unlawful. The defendants' answer, as a general rule, denies the charges thus made, although it at the same time admits some of the acts alleged and insists that such acts were not unlawful. We have thus to determine from the pleadings and evidence whether any and which of the charges made are established, and whether the charges so established are legally sufficient to warrant the present proceedings and decree.

One of the charges upon which considerable stress is laid, and upon which the court below found in favor of the Attorney-General, is that of admitting minors to membership. The statute requires that the certificate of association shall state, among other things, "the limits as to age of applicants for membership," and, in pursuance of that requirement, the certificate of association in this case, which was submit-

ted to and approved by the auditor and by him transmitted to the Secretary of State, and upon which the latter issued the certificate of organization, provided that "No person shall become a member who is under ten or over seventy years of age." It appears from the evidence and the defendants' admissions that, of about six hundred members belonging to the association, something over sixty were admitted under the age of twenty-one years, some of them being but little past the minimum age. Was their admission unlawful?

The statute under which the association was organized is silent on the subject, nor do we find any statute which either expressly, or, so far as we can discover, by implication, either permits or forbids their admission to membership. If, then, minors are ineligible, such ineligibility arises from some principle growing out of the nature and objects of these associations, or the policy of the law applicable thereto.

The contention is that the certificate of membership is a personal contract between the member and the association, and that as an infant is capable of making only a voidable contract, his admission to membership is a violation of those principles of mutuality which lie at the basis of mutual benefit societies. We may admit in the broadest sense that these societies are founded upon the principle of entire mutuality in relation to burdens as well as benefits; yet we are unable to see how that principle places the membership of infants upon any footing different from that of adults.

While the certificate of membership is a contract, such contract, in the absence of express stipulations to the contrary, is purely unilateral. It may be enforced against the association where the member has performed all the prescribed conditions, but none of its stipulations are enforceable against the member. If he fails to pay his assessments or dues, or does any act forbidden by the certificate of membership, the certificate becomes void and the membership ceases. But the making of an assessment or the maturing of dues does not make the member a debtor to the association so as to authorize it to bring a suit for its recovery in case of his neglect or refusal to pay. Payment is left wholly to his discretion. The contract then not being one which has the legal effect of binding him to the payment of any money or the performance of any condition, we cannot see how it can be at all important whether it is voidable or otherwise. Performance is no more left to the option of the member where the contract is made by an infant than when made by an adult. If an infant performs the conditions prescribed in the certificate, he, the same as an adult, becomes entitled to the benefits thereby secured. If he fails to perform, his membership ceases, and that is all.

We do not assent to the view that, as a further consequence of his disability, he may recover back the dues and assessments he may have already paid. "If an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained by fraud." 1 Parsons, Contracts, 332.

Nor are we able to see any force in the suggestion

that minors should not be admitted to membership because of their incapacity to act as trustees, or to perform the duties of members at corporate meetings, such as consulting or giving advice for the mutual benefit of the members, voting for officers, and the like. We know of no reason why the capacity to act as trustee should be a necessary qualification for membership. If a sufficient number of members possess the requisite capacity, so as to afford the members a reasonable and proper range of choice in the selection of trustees, the admission of others who are not thus qualified can work no injury to anybody.

It will not be claimed that the want of the requisite intelligence or business experience on the part of an adult to qualify him to act as trustee would render him ineligible to membership, but these are quite as essential to the proper discharge of the duties of trustee as mere legal capacity. There would seem to be no legal obstacle in the way of minors taking part in corporate meetings, consulting, advising, or even voting. The only objection to their doing so grows out of their inexperience and the immaturity of their judgments, but these are disqualifications which are not necessarily confined to persons under the age of twenty-one years; and no one would allege them as a legal bar to the admission of an adult to membership.

It should be remembered that in this proceeding we have nothing to do with the good or bad policy, in an economic or business point of view, of admitting minors to membership. Whether it was wise or unwise is not the question. We have only to determine whether it was such a violation of the rules or policy of the law as should subject the association to dissolution. On this point we are unable to agree with the learned chancellor before whom the cause was heard, our opinion being that, so far as this charge is concerned, the decree is not sustained.

But there are other charges, either admitted or proved, of acts on the part of the association and its officers, which constitute such violations of law as warrant the dissolution of the association. Prominent among these is that which relates to the use by the association of the advance mortuary assessment for the payment of current expenses. The by-laws of the association provided that all persons becoming members should be required to pay a certain admission fee, the annual dues for one year, and one advance mortuary assessment. The money derived from this assessment was set apart and treated as a mortuary fund until February 16, 1886, at which date the trustees adopted a resolution authorizing the manager to use the advance mortuary assessment in defraying current expenses, the same to be replaced to the credit of the association from annual dues as soon as expedient. After the adoption of this resolution, the advance mortuary assessment or the larger portion of it was used by the manager for expenses; and as a consequence, at the time of filing the information, there was a large deficiency in the mortuary fund, if the advance mortuary assessment is to be treated as a part of that fund.

The defendants admit the adoption of said resolution and the subsequent use of the advance mortuary assessment as alleged. but



content that the association had the legal right to so use it.

The sixth section of the statute under which the association was organized provides that "No part of the funds collected for the payment of death benefits shall be applied for any other purpose." There can be no doubt that the advance mortuary assessment was money collected for the payment of death benefits, within the meaning of the statute. That is the clear import of the name under which it was collected; and if it was in fact designed for any other purpose, the very name and pretense under which the money was demanded, were of themselves a palpable fraud upon the members paying it. Not only is this so, but the circulars and other publications distributed by the association for the purpose of advertising its scheme and inducing those who might read them to apply for membership, represented that all expenses were to be paid out of the membership fees and the annual dues; and such was doubtless the understanding of most, if not all, who became members. The use of the money thus obtained for current expenses was not only a fraud upon the members, but a clear, palpable and inexcusable violation of law.

The eighth section of said statute provides that associations organized thereunder may provide by their by-laws for the accumulation of a surplus, general or guaranty fund, to be invested in a manner particularly specified; and that such fund, when so set apart and invested shall, with the increase thereof, belong to such association and not to the directors, trustees, managers or officers thereof, "and shall be used only for mortuary benefits, without assessment, or applied in payment of future assessments, or otherwise used for the promotion of the object or objects for which such funds are specially provided and set apart; and such use shall not be deemed or construed to mean a profit received by members within the meaning of the statutes of this State."

The defendants' certificate of association provided, as a part of the plan upon which the association was formed, that 25 per cent of the assessments for death benefits should constitute a guaranty fund to be known as the "Tontine Reserve Fund," and that for the apportionment of such fund the association should be divided into classes by years, the portion of such fund contributed during ten years by members of each class, together with the accumulations, to be apportioned equitably among the surviving persistent members of that class. We think it clear that such disposition of the reserve fund was in direct violation of the letter, as well as the spirit, of the statute. The moneys from which it was to be accumulated, viz.: those collected for the payment of death benefits, were dedicated and set apart by the statute to that purpose alone, and any other application of them was expressly prohibited. It follows that a reserve fund accumulated from that source could be lawfully applied to no other purpose than that of paying death benefits. But in addition to this, the section of the statute permitting the accumulation of such fund expressly provided that the fund should belong to the association—a provision which necessarily excludes the idea of its belonging to or

being distributable among the persistent surviving members of a particular class.

Doubtless it was the intention of the statute, in providing for the accumulation of a reserve fund, to place the association in such condition as to be able to pay its death benefits with greater promptness and certainty, and perhaps to provide against unexpected drafts upon its resources by extraordinary mortality caused by the visitation of epidemic diseases when the ordinary death assessments would be likely to prove insufficient. It thus appears that the plan upon which the association was formed, so far as it relates to the disposition to be made of its reserve fund, was in direct violation of law.

The information charges that the association, in order to obtain applications for membership, held out to the world that it had a legal right to, and would at the option of a member, refund to him in cash, at the expiration of the period of ten years, all the reserve fund to which he would be equitably entitled, in accordance with the plan upon which that fund was being accumulated. This charge is admitted, and the claim is made that the association had the right to offer and make such payment. That such payment would be unlawful follows from what has been said, as well as from the further reason that it would be an allowance to the member of money from the association as a profit.

The payment promised, it will be observed, was not of the unexpended balance of the assessment paid by the member, or such balance and interest, but the equitable share of the member as one of the surviving persistent members of the particular class to which the fund accumulated at the expiration of the tontine period was to belong. That share would manifestly be increased by the lapsing of the interest in the fund of all members who during the period should cease to be such by delinquency or otherwise, thus clearly introducing into the proposed payments the element of profit. The statute expressly forbids the receipt by members of associations organized thereunder of any money as profit; and it therefore follows that the payment promised to members at the expiration of the tontine period was in direct violation of its terms.

We are also of the opinion that there was a clear violation of the spirit, if not of the letter, of the statute in the mode adopted for the election of officers, by which the virtual control and management of the association was taken from the board of trustees and vested in the manager and secretary. The statute provides that the affairs of all associations organized thereunder shall be managed by not less than five directors, trustees or managers, who shall be elected from and by the members, at such time and place and for such period, not exceeding three years, as may be provided for in the by-laws. The certificate of association provided that the management of the association should be vested in a board of eight trustees, who were to be elected annually.

At first the manager and secretary were appointed by the board of trustees, but in consequence of some friction between the manager and the first board of trustees in relation to the

proper mode of conducting the affairs of the association, a resolution was proposed and adopted at the meeting of the association held in January, 1886, providing that the manager and secretary should thereafter be elected annually by the members. It appears that the blank applications for membership then in use by the association had printed upon them a blank proxy authorizing the person whose name should be inserted therein to act and vote for the member at all meetings of the association; and underneath it was a request to the applicant for membership to sign it in blank, to be filled up by the secretary. In accordance with this request a large number of these proxies were signed in blank and transmitted to the secretary.

It does not distinctly appear whether the proxies thus obtained were ever in fact used at the corporate meetings of the association, nor does it seem to us to be very important whether they were or not. The resolution changing the mode of electing the manager and secretary and making them practically independent of the board of trustees, was adopted mainly by the use of proxies, either the ones indorsed on the applications for membership or others. After the adoption of that resolution, the mere possession, by the secretary and manager, of a sufficient number of proxies to control all elections and other corporate action, and to perpetuate themselves in power, was repugnant to the principles upon which the association was founded, and a clear abuse of the opportunities which their official positions afforded them. It took the control and management of the association from the body to which both the statute and the articles of association committed it, and placed it in the irresponsible hands of two of the subordinate officers.

We cannot for a moment suppose that so large a number of applicants for membership signed documents so utterly destructive of the very purposes and objects of the association understandingly, and properly appreciating the consequences of their action. The circumstances tend rather to the conclusion that they were led to suppose that the execution of the proxy was a condition precedent to their admission to membership, and that they therefore signed unadvisedly and without understanding or properly considering what they were doing. An improper and unlawful advantage of the members was thus taken on their admission into the association.

After the adoption of the resolution of January, 1886, the board of trustees gave but very little actual attention to the affairs of the association, and that only in a perfunctory manner, and, as we may well assume, at the dictation of the manager and secretary. The latter were the real governing authority, and conducted the business of the association as they saw fit. This was a palpable subversion of the rules of law as well as a fraud upon the members, and justly subjected the association to proceedings by the Attorney-General for its dissolution.

The information accuses the officers of the association of false representations as to various matters. Of these one is admitted by the answer, although the fraudulent intent is denied. That consists of issuing certificates of membership numbered, but not consecutively—

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a particular certificate being thus given a number very much larger than the total number of certificates issued up to that date. The answer alleges that this was done for the purpose of preventing rival associations from ascertaining the amount of business done by the defendant.

Whether this was the true purpose or not, there is no evidence that any means were taken to apprise applicants of the actual number of certificates issued; nor does it appear that they had any knowledge on that subject; and as by the terms of the certificates the amount of the benefits payable on the death of a member depended upon the number of members in good standing at the time of his death, the issuing of certificates with numbers much larger than the number of certificates previously issued had a direct tendency to deceive members receiving certificates as to their value. Whether intended or not, this mode of issuing certificates operated as an actual fraud upon those becoming members, and the result, so far as concerns those actually deceived, was the same as though the misnumbering of the certificates had been adopted with an actual intent to deceive and defraud.

It is also alleged that the annual statement to the auditor was false in its report of the financial condition of the association. Whether said statement is false or not in the particular pointed out depends upon the right of the association to use the advance mortuary assessments for current expenses. As we hold that it had no such right, it follows that the statement was incorrect by the amount the mortuary and tontine funds had been depleted by the misappropriation of the advance mortuary assessments.

It is urged that this was a mistake of law honestly made, which ought not to subject the association to proceedings by the Attorney-General for its dissolution. The provision of the statute prohibiting the use of the mortuary assessments for any other purpose than that of paying death benefits is so plain and unambiguous that an honest mistake of law on that point seems scarcely possible. Besides, we are unable to see how a mistake of law can be set up in such case as a defense. The evidence, however, tends strongly to the conclusion that there was no mistake, but that the officers of the association acted in the matter with knowledge that they were violating a statutory prohibition. They claim to have taken legal advice; but it is by no means apparent that they took advice except from one of their own number, and it is not clear that such advice was sought in good faith or honestly believed to be correct. Another circumstance tends to the same conclusion, and that is that the officers studiously concealed from the auditor the fact that they were misappropriating the advance mortuary assessments in the manner above stated.

Again; in the statement to the auditor, the officers gave a negative answer to the question in the auditor's blank, whether the association undertook or promised to pay members during life, without regard to their physical condition, any sum of money or thing of value. It appears from what has already been said that his answer was false. The promise to pay to each member at the end of the period of ten years,

if he chose to receive it, his equitable proportion of the reserve or tontine fund, was a promise to pay money to members during life without regard to their physical condition. So of the answer to the question for what purpose and how the reserve or tontine fund was created.

The answer given was that it was created for the purpose of meeting the advance of rate at the end of ten years from the date of entry, by reserving 25 per cent of the net amount of assessments. This was correct so far as it went, but was false in suppressing the fact that the fund might be withdrawn at the end of ten years. The suppression of a material fact called for by a question makes the answer as essentially false as would the affirmative assertion of an untruth.

Another, and in our judgment a very material, official delinquency is charged in the information, based upon the unmethodical, if not incorrect, manner in which the books of account of the association were kept. The evidence shows that the books containing the accounts of money received and expended were so confused and unsystematic that it was difficult, if not impossible, to derive therefrom any certain information as to the financial affairs of the association. The experts employed by the auditor, finding themselves unable to strike any balance from the books, were compelled to

construct the accounts for themselves anew out of such original data as they were able to find. The failure of the officers of a mutual benefit association to keep correct and intelligible books of account, whether such failure results from design, carelessness or want of skill, is a serious breach of official duty. Such officers are trustees, having funds intrusted to their care, to be safely and honestly kept and administered, not for their own benefit, but solely for the promotion of the laudable objects for which the association is organized.

It is a duty of primary importance, incumbent on all trustees, to keep proper accounts of trust funds; for unless that is done, the beneficial owners of such funds are subjected to constant uncertainty as to their rights, and to a constant liability to be defrauded. Next to the duty of honestly administering a trust fund is that of keeping a true, honest and intelligible account of such administration.

Evidence was introduced tending to sustain various of the other charges made by the information, several of which the court below held to be sustained, and in which conclusion we are disposed to concur. It is unnecessary, however, for us to protract the discussion, as what has already been said is sufficient to show that in our opinion the decree is fully warranted by the evidence. *It will therefore be affirmed.*

## OHIO SUPREME COURT.

John A. LEE, Treasurer of Richland County, *Pf. in Err.*,

v.

Edward STURGES.

WESTERN INS. CO. of Cincinnati, *Pf.*  
*in Err.*,

v.

Frank RATTERMAN, Treasurer of Hamilton County.

(....48 Ohio St....)

**1. The provision of section 3 of the Act of April 5, 1859 (S. & C. 1438),** that "No person shall be required to include in his statement as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, which he is required to list, any share or portion of the capital or property of any company or corporation, which is required to list or return its capital and property for taxation in this State," does not apply to shares of a foreign corporation, although the capital of the corporation is taxed in the State where located, and although the corporation has substantial property in Ohio on which it pays taxes here; nor does it apply to shares of a railroad company which is formed by the consolidation of an Ohio company with companies of other States, notwithstanding such company pays taxes in Ohio on the portion of its property which is situated here.

**2. A construction, by officers having the enforcement of the Tax Laws of Ohio,** since the enactment thereof, to the effect that under such laws, shares held by residents of Ohio of stock of foreign railroad corporations having

property in this State on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio, does not bind the successors of such officers, nor the State, in the proper assessment and collection of taxes upon such shares.

(January 8, 1890.)

**THE** first case is error to the Court of Common Pleas of Richland County, reserved in the District Court. *Judgment for amount claimed, but without interest.*

The second case is error to the Superior Court of Cincinnati. *Judgment modified and affirmed.*

Statement by Spear, J.:

The plaintiff in error, Lee, was, at the commencement of the action, treasurer of Richland County. By his petition filed August 16, 1878, he sought to recover, as taxes for the year 1876, upon shares of stock owned by defendant, of the Western Union Telegraph Company and the Lake Shore Michigan Southern Railway Company, the sum of \$1,024.34, and as taxes for the year 1877, upon stock of the same railway company, \$591.73, together with 10 per cent penalty, in all \$1,777.07, and interest. The taxes were placed upon the duplicate by the auditor after the semi-annual settlement with the treasurer, and penalty added, and the penalty so added and demanded is that provided for by section 2855 of the Revised Statutes.

The facts, as found by the district court, show that the Western Union Telegraph Company is a corporation organized under the Laws

\*Head notes by the Court

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of the State of New York, and carries on the business of transmitting telegraphic dispatches through the State of Ohio and other States. It owns real estate, not in Ohio, exclusive of its line, of the value of \$2,635,556.86. Its entire line is 78,955 miles; in Ohio it is 4,950 miles. Its property in this State consists of its line, telegraph apparatus, chemicals and office furniture. The property has been returned, and the company has paid taxes on it since 1872, from \$10,000 to \$15,000 each year.

The Lake Shore & Michigan Southern Railway Company is the result of a consolidation of a number of corporations of the States of Michigan, Illinois, Indiana, Ohio, Pennsylvania and New York, the Ohio corporation being called The Lake Shore Railway Company. It owns a railroad from Buffalo, New York, to Chicago, Illinois, extending through Ohio and into each of the other States named; also feeders and branch lines. Its capital stock is \$50,000,000, made up from the aggregate capital stock of the several corporations which were consolidated to create it. Of its track, 377 miles are in Ohio. The stock of the Lake Shore Company amounted to \$15,000,000, and by the terms of the consolidation agreement, the owners of the stock of that corporation surrendered their stock and received a like amount of the stock of the consolidated company. Since 1870 the consolidated company has returned for taxation, and paid taxes on, its property in this State, consisting of its line of railroad, roadbeds, depots, station-houses, and the necessary real estate for the same, rolling stock, and other property, of the value of \$13,000,000, payable in the year 1877, the sum of \$286,817.88, on a valuation of less than one fourth its capital stock.

Upon the facts so found the district court ordered reserved to this court, as question of law, "whether or not shares of the capital stock of the said The Western Union Telegraph Company, and the Lake Shore & Michigan Southern Railway Company are taxable in the hands of individual owners of the same, who are residents of the State of Ohio?" which is the only question in this case.

The plaintiff in error, The Western Insurance Company of Cincinnati, seeks to enjoin the Treasurer of Hamilton County, Ratterman, from collecting taxes assessed against the company for the year 1886, to the amount of \$681.80, upon shares of stock owned by the company of the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, and of the stock of the Pittsburgh, Ft. Wayne & Chicago Railway Company. The taxes were entered upon the tax duplicate by the auditor by way of correction of the return made by the company. In the superior court a motion to strike from the petition, as irrelevant and as surplussage, the following paragraph was sustained, viz.:

"Since the year 1852, the Statutes of Ohio relating to the taxation of investments in stocks or corporations have been substantially the same as those in force on the day following the second Monday of April, 1846, and in all this period said statutes have been construed, not only by the people of the State of Ohio, generally, but by the officers charged with the execution thereof, as not requiring the owners

of shares of stock in railway corporations, the capital of which is divided into shares which are transferable by each owner without the consent of the other stockholders, and part of the line of the railway of which lies within the State of Ohio, to list the same for taxation, or authorizing the officers of said State to tax the same against the owner thereof, and that at the time property was required to be listed for taxation in 1886, there was no law of Ohio, as plaintiff believes and charges, which subjected said shares of stock to taxation in the hands of the owners thereof."

The sustaining of this motion is one of the grounds of error.

Defendant filed a cross petition, asking to recover \$681.80 taxes and 15 per centum penalty.

The Cincinnati, Indianapolis, St. Louis & Chicago Railway Company is an Indiana corporation. Of a total of 177.47 miles of road, 20.64 miles are in Ohio, the remainder in Indiana. Of a capital stock of \$7,000,000, the property on which the corporation pays taxes in Ohio is \$477,609. The value of the capital stock at the time of this assessment was \$4,655,000, or \$66.50 on each \$100 of stock, the taxes paid being on a valuation of a little over one tenth the value of its capital stock.

The Pittsburgh, Fort Wayne & Chicago Railway Company is a corporation organized under the Laws of Pennsylvania, Indiana and Illinois, owning a line of railway from Pittsburgh, Penna., across Ohio and Indiana to Chicago, Illinois. Its entire line is 468.32 miles, of which 251.65 are in Ohio. Its capital stock was valued in April, 1886, at \$40,553,148.99, and it paid taxes on property in Ohio valued at \$8,749,197, being something over one fifth the value of its stock.

The insurance company included these stocks in its return to the auditor, placing them under the head of securities not subject to taxation.

In the superior court judgment was rendered in favor of the defendant for the amount of taxes and penalty claimed in his cross petition, which judgment was affirmed at general term; and it is to reverse this judgment that this proceeding in error is brought.

*Messrs. Jenner & Tracy* for Lee, Treasurer.

*Messrs. C. H. Scribner, Dirlam & Leyman, J. M. Jones, Estep, Dickey & Squire* and *O. G. Getzen-Danner* for Sturges.

*Messrs. Paxton & Warrington, Follett, Hyman & Kelley, Lincoln, Stephens & Lincoln, Harmon, Colston, Goldsmith & Hoadley, Wm. Worthington, George Hoadley, Thomas McDougall, Joshua H. Bates, Kramer & Kramer, Nash & Lents* for Western Ins. Co.

*Messrs. Rufus B. Smith, W. A. Davidson, Wm. L. Avery and Goss & Cohen* for Ratterman, Treasurer.

*Spear, J.*, delivered the opinion of the court:

The duty of putting in form the views of the majority of the court upon the issues raised in these cases having been placed upon the writer, he approaches its performance with a grave

sense of the importance of the questions involved, and of the difficulties surrounding their satisfactory solution. The court has been favored, from the thirty-five eminent counsel appearing in the cases, with something over four hundred pages of printed argument, all of which has been read and duly considered. Obviously it is not practicable to review, or even in terms notice, all the points urged; and the writer will content himself with announcing the conclusions reached by the majority, and adding such considerations as occur in the progress of their statement.

The questions arising upon the record are: (1) whether shares of stock held by citizens of Ohio in a foreign corporation, which has in this State substantial property upon which it pays taxes, are taxable here; and (2) whether shares so held of stock of a consolidated railroad company are taxable here, where the company is formed by consolidation of an Ohio company with companies of other States, and has substantial property in the State on which it pays taxes—the larger portion of its property being without the State.

The claim against their taxability is substantially that (1) the Legislature has not authorized such a tax—or, in other words, there is no law for it; (2) it has authorized holders of such shares to omit them from their tax returns; (3) the tax laws have been thus construed from their inception, by the taxing officers and tax payers; and (4) the levying of taxes upon such shares would impose unequal burdens and would result in double taxation.

It is believed that as to the telegraph stock, at least, previous decisions of this court have practically determined the controversy, if, indeed, they have not disposed of all the questions in the cases. We will now refer to those decisions in connection with the constitutional and statutory provisions which affect the questions.

Section 2 of article 12 of the Constitution provides that "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property, according to its true value in money," and that "Personal property to an amount not exceeding in value \$200 for each individual may, by general laws, be exempted from taxation."

Section 1 of the Act of April 5, 1859 (S. & C. 1488), entitled "An Act for the Assessment and Taxation of all Property in this State, and for Levying Taxes Thereon According to its True Value in Money" (which Act is now codified in Revised Statutes as section 2730 and following), is as follows: "That all property, whether real or personal, in this State, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise of persons residing therein; the property of corporations and the property of all banks or banking companies now existing or hereafter created, and of all bankers, except such as is hereinafter expressly exempted—shall be subject to taxation; and such property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, or the value thereof, shall be entered on the list of taxable property for that purpose, in the manner prescribed by this Act."

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Section 2 defines the term "investments in stocks" in these words:

"The term 'investments in stocks,' wherever used in this Act, shall be held to mean and include all moneys invested in the public stocks of this or any other State, or of the United States, or any association, corporation, joint stock company or otherwise, the stock or capital of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by this Act, held by persons residing in this State, either for themselves or as guardians, trustees or agents."

The 9th subdivision of section 8 provides that "No person shall be required to include in his statement as a part of the personal property moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, which he is required to list, any share or portion of the capital or property of any company or corporation which is required to list or return its capital and property for taxation in this State."

Section 59 of the Act provides that "No person shall be required to list for taxation any certificate of the capital stock of any company the capital stock of which is taxed in the name of said company."

It is clear that the purpose of section 1 is to tax *all* investments in stocks held within the State. This we are bound to assume, for every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the Constitution referred to; and we are forced to the conclusion that the General Assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provisions *all* property within the State, and not to exceed in its exemptions the limit prescribed, as to persons, of "personal property not exceeding in value two hundred dollars for each individual." And, further, that where an exception or exemption is claimed, the intention of the General Assembly to except must be expressed in clear and unambiguous terms. *Cincinnati College v. State*, 19 Ohio, 110; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665 [29 L. ed. 770]; *Farrington v. Tenn.* 95 U. S. 679 [24 L. ed. 558]; *Chicago, B. & K. O. R. Co. v. Guffey*, 120 U. S. 569 [30 L. ed. 783]; *Portland, S. & P. R. Co. v. Saco*, 60 Maine, 196; *Lima v. Cemetery Asso.* 43 Ohio St. 128.

It seems equally clear that the legislative purpose was to tax all the property of corporations as well as all investments in stocks.

The stock in question comes within the description contained in sections 1 and 2 above quoted. It follows that, if this Act be valid, the stocks sought to be taxed here are properly taxable unless it is made clearly to appear that they are, in whole or in part, within the spirit and letter of the exceptions. That the Act is valid, and that stocks held here in foreign corporations may be taxed, was distinctly held in *Worthington v. Sebastian*, 25 Ohio St. 1.

It may be assumed that "capital stock" and "capital and property" mean practically the same thing. Primarily the capital stock is the

money paid in by the stockholders in compliance with the terms of their subscriptions. It soon, however, takes the form of real estate, or personal property, or both, including machinery, buildings, credits, rights in action, etc.; so that it may here be taken to mean personal property, and such real estate as may be necessary to the daily operations of the company, and of its moneys and credits. The capital is thus represented by the property in which it has been invested.

The claim is that this company does list in conformity with the statute, because it lists that part of its property which is in Ohio, and that to require the shares of stock to be listed by the stockholders would result in double taxation. The facts show that about one sixteenth of its line is in Ohio. A very small part is returned for taxation here, and taxes are paid upon that small portion. The great bulk is without the State and beyond its reach. It falls far short of meeting the letter and spirit of the words, "its capital and property." The language is not "to return its capital and property *within the State* for taxation," but is to "return its capital and property for taxation in this State." The "capital and property" is not a small part of it.

We cannot say that so much of the valuation as has been assessed in Ohio in the name of the company may be deducted from the value of the shares, and the balance taxed. We must take the statute as we find it. We cannot interpolate words and make the clause read as though written "which is required to list or return a part of its capital and property," or the other read as though written "any portion of the capital stock of which is taxed in the name of the company." Had the General Assembly intended this meaning, it would have used apt words to express it.

Nor is it apparent that double taxation would follow. The shares of stock are distinct from the capital or property of the company. That may be largely real estate; the shares are in the nature of personality. They can have no locality, and must, therefore, of necessity, follow the person of the owner, unless other provision is made by statute. The corporation is the legal owner of all the property of the company, real and personal; and within the powers conferred upon it by its charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.

The interest of the shareholder entitles him to participate in the net profits in proportion to the number of his shares; to have a voice in the selection of officers to manage the business of the company in like proportion, and, upon its dissolution, the right to his proportion of the property that may remain of the corporation after payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him; is under his sole control, so that he may sell or hypothecate it. He is entitled, from net earnings of the corporation, to dividends upon his stock, and the value of the stock depends largely upon its capacity for earning dividends. The shares of stock may be worth much more than the property of the corporation; that is, the franchise may be very

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valuable while the visible capital may be of but little value, and dividends may be greatly out of proportion to the tangible property, as frequently occurs in regard to street railroads, gas companies, electric light companies, etc. *New York v. Tax Comrs.* 71 U. S. 4 Wall. 244 [18 L. ed. 844]; *Union Bank v. State*, 9 Yerg. 490; *Cook v. Burlington*, 59 Iowa, 251.

It follows from this that although the shareholder may be affected as regards the extent of his dividends by a taxation of the property of the corporation, yet a tax on the shares is not a tax on the capital of the company, and *e converso*, a tax on the capital is not a tax on the shares held by the stockholders. Taxation of the capital and property of the corporation may be accepted by the State as an equivalent for, but it is not the same as, a tax on the shares.

We have many subjects of taxation which approach more nearly to double taxation than that of taxing capital stock and individual shares of stock in addition. Take the familiar instance of the taxation of mortgages. The owner of real estate, a farm for instance, mortgages it for money to invest in cattle to stock it. He pays taxes on the land without deduction, and on the live stock; and the lender of the money pays taxes on the mortgage. By reason of this latter fact the lender demands more interest, which the farmer pays. He thus pays taxes on his farm, on his stock the result of the borrowed money, and indirectly, the whole, or a considerable portion, of the tax on the mortgage.

And yet, reduced to its last analysis, this is not regarded as double taxation, because value is taxed each time. At all events, it is unquestionably the legal rule in Ohio. It is not impossible that a large portion of the stock of this corporation may be held by residents of this State. In such case, if the claim of the defendant should prevail, large amounts within the State, represented by these shares, would escape taxation, while the shares of stock held by our citizens in foreign corporations which happen not to have property within the State, would bear their full burden. Such a rule would not tend to uniformity or equality of taxation. And, inasmuch as the tax on the property of the corporation within the State is not a tax on the shares, and is not by the statute in terms made an equivalent, and inasmuch as the manifest purpose of the Legislature was to reach *all* investments in stocks in some form, we think a rational construction of the statute can lead to no other conclusion than that the telegraph stock cannot come within the purview of the exemption clauses.

The case of *Bradley v. Bauder*, 36 Ohio St. 28, is authority upon this question, and, we think, disposes of it in consonance with the views here expressed. The syllabus is: "By the provisions of the Act of May 11, 1878, an owner, residing in Ohio, of shares of stock in a foreign corporation, is required to list the same for taxation, notwithstanding the capital of the corporation is taxed in the State where the corporation is located."

The Act of 1878, here referred to, embodies substantially the provisions of the Act of 1859. A recurrence to the record shows that every question we have here as to telegraph stock was present there. Among the shares of stock,

taxation of which was sought to be enjoined in that case, were shares of the Adams Express Company, averred in the petition to be, and well known to be, a foreign corporation having lines running through this State upon which it did business, and having property within the State upon which it paid taxes here. It was urged by counsel for plaintiff in error, in his printed brief, that it was a company created by and located in the State of New York, and reasoned that the fact that it paid taxes in that State, and in this State upon its property employed in its business here, ought to exempt the shares. The case was determined upon a general demurrer to the petition which was sustained, and judgment without dissent given for defendant. Necessarily, therefore, this question was passed upon. It is within the letter, and, as we think, the logic, of both the syllabus and the opinion. That it is not given importance in the printed report may be owing to a belief in the mind of the learned Judge who reported the case that it was not of consequence. And it was not, if the principle announced in the case is correct. We believe it to be, and, in reaching the conclusion hereinbefore indicated as to the telegraph stock, we but follow the logic of this case.

To like effect is the holding of the Supreme Court of the United States in *Sturges v. Carter*, 114 U. S. 511 [20 L. ed. 240]. The plaintiff in that case, Carter, treasurer, the successor of Lee, brought suit in the Common Pleas of Richland County, to collect taxes on stock in the same telegraph company. Sturges removed the case to the Circuit Court of the United States where it was tried before Judge Baxter. Judgment being rendered against the defendant, he sued out a writ of error to the supreme court, where, at the October Term, 1884, by the unanimous opinion of the court, the judgment was affirmed. The syllabus is as follows: "The provision, section 59, Act of April 5, 1859, of Ohio, that 'No person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of the company,' does not apply to shares in a foreign corporation which pays taxes in Ohio only on the portion of its property which is situated there."

With due deference to the contrary opinions of the very learned counsel, so vigorously expressed in argument in this case, we may be allowed to give our assent to the judgment of the supreme court upon the facts, and to express respect for the decision as authority.

It is claimed for the shares of railroad stock that the language of section 2 of the Act (heretofore quoted) defining the phrase "investments in stocks," in terms excludes them from taxation here, and that they are of the class which sections 3 and 59 authorize the holder to omit. This, because the word *which* in the clause "for taxation of which no special provision is made by this Act" refers, not to "shares" but to the capital stock of the company, and therefore, "investments in stocks" includes only stocks in corporations as to the taxing of the capital stock of which no special provision is made by law; that there is a special provision made by law for the taxing of railroad companies; hence, the shares of

stock of such companies in the hands of individuals are not taxable.

We are not impressed with the prime importance of abstruse and ingenious distinctions in regard to the wording of section 2. There may be apparent objections to any of the differing constructions sought to be given to this clause. But, however it be construed, we think the result is the same. If it be conceded that the word "which" should be referred back to the words "the stock or capital," then, taking that clause in connection with the portion of the ninth clause of section 3, and the first clause of section 59, and construing the whole legislation in the light of the constitutional requirement before referred to and of the previous decisions of this court, the "special provision" must be one which relates to an Ohio corporation proper, one as to which as in *Jones v. Davis*, 35 Ohio St. 474, the State had exercised, or might exercise, the right to tax the capital stock in the name of the company.

Now, the "special provision" for the taxation of railroads, is that provided by sections 2770 to 2776, Revised Statutes, and is in substance, that the auditors of the counties through which the road passes meet annually as a board of appraisers and assessors and proceed to ascertain all the personal property, which includes roadbed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys and credits, and undivided profits of the company, and the actual value thereof in money. The board may require the president, secretary, treasurer, receiver and principal accounting officer to produce a detailed statement, under oath, of all the items constituting such property, moneys, credits, and their value, and may examine under oath such officer, and the books and papers of the road. The value of all such property is then apportioned by the board among the several counties, so that each city, village, township and district shall be apportioned such part as shall equalize the relative value of the real estate, structures and stationary personal property in proportion to the whole value of the same in the State, and the rolling stock is apportioned in the same proportion and in the same manner. When any company has part of its road in this State and part without, the board is to take the value of the property, moneys, and credits thus ascertained and divide it in the proportion the length of such road in the State bears to the whole length, and determine the principal sum for the value of the road in the State accordingly, equalizing the relative value between counties, etc., as before indicated.

It will be seen at a glance that this scheme has for its object the ascertainment of the value and the taxation according to that value, and the property of the road within the State only; the marshaling of the entire property and its valuation being simply an ingenious mode of ascertaining the amount and value of the property, within the State, to be taxed. That which lies without is first included, because the proper equalization as to value cannot be made without it, and then it is deducted. The result is the ascertainment for taxation of the proportion of value properly taxable within the State.



It works out for the railroad companies herein named, taxation of a little over 10 per cent of the value of the capital stock of the Cincinnati, Indianapolis, St. Louis & Chicago Company, about 21½ per cent of the value of the Pittsburgh, Fort Wayne & Chicago Company, and of the Lake Shore & Michigan Southern about 25 per cent.

A special provision attended with such results can hardly be regarded as one which embraces taxation of capital and property of a company, nor one which furnishes an instance where the capital stock is taxed in the name of the company.

As to the Lake Shore & Michigan Southern Railway Company, it is further insisted that it is not a foreign, but a domestic, corporation; and as it has returned and listed and paid taxes on its immense property lying within the State, in conformity with the statute, the shares in the hands of stockholders cannot be taxed. The finding of facts does not in express terms declare that this company is organized in Ohio, but we understand the fact so to be. That is, it is an Ohio corporation in the same sense as are all consolidated railroad companies made up in part of an Ohio Company. It does not, however, necessarily follow that they are domestic corporations in all aspects and for all purposes. Such corporations derive their corporate existence and all their powers from domestic law.

A consolidated railway company, composed of companies of this and other States, derives its corporate existence and rights from the laws of the respective States in which its line of railway is located, and is, therefore, strictly speaking, an interstate corporation. It is not domesticated in one, but in several States. It is not the creature of one, but of all the States in which it, in part, exists, and has been enabled by their respective statutes to become a corporation for the ownership and management of an interstate line of railway. Such is the character of the Lake Shore & Michigan Southern Railway Company. It is a corporation of the States in which it is located, from Buffalo to Chicago. The consolidated company, when the agreement of consolidation is made and perfected, and the original or a copy filed with the Secretary of State, is to possess within this State all the rights, privileges and franchises, and be subject to all the restrictions, liabilities and duties, of a railroad company. A copy of this agreement shall be received as evidence that such consolidation was authorized by the laws of the several States within which the companies were chartered. Such company must establish a principal office within the State, and suits may be brought against it in the courts of the State as against other companies. That portion of the road in this State, and all its real and personal property, shall be listed for taxation and taxed in the same manner as the road and property of other railroad companies in the State; and the rolling machinery is to be listed at a valuation which will give such proportion of the value of the whole as the length of line in the State bears to the length of the whole line. But there is no requirement that it shall list its capital stock nor shall it list *all* its property here; it must return only such as is within the State. This,

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by the terms of the Act under review, was required of every foreign corporation; and therefore it imposes upon such consolidated company no burden as to taxation beyond that imposed upon every foreign corporation having property within the State. Although it is required to have a principal office here, its general business may be done elsewhere. It may hold millions and millions of credits without the State, and they are not touched here.

Not so, to the same extent at least, with a strictly domestic corporation. Its *situs* is here to all intents and purposes. If it owns credits, shares for instance in the stock of foreign corporations (which is often the case, whether there be legal warrant for it or not), it must list the same here as fully as the private citizen is required to do; and of course all visible property is taxed here; so that it cannot be said that the power of taxation over a consolidated company is the same, or as extensive, as that over a strictly domestic company.

Again; by the Act of consolidation, the shares of stock in the consolidating companies, held by the shareholders, are surrendered, and in their place are substituted shares in the consolidated company, a share of stock in which is a fractional part of all its capital invested in the railway and owned by the company from one terminus to the other. That which before was, in a sense, represented in the railroad and the other property in Ohio only, is now, in that same sense, represented in the entire railroad and property of the consolidated company. The old Ohio Company has out no certificates of stock whatever; indeed, it has ceased to exist, for, on perfecting the agreement, "The several corporations shall be deemed and taken to be one corporation." That one is the new one. The old is abolished and its charter extinguished.

The present company, if treated as an Ohio Company, has out no stock, and it is, therefore, not the stock of an Ohio Company which is sought to be taxed. The Ohio stockholder has no more interest in or control over the road and property in this State than in that lying in the other States, nor have the stockholders residing in the other States any less interest in the Ohio property of the corporation than in that lying without. Upon a dissolution of the corporation the stockholders in Ohio would not take the property here or its proceeds; nor would it fall to the original stockholders in the old Ohio Company—the Lake Shore Company. On the contrary, all stockholders of the consolidated company, wherever residing, and by whatever company of the consolidation their original stock was issued, would be interested alike in the whole residuum, in proportion to their respective shares.

It is thus made apparent, as it seems to us, that the question whether the railway stock held in Ohio is taxable here is not to be answered in the negative merely because it is ascertained that the corporation was incorporated under the Laws of Ohio. There still devolves upon the shareholder the burden of showing, clearly and without question, that the results following such organization bring the shares within the exemption, taxability being the rule, exemption the exception. Has this been done? We think not. It is true that the property of

the corporation entered for taxation in Ohio is substantial in character, and that the amount paid by the company as taxes on that property is large. But the greater portion of the company's entire property, at least three fourths in value of it, lies without the State.

We are unable to perceive that the reasoning of the court in *Sturges v. Carter*, *supra*, and the logic of *Bradley v. Bauder*, *supra*, is not applicable to this stock as well as to that of the telegraph company. To hold it exempt would, we think, require, in effect, an overruling of those cases. The railway company is not, any more than is the telegraph company, required to return all, or substantially all, its property for taxation in this State. In a word, the consolidated company does not fall within the description of the exemption clauses of the statute.

Marked stress is laid in argument, as supporting the contention of the insurance company, upon the case of *Frazer v. Seibern*, 16 Ohio St. 615.

A full analysis of this case would require much space, and it would not, it seems to us, prove profitable. The case construes the Act of Congress of 1861, authorizing the formation of national banks, and clauses of the taxing laws of Ohio under consideration in the cases at bar, and gives a rule for applying the qualifying clauses of the National Bank Act, and holds that the clause limiting taxation of shares in national banks to a rate not greater than that imposed upon shares in state banks, means that as the taxation of such shares is provided for under the state tax law by taxation upon the banks themselves, which have the right to deduct from their capital for taxation real estate and government bonds held by them exempted by United States law, so, in assessing shares in national banks the same deduction shall be made. And where, under the state law imposing taxes upon shares in national banks, the tax is in excess of the rate imposed upon the banks of the State, the payment of such excess might be enjoined upon payment of a sum which would be a fair equivalent for the tax on the state banks.

With due respect to the claim of counsel, whose ingenious argument upon the point we have read with much interest, we cannot see that the holding noticeably aids his contention, or gives a rule determining adversely the question of taxing shares in a foreign corporation. Because the Law of the United States fixed a rule for the taxation, by a State, of shares in national banks located within such State, and that rule authorized exemptions in order to conform taxation of federal bank shares to the rule applied to shares in state banks, it does not follow that our statute should be so construed as to exempt shares in a foreign corporation, as to which there is no requirement of federal law whatever. In the bank case our court but bowed to the controlling authority of the general government. It held the law in that case in obedience to that superior power, in the same breath expressing regret because of the necessity.

Nor does a reading of the opinion in the bank case impress us that the learned judge who wrote it anticipated that such a construction as is here claimed could be given to it.

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We quote from Welsh, *J.*, on page 622. Speaking of our tax law, he says:

"It provides for a tax against certain corporations and companies upon their capital, and for a tax against the shareholders, upon their stock. In those corporations and companies that are not so taxed upon their capital . . . The intention manifestly was to subject the capital employed by these corporations and associations to a single taxation—some of them in one form, and some in another—and not to tax any of them twice. It is the unmistakable intention manifested in our tax legislation for the last twenty years—the central idea of our system of general *ad valorem* taxation—to tax every person upon what he is worth. In a system like ours, where intangible as well as tangible property is taxed, some forms of double taxation are unavoidable; but the object should be—and such seems to have been the general aim of all our late legislation upon the subject—to avoid double taxation whenever it is practicable, and as nearly as may be, to tax all according to their actual wealth. That object is best attained in case of a corporation, or joint stock company, by taxing the stockholders—the persons who own its property, upon the full value of their shares therein, including, of course, their interest in the franchise or privilege, and in all tangible property owned by the company; and by taxing the corporation also upon the value of such tangible property. . . . This is the rule adopted by the Act of Congress in question, and it seems to us a just and fair rule. The Act of 1865, by subjecting shareholders in the national banks to such a tax, places upon the owners of those banks, the shareholders therein, no more than their just proportion of the public burden of taxation; and we regret that any technical reasons, growing out of the taxation of the few remaining state banks, should stand in the way of its enforcement."

This construction of the exemption feature of the Act of 1869 confines the exception to home corporations, and clearly recognizes the distinction between the taxation of shares and the taxation of capital stock which we have sought to point out.

It may not be possible to construe the Act so as to bring about perfect equality in all cases. Take, for instance, the case of a corporation having in this State, and subject to its taxing laws, nearly all its property, and only a small portion without; if the shares are taxed because it is a foreign corporation, the result has the appearance of double taxation, while, in case of a corporation having in the State a trifle of its property, the greater portion being beyond the limits, and the shares held in this State are not taxed because it is a home corporation, apparently there is property in the State which escapes taxation.

But these are extreme instances and extreme cases do not prove satisfactory tests. However, while recognizing the fact that there is room for differences of opinion on the subject, as conclusion, we are disposed to be content with a construction of these exemption clauses which will be in accord with the opinion in the case last cited and with that indicated in the opinion in *Bradley v. Bauder*, *supra*, and treat them as applying only to corporations which

are strictly domestic, and thus to exempt from taxation only "the shares of stock in corporations where the State had exercised the right to tax the capital stock in the name of the company."

This construction applies them to that class of corporations over which the State may have, as to their capital and property, as well as management, entire control. In this view, when the General Assembly uses the words "capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State," it refers to that class of corporations whose entire capital and property it is possible to require to be listed here. This is not possible of a railroad company made up by consolidation of an Ohio Company with companies of other States. As to this feature it is as essentially foreign as is a strictly foreign corporation holding property within the State. Any other construction would, we think, be at war with the language of the statute, and would, besides, result in many cases in releasing from taxation large amounts of property held in the State, for which there would be no equivalent. Of course we do not overlook the fact that, under the rule suggested, some property owned by domestic corporations may escape taxation because of being without the State, and so beyond reach. This will be found true as to exceptional cases; but treating them as a class, their capital and property are all here.

The fact that some property of domestic corporations would thus avoid taxation is urged as a reason for the release of the railway and telegraph shares here on the ground that, if held, the rule would result in unequal taxation; and it is further urged that to subject these shares to taxation would result in driving a large volume of capital from the State. The force of this argument is not perceptible. Whether the tendency of holding such shares taxable will be to drive capital from the State, or will, on the other hand, induce such holders to invest in stocks of home corporations, we need not inquire, for the court's duty is not to declare that to be law which it may think may prove most advantageous to the people, but to declare the law as it finds it.

Nor can the court be called upon to equalize taxation. The shares in question are held subject to taxation because, as we think, the law says they are so subject. Those of domestic corporations are held exempt because the law says they are to be excepted. If this works inequality, or if it tends to drive certain species of capital from the State, the remedy, if any, is with the law-making power and not with the courts. Nor does the fact, if it be so, that other property escapes, necessarily render this tax invalid. *Exchange Bank v. Hines*, 3 Ohio St. 1; *Wagoner v. Loomis*, 37 Ohio St. 571.

"It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions." Cooley, *Taxation*, 221.

It is probable that the lightening of the burden of taxation attracts the owners of property

to locate, and draws foreign capital to the State. Referring again to the taxation of mortgages, it is plausibly urged by many that if the tax on mortgages in the hands of residents were abolished, capitalists having money to loan would be attracted here from other localities and the rate of interest would fall, thus giving our enterprising people the use of more capital and at a less rate of interest. If this be conceded should the court therefore declare that mortgages given to residents of Ohio may not be taxed?

Fear is expressed by counsel that great wrong and injustice will be done the stockholders, in these and similar corporations, by taxing their shares, because they cannot know whether the corporation has listed all its property, and they should not be held accountable for its default. We think the fear unsubstantial. The stockholder need know only that the corporation is required to list. Where it is so required, presumably the capital stock of such company is taxed in the name of the company. Where such duty devolves upon the corporation, the taxing officers will, in case of default, follow the corporation, not the individual stockholder.

It is insisted that railroad capitalists have been encouraged by the State to consolidate railroad companies, and having invested their money in such stocks under the belief that they were nontaxable, it would now work an injustice to assess a tax upon them. This view seems to ignore the fact, well known to most citizens, that the legislation referred to has been at the instance of the companies themselves. The legislation was enacted because the companies, conceiving it to be for their interest, asked for it, and, having influence, procured it. It was not forced upon them, nor was it initiated by the people. If, by agreeing to consolidation, any surrendered nontaxable stock, taking in exchange stocks which turn out to be subject to taxation, presumably they anticipated other advantages which would more than compensate; and, without doubt, this anticipation has been realized in most instances. *State v. Maine Cent. R. Co.* 66 Maine, 488; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499 [24 L. ed. 836].

The allegations in the petition of the insurance company as "to uniform construction" by the people and taxing officers, were, so far as competent for consideration by the court, matter of evidence, save where they might be taken judicial notice of by the court; hence, the sustaining of the motion to strike out was not error. The omission of the taxing officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors or the legal construction of a statute under which its exemption is claimed. *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665 [29 L. ed. 770].

If it could, the consequence would be the lodging in their hands of the very power of exemption which the General Assembly alone can validly wield, and that under the limitations of the Constitution. Nor can laches be imputed to the State. "The general principle is, that laches is not imputable to the government; and this maxim is founded not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents;

and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions." *U. S. v. Kirkpatrick*, 22 U. S. 9 Wheat. 735 [6 L. ed. 199]; *State v. Breuer*, 64 Ala. 287; *Easton Bank v. Com.* 10 Pa. 443; *Del. Division Canal Co. v. Com.* 57 Pa. 399; *Dennis v. Vicksburg, S. & P. R. Co.* 34 La. Ann. 954, 958; *Finley v. Philadelphia*, 82 Pa. 381.

Even if it were error, the plaintiff in error seems to have had full benefit of it as if pleaded and proven. It is probable, however, that the claimed "uniform construction" has not been quite so "uniform" as counsel suppose. At least in one of the counties through which the Pittsburgh, Fort Wayne & Chicago Railway passes, a different view obtained. In the year 1882 an action was brought to enjoin the county treasurer from collecting taxes on stock in that company owned by the plaintiff and which the assessor had returned as subject to taxation. A demurrer was filed to the petition. The stockholder's case was presented, by two as able and experienced lawyers as practice in that part of the State, to a common pleas judge of exceptional capacity. The demurrer was sustained, and the case was not further prosecuted. The extent of the claim for "uniform construction" seems to be that in case of doubt as to proper construction, the construction by

state and county officers should prevail. This has been at large argued and considered. This construction, counsel urge, has been known to the General Assembly; and had it been the legislative will to tax such shares, further legislation would have been had to that effect. With equal pertinency this consideration could have been pressed in the case of *Worthington v. Sebastian*, *supra*, and in *Bradley v. Bauder*, *supra*.

The argument lacks force as applied to this subject at this time. It somewhat persuades, but does not convince.

Our conclusion is that there is not such doubt present as will make this claimed "uniform construction" available as against the claim for taxes here made. But the record in the case of the Western Insurance Company shows no ground for penalty. The cross petition was apparently predicated on section 2459 of the Revised Statutes, which makes no provision for a penalty. It does not appear that the duplicate showed an entry by the auditor as contemplated by section 2855; hence, no penalty can be allowed.

In the case of *Lee v. Sturges* a judgment will be rendered for the amount claimed, but without interest. In the other case the judgment of the superior court will be modified by deduction of the amount of penalty included in the judgment, and otherwise affirmed.

Owen, Ch. J., and Dickman, J., dissent.

## NEBRASKA SUPREME COURT.

STATE, *ex rel.* William LEESE, Atty-Gen.,  
v.  
CHICAGO, BURLINGTON & QUINCY R.  
CO.

(.....Neb. ....)

\*1. Eminent domain; consolidated railroads. While section 8 of article 11 of the Con-

\*Head notes by the COURT.

NOTE—Consolidation of corporations. The authority of two or more corporations to consolidate into one is given by statute, and may be given in the original charter or in subsequent statutes; but the legislative sanction must be given in some legal form. *Morawetz, Corp.* 55 544, 545; *Field, Corp.* 337; *Booe v. Junction R. Co.* 10 Ind. 93; *State v. Bailey*, 18 Ind. 48; *Shelbyville & R. Turnpike Co. v. Barnes*, 42 Ind. 498; *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 1 West. Rep. 251, 104 Ind. 97. State statutes authorizing the consolidation of corporations, are Acts of Incorporation (Ohio & M. R. Co. v. People, 12 West. Rep. 608, 123 Ill. 467). The effect of the consolidation of three corporations was a dissolution of the three old and the creation of a new corporation with property, liability, and stockholders derived from those passing out of existence. *Clearwater v. Meredith*, 68 U. S. 1 Wall. 25, 40 (17 L. ed. 604, 608); *Pullman's Palace Car Co. v. Missouri Pac. R. Co.* 115 U. S. 587 (29 L. ed. 499); *Meyer v. Muscatine*, 68 U. S. 1 Wall. 384 (17 L. ed. 554). Whether the consolidation of two corporations works a dissolution of them both and creates a new corporation depends upon the statutes under which the consolidation takes place (Central R. & Banking Co. v. Georgia, 42 U. S. 665, 23 L. ed. 757), or the terms of the agreement of consolidation. *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587 (29 L. ed. 255). By the consolidation the old corporations do not become extinct, so as not to be able to wind up their business; and in New York an assignment of the legal title of a patent, in writing, to the new corporation, by

stitution of this State provides that no railroad corporation organized under the laws of another State, or of the United States, and doing business in this State, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of this State, it does not prohibit existing railroad companies, one of which is a domestic corpora-

the president and secretary of one of the old ones, after the consolidation, in pursuance of a previous vote of its executive committee, conveys title. *Edison Electric Light Co. v. New Haven Electric Co.* 35 Fed. Rep. 233. A consolidation of two railroad companies merges the franchises and privileges of each in the new company, so that they continue to exist in respect to the several roads so consolidated. *Tomlinson v. Branch*, 32 U. S. 15 Wall. 160 (21 L. ed. 159); *Branch v. Charleston*, 38 U. S. 677 (23 L. ed. 750); *Angler v. East Tennessee, V. & G. R. Co.* 74 Ga. 634. Where an Act uniting two colleges is valid, and the two original corporations become merged in one, neither of them can thereafter sue for any cause of action. *Pa. College Cases*, 30 U. S. 18 Wall. 190 (20 L. ed. 650).

New corporations created by consolidation. A new corporation may be created by the union of two or more corporations and its powers and privileges designated by reference to the charters of other companies (*Maine Cent. R. Co. v. Maine*, 35 U. S. 499, 24 L. ed. 586); and an agreement to consolidate creates a new corporation. *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465 (28 L. ed. 1056); *Shields v. Ohio*, 35 U. S. 319 (24 L. ed. 357); *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161 (30 L. ed. 190); *Covington & C. Bridge Co. v. Mayer*, 31 Ohio St. 317; *Bishop v. Brainerd*, 28 Conn. 289; *2 Morawetz, Priv. Corp.* 1000, 1001; *Ohio & M. R. Co. v. People*, 12 West. Rep. 608, 123 Ill. 467. The question whether the corporation so formed is a new corporation, within the meaning of the Act of the Legislature, is merely a question of statutory construction. *Morawetz, Priv. Corp.* 554; *Field, Corp.* Wood's ed. § 384; *McMahon*

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tion, from becoming a body corporate by consolidation, instead of by the formation of a new corporation, providing such consolidation is made pursuant to the laws of this State permitting the same, and by which it became "a body corporate, pursuant to and in accordance with the laws of this State."

**1. Case in judgment.** The C. B. & Q. R. Co. was a corporation organized under the Laws of the State of Illinois and of the State of Iowa, and operating a railroad from the City of Chicago, in Illinois, to a point on the Missouri River in Iowa, opposite the City of Plattsmouth, in this State, and the Burlington & Missouri River Railroad Company in Nebraska was a corporation organized under and by virtue of the laws of this State, operating a railroad from the City of Plattsmouth to Kearney. These two corporations consolidated their stock and franchises into one corporation or joint stock company, to be known as the "Chicago, Burlington & Quincy Railroad Company," under the provisions of section 114, chap. 16, Comp. Stat. 1887. It was held that by virtue of such consolidation, and the compliance with the laws of this State, the corporation created thereby became a body corporate, pursuant to and in accordance with the laws of this State, and was therefore not a foreign corporation.

(December 12, 1888.)

**INFORMATION** in the nature of *quo warranto*. Judgment for defendant.

The facts and questions presented are stated in the opinion.

*Messrs. William Leese, Atty-Gen., and J. M. Stewart*, for plaintiff:

Any Act of the Legislature under which this defendant claims to be exercising the right of eminent domain, or permitting it to acquire the right of way or real estate in this State for depot or other uses, is unconstitutional and void, unless they incorporate under the provisions of chapter 16, Compiled Statutes.

Const. § 1, art. 11; *State v. Scott*, 22 Neb. 628; *Trester v. Mo. Pac. R. Co.* (Neb.) 86 N.W. Rep. 502.

*Messrs. Dexter, Herrick & Allen and Marquette & Dewese*, for defendant.

*v. Morrison*, 16 Ind. 172; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 238; *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 1 West. Rep. 251, 104 Ind. 97. Such new corporation is subject to the general law that any Act of incorporation subsequently passed should be liable to amendment, alteration or repeal. *Id.*; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359 (23 L. ed. 185); *Atlanta & R. A. L. R. Co. v. State*, 63 Ga. 433; *Powell v. North Mo. R. Co.* 42 Mo. 63. The new company takes its charter subject to existing constitutional provisions to this effect. *Shields v. Ohio*, 95 U. S. 319 (24 L. ed. 357); *Perk v. Chicago & N. W. R. Co.* 94 U. S. 177 (24 L. ed. 98). Where a corporation is formed by the union of several existing corporations, it must pay taxes on the property of one of the former corporations which was not exempted from taxation, there being no provision to the contrary in the Act of consolidation. *Phila. & W. R. Co. v. Maryland*, 51 U. S. 10 How. 376 (13 L. ed. 43); *Tomlinson v. Branch*, 32 U. S. 15 Wall. 490 (21 L. ed. 189); *Branch v. Charleston*, 32 U. S. 677 (23 L. ed. 750); *Central R. & Banking Co. v. Georgia*, 92 U. S. 665 (23 L. ed. 757); *Southwestern R. Co. v. Georgia*, 92 U. S. 676 (23 L. ed. 762). An exemption from taxation, in the charter of a railroad company, is carried to a new company formed by consolidation, where the Act authorizing the union declares that the new company shall have the powers and privileges of the former ones. *Humphroy v. Pegues*, 53 U.S. 16 Wall. 244 (21 L. ed. 326); *Phila. & W. R. Co. v. Maryland*; *Tomlinson v. Branch*; *Branch v. Charleston*; *Central R. & Banking Co. v. Georgia*; *Southwestern R. Co. v. Georgia*, *supra*. The new company is not subject to any

*Reese, Ch. J.*, delivered the opinion of the court:

This is an information in the nature of a *quo warranto*, instituted by the Attorney-General against the defendant. The allegations of the information are, in substance, that the defendant is a railroad corporation organized and existing under the Laws of the State of Illinois, and is not incorporated under the Laws of this State, and is therefore a foreign corporation; that it has been, and is now, unlawfully exercising the right of eminent domain by purchasing real estate for depot and other uses, as well as by obtaining the same by condemnation proceedings, for the purposes of right of way for its railroad, and that it is now and has been for some time past, unlawfully usurping the rights, privileges and franchises of a domestic corporation, without having become one under the laws of this State.

To this information the defendant filed its answer, which consists of an extended history of the defendant, from the time of its incorporation in the State of Illinois to the present time, and which need not be noticed further than that the Chicago, Burlington & Quincy Railroad Company, as originally organized, constructed its railroad from the City of Chicago to the City of Burlington, Iowa; that the Burlington & Missouri River Railroad Company was duly incorporated under the Laws of the State of Iowa, and that it constructed a line of road from said City of Burlington to a point on the Missouri River opposite the City of Plattsmouth, in this State; that the lines of road were so constructed as to form a continuous line, and were connected for that purpose at the City of Burlington; that these two corporations, acting under the Laws of the State of Illinois and of the State of Iowa, consolidated their franchises and interests so as to become one corporation or joint stock company by the name of the "Chicago, Burlington & Quincy Railroad Company;" that in the year 1869 articles of incorporation were filed in the office of the Secretary of State of Nebraska, duly incorporating the Burlington & Missouri

lien in favor of bonds of one of the old companies, issued after the passage of the statutes authorizing the consolidation, unsecured by mortgage or lien before the consolidation, and the holders of which had not exchanged or offered to exchange them for bonds of the consolidated company before the proceedings for foreclosure. *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587 (29 L. ed. 235).

*Succeeds to powers, rights, privileges and obligations.* The new corporation is a *de facto* corporation and its existence can only be attacked in a direct proceeding. *Chicago, K. & W. R. Co. v. Stafford County*, 36 Kan. 121. The presumption is that the new company has all the powers and privileges, and is subject to all the restrictions and liabilities of the old companies out of which it is formed. *Tenn. v. Whitworth*, 117 U. S. 199 (29 L. ed. 833); *Tomlinson v. Branch*, 32 U. S. 15 Wall. 490 (21 L. ed. 189); *Branch v. Charleston*, 32 U. S. 677 (23 L. ed. 750); *Scotland County v. Thomas*, 94 U. S. 682 (24 L. ed. 219); *Green County v. Connors*, 109 U. S. 104 (27 L. ed. 872); *Zimmer v. State*, 80 Ark. 677; *Chicago, R. I. & P. R. Co. v. Mott*, 75 Ill. 524; *Phila. & W. R. Co. v. Md.* 51 U. S. 10 How. 376 (13 L. ed. 461). And this includes the power of condemnation of land for railroad purposes. *South Carolina R. Co. v. Blake*, 9 Rich. L. 238. The general rule is that the consolidated corporation succeeds to the rights of the constituent corporations unless the statute otherwise provides. *Scott v. Hansher*, 94 Ind. 1; *Indianapolis, etc. Co. v. Jones*, 29 Ind. 465; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 238; *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 1 West. Rep. 251, 104 Ind. 97.

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River Railroad Company in Nebraska, the object and purpose of which, as set forth in its articles of incorporation, was to construct and operate a line of road of uniform gauge with the other railroads, from Plattsmouth to Kearney; that said company constructed its railroad in accordance with the purpose of its incorporation, and by which a continuous line of traffic could be maintained from the City of Kearney to the City of Chicago.

The only other feature of the answer which it is deemed necessary to notice is that on and prior to the first day of January, 1880, the railroad of the Chicago, Burlington & Quincy Railroad Company in Iowa, and the railroad of the Burlington & Missouri River Railroad Company in Nebraska, being connected at the boundary line between the States of Iowa and Nebraska, at the City of Plattsmouth, in accordance with the laws of the State of Iowa and Nebraska, and in pursuance of a vote of more than three fourths of all the stockholders of the respective companies, entered into certain articles of consolidation, whereby the parties thereto merged and consolidated the stock of the respective companies, making one joint stock company of said corporations by the name of the Chicago, Burlington & Quincy Railroad Company; that, by force of said articles of consolidation and the laws of Nebraska, the said Chicago, Burlington & Quincy Railroad Company, when organized, became a corporation of Nebraska, pursuant to and in accordance with the laws of the State, and, by virtue of such consolidation and compliance with the laws of this State, became a domestic corporation, with all the rights, franchises and privileges of any other domestic corporation, including the power to exercise the right of eminent domain. It therefore denies that it is unlawfully usurping any of the rights which it is now exercising, but insists that by the consolidation referred to, the method of which is set out at length in the answer, it became and is a domestic corporation, and is not a foreign corporation, as alleged in the information.

It is not deemed necessary to set out in detail the method of consolidation which is presented and set up in the answer, further than

to say that it appears to have been in compliance with the requirements of the laws of this State, and especially of section 114, chap. 16, Comp. Stat. 1887. This section we here copy:

"Every railroad company organized under the laws of this State shall have power to intersect, join, and unite its railroad or railroads with any railroad or railroads constructed, or to be constructed, in this State, or in any adjoining State or Territory, by any railroad company organized under the laws of any State or Territory, at such point on the boundary line of this State and such adjoining State or Territory, or at such other point as may be mutually agreed upon between said companies; and all such railroad companies whose railroads are or may be connected at the boundary line of this State, or at such other agreed point, by bridge, transfer, ferry or otherwise, as to form practically a continuous line of railway over which cars may pass, are authorized to consolidate the stock of the respective companies, making one joint stock company thereof, and bring the railroads thus connected under one management, upon such terms as may be mutually agreed; *Provided*, no railroad company shall consolidate its stock, property, franchises, or earnings, in whole or in part, with any other railroad corporation owning or operating a parallel or competing line in this State. Articles stating the terms of such consolidation shall be approved by each company by a vote of the stockholders owning a majority of the stock, in person or by proxy, at either a regular annual meeting thereof, or at a special meeting called for that purpose, by a notice of at least sixty days, stating the object of such meeting, to be addressed to each of such stockholders when their place of residence is known, and deposited in the postoffice, and published for at least three successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal business office, or by the consent, in writing, of such majority annexed to such articles and copies of said articles and of the records of such approval or of such consent, and accompanied by lists of the stockholders of such corporation, and the number of shares held by

Where a statute consolidating companies confers the rights and privileges of each upon the consolidated companies, such privileges extend only to the property each had. *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718; 24 L. ed. 310. Where two original companies had by reason of consolidation become extinct the new company succeeded not only to all their property and franchises but also to all their liabilities and burdens (*People v. Louisville & N. R. Co.*, 8 West. Rep. 347, 120 Ill. 48); and the same duties and obligations attach. *State v. Northern Pac. R. Co.*, 36 Minn. 207, 30 N. W. 663; *Plainview v. Winona & St. P. R. Co.*, 36 Minn. 505, 32 N. W. 745; *Angier v. East Tennessee, V. & G. R. Co.*, 74 Ga. 634. The Act providing for the consolidation of railroads does not give by implication the power to lease. *Mills v. N. J. Cent. R. Co.*, 2 Cent. Rep. 239, 41 N. J. Eq. 1.

*Status as regards citizenship.* A railroad corporation created by and under the Laws of North Carolina and an adjoining State, is subject to the Laws of North Carolina, except as otherwise expressly provided in the charter. *McGwigan v. Wilmington & W. R. Co.*, 95 N. C. 423. Where corporations created by different States consolidate, it becomes a new corporation, at least *de facto*, and succeeds to the rights and duties of the several corporations. *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199; *Atlanta & R. A. L. R. Co. v. State*, 63 Ga. 483. It is a domestic corporation. *Re St. Paul & N. P. R. Co.*, 36 Minn. 85. It is a separate corporation in each 2 L. R. A.

State so far that it is governed by the laws of each State within its own territory. *Pittsburgh & S. L. R. Co. v. Rothschild (Pa.)*, 4 Cent. Rep. 108; *Graham v. Boston, H. & E. R. Co.*, 14 Fed. Rep. 757. It has the same relation to each State as the original company in that State. *Pittsburgh & St. L. R. Co. v. Rothschild (Pa.)*, 4 Cent. Rep. 108; *Delaware R. R. Tax Case*, 85 U. S. 18 Wall. 206 (21 L. ed. 888). Such a corporation does not fall within the constitutional provision that a majority of the directors of companies now or hereafter to be incorporated shall be citizens and residents of the State. *Ohio & M. R. Co. v. People*, 12 West. Rep. 601, 123 Ill. 407. The status of the consolidated corporation is that of an association incorporated in each State and acts on either as a corporation of that State (*Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615); and consequently is a citizen of each State. *Chicago & N. W. R. Co. v. Auditor-General*, 53 Mich. 79. It is a domestic corporation as to the power derived from the State in which it acts, and a foreign corporation in respect to other sources of its existence. *Binney's Case*, 2 Bland, Ch. 99; *State v. Northwestern Cent. R. Co.*, 18 Md. 193; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287; *Chicago & N. W. R. Co. v. Auditor-General*, 53 Mich. 79; *McGregor v. Erie R. Co.*, 35 N. J. L. 89; *Sage v. Lake Shore & M. S. R. Co.*, 70 N. Y. 229; *Sprague v. Hartford, P. & F. R. Co.*, 5 R. I. 233; *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286 (17 L. ed. 130).

each, duly certified by the respective presidents and secretaries, with the respective corporate seals affixed, shall be filed for record in the office of the Secretary of State of this State before any such consolidation shall have any validity or effect. Upon filing for record in the office of the Secretary of State of the copies of said articles of such consolidation, and of such record of approval or consent, the companies so consolidating shall become one corporation; and the said consolidating corporations shall become merged in the new corporation provided for in said articles, and shall be known thereafter by the corporate name therein adopted, and shall within this State possess all the powers, franchises and immunities, including the right of further consolidation with other corporations under this section, and be subject to the same liabilities and restrictions imposed by the laws of this State upon other railroad companies, and shall, in addition, possess such powers, franchises and immunities, and be liable to such special restrictions and liabilities, as the said consolidated corporations were within this State possessed of or subject to under any laws of this State peculiarly applicable to them, or either of them, at the time of such consolidation."

Upon the filing of this answer the cause was argued and submitted upon the pleadings; counsel for defendant insisting that, by virtue of the consolidation set out in the answer, which was admitted by the Attorney-General, the defendant became a domestic corporation. The Attorney-General contended against this conclusion. The case is decided upon the pleadings alone.

The question presented is not whether defendant has complied with the laws of this State. If that is admitted, the question still is whether or not such compliance has rendered it a domestic corporation within section 8 of article 11 of the Constitution, which provides that "No railroad corporation organized under the laws of another State, or of the United States, and doing business in this State, shall be entitled to exercise the right of eminent domain, or have the power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of this State."

It will be noticed that by section 114, above quoted, it is provided that, upon the filing for record, in the office of the Secretary of State, of copies of the articles of consolidation, with the consent or approval of the companies so consolidating, they shall become one corporation, which shall be known by the name adopted, and shall possess the powers, franchises and immunities, and be subject to the liabilities and restrictions, imposed by the laws of this State upon other railroad companies, and as the consolidating corporations within this State were possessed of, subject to and under the laws of this State at the time of such consolidation.

This section, in effect provides that where a domestic corporation—that is, one organized under the laws of this State, and having its existence solely within this State—becomes consolidated with a corporation originally created in another State, the new corporation is en-

titled to exercise the same rights, and is subject to the same restrictions and liabilities, as the original corporation in this State before the consolidation. These rights and privileges consist in the exercise of the right of eminent domain, of acquiring property by purchase for the use of the corporation, and of enjoying such other rights and privileges as properly belong to corporations. The restrictions and liabilities are that it shall be subject to the laws of this State, and its jurisdiction, in the execution of their authority; that it shall not have the peculiar privileges which are granted to foreign persons or corporations, in the way of removal of its suits from the state to the federal courts; and that, in the exercise of all its corporate functions, it must be governed by and be subject to the laws of this State.

It was evidently the purpose of the Legislature, in the enactment of the law under consideration, that by complying with its provisions the corporation so complying should be a domestic, and not a foreign, corporation. This being true, it seems to us quite clear that such a consolidation, when effected, would bring the consolidated company, not only within the spirit, but within the letter, of the law and of the Constitution. 2 Morawetz, Priv. Corp. § 939 *et seq.*

By the section of the law above quoted, such a consolidated corporation would not be a corporation "organized under the laws of another State, or of the United States;" and while not originally incorporated within this State, in the manner in which new corporations are formed, yet "it would become a body corporate pursuant to, and in accordance with, the laws of this State," as specified in the Constitution, although, in a legal sense, distinct from the corporation in the other States through which the road runs—in fact, a domestic corporation. The Legislature, therefore, by the Act provided a method, other than that of forming a new corporation, by which corporations in existence, one of which is a domestic corporation, might become such body corporate under the laws of the State. It is alleged in the answer that this consolidated corporation was created about the first day of January, 1880; that since that date it has been, in law and in fact, a domestic corporation, and not a corporation "organized under the laws of another State, or of the United States."

Upon an examination of the allegations and averments of the answer, in connection with the section of the statute above referred to, as well as that of the Constitution, we are convinced that by the action of the companies, as set out in the answer, the defendant became, and now is, a "body corporate, pursuant to and in accordance with the laws of this State," and is entitled to exercise the rights and privileges of such corporation, and is subject also to all the limitations and liabilities imposed upon domestic corporations, and that it is not a "corporation organized and existing under the Laws of the State of Illinois," as alleged in the information, nor of any other foreign State.

It was stated by counsel for the defendant, upon the argument of the cause, that the view entertained by them at that time had not been entertained by them during the whole of the time which has elapsed since the first day of



January, 1880; and that, acting upon a different opinion, they had sought to and had removed causes from the courts of this State to the United States Circuit Court as a foreign corporation; but that in the early part of the year 1888 they had become convinced that they were not entitled to do so, and since that time had acted in all respects as a domestic corporation subject to the laws of this State.

The Attorney-General, being desirous only of

having the status of the defendant company ascertained and declared, agreed with counsel representing it upon a judgment to be entered in case the court found, upon the facts presented, that the defendant was not unlawfully usurping the rights, privileges and franchises as alleged in the information. *Judgment will therefore be entered in accordance with this opinion.*

The other Judges concur.

## OREGON SUPREME COURT.

B. W. HUSTON *et al.*, *Appts.*,

v.

William BYBEE, *Resp't.*

(.... Oreg. ....)

**1. An adverse, exclusive, and uninterrupted use and enjoyment by one person, and those under whom he claims, of all the water of a creek, taken therefrom by means of a ditch, and conveyed to certain mining grounds for mining purposes, for twelve years, or for any period beyond that of the Statute of Limitations prescribing the time in which entry shall be made upon real property, will bar the owner of the land through which the creek runs of his riparian rights; but where the ditch was constructed by means of which the water was originally appropriated under a license granted by the owner of the land in which he reserved the right to use the water a part of each year for his own purposes, such adverse use by grantees from the original appropriator cannot be established unless it is shown that the use of the water by them has been in hostility to the use of it by the owner of the land under such reservation.**

**2. The users of the water, in such case, must show that their use of it was in defiance of any right upon the part of the owner to use it for any purpose, that they totally ignored his right to use it at all, and that he acquiesced therein.**

**3. To authorize a person to claim a forfeiture of valuable property rights, on account of the violation of a condition upon which they are granted, he must proceed to enforce it at once. He cannot remain passive for a long time after acts have transpired, upon which others have relied in matters of importance to them, and then insist upon the forfeiture in consequence thereof.**

**4. Where a certain stream of water ran across the land of B. which he was accustomed to use for the purposes of irrigation, for watering his stock, and for domestic use, and which was valuable and necessary for such uses; and he was applied to by one S. for permission to dig a ditch across his land in order to conduct the water of the stream to certain mining grounds below, upon which S. was engaged in mining; and B. granted the permission, upon the promise of S. that the former should have the exclusive use of the water flowing through the ditch at any point on said lands where he might desire to turn it for irrigating purposes during the spring and summer months, and that S. would not sell or dispose of the ditch or water-right to anyone else, but that they would revert and become the property of B.—*held*, that by a fair construction of the arrangement between B. and S., in view of the circumstances of the transaction, the former was to have the use of the water whenever required for**

the use of his premises for the purposes mentioned, and the latter was to have the use of it at all other times for the purpose of working his mining ground.

**5. Held, further**, that S., having subsequently sold his mining ground and interest in the ditch, and H. having, by means conveyances from S., succeeded to the same, and he and his grantors having used the water conveyed through said ditch for the purpose of operating in the said mining ground, with the knowledge and acquiescence of B., that the latter was not entitled to claim a forfeiture of the said ditch and water-right on account of the said sale by S.; that B's acquiescence in the sales and transfers of the ditch and water-right must be deemed a waiver of the condition that S. would not sell them.

**6. Held, also**, that the use by H. and his grantors of the ditch and water to operate the mine, although it extended beyond the period of the Statute of Limitations, would not constitute such an adverse possession against B. as would bar his right to the use of the water, under the reservation in the license to S. to construct the ditch, unless H. and his grantors had wholly excluded B. from the exercise of such right during such period; and that evidence of B. having used the ditch and water a portion of each year during the whole time referred to, for irrigating his land and for the other purposes mentioned, disproved any such exclusive use thereof as suggested, or any use inconsistent with said license and reservation.

**7. Held, too**, that B. and H., and those holding under H., had co-existing rights in the ditch and water; that B. had the preference during the season when the condition of his premises were such as to require the use of the water for the purposes mentioned, but that he had no right to waste it at any time, or to use it extravagantly or imprudently; that H. had the full and free right to use it at all other times, and that each was required to respect the rights and interests of the other regarding the matter, in every particular.

(December 12, 1888.)

**A** PPEAL by plaintiffs, from a decree of the Circuit Court of Jackson County, dismissing the complaint in a suit to enjoin the diversion of the waters of a stream. *Affirmed.*

The facts and questions presented are stated in the opinion.

*Messrs. J. R. Neil, H. K. Hanna, and E. De Peant* for appellants.

*Messrs. P. P. Prim and H. Kelly* for respondent.

**Thayer, Ch. J.**, delivered the opinion of the court:

This appeal is from a decree rendered in s

\*Head notes by the Court.

suit brought by the appellants against the respondent, to enjoin him from diverting water from what is now known as "Walker Creek," formerly Phillip's Creek, in the County of Jackson.

The appellants allege that they were owners and in the possession of certain mining claims which they had been working during the mining seasons since 1876, and that in so doing they had necessarily required and used all the water of said creek. That they and their grantors, about the year 1865, dug and constructed a ditch in said county known as the "Willow Springs Mining Ditch," and thereby appropriated all the water of said creek at a point above the residence of the respondent, and running thence in a northerly direction along the foot hills above Willow Springs, to what is known as "Hite's Gulch," thence to their said mining ground; and each and every year had, by means of said ditch, conveyed all the water of the creek and said gulch, and the other gulches running into said ditch, to their said mining claims, and used the same for mining purposes thereon, and by so doing had acquired a prior right over respondent to the use and enjoyment of said water. That for more than twelve years appellants and their grantors had been in the adverse, exclusive and uninterrupted use and enjoyment of all of said water for mining their said claims, with the knowledge of said respondent. That on the first day of April, 1887, while appellants were in possession and use of the said water as mentioned, the respondent wrongfully and maliciously diverted it from said ditch, thereby depriving appellants of its use and enjoyment, and still continued to do so, and refused to desist therefrom, to the great and irreparable injury of the appellants.

The respondent denied all the material allegations of the complaint, except as admitted in further and separate answers thereto, and alleged in said further and separate answers:

(1) That at the time said ditch was constructed, and the water of said creek appropriated and used through the same, and for a long time prior thereto, the respondent was the owner in fee of a large tract of land, consisting of agricultural, meadow and pasture lands, on which there were valuable improvements, and upon which the respondent reared and kept a great many head of horses, cattle, sheep and hogs. That the water of said creek flowed through said lands of respondent, near his residence thereon, in a natural channel, at the time the ditch was constructed, and the water appropriated had done so for a long time prior thereto, and was at the time of its appropriation through said ditch, and had been for a long time prior thereto appropriated and used by the respondent for irrigating his crops grown upon said lands, watering his stock, and for domestic purposes about his house; and was valuable to him, and necessary for the several purposes mentioned. That at the time mentioned in the complaint as the time of the appropriation of the water of the creek by the appellants and their grantors, one Jack Sears, in consideration that the respondent would permit him to dig and construct the ditch through the respondent's lands, promised and agreed with the respondent that the latter should have the exclusive use of the

water flowing through the ditch at any point on his premises where he might desire to turn it out for irrigating purposes during the spring and summer months; and that in accordance with said agreement the respondent had so turned the water out of the ditch, and appropriated and used the same for irrigating purposes upon said lands each and every spring and summer since the ditch was constructed, and the water thereby appropriated, as he had a right to do under said agreement with the original appropriator of said water; and the respondent has so appropriated and used said water as mentioned without hindrance or objection from anyone until the commencement of the suit by appellants; and that the act complained of by them in their complaint was the turning of the water out of the ditch by respondent in the month of April, 1887, for the purposes of such irrigation.

(2) That the respondent has had the adverse, exclusive and uninterrupted possession and use of said water through said ditch for irrigating purposes every spring and summer since the ditch was constructed, and such possession and use thereof in its natural channel long prior to the construction of the ditch, and for more than twenty years before the commencement of the suit.

(3) That in addition to the promises mentioned as having been made by said Sears in consideration of the respondent permitting him to dig and construct the ditch through the respondent's land, Sears promised and agreed with the latter that whenever he got done with using the water through the ditch that he would not sell or dispose of the ditch or water-right to anyone else, but that the ditch and water should revert and become the property of the respondent, and that Sears long since got done with using the ditch and water.

The appellants demurred to the new matter contained in the answer, as not being sufficient to constitute a defense. The court overruled the demurrer, and the appellants filed a reply specifically denying said new matter. The case having been heard by the circuit court upon depositions and proofs taken therein, a decree was given dismissing the complaint, which is the decree appealed from.

I think the evidence fully sustains the allegations of new matter in the answer as to the agreement and circumstances under which the ditch was constructed, and the water for the use of the mining claims thereby appropriated; also as to the reservation made by the respondent of the use of the water of the creek for the purpose of irrigating his land during the spring and summer months; and of his custom and habit of using it during such periods for the purpose mentioned, and for such other purposes as he might desire to use it about his premises. The situation of the creek, its importance as a means of irrigation, and its necessity in many other respects, are so apparent that no man of any prudence would permit its waters gratuitously to be appropriated without making such a reservation as claimed. It is easy to see how a person situated as the respondent was could be induced to allow another to construct a ditch across his land, and use it to conduct water to mining grounds, during a period of the year when he himself did not need

it; but it would be difficult to understand why he would do so at a time when it was highly necessary that he should have the water for his own use, unless he granted the privilege for a consideration which he deemed sufficient to remunerate him for the injury and inconvenience he would thereby necessarily subject himself to.

The respondent seems to have been willing that Sears should have the right to use the water during the time he did not need its use, and I think we may reasonably conclude from the testimony, and the circumstances surrounding the affair, that the arrangement between the parties was to the effect that Sears was to have the right to use the water at all times during which the respondent did not require it for irrigating his land, watering his stock, and for domestic purposes about his house. The respondent claims that the agreement between him and Sears was that the latter should not sell or dispose of the ditch and water right to anyone else, but that both should revert to him when Sears got done with using the water through the ditch. Sears, however, in 1867, sold his mining ground, together with the ditch and water-right, to certain Chinamen, who in 1876 sold to Thomas Chavener, and the latter in 1886, sold to B. W. Huston, one of the appellants, and the said respective grantees have been using the water and ditch ever since, and the respondent has acquiesced in such use. Besides, the license, after it was executed, created a right of property.

Under these circumstances, therefore, the respondent at this late date would not, it seems to me, have any right to claim a reversion of the property in consequence of its alienation. I think we may infer, after the lapse of so long a time, that the respondent consented to the transfer. A person will not be allowed to avail himself of a forfeiture of valuable rights, unless he claims it immediately on the happening of the condition upon which it depends. He cannot remain passive in such a case for a long time after acts have transpired upon which others have relied in matters of importance to them, and then enforce a forfeiture in consequence thereof. If the respondent had desired to avail himself of the benefit of the condition in the agreement with Sears, upon the happening of which the ditch and water-right were to revert to him, he should have claimed it immediately after the sale to the Chinamen.

Instead of doing that, however, he allowed the affair to run along about twenty years without any apparent objection, and then insisted upon his right to the reversion, which he has himself forfeited by his own laches. But it does not follow that the appellants acquired any right in the ditch and water superior to that which Sears himself had. The interest of the latter therein was limited by the terms of the license or privilege; and he could convey no greater right than he possessed, whatever he may have undertaken to do. Nor could purchasers from his grantee acquire any right beyond that, unless they could show that the respondent in some manner had represented that the grantee was the absolute owner of the property, and that they had been induced to make the purchase upon the faith of such representation.

The case is not like that of a sale of real

property to a *bona fide* purchaser, where an outstanding equity exists. Sears had no deed from the respondent of any interest in the ditch, and a purchaser from him was bound to inquire as to the extent of his interest. The appellants allege in their complaint that for more than twelve years they and their grantors have had the adverse, exclusive, uninterrupted use and enjoyment of all the water of the creek, and used it for their mining claims with the knowledge of the respondent. They claim, I suppose, that they have maintained such adverse possession ever since the execution of the deed by the Chinamen to Chavener. The latter, however, only had such right in the property as he acquired from the Chinamen, which was no greater right than Sears possessed, and was all that he was able to convey, or had any right to undertake to convey, although the deed executed by him purports to convey the absolute title to the ditch, and contains a general covenant of warranty. An assumption, however, upon the part of the grantor, to convey a greater interest in property than he possesses, will not effect a transfer of it, nor extinguish outstanding rights of the character of those in question.

The appellants must therefore rely wholly upon their claims of adverse possession in order to defeat the right of the respondent to use the water from the ditch in the manner mentioned; and I do not think they can establish it, under the circumstances of this case, unless the respondent had actual knowledge that the appellants claimed to be the absolute owners of the ditch and water-right, or had knowledge of facts from which such a claim would necessarily be inferred. They must certainly prove more than the fact that they have conducted the water through the ditch, and used it in their mining operations during the period alleged, as such use was entirely consistent with the license. The proof must establish an exclusive use of the water under a claim to so use it, regardless of the reservation in favor of the respondent in the agreement between him and Sears, under which the latter was permitted to construct the ditch; and I have strong doubts about the appellants being able to maintain that it is sufficient for that purpose. The evidence shows beyond question that the respondent has been accustomed to use the water from the ditch for irrigating his lands, and for the use of his premises generally, every year since the ditch has been constructed; that his use thereof has been openly and notoriously exercised, under a claim of right as original owner of the water.

The appellants' counsel appear to be under an impression that if the appellants have been in the use and enjoyment of the ditch, under a claim of right, for a period beyond that of the Statute of Limitations, they have acquired a title to it by prescription, and that such title is necessarily exclusive of any right on the part of the respondent to use the water thereof. They seem to ignore the fact that the appellants and the respondent may both have rights to use the water.

It seems to me that there is nothing inconsistent in the view that the appellants may have the right to use the water for mining purposes, and the respondent the right to use it for irri-

gation, for the use of his stock, and for household purposes, and that both rights may coexist. That seems to have been the understanding in the outset, and I do not see how time and usage have changed it. Nor can I discover how the affair can be better adjusted than to accord to the respective parties the right to use the water in the manner suggested. According to my view of the matter, the respondent should have the use of it when necessary for the purposes mentioned, and the appellants should have the right to use it at all other times.

There may be a short period during each year when both parties may desire to use the water at the same time. In such case the respondent should have the preference, but he should not be allowed to waste it, or to use it imprudently, or to any greater extent than is actually necessary. The exercise of a reasonable spirit of accommodation by the respective parties in regard to the use of the water will render it beneficial to both, and will to a great extent avoid a conflict of interest.

The appellants allege in their complaint, as has been shown, that the respondent on the first day of April, 1887, wrongfully and maliciously diverted the water from the ditch, and deprived the appellants of its use and enjoyment, and

still continued to do so, and refused to desist therefrom. If I believed that the evidence in the case sustained this allegation, I should be in favor of perpetually enjoining the respondent from the commission of such acts; but the evidence of William Cook shows that all the water that was taken out of the ditch at that time was for the purpose of irrigating a crop of alfalfa, and that if it had not been so used the respondent would not have had a crop; that it was young alfalfa, sown the spring before; that there were about five acres of it, and that it required more water than old alfalfa does; and I cannot find from the appellants' brief that any testimony was given on their part in regard to the matter.

The appellants' counsel, it would appear, were too intent upon establishing an exclusive right in behalf of their clients to the use of the water to show what acts the respondent did on that occasion, beyond the fact that he diverted it from the ditch; but that, as I view the case, is not sufficient. The appellants have acquired no such right, and should not insist upon it until the right which the respondent reserved to himself, when he permitted the ditch to be constructed, is lawfully extinguished.

*The decree appealed from must be affirmed.*

## UNITED STATES COURT OF CLAIMS.

Rafael LOPEZ

v.

UNITED STATES.

(....Ct. of Cl....)

**1. While assignments, transfers and powers of attorney to collect money due from the United States, before the issuance of a warrant therefor are, by force of § 3477, U. S. Rev. Stat., void if the assignors or principals revoke and repudiate them before payment is made upon them, still the accounting officers of the Treasury may recognize them and may state accounts in favor of the assignees or attor-**

neys in fact, and payment may be made at any time before revocation; and such payments are binding and conclusive upon the parties and are a complete discharge of the indebtedness as against the assignors.

**2. A United States Marshal may pay witness fees to persons other than those in whose favor such fees are taxed by the court, upon the unrevoked and undisputed orders, assignments or transfers thereof by the witnesses.**

**3. Unrevoked and undisputed orders, assignments, and transfers of claims against the United States for taxed witness' fees are so far valid under the law that if payment be made thereon the assignors will be estopped from set-**

*NOTE.—Rev. Stat. U. S. § 3477; assignment of claims against the United States void. The Act of 1853 is of universal application, and covers all claims against the United States in every tribunal in which they may be asserted; and such was the understanding of Congress when the Revised Statutes were enacted. U. S. v. Gillis, 98 U. S. 414 (24 L. ed. 505). A claim against the United States could not be assigned so as to enable the assignee to bring suit against the Government in his own name in court of claims. Id. In Spoford v. Kirk, 97 U. S. 484 (24 L. ed. 1032), the question was as to the validity of certain orders drawn by a claimant, before the allowance of his claim, upon the attorneys having it in charge, directing the latter to pay certain sums out of the proceeds when collected; and which orders, being accepted by the attorneys, were purchased by Spoford in good faith and for value. Bailey v. U. S., 109 U. S. 438 (27 L. ed. 959). The transfer or assignment to Spoford was, under the Act of 1853, a nullity as between him and the claimant. Bailey v. U. S., 109 U. S. 438 (27 L. ed. 959). The Act of February 23, 1853, renders all claims against the Government inalienable, alike in law and in equity, for every purpose and between all parties. Spoford v. Kirk, 97 U. S. 484 (24 L. ed. 1032). Section 3477 embraces alike legal and equitable assignments. Id. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government for creating an interest in the claim in any other than himself. Id. An order drawn by one having a*

claim against the Government, upon its attorneys who are collecting it and accepted by them, requiring them to pay a sum certain to another from the fund when collected, is, independent of any statutory prohibition, in equity, a partial assignment of the fund. Id.

*Exceptions to rule; statutes construed. The statutes in question are not to be interpreted according to the liberal acceptance of the words used. Goodman v. Niblack, 102 U. S. 556 (23 L. ed. 229); Bailey v. U. S., 109 U. S. 438 (27 L. ed. 959). Section 3477 of the Revised Statutes, forbidding transfers of claims against the Government, does not include a voluntary assignment of a claim against the United States, which is included in an assignment made by an insolvent debtor, of all his effects for the benefit of his creditors. Goodman v. Niblack, supra. It only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in the court of claims. It simply forbids the assignment of such claims before their allowance, and the issue of a warrant for the amount due thereon, and the issue of a warrant for their payment. Hobbs v. McLean, 117 U. S. 574 (29 L. ed. 549). The Act of 1853 applies to cases of voluntary assignments of demands against the Government, and does not embrace cases where the title is transferred by operation of law. "The passing of claims to heirs, devisees or assignees in bankruptcy," said the court, "are not within the evil at which the statute aimed." Erwin v. U. S. 97*

ting up any other claim on their behalf; and such payment will be a valid discharge of the indebtedness.

4. While the accounting officers of the Treasury may state and certify accounts in favor of purchasers, assignees or transferees of claims against the United States for taxed witness fees whose assignments are not controverted, they may exercise their own discretion in the matter, with due regard to the convenience of parties and the Government. Such assignees have no rights which make it obligatory upon the accounting officers to so state accounts in their favor.

(January 14, 1890.)

ON request of the Secretary of the Treasury for an opinion as to the allowance of a claim against the United States, by the assignee of a court certificate of United States witness fees, for payment of the amount thereof.

The facts and questions presented are stated in the opinion.

Richardson, *Ch. J.*, delivered the opinion of the court:

The Secretary of the Treasury, in his letter transmitting this case, requests the court to give the department its opinion on the following points, suggested by the First Comptroller of the Treasury:

1. Whether assignments or transfers of claims of witnesses are valid under the law.

2. Whether purchasers, assignees or transferees of such claims have such rights as make it obligatory on the accounting officers to state and certify accounts in favor of such purchasers, assignees or transferees.

3. Under the law is a marshal authorized to pay witness fees to any other person than those in whose favor they have been taxed and allowed by the court?

The facts of the particular case in which these questions arise, fully set out in the findings, may be more concisely stated, as follows:

At a term of the United States District Court for the First Judicial District of New Mexico a large number of witnesses were summoned and attended on behalf of the United States.

The court made orders directing that there be allowed and paid to them for travel and attendance certain sums fixed by the order varying from about \$8 to \$34.

The clerk gave to each one a certified copy, under seal of the court, of the order directing payment to him. Forty-six of these witnesses presented their certificates to the marshal of the district, who was unable to pay them for want of public funds in his hands. He, however, allowed the witnesses to sign his pay-roll, receipting for payment of the respective sums due them, and he indorsed on the certificates the fact that such receipts had been so signed. This was done with the understanding that the payees would sell, transfer and indorse the same, and that the marshal would pay them to the indorsees as soon as he received public funds for that purpose. Before receiving such funds he went out of office.

In the mean time Rafael Lopez, the present claimant, had purchased the forty-six certificates for valuable consideration, had taken assignments by indorsements thereon, and had presented them to the marshal for payment; but they had never been paid.

The marshal on settling his accounts with the Government returned his pay-rolls to the accounting officers of the Treasury making no claim for himself on account of the forty-six receipts. The claimant, Lopez, forwarded the certificates to said officers, and asked for payment through the Treasury Department. It does not appear that the original payees have made further claim for payment to them, or repudiated in any way their sales and transfers, nor that there are any claimants to the money adverse to said Lopez.

The difficulty which the comptroller finds in stating an account in favor of Lopez, the purchaser of the certificates, arises from the terms of section 3477, \*of the Revised Statutes, as interpreted by the supreme court in the cases of *United States v. Gillis*, 95 U. S. 407 [24 L. ed. 503], and *Spooford v. Kirk*, 97 U. S. 484 [24 L. ed. 1082].

U. S. 392 (24 L. ed. 1065); *Goodman v. Niblack*, and *Bailey v. U. S.* *supra*. When the Government, as lessee of real estate occupied by it, recognizes through its proper officers a transfer of the property and an assignment of the lease, and an assignment of rent under it, and pays the rent, there is nothing in section 3477, Revised Statutes, respecting transfers and assignments of claims against the United States which invalidates that transaction for the benefit of a third party. *Freedman Sav. & T. Co. v. Shepherd*, 127 U. S. 494 (32 L. ed. 163); *Goodman v. Niblack*, 102 U. S. 556 (28 L. ed. 230). Payment to an attorney in fact, constituted such by power of attorney executed by the claimants before the allowance of their claim by Congress or by the proper department, is good as between the Government and such claimants, where the power of attorney has not been revoked at the time payment is made, notwithstanding the provisions of the Act of July 20, 1846, entitled "An Act in Relation to the Payment of Claims," and the Act of February 26, 1853, entitled "An Act to Prevent Frauds upon the Treasury of the United States." 9 Stat. at L. 41; and 10 Stat. at L. 170; *Bailey v. U. S.* 109 U. S. 432 (27 L. ed. 886). An assignment by operation of law to an assignee in bankruptcy was not within the prohibition of the statute. *Erwin v. U. S.* 97 U. S. 332 (24 L. ed. 1065); *St. Paul & D. R. Co. v. U. S.* 112 U. S. 738 (28 L. ed. 811). The statute does not apply to a claim against the United States reduced to a judgment under the Act of March 3, 1875 (U. S. v. *Grawold*, 80 Fed. Rep. 605); so of a decree compelling defendant to assign his claim, or to execute a power of attorney authorizing its collection. 3 L. R. A.

*Willard v. Mueller*, 23 Fed. Rep. 200. A voluntary assignment by an insolvent debtor, for the benefit of creditors, was held valid to pass the title to a claim against the United States. *Goodman v. Niblack*, and *St. Paul & D. R. Co. v. U. S.* *supra*. Where a person, in anticipation of obtaining a government contract, forms a partnership with two other parties for the execution of the contract, such partnership contract was not, under the circumstances, a violation of sections 3477 and 3737, Revised Statutes. *Hobbs v. McLean*, 117 U. S. 567 (29 L. ed. 940).

*Act creating court of claims.* The Act creating the court of claims did not work a repeal of any provisions of the Act of 1833, nor make claims assignable that were incapable of assignment before its enactment. *U. S. v. Gillis*, 95 U. S. 407 (24 L. ed. 503). All transfers and assignments of claims against the United States were made void by the statute, not only when the assignees set up the claims in the Treasury Department, but also when they attempted to sue in the court of claims, and very convincing reasons were given for the decision. 11: *Sines v. U. S.* 1 Ct. Cl. 12; *Cooper v. U. S.* 1 Ct. Cl. 87; *Cote v. U. S.* 3 Ct. Cl. 64-71. The court of claims is without power to adjudicate upon merely equitable rights. *Bonner v. U. S.* 70 U. S. 9 Wail. 166 (19 L. ed. 606); *U. S. v. Gillis*, *supra*.

\*Section 3477, U. S. Rev. Stat. (Act Feb. 26, 1869, chap. 81, § 1, 10 Stat. at L. 170), referred to in the opinion, is as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein,

"A great deal has been said and written in regard to that section and the previous Acts embodied therein," says the first comptroller in one of his communications filed in this case; and it is well known that the accounting officers and the public, doing business with the Government, have been much embarrassed by it. A careful review of the subject and of the recent decisions of the supreme court will show that the true interpretation of the statute has now become authoritatively settled, and that the rights of parties affected by it, and the powers and duties of the accounting officers under it, have been made clear.

Soon after the passage of the Act of February 26, 1853, chap. 81 (10 Stat. at L. 170), now said section 3477 of the Revised Statutes, the then first comptroller, Elisha Whittlesey, issued an elaborate circular explaining his interpretation of the Act and the practice of the department to be adopted under its provisions. The opinions of the supreme court in the *Gillis Case*, and in the case of *Spofford v. Kirk*, seemed to be in contravention of the views expressed in that circular and of the prevailing practice of the department.

The first comptroller immediately upon the publication of those opinions, laid a copy of that circular before *Mr. Justice Strong*, who had delivered the opinion of the court in those cases. The latter, after a careful examination, indorsed his concurrence in the construction therein given to the Act, and the same was filed among the archives of the Treasury Department. The following is a copy of the circular, omitting parts not material, with *Mr. Justice Strong's* indorsement thereon:

"(14). It has been customary for salaried officers, contractors and other creditors of the United States, to draw orders or drafts on the Government, which they negotiate, and thus realize the amount due them before the accounts are passed. This is often a great convenience to persons living at a distance, on the Pacific Coast, or anywhere west of the Mississippi. Salaries are paid quarterly, but the account for a quarter cannot be passed until after the end of the quarter. Heretofore drafts have been frequently drawn for a quarter's salary, or for a portion of it, and sent here before the end of the quarter; and when so received the account has been passed, and the warrant issued to the owner of the draft as the assignee of the salary.

"If the statute of February last should be applied to salary accounts, no such drafts could be drawn until after the end of the quarter, after the account was passed, and a warrant on

whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

2 L. R. A.

the treasurer issued for the payment thereof. The result would be that many officers would be compelled to wait from thirty to sixty days after the end of each quarter in order to receive warrants on the treasurer, or the treasurer's drafts, before they could realize any portion of their salary; and the delay and inconvenience to many contractors, creditors and employés of the Government would be still greater.

"I do not believe that Congress intended that the statute should be applied to any such cases.

"(15). What was the evil for which the remedy was designed? A reference to the terms of those statutes and the practice of agents in prosecuting claims before Congress, indicate the evil and the object of the remedy.

"Agents were in the habit of getting general powers of attorney to prosecute before Congress or the departments uncertain and doubtful claims, and to obtain and receive the amount which might be allowed upon them; and in many instances assignments were obtained of large claims for very small sums from persons not knowing their rights.

"In such cases unsuspecting persons were put into the hands and power of sharp and cunning agents and shrewd unscrupulous speculators; the claimant often had no means of protecting himself against the false representations and deceptions of agents and purchasers, and the agent might misrepresent the amount collected.

"Hence the requirement that the power of attorney, draft, assignment or transfer should refer to the statute under which the claim is allowed, and that the amount due should be ascertained, and a warrant issued for the same, before any such power of attorney, draft transfer or assignment can be legally made.

"It is obvious that this is required by the statute in order that the claimant may fully understand the extent of his rights, and the amount allowed to him, before he can legally assign or transfer the same, or authorize any other person to receive the amount.

"But no such precaution is necessary in relation to salary accounts, accounts for services rendered, or supplies furnished, or for any other form of debt, about the amount of which there has never been any dispute. The officer or creditor in all such cases knows the precise amount, or very nearly the amount, due him; and no good can arise, but often very great inconvenience and evil, from imposing on him restrictions in relation to the time and mode of transferring and assigning the same or of making powers of attorney for the receipt thereof.

"(16). From various causes soldiers may not have been paid all that was due them. When the rolls are examined by the second auditor the amount found due is reported to the second comptroller, and, if he admits it, he signs the report; and any paymaster of the Army of the United States is authorized to pay the amount so found and certified. Certificates of this character are frequently assigned by the soldiers to avoid the loss of time and expense incident to traveling a distance to present them personally. The paymasters pay them, and include them in their accounts.

"(17). Similar balances are found due to sailors by the fourth auditor and reported to the second comptroller; and if he concurs he

signs the report, which authorizes a navy agent to make payment to the sailors or to their assignees. It is not known that any imposition, fraud or extortion has been practiced in any of these cases.

"(18). Warrants are not issued to pay these and similar balances; advances are made to the paymasters and navy agents generally, without specifying who are to be paid.

"(19). In making payment to a contractor for transporting the mail, no warrant is issued in his name. The contractors collect of the postmasters, or they draw orders on the department, or the department sends them drafts according to the circumstances of the case. Collections from postmasters are generally by the carriers on authority given by the contractors—the department having designated the officers from which collections are to be made.

"(20). Orders are drawn by mail contractors to pay for expenses necessarily to be incurred in transporting the mail, and generally to obtain a credit in advance. They are lodged by the drawee or assignee with the auditor to be paid when due, if the department shall then be indebted to the contractor.

"(21). The stocks of the United States are owned and held throughout the civilized and commercial parts of the world. Interest is to be paid thereon by agreement, semi-annually. In almost every instance it is paid on powers of attorney. A warrant is not drawn to pay any particular person, but seasonable advances are made to the assistant treasurers, or other persons designated, to pay the interest, in different sections of the United States. Frequently powers of attorney are executed for collecting interest without any limitation as to time.

"(22). American consuls are required by law and by the directions of the Secretary of State, to relieve indigent and distressed American seamen in foreign countries. Having incurred expenses for their relief, they are instructed to draw on the Secretary of State, and to accompany the drafts by accounts and vouchers. The drafts are generally in favor of the business correspondents of the consuls in the principal cities, and may have been indorsed before they reached the state department. If sustained by the accounts and vouchers they are paid to the holder on the requisitions of the Secretary of State directed to the Secretary of the Treasury; and the accounts of the consuls are thereafter settled in the due course of business by the accounting officers.

"(23). Consuls are authorized and required by law to send destitute seamen to the United States, and they are empowered to contract with masters of American vessels to transport such seamen, at a price to be agreed upon, not to exceed \$10 for each one. To enable the master of the vessel to obtain the payment specified, the consul gives him a certificate stating the names of the seamen placed on board, and the amount to be paid for their passage. On the arrival of the vessel in a port of the United States, the collector of the customs indorses on the certificate that such seamen have arrived. The master of the vessel, if not the owner of it, assigns the certificate to the person or persons entitled to the pay, and an account is reported by the fifth auditor in favor of the assignees.

3 L. R. A.

"(24). If those statutes should be applied to the cases mentioned, and to those of like character, the business of the Government would be arrested to a great extent, to the injury of individuals, in violation of contracts, and of the public faith.

"(25). My conclusion is that ordinary debts and accounts against the Government, which have been legally contracted and never disputed, are not claims within the meaning of those statutes, and that the statutes do not apply to them, but apply to uncertain damages and losses, extra allowances, pensions, equitable demands, claims for the correction of alleged errors, claims for a return or repayment of duties, items of account which have been rejected or are disputed, and such classes of cases as are usually referred to the committee on claims, and to committees other than the committee of ways and means.

— "Comptroller."

[Indorsement by Mr. Justice Strong.]

With no authority to speak for the court, I am of opinion that the construction of the Act of 1853, given in this circular, is correct. Perhaps the language of the court in *United States v. Gillis*, 95 U. S. 407 [24 L. ed. 503], was not sufficiently limited. It had primary reference to the case then before the court; but certainly the word "claim," as used in the Act, ought not to be held to embrace liquidated debts.

W. Strong.

In *McKnight's Case*, 18 Ct. Cl. 293, the defendants filed a counterclaim against the claimants to recover back money paid to them as assignees of one Hart upon an assignment declared void by the Act of 1853. The original assignors had never revoked or repudiated this assignment. We held that the Treasury having recognized the assignment and paid the amount due on an accounting to the assignee, no action would lie to recover it back, saying in our opinion: "If parties allow money due them to be paid to others with their knowledge and consent, it is an adoption and ratification of the act which they cannot afterwards set aside; and such payment is a valid discharge of the debt as between the Government and the creditor."

On appeal the supreme court affirmed the judgment of this court, and sustained our views, saying in its opinion:

"It is true the assignment was contrary to law, and, therefore, a nullity; but there was nothing contrary to morals or conscience in the payment or receipt of the money. The facts were all known. There was no indirection, concealment or improper purpose on either side.

"Although the petitioners had no claim against the United States, they had a valid claim against Hart. The money was received in payment of his debt, and discharged it to that extent. He is estopped by his receipt from setting up any claim against the Government. It does not appear that he has ever complained." 98 U. S. 185 [25 L. ed. 115].

This case was followed by that of *Bailey v. United States*, 15 Ct. Cl. 490, where the force of assignments was again considered, and the court in its opinion used the following language:



"The statute in this case (Act 26th February, 1853, 10 Stat. at L. 171) does not attach any turpitude of the assignment of a claim or the giving of a power of attorney such as was given by the claimants. It does not prohibit the giving of such assignment and powers, nor prohibit the officers of the Government from acting upon them; it merely declares them to be void.

"We are of the opinion that where a payment is made upon a power of attorney properly authenticated, actually given and sufficiently comprehensive in terms, its validity or invalidity under the statute is no longer in question, and no party to the transaction is at liberty to deny the effectiveness of the payment. Such powers of attorney belong to that class of obligations which may be void while they remain executory, but which are to be treated as valid when they have become executed. Courts cannot enforce them; but if the parties voluntarily give effect to them, sound morality forbids that they should be allowed to question the effectiveness of what they have themselves accomplished."

This case was also appealed, and the supreme court fully sustained the views of this court, as appears by the following extract from its opinion, 109 U. S. 438 [27 L. ed. 989]:

"The question is whether payment to one who has been authorized to receive it by the power of attorney executed before the allowance of the claim by the Act of Congress, was good as between the Government and the claimant, where, at the time of payment, such power of attorney was unrevoked.

"If, in respect of transfers or assignments of claims, the purpose of the statute, as ruled in *Goodman v. Niblack*, 102 U. S. 556 [20 L. ed. 229], was to protect the Government, not the claimant in his dealings with the Government, it is difficult to perceive upon what ground it could be held that the statutory inhibition upon powers of attorney in advance of the allowance of the claim and the issuing of the warrant, can be used to compel a second payment after the amount thereof has been paid to the person authorized by the claimant to receive it.

"A mere power of attorney given before the warrant is issued—so long at least as it is unexecuted—may undoubtedly be treated by the claimant as absolutely null and void in any contest between him and his attorney in fact. And it may be so regarded by the officers of the Government whose duty it is to adjust the claim and issue a warrant for its amount.

"But if those officers chose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them as authorized to receive payment, the claimant cannot be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent.

"To hold otherwise would be inconsistent with the ruling heretofore made, and with which, upon consideration, we are entirely satisfied that the purpose of Congress by the enactment in question was to protect the Government against frauds upon the part of claimants and those who might become interested with them in the prosecution of claims, whether before Congress or the several departments.

"The title of the Act of 1853 suggests this

purpose. It is to prevent frauds upon the treasury.

"An effectual means to that end was to authorize the officers of the government to disregard any assignment or transfer of a claim, or any power of attorney to collect it, unless made or executed after the allowance of the claim, the ascertainment of the amount due thereon, and the issuing of the warrant for the payment thereof."

The next and latest case involving the interpretation of the statute is that of *Freedman's Sav. & T. Co. v. Shepherd*, with *Shepherd v. Thompson*, 127 U. S. 494 [32 L. ed. 163]. In that case the United States was lessee of certain real estate, and the lessor had made assignments of rents under the lease, somewhat complicated by the facts. The validity and effect of those assignments and the application of the money paid upon them by the United States was directly in issue. The court in its opinion said:

"Here the officers of the government chose to recognize the assignment; and of their action neither Bradley nor Shepherd, nor Shepherd's trustees can rightfully complain.

"The government is acquitted of any liability in respect to the claim for rent, for its officers have acted in conformity with the directions, not only of the original claimant but of his assignee, Shepherd, and of Shepherd's trustees.

"The simple question is whether the money received from the government shall be diverted from the purpose to which Bradley, Shepherd and Shepherd's trustees agreed in writing that it should be devoted, namely: to the payment of the debts Thompson holds against Shepherd. This question must be answered in the negative; and in so adjudging we do not contravene the letter or the spirit of the statute relating to the assignment of claims upon the United States."

The result of all these decisions is, in our opinion, that while such assignments, transfers and powers of attorney to collect money due from the United States are void if the assignors or principals revoke and repudiate them before payment is made upon them, still the accounting officers of the Treasury may recognize them and may state accounts in favor of the assignees or attorneys in fact, and payment may be made at any time before revocation, and that such payments are binding and conclusive upon the parties and are a complete discharge of the indebtedness as against the assignors.

The practical effect of the law, thus interpreted, is that such assignments and transfers, whatever be the consideration, are mere naked powers of attorney, revocable at pleasure. Creditors may avail themselves of such instruments in order to have money due them from the United States paid to such persons and in such manner as they may direct, in like manner as they may transact business with individuals, provided there be no controversy and the accounting officers see no grounds for suspicion of fraud or other satisfactory reason for refusing to recognize the transfers. But the Government cannot be involved in controversies between private parties.

As to marshals the Revised Statutes provide: "Sec. 855. In cases where the United States are parties the marshal shall, on the order of the court, to be entered on its minutes, pay to the

jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the Treasury in his accounts."

In making payment of witness fees marshals must be governed by the general laws as to powers of attorney and assignments applicable alike in all cases.

In the present case the marshal whose duty it was to pay these fees has gone out of office; has returned his pay-rolls to the Treasury Department, and the department is in possession of the certificates given to the witness and by them indorsed to the claimant.

It will no doubt be convenient for all parties concerned that payment be made directly from the treasury instead of through a marshal. We find nothing in the facts to prevent the accounting officer from stating an account in favor of the claimant, Lopez, for the amount of his demand, making payment to him upon a warrant in the usual manner.

Upon the points specifically presented by the

Secretary of the Treasury, we make the following conclusions of law:

1. A marshal may pay witness fees to persons other than those in whose favor such fees are taxed by the court, upon the unrevoked and undisputed orders, assignments or transfers thereof by the witnesses.

2. Such unrevoked and undisputed orders, assignments and transfers are so far valid under the law that if payment be made thereon the assignors will be estopped from setting up any other claim on their behalf, and such payment will be a valid discharge of the indebtedness.

3. While the accounting officers of the Treasury may state and certify accounts in favor of such purchasers, assignees or transferees whose assignments are not controverted, they may exercise their own discretion in the matter, with due regard to the convenience of parties and the government. Such assignees have no rights which make it obligatory upon the accounting officers to so state accounts in their favor.

## NEW YORK COURT OF APPEALS.

Celia J. DONAHUE, *Appt.*

*v.*

STATE OF NEW YORK, *Respnt.*

(.....N. Y.....)

1. **No dedication for the purposes of a highway** can be inferred by the public use for more than twenty years of the covered surface formed by timbers, planks and earth over a canal feeder belonging to the State. The land being appropriated for use as a canal feeder, a grant for highway purposes could not be made; and a dedication for such purposes cannot, therefore, be presumed.

2. **A grant** cannot be presumed where it would have been unlawful.

3. **The State**, having for more than twenty years suffered, merely by acquiescence, without permission or agreement, the use of a strip of covered surface over a canal feeder, for purposes of passage, owes a duty to abstain from injuring, either carelessly or intentionally, a person so using it, but not a duty of active vigilance to prevent such injury, especially where the traveler is perfectly familiar with the condition of the surface.

(January 15, 1889.)

**A** PPEAL by plaintiff, from a decision of the State Board of Claims awarding nothing on a claim for damages for personal injuries received through falling into a canal feeder. *Affirmed.*

The questions presented are stated in the opinion.

*Mr. P. D. Niver* for appellant.

*Mr. Charles F. Tabor, Atty-Gen.,* for the State.

*Gray, J.*, delivered the opinion of the court:

The appellant filed a claim against the State for personal injuries received from a fall into a feeder of the Champlain Canal running through Cohoes. This feeder had been constructed by the State many years ago, and runs from the S L. R. A.

Mohawk River, until it empties into the canal alongside of which it runs for some 180 feet. It is covered with timbers and planks, upon which earth is laid to the depth of several feet. Its surface has been made use of for more than twenty years by the public as a highway, and it is known as "Champlain Street," in Cohoes; but it was never laid out as a street or highway by virtue of any municipal or other authority.

The appellant bases her claim to recover against the State on various grounds. She says that there was a user of the land for more than twenty years, which constituted it a public highway, and that, from acquiescence by the State in such a public use, there was imposed upon it a duty of vigilance as to its condition, and as to the exercise of reasonable care for the protection of persons passing over it.

In awarding nothing to the claimant we think the board of claims committed no error. Upon the trial it was conceded that no highway had ever been laid out at that point, and we think a legal dedication of the land as a public highway cannot be inferred. It could not be inferred on the theory of prescription, because that would depend upon a supposed grant, and a grant cannot be presumed where it would have been unlawful. *Burbank v. Fay*, 65 N. Y. 57.

The land in question was the property of the State, and as such was appropriated for the use described as a feeder to the canal, and never could have become the subject of any grant for the purpose of a public highway. The most that can be said in favor of appellant's contention is that the State suffered the use of this strip of its canal for purposes of passage over or upon it; but it was merely by sufferance that it was so used, and not by any agreement or permission. Nor did the State owe any active legal duty to protect those who so made use of its land. It owed a duty to abstain from injuring the plaintiff, either carelessly or intentionally; but it owed her no duty of active vigilance to see that she was not injured while up-

on the land for her own convenience. *Splitstorf v. State*, 108 N. Y. 214, 10 Cent. Rep. 699.

The commissioners found as facts that the claimant had lived for many years nearly opposite the place where she was injured, and was familiar with the condition and manner of construction of the feeder, and with its uses and manner of operation. This finding was warranted by the evidence, and we are concluded

by it. These circumstances in this case operated further to relieve the State from any claim for the consequences of plaintiff's use of its land, and charged the claimant with knowledge of its nature, uses and condition.

*The award of the Board of Claims should be affirmed, with costs.*

All concur, except **Andrews, Earl and Peckham, JJ.**, dissenting.

## PENNSYLVANIA SUPREME COURT.

### APPEAL OF D. P. AYARS *et al.*

(....Pa....)

1. **Under a constitutional provision against local and special legislation**, the classification of cities, with the view of legislating for either class separately, is essentially unconstitutional, unless a necessity therefor exists—a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless and detrimental to the others.

2. **The Pennsylvania Act of May 24, 1887, dividing the cities of the State into seven classes**—the charter powers of those between the fourth and seventh classes being precisely similar, with very few and quite unimportant exceptions—is unconstitutional, as the only possible purpose of the classification is to evade the constitutional limitation in respect to local and special laws.

3. **The fact that local and special laws are in force in some cities at the time of the adoption of the Constitution prohibiting such laws, and are not affected thereby, will not justify the substitution of other local or special laws in their stead.**

NOTE.—*Constitutional law, inhibition of special and local legislation; county organization and government.* The Constitution of Arkansas requires the General Assembly to provide for the organization of counties and villages by general laws. *Babcock v. Helena*, 34 Ark. 499. Under the provisions of the Constitution of Alabama, an Act which affects the whole county and relates to its political organization is not obnoxious to the Constitution, which inhibits local and special legislation. *Clarke v. Jack*, 60 Ala. 271. A prohibition of special legislation relating to the affairs of counties is violated by an Act excluding perpetually from its operation counties containing more than a designated, and less than another designated, number of inhabitants. *Morrison v. Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *Endlich's Stats.* 735. Such exclusion deprives the Act of the character of a legitimate Act for classification (*Ibid.*); as to the general admissibility of which, under a restraint upon special legislation, see *People v. Squire*, 10 Cent. Rep. 437, 107 N. Y. 593; *Roup's Case*, 81\* Pa. 211; *State v. Hudson*, 3 West. Rep. 159, 44 Ohio St. 137; *Cooley, Const. Law*, 153, note 4. A law general in its terms, but applying to but one county by reason of population, etc., is void. *Devine v. Cook County*, 84 Ill. 590. A statute applying to all counties having 40,000 population according to the last census is void as suspending general laws, and passed for the benefit of but two counties. *Woodard v. Brien*, 14 Lea. 520. An Act concerning inns and taverns is void where it applies to but three towns in one county. *State, Zeigler v. Gaddis*, 44 N. J. L. 383. An Act to lay out, open and improve a public road in each county in the State is unconstitutional. If one county is excepted from its operation. *State v. Hudson County*, 9 Cent. Rep. 501, 50 N. J. L. 82; *Hudson County v. Buck*, 6 Cent. Rep. 835, 49 N. J. L. 228. The constitutional provision prohibiting the passage of local and special laws repealed art. 11, § 1, providing a

4. **Whether, in any given case, the Legislature has transcended its power** and passed a law in conflict with the constitutional limitation in respect to local or special laws, is essentially a question of law, and must necessarily be decided by the courts.

5. **The Pennsylvania Act of May 24, 1887, dividing cities into classes, cannot go into effect (even if valid) and become operative, till the terms of all the members of a council in office at the time of the approval of the Act have fully expired.**

(January 7, 1889.)

**APPEAL** by plaintiffs, from a decree of the Common Pleas of Luzerne County dismissing a bill in equity for an injunction. *Affirmed.*

The bill was filed by **D. P. Ayars *et al.***, members of the select council, **Charles J. Bauer *et al.***, members of the Common Council, and **F. V. Rockafellow**, Treasurer of the City of Wilkesbarre, plaintiffs, against **C. A. Westfield *et al.***, defendants, to enjoin the defendants from organizing as, or performing the duties of, councilmen of said city.

The plaintiffs were all elected to office under the provisions of the Act of May 24, 1887 (P.

mode of special legislation for the removal of county seats. *Nichols v. Walter*, 37 Minn. 264. A special Act to provide for the organization of a county, and declaring that the General Assembly shall provide by a general law for a township organization, is not a violation of the Constitution. *Leach v. People*, 10 West. Rep. 617, 122 Ill. 420. The Constitution of Illinois does not require the Legislature to dispense with the county court for the management of the fiscal affairs of any county which shall adopt a township organization; but the affairs of said county may be transacted in such manner as the General Assembly may provide; and such legislation does not contravene the constitutional provision in respect of a general law for township organization. *Leach v. People*, 10 West. Rep. 617, 122 Ill. 420. An Act authorizing the County Superintendent of Lee County to pay certain debts contracted by the school trustees of a certain city is valid. A curative and healing statute is not obnoxious to this provision of the Constitution. *McKemie v. Gorman*, 68 Ala. 442.

*Acts relating to notaries public.* A statute conferring on notaries public in certain named counties judicial authority concurrent with justices of the peace in such counties is valid. *Carroll v. State*, 58 Ala. 396. But an Act relating to notaries which in effect applies only to a single county is void. *State v. Herrmann*, 75 Mo. 340.

*Acts fixing salaries of officers.* A statute regulating the compensation of county officers is not in violation of Nev. Const. art. 4, § 20, prohibiting the Legislature from passing local or special laws for the assessment and collection of taxes for State, county and township purposes. *State v. Fogus*, 19 Nev. 247. Nev. Stat. 1883, 73, fixing the salaries of county officers in certain counties, is unconstitutional because in its practical operation it does not apply to any general class of counties. *State v. Boyd*, 19 Nev. 43. So a statute, fixing the salary of

L. 204), entitled "An Act Dividing Cities of This State into Seven Classes," etc.

The status of the defendants, together with other facts of the case, are set forth in the following opinion of the court below, per Rice, P. J., on the hearing on bill and answer:

According to the classification made by the Act of May 24, 1887 (P. L. 204), entitled an "Act Dividing Cities of this State into Seven Classes," etc., Wilkesbarre is a city of the fifth class, and, at the date of the approval of the Act, was, by virtue of the provisions of its special charter, "operating with but one branch of council."

The defendants may be classified as follows: (1) members of said body elected prior to the approval of the Act of 1887 for terms which will not expire until the first Monday of April, 1889, and 1890; (2) persons elected at the last municipal election to fill vacancies; (3) persons elected at the same election as the successors of members of council whose terms will expire on the first Monday of April, 1888.

It is alleged in the bill, and admitted in the answer, that these individuals purpose, on the first Monday of April, 1888, to organize, and hereafter to exercise the functions, and perform the duties, of councilmen, and, amongst other things, to levy taxes, elect city officers, and to take and retain possession and control of city property to the exclusion of the persons claiming to have been elected at the last municipal election as select and common councilmen.

The plaintiffs' contention is that, on and after the last mentioned date, the body known as the city council, and the office of councilman created by the special charter of the city, will cease to exist, and thereafter the legislative department of the city will consist of two branches: the select and the common council, the members of which have been elected under

the Act of 1887. They therefore pray for an injunction to restrain the defendants from organizing as aforesaid, upon the grounds that the proposed action of the defendants will be an illegal usurpation of the functions of the select and common councils of the city, and that, if they are permitted to proceed, great confusion will result in the government of the city in levying and collecting its taxes, in maintaining law and order within its limits, and irreparable damage will result to the citizens in their persons; and, in short, the bill denies the right of the defendants, or any of them, to organize and act as councilmen of the city after the date mentioned.

On the other hand, the rights of the defendants is defended upon several grounds: (1) that the Act of 1887 is wholly unconstitutional and void; (2) that the Legislature did not intend said Act to apply to the city of Wilkesbarre, and to repeal the provisions of its special charter vesting the legislative power of the city in a single body known as the city council; (3) that the provisions of said Act relating to the election and installation of common and select councilmen cannot go into effect and become operative until the terms of all the members of the present council, in office at the date of the approval of the Act, shall have fully expired, which will not be until the first Monday of April, 1890.

I. The suggestions made in support of the second proposition are well worthy of consideration; but after a most patient study of the Act, we cannot escape the conclusion that it was intended to apply, not only to cities hereafter to be incorporated and to cities heretofore incorporated operating under the Act of 1874 and its supplements, but also to cities operating under special charters, and to repeal inconsistent laws whether general or special. There is strong reason for questioning whether the title of the

the county clerk, which in effect applies only to a single county, is void. *Gibbs v. Morgan*, 30 N. J. Eq. 128.

**Prius regulations.** An Act to punish gaming within two miles of Chippewa Lake is void (*State v. Winch*, 45 Ohio St. 668); but an Act prohibiting the sale of intoxicating liquors within two miles of any agricultural fair is valid. *Heek v. State*, 6 West. Rep. 814, 44 Ohio St. 538. So, an Act prohibiting the sale of liquor within eight miles of the court house in S. is valid. *Harrison v. Gordy*, 57 Ala. 49. So, an Act prohibiting the sale of liquors within three and a half miles of the "White Church," in Macon County, and also "Fish Pond Church," in Coon County, is valid. *Blook v. State*, 66 Ala. 494.

**Establishment of municipalities.** The present Constitution does not abolish the municipalities of the State; but, on the contrary, makes existing municipalities more independent of state control by inhibiting state legislation by special statutes. *Re Guerrero*, 60 Cal. 88. When a statute is general in its terms, and its sole effect is to remove existing deficiencies and to subject the affairs of towns to the operation of a general law, the statute is not special or local, although the pre-existing conditions were such that it would effect a change in only one town or county. *State v. Govern*, 1 Cent. Rep. 689, 47 N. J. L. 368. See also 48 N. J. L. 612. The propriety of establishing a municipality and of including within its boundaries a particular territory is in general a political question. If the course pursued in establishing it be substantially such as is pointed out by the law-making department, courts do not interfere. *People v. Riverside*, 70 Cal. 461. It is for the Legislature, not the courts, to say when a special Act is necessary and when the general law will do. *Owners of Lands v. People*, 118 Ill. 296; *Carpenter v. People*, 8 Colo. 122. It is for the Legislature to judge whether a law on any given subject not enumerated

in the Constitution can be made applicable "and of uniform operation throughout the State," as required by Ind. Const. 1851, art. 4, § 23. *Wiley v. Bluffton*, 9 West. Rep. 683, 111 Ind. 152. Iowa Laws 1886, chap. 134, providing for redistricting the State for judicial purposes, etc., is not unconstitutional as not being general and of uniform operation throughout the State. *State v. Emmons*, 72 Iowa, 265. The Act providing for municipal improvements is not a special law within the constitutional inhibition. *Thomson v. Ashworth*, 78 Cal. 73. A statute authorizing one half the bonded creditors of a city, acting in conjunction with twenty residents of such city, to reincorporate, etc., is in violation of that provision of the Constitution which provides that the Legislature shall establish a uniform municipal system. *State v. Stark*, 18 Fla. 255. A statute which by its terms excludes from its operation all corporations for municipal purposes except those which may be composed of cities and counties merged or consolidated into one government is in direct contravention of the Constitution. *Desmond v. Dunn*, 55 Cal. 250. A supplement to an Act which relates to the creation of a borough government out of certain existing municipalities is invalid if it gives greater powers than those possessed by townships and less than those possessed by cities or other existing municipalities. *State v. Sloane*, 6 Cent. Rep. 346, 49 N. J. L. 356. In passing general laws for the organization of cities and towns the General Assembly exercises all its legislative authority; but in providing measures for carrying the law into effect it must confer upon some individuals or bodies the power to act; and fixing the boundaries is among the acts which must be performed through such conferred powers. *People v. Fleming*, 10 Colo. 553.

**Classification of cities.** An Act providing for the classification of municipal corporations is a General Law. *Pritchett v. Stanislaus County*, 73 Cal. 310. And such a law classifying the cities of the

Act clearly expresses, and gives notice of, all the subjects of legislation embraced in it; but we do not think this is true as to the particular provisions required to be considered in this case. An entire Act is not necessarily unconstitutional because its title fails to give notice of some particular matter contained therein. *Dehursht v. Allegheny*, 95 Pa. 437. An Act repealing a special or local law may be constitutional notwithstanding the bill does not expressly state that such was its purpose. *Com. v. McCandless*, 10 Cent. Rep. 758.

II. It is now too late to question the power of the Legislature to classify cities according to population, and to legislate, upon some subjects at least, for each class separately. *Wheeler v. Phila.* 77 Pa. 338; *Kilgore v. Magee*, 85 Pa. 401.

It is argued, however, that such classification must be reasonable, and justified by necessity, otherwise it will be in violation of section 7, article 3, of the Constitution. But who is to decide as to the reasonableness of, and necessity for, the classification; and by what rule or standard are these questions to be determined? Conceding it to be a matter resting primarily in the discretion of the Legislature, is their discretion unlimited, and their judgment conclusive? We think not. Where classification is carried to such an extreme as to leave no room for doubt, that, in purpose and effect, it is a mere cover for special legislation, we believe the courts have the power, and should declare that the constitutional limits have been passed. The question whether this is such an Act is of the gravest importance, and no good purpose is to be served by postponing its decision; but, as we now view the case, it is not absolutely required to be made at the present time. Furthermore, while the inferior courts have the power, and in a plain case should exercise it, to

declare an Act unconstitutional, yet there is impropriety in doing so, except where the case is very clear and the emergency great.

III. Therefore, without stopping to suggest technical difficulties in the way of a conclusive adjudication of the rights of these contending officers in this form of proceeding, or to discuss further the first two propositions above stated, we shall proceed at once to a consideration of the question whether, in any legal view of the case, the time has arrived for the transition from a city government with a single branch council to a government with two branches of council.

The city of Wilkesbarre was incorporated by Act of May 4, 1871 (P. L. 539). Its council consisted of twenty-one members, one from each of the fifteen wards, one at large from the first, second, third and fifth wards, two at large from the fourth and seventh wards, one at large from the sixth, eighth and ninth wards, one at large from the tenth, twelfth and fifteenth wards, and one at large from the eleventh, thirteenth and fourteenth wards.

It was decided by Judge Harding, in *Phania v. Reynolds*, 6 Luz. Legal Reg. 21, 13 Phila. 522, that the city of Wilkesbarre was not compelled to come under the provisions of the Act of May 25, 1874, and elect two branches of councils. This decision was always regarded as conclusive of the status of the city with reference to the Act of 1874, and it is manifest that no total and instantaneous change in that status was wrought by the Act of 1887. In other words, the city council was not at once legislated out of existence, for the Act declared that "The corporate powers and the number, character, powers and duties of the officers of the cities . . . now in existence by virtue of the laws of this Commonwealth, shall be and

State into six classes, according to population, is constitutional. *Id.* The classification need not be restricted to the population of the municipality, but may be based on the conduct or condition of the people resident therein. *State v. Hunter*, 38 Kan. 578. For the purposes of legislation, cities constitute a class, and a law applicable to this class only is not in contravention of the Constitution. *Re Comrs. of Adjustment of Elizabeth*, 8 Cent. Rep. 327, 49 N. J. L. 488. It is not necessary that a law relating to municipalities should operate upon all cities of the State, in order to be constitutional. *State v. Hunter*, 38 Kan. 578. A general law unlimited as to time in its operation is not local legislation because it happens that but one city in the State has the necessary population to come within its purview. *Darrow v. People*, 8 Colo. 413. A law applicable to cities only is not in contravention of the New Jersey Constitution. *Re Comrs. of Adjustment of Elizabeth*, 8 Cent. Rep. 327, 49 N. J. L. 488. Law declaring void the incorporation of villages attempted to be incorporated under prior laws is not unconstitutional, it being a general law applying to a class. *State v. Spaude*, 37 Minn. 322. If a law has room within its terms to operate upon all of a class of things, present and prospective, and not merely upon one particular thing or upon a particular class of things existing at the time of its passage, it is general, not special. *State v. Hunter*, 38 Kan. 578. An Act exempting a city from its operation is a special law and unconstitutional. *State, Bowyer v. Camden*, 9 Cent. Rep. 497, 50 N. J. L. 87. An Act made applicable only to cities of the second class having a population of 31,000 at the last federal census if it could apply only to one city in the State, and never to any other, is in conflict with Ohio Const. art. 13, § 1, and therefore void. *Marmet v. State*, 9 West. Rep. 453, 45 Ohio St. 63. An Act being applicable only to such cities as may adopt it by ordinance, is unconstitutional. *Reading v. Savage*, 12 Cent. Rep. 453, 130 Pa. 198. An Act which provides that a writ of *scire facias* issued to recover

a municipal claim in cities of the first class, shall have additional force to revive and continue the lien of said claim for five years from date of the writ is unconstitutional. *Phila. v. Pepper*, 6 Cent. Rep. 419, 115 Pa. 291. A statute authorizing the issue of municipal bonds, which applies only to cities of 25,000 inhabitants or over, is void. *Anderson v. Trenton*, 42 N. J. L. 486.

*Regulating police departments of cities and towns.* A statute regulating police departments in all cities of the State is a general law and constitutional. *New Brunswick v. Fitzgerald*, 8 Cent. Rep. 310, 48 N. J. L. 457. A statute declaring that no policeman in any city shall be removed except for cause and after hearing is general and constitutional. *New Brunswick v. Fitzgerald*, 8 Cent. Rep. 310, 48 N. J. L. 457. An Act regulating the tenure and terms of office in the police departments of cities is not unconstitutional by reason of limiting its operation to cities, and not extending it to towns and villages. *New Brunswick v. Fitzgerald*, 8 Cent. Rep. 310, 48 N. J. L. 457. But a provision in an Act that it shall not apply to "summer resorts," is within the constitutional prohibition against local and special laws regulating the internal affairs of towns and counties. *State, Clark v. Cape May (N. J.)* 12 Cent. Rep. 800. An Act extending the term of office of members of city councils and providing for their classification is not a local or special Act. *State, Randolph v. Wood*, 5 Cent. Rep. 345, 49 N. J. L. 38. A clause in a statute, which introduces a regulation and an exception by which the regulation is limited, giving different cities a different kind of tenure of office, and which fixes no regulation common to all, is unconstitutional. *New Brunswick v. Fitzgerald*, 8 Cent. Rep. 310, 48 N. J. L. 457.

*Taxation.* An Act providing for licenses, general in its terms and operation, is not invalid merely from the fact that when it went into operation there was but one city of the class and grade to which it could apply. *Marmot v. State*, 9 West. Rep. 453, 45 Ohio St. 63. An Act to establish an ex-

remain as now provided by law except where otherwise provided by this Act (§ 1, art. 2), and that in cities of the several classes operating with but one branch of council, the members thereof in office at the date of the approval hereof shall be empowered to exercise all the functions of councils in the manner theretofore authorized, until their successors are installed in accordance with the provisions of this Act." Sec. 4, art. 23.

By "successors" is meant, not persons elected to the "city council," for the Act of 1887 makes no express provision for such election, but persons elected to the select and the common branches of councils, for which it does provide. When, therefore, can members of the latter bodies be legally elected and installed? The plaintiffs' counsel contend that they were to be elected at the first municipal election following the passage of the Act, and to be installed on the first Monday of the succeeding April.

In section 16, article IV, it is provided as follows: "The terms of members of councils . . . elected upon the third Tuesday of February in any year shall begin on the first Monday of April next ensuing thereto . . . and all elections for officers whose terms will expire on the first Monday of April shall be held on the third Tuesday of February next preceding thereto." It may be said that this section throws no light upon the question before us, because neither event, by which the other is to be determined, is fixed. This might be true if the fact were to be ignored that the Legislature has, itself, treated the persons to be elected to the select and common branches of councils as the "successors" of the members of the present city council Sec. 4, art. 23. But with that in view is it not perfectly fair to conclude that the Legislature intended this section to be a comprehensive designation of the time when all

city officers should be elected, and to apply to cities theretofore operating with a single council as well as to cities having two branches? It is to be noticed that the article in which it is contained is entitled "General Provisions Applicable to Cities of the Fourth, Fifth, Sixth and Seventh Classes." But without laying any great stress upon this feature of the Act, it is surely no distortion of the language of the section relating to the election of select and common councilmen to construe it in the sense clearly recognized by the Legislature in the last section of the Act. Thus construed, the section under consideration (§ 16, art. 4), would of itself preclude the idea that there could be any election of members of the select and the common councils until the municipal election immediately preceding the expiration of the terms of the members of the city council now in office.

We now come to section 2, article 8, which provides that "At the first election under this Act, the members of select council from odd numbered wards shall be chosen for two years, and those from even numbered wards shall be chosen for four years." This expression, "at the first election under this Act," is thought to be conclusive of the whole question, but we cannot so regard it. As we have heretofore pointed out, the Legislature has already, by a general provision, designated the time for the election and installation of councilmen and other city and ward officers except aldermen; and the immediate subject now before them was, not the time, but the mode, of electing councilmen, so that their terms should expire at different times. It is true, at the last municipal election, a comptroller, a treasurer and assessors were elected. In one sense it was the first election under the Act. But does it follow that councilmen were to be elected from

else department in cities of a certain class rated by inhabitants is local and special. Board of License & Excise v. Closson, 8 Cent. Rep. 340, 49 N. J. L. 482. While population may form a basis for classification it can only do so for legislative purposes. State, Randolph, v. Wood, 5 Cent. Rep. 345, 49 N. J. L. 85. Sections of a statute providing a scheme of taxation for cities, but excluding from their operation a certain class of cities unless they accept the scheme by ordinance, are invalid. Com. v. Halsead (Pa.) 7 Atl. Rep. 221. An Act respecting licenses in cities of the first class, where it applies to but two cities in the State, is void. State, Pavonia Horse R. Co., v. Jersey City, 45 N. J. L. 297.

*Constitutionality of special and local legislation.* A special law detaching a city from a township is valid where it does not appear that the effect was to deprive the people of the opportunity of holding the general town election for that year. State v. Gurley, 37 Minn. 475. The General Assembly has power, by a special law, to amend an Act of incorporation, even to effect enlargement of jurisdiction, territorially or otherwise. Wiley v. Bluffton, 9 West. Rep. 681, 111 Ind. 152. The Legislature may, by a private Act, appoint a trustee to execute the trust created by a deed. Tindal v. Drake, 60 Ala. 170. A special Act removing administration proceedings then pending in the county where intestate lived at the time of his death, into another county, is valid. Van Hoose v. Bush, 54 Ala. 342. An Act relieving certain married women from the disabilities of coverture, being attributable rather to the prerogative than the legislative power over person and property, is valid. Ashford v. Watkins, 70 Ala. 156.

*Local laws.* An Act is local which specially concerns the property and rights of a portion of the people of the State, although its subject may be of a public nature, and although in its general operation the people of the entire State may, in some sense, have an interest. Ill. v. Ill. Cent. R. Co. 33

Fed. Rep. 730. An Act which infringes the right of local self government is unconstitutional. Wilcox v. Paddock (Mich.) 8 West. Rep. 109. An Act regulating the criminal procedure in St. Louis is unconstitutional and void. State v. Kring, 74 Mo. 612. So an Act relating to burglary in cities of the first class is void. Ex parte Falk, 42 Ohio St. 638. The Pennsylvania Act of 1879, for the regulation of boroughs as amended by the Pennsylvania Act of May 17, 1883, is not unconstitutional as providing for local legislation. Re Pottstown, 10 Cent. Rep. 800, 117 Pa. 538, 20 W. N. C. 494. But a law applying to some townships and excepting others from its operation is not a general law. State, Hoetzel, v. East Orange, 11 Cent. Rep. 347, 30 N. J. L. 354. The New Jersey Act of March 27, 1882, entitled "An Act Authorizing Township Committees in any Township not Containing an Incorporated City or Borough within its Limits, to Pave Streets Thereof," is special and local, within Pa. Const. art. 4, § 8, ¶ 11. State, Dobbins, v. Jones (N. J.) 12 Cent. Rep. 802.

*Notice required.* Where the Louisiana Constitution has in express terms conferred on the General Assembly the duty, or even the power, to adopt legislation on the particular subject, even though local in its character, such duty and power are not subject to the restrictions imposed by article 48, prohibiting local or special laws without previous published notice, etc. Excelsior Planting & Mfg. Co. v. Green, 39 La. Ann. 455. Special and local legislation as to cities and towns may be enacted at any session of the Legislature and without the notice required by section 21 of article 3 of the Constitution. State v. Duval County (Fla.) 3 So. Rep. 193. To the same effect, see Excelsior Planting & Mfg. Co. v. Green, 39 La. Ann. 455. Where the journals are silent as to the proof of notice required by the Constitution, of intention to apply for the passage of a local or special Act, it will be presumed that sufficient proof was made on that subject. Walker v. Griffith, 60 Ala. 361.

the several wards of all cities of the fourth, fifth, sixth and seventh classes, irrespective of the fact that there were no vacancies in that office to be filled? Is this clause to be construed as impliedly legislating out of office members of select and common councils whose terms had not expired in cities heretofore having two branches of councils; and why should the terms be given a broader effect when applied to cities operating with a single branch council?

We are convinced that the Legislature had no such intention. This is shown not only by other sections of the Act to which we have already referred and shall hereafter refer, but also by the immediate context which specially provides that "The terms of all members of councils now in office, in each of said cities of the fourth class, shall cease and determine on the first Monday of April next succeeding the date of the approval of this Act, and their successors shall be chosen as herein provided on the third Tuesday of February preceding thereto." If the first clause of the section under consideration is to be read and applied liberally, in disregard of the rights of councilmen whose terms have not expired, it was superfluous, much more it was misleading, to insert in the same section a provision to the same effect, but in express terms, applying exclusively to cities of a single class. The fair inference is that the Legislature did not suppose or intend that the single expression at the beginning of the section, manifestly chosen with reference to an entirely different subject, should be given the sweeping effect claimed for it here. But the intention of the Legislature is not left to mere inference. "All officers of each of said cities of the fourth, fifth, sixth and seventh classes in office at the date of the approval thereof shall, except where otherwise herein provided, continue to hold their office for the terms for which they were respectively elected," Sec. 1, art. 18. We do not dispute the power of the Legislature to destroy the office of city councilman created by the charter and thereby end the official life of the incumbent before the expiration of the term for which he was elected. See *Court v. McCombe*, 6 M. 486; *Cooley*, Civ. Lien, p. 276 and note.

But in view of the express provision just quoted the court would not be justified in straining doubtful provisions contained in other sections of the Act in order to bring about that result, even though we might deem it advisable that the change in the form of the city government, if to be made at all, should be made at once. There is certainly no declaration in the Act abolishing the office, or abridging the term, of any councilman, whether in cities having but one council or two branches of councils, except in cities of the fourth class. If any expression in the Act has that effect it is by implication only. But we have been led to the conclusion, and have endeavored to show, that the clauses relied on by the plaintiffs may fairly be construed, where standing alone, as authorizing the election of councilmen, not at the first election at which some other officer designated by the Act is to be elected, but at the first election when the occasion therefor shall arise. The exception in the section under consideration has sufficient to operate on in the provision heretofore quoted 2 L. R. A.

concerning cities of the fourth class, without applying it to other provisions, which, fairly construed, are entirely consistent with the purview of the section. We thus reach a conclusion in which all of these clauses and sections are harmonized and given effect without treating any portion of any of them as superfluous, and without straining the terms used by the Legislature beyond the limits obviously contemplated by them.

IV. Having concluded that the members of council in office at the date of the approval of the Act are entitled to serve out their respective terms and to exercise the functions of the office, the question arises as to the right of persons, elected at the last municipal election under the city charter, to take part in the reorganization of the city council on the first Monday of April, and thereafter to act as members of said body.

We are referred to the last section of the Act (§ 4, art. 28) as precluding the idea that there can be any further elections under the charter. Inasmuch as a preceding section of the same article had already declared the rights of all city officers in office, it may be questioned whether the Legislature, in adding the section under consideration, did not have in view the powers and functions of the body of which the defendants are members, rather than the proper constitution of that body, and the rights of individuals to sit as members thereof. Without declaring that such is the true construction of the section, it is clear that if the language be taken liberally (assuming, of course, the correctness of our conclusion that the existing council will not be superseded until the terms of the present members shall have expired), it would have the effect of extending the terms of members which will expire on the first Monday of April 1888 and 1889, in violation of section 18, article 8, of the Constitution. It is to be presumed that the Legislature did not intend to violate this constitutional provision, and their language is to be construed, if possible, consistently with that presumption. Hence the section is to be read with the implied qualification that no member shall continue in office after his term has expired, or he has become disqualified otherwise to act. This proposition seems to us too plain to need argument to support it.

But if there can be no legal election of common and select councilmen until the municipal election immediately preceding the expiration of the terms of the members of the existing council, namely: in February, 1890, how are vacancies in that body occurring in the mean time by death, resignation, removal or otherwise to be filled? It is thought that the absence of any provision on the subject shows the absurdity of the conclusion heretofore arrived at. We agree that this would be a very potent argument against the soundness of that conclusion, if it were true that there is no legal authority for the election of members to fill such vacancies. But is it true? It must be conceded that such authority is not expressly given in the Act of 1887, but this is not conclusive against the right claimed by the defendants, for it was not necessary to its existence that it should be declared in so many words. The provisions of the charter are repealed by the Act of 1887, only to the extent that they are inconsistent



therewith or supplied by the provisions thereof. Therefore, until the time arrives for the election, under the Act of 1887, of members of the two branches of councils which will be the successors of the present council, the provisions of the charter will not conflict with the provisions of the general Act upon this subject and will remain in force. The two Acts being to that extent *in pari materia* are to be construed together. While the charter furnishes, and will continue to give, ample authority for the election of members of the city council, such persons will take and hold their offices subject to the provisions of the Act of 1887 superseding the office when the terms of the present members shall expire. If the Legislature had intended that event to occur on the first Monday of April next, it seems to us that they would not have left so important a matter to uncertain inference, but would have expressed their will in as clear and unambiguous terms as they employed when legislating for cities of the fourth class.

Our conclusions may be summed up as follows: the defendants of the first class are entitled to hold their offices until the expiration of the terms for which they were elected; the defendants of the second and third classes were legally elected under the city charter; the said defendants, if otherwise duly qualified, will be authorized on the first Monday of April next to organize, and thereafter to exercise the functions and perform the duties of members of the council of the city of Wilkesbarre; and the transition from a city government with a single council to a government with two branches of councils cannot legally occur until the expiration of the terms of the members of said single council in office at the date of the approval of the Act of 1887. It follows that this bill must be dismissed.

Thereupon a decree was entered refusing an injunction and dismissing the bill; and plaintiffs appealed, assigning as error the action of the court (1) in holding that the City Council of Wilkesbarre is entitled to exercise the functions of councils until April, 1890; (2) in not holding that the select and common councils under the Act of 1887 are entitled to exercise their functions since April 2, 1888.

**Messrs. A. Farnham, S. J. Strauss and J. V. Darling**, for appellants:

An entire Act is not necessarily unconstitutional because its title fails to give notice of some particular matter contained therein.

*Deshurst v. Allegheny*, 95 Pa. 487; *McGee's App.* 6 Cent. Rep. 628, 114 Pa. 470.

The power of the Legislature to classify cities according to population has been recognized in—

*Wheeler v. Phila.* 77 Pa. 389; *Kilgore v. Magee*, 85 Pa. 401; *Com. v. Patton*, 88 Pa. 258; *Scowden's App.* 96 Pa. 422; *Davis v. Olark*, 106 Pa. 877; *Morrison v. Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *Appeal of Scranton School Dist.* 4 Cent. Rep. 811, 113 Pa. 176; *McCarthy v. Com.* 16 W. N. C. 497; *Scranton v. Silkman*, 4 Cent. Rep. 817, 113 Pa. 191; *Luzerne Co. v. Glennon*, 109 Pa. 564.

The Legislature having the authority to classify cities by population it is within its own

discretion when and to what extent it shall be exercised.

See *State v. Boons Co. Court*, 50 Mo. 817; cited in *Brown v. Denver*, 7 Colo. 810, 80 Alb. L. J. 451; *Warfel v. Cochran*, 84 Pa. 881; *Hill v. Kensington*, 1 Pars. Sel. Cas. 501; *West Phila. Pass R. Co. v. Perkins*, 4 Brewst. 173; *Ford v. West Pittston*, 6 Luz. Legal leg. 54.

**Messrs. William S. McLean and H. W. Palmer**, for appellees:

Acts classifying cities have only been upheld where rendered proper by overruling necessity.

See *Wheeler v. Phila.* 77 Pa. 388; *Kilgore v. Magee*, 85 Pa. 401; *Com. v. Patton*, 88 Pa. 258, 7 W. N. C. 6; *McCarthy v. Com.* 16 W. N. C. 497.

In several cases, notably *Davis v. Clark*, 106 Pa. 877; *Scranton v. Silkman*, 4 Cent. Rep. 817, 113 Pa. 191; *McCarthy v. Connelly*, 16 W. N. C. 497; *Phila. v. Haddington M. E. Church*, 6 Cent. Rep. 419, 115 Pa. 291, Acts legislating for classified cities or counties have been held unconstitutional, for the reason that some members of the class designated were excluded or could never have the benefit of the Act, establishing the additional rule that legislation for members of a class will not be tolerated.

See also *Morrison v. Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *Phila. v. Haddington M. E. Church*, 6 Cent. Rep. 419, 115 Pa. 291.

The course of judicial decision in other States upon provisions similar to those contained in the Constitution of Pennsylvania is instructive as showing the general disposition of courts of last resort to enforce constitutional provisions.

*State, Anderson, v. Trenton*, 42 N. J. L. 486; *Desmond v. Dunn*, 55 Cal. 242; *Earle v. San Francisco Board of Education*, 55 Cal. 489; *State v. Kring*, 74 Mo. 612; *State, Zeigler, v. Gaddis*, 44 N. J. L. 368; *State v. Stark*, 18 Fla. 255; *State v. Herrmann*, 75 Mo. 340; *State, Pannonia Horae R. Co. v. Jersey City*, 45 N. J. L. 297; *Gibbs v. Morgan*, 89 N. J. Eq. 126; *Ernst v. Morgan*, 89 N. J. Eq. 391; *Woodard v. Brien*, 14 Lea, 520; *Ex parte Falk*, 42 Ohio St. 688.

**Starrett, J.**, delivered the opinion of the court:

One of the questions involved in this contention is whether, under the provisions of the Act of May 24, 1887, entitled "An Act Dividing Cities of This State into Seven Classes," etc., the time has arrived for the contemplated change, in the city of Wilkesbarre, from a single council to one consisting of two separate branches.

For reasons given at length in the opinion of its learned President, the court below rightly held it had not; "that the provisions of said Act relating to the election and installation of select and common councilmen cannot go into effect and become operative until the terms of all the members of the present council, in office at the date of the approval of the Act, shall have fully expired, which will not be until the first Monday of April, 1890."

Another and vastly more important question is whether the Act under consideration is constitutional. That subject was also briefly considered, but while the court appears to have inclined to the opinion that the Act is unconsti-

tutional and void, it was not deemed necessary to decide the question, because, for the reason above stated, the bill was prematurely brought and could not therefore, in any event, be sustained.

We might for the same reason affirm the decree, but the question is so important in all its bearings that it should be decided without unnecessary delay.

The broad ground on which the court was asked to declare the Act unconstitutional is that, under the specious guise of classification, it is local and special legislation pure and simple, and, without pretense of necessity, opens wide the door for further legislation of the same vicious and inhibited character. It is difficult, if not impossible, to escape from that position.

Classification is not expressly forbidden by the Constitution. On the contrary it is distinctly recognized for certain purposes. For example, article 9, section 1, declares: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Thus, by necessary implication, authority is given to classify property for the purpose of taxation, but by express mandate of the last clause above quoted, all taxes must be levied and collected under general, and not special or local, laws.

During the session of the Legislature immediately preceding the adoption of the present Constitution nearly 150 local or special laws were enacted for the city of Philadelphia, more than one third that number for the city of Pittsburgh, and for other municipal divisions of the State about the same proportion. This was by no means exceptional. The pernicious system of special legislation, practiced for many years before, had become so general and deep rooted, and the evils resulting therefrom so alarming, that the people of the Commonwealth determined to apply the only remedy that promised any hope of relief. Doubtless it was a proper appreciation of the magnitude of the evil, as much as anything else, that called into existence the convention that framed the present Constitution and induced its adoption by an overwhelming vote. One of the manifest objects of that instrument was to eradicate that species of legislation and substitute, in lieu of it, general laws whenever it was possible to do so.

This is so clearly apparent that no unbiased mind can contemplate the seventh section of article 8, and kindred provisions, without reaching that conclusion. That section contains a schedule of nearly fifty prolific subjects of previous special and local legislation, and ordains that "The General Assembly shall not pass any local or special law" relating to either of them. As an additional safeguard in cases where special legislation is not expressly prohibited, the next section declares: "No local or special bill shall be passed unless notice of the intention to apply therefor shall have been published," etc.

Among the prohibited subjects specified in the seventh section, *supra*, are "local or special laws authorizing the creation, extension, or impairing of liens," "regulating the affairs of counties, cities, townships, wards, boroughs or

school districts;" authorizing the "laying out, opening, altering or maintaining roads, highways, streets or alleys;" "vacating roads, town plats, streets or alleys;" "incorporating cities, towns or villages, or changing their charters;" "creating offices, or prescribing the powers and duties of officers in counties, cities, boroughs, townships, election or school districts;" "regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes," etc.

In *Wheeler v. Philadelphia*, 77 Pa. 388, the question of classification first arose under the Act of May 23, 1874, entitled "An Act Dividing the Cities of this State into Three Classes, Regulating the Passage of Ordinances," etc. It was there held that the Act, so far as its provisions were then involved, does not contravene the clause of the Constitution prohibiting the passage of any local or special law "regulating the affairs of counties, cities," etc.; that the classification therein provided for is founded on certain manifest peculiarities, distinguishing the cities of each class from the others, and to some extent, at least, demanding legislation for each respectively, that would not only be unnecessary but detrimental to the other classes; and hence the Act, so far as its provisions were involved in that contention, was constitutional.

It is not necessary to refer specially to the reasons given in support of these conclusions; nor is any attempt to further fortify the latter by suggesting other reasons required. All that can be profitably said on the questions involved will be found in the elaborate and exhaustive opinion of the court delivered by our Brother Paxson. We are not asked to overrule that case, but simply to say that classification, as a mere pretext for special and local legislation, has since been carried to an extreme for which no warrant can be found either in the fundamental law or the decisions of this court.

The question was again presented in *Kügors v. Magee*, 85 Pa. 401. In that case, *Chief Justice Agnew*, referring to *Wheeler v. Philadelphia*, *supra*, said: "We adhere to that decision, and indeed cannot see how the question of power could have been decided differently. To say that no general law can be passed to regulate a certain subject, because some of the classes contained in the regulation do not exist or exist only in a limited form, is to hold that no law can be passed to provide for future wants and necessities. The welfare of the State, and one of the chief purposes of legislation would be struck down by such a decision."

Subsequent legislation clearly indicates that the scope of the decision in *Wheeler v. Philadelphia* was either misunderstood or ignored. It was never intended to license indiscriminate classification as a mere pretext for the enactment of laws essentially local or special.

Repeated and pointed admonitions of that fact were given in subsequent cases involving the general subject. In 1878 an Act was passed the sole object of which was to provide specially for holding courts in the city of Titusville in the county of Crawford. For the purpose of individuating that city and county and limiting the operation of the Act to them, without mentioning either by name, the following ingenious but deceptive periphrasis was em-

ployed: "In all counties of this Commonwealth where there is a population of more than 60,000 inhabitants, and in which there shall be any city incorporated, at the time of the passage of this Act, with a population exceeding 8,000 inhabitants, situate at a distance from the county-seat of more than twenty-seven miles by the usually traveled public road, it shall be the duty of the president judge or additional law judges, or either of them, to make an order providing for the holding of one week of court, at each regular term of court for said county, for the trial of civil or criminal cases in said city." In *Com. v. Patton*, 88 Pa. 258, this covert attempt at special legislation was fitly characterized as "classification run mad."

At the next session of the Legislature another abortive attempt was made to accomplish the same object by a somewhat different but at the same time equally elaborate circumlocution, differing from the former, not in kind, but only in degree. In pronouncing that Act also unconstitutional this court said:

"It is no part of our business to discuss the wisdom of this legislation. However vicious in principle we might regard it, our plain duty is to enforce it, provided it is not in conflict with the fundamental law. It requires but a glance at the Act to see that it is an attempt to evade the Constitution. It is special legislation under the attempted disguise of a general law. Of all forms of special legislation, this is the most vicious. . . . The Act was doubtless regarded by its framers as classification of counties, but it is not so. Nor does any good reason occur to my mind why there should be such classification. If there be such reasons, amounting to a necessity therefor, we shall probably hear of them in due season. In the mean time, classification which is grounded in no necessity, and has for its sole object an evasion of the Constitution, will not be encouraged." *Seowden's App.* 96 Pa. 422.

Again, in *Morrison v. Bachert*, 112 Pa. 322, 3 Cent. Rep. 117, an attempt to classify counties for the purpose of regulating fees of officers was declared unconstitutional. Referring to the section now under consideration, our Brother Paxson, by whom the opinions in the two last cited cases were delivered, said: "It was a wise provision, and will be sternly enforced. It is our purpose to adhere rigidly to that instrument, that the people may not be deprived of its benefits. It ought not to be necessary for this court to make this judicial declaration, but it is proper to do so in view of the amount of legislation which is periodically placed upon the statute book in entire disregard of the fundamental law. Much of this legislation may remain unchallenged for years only to be overturned when it reaches this court. In the mean time parties may have acted upon it, rights may have grown up, and the inconvenience and loss entailed thereby may not be inconsiderable. As we view it, this note of warning at this time is needed."

Other cases might be cited in which similar notes of warning were sounded. Among these are *Davis v. Clark*, 106 Pa. 877; *McCarthy v. Com.* 16 W. N. C. 497; *Seranton School District's App.* 4 Cent. Rep. 811, 118 Pa. 176; *Seranton v. Silkman*, 4 Cent. Rep. 817, 118 Pa. 8 L. R. A.

191; *Strine v. Folts*, 4 Cent. Rep. 288, 118 Pa. 849; *Phila. v. Haddington M. E. Church*, 6 Cent. Rep. 419, 115 Pa. 291; *Evans v. Phillips*, 9 Cent. Rep. 691, 117 Pa. 226; *Weinman v. Wilkensburg R. Co.* 11 Cent. Rep. 54, 118 Pa. 192.

In *Seranton School District's Appeal*, *supra*, it was said by our Brother Green: "All our recent decisions are to the effect that if local results either are or may be produced by a piece of legislation, it offends against" the article prohibiting local or special legislation.

In *Philadelphia v. Haddington M. E. Church*, *supra*, an Act giving to a *scire facies* the effect of extending municipal liens in cities of the first class was pronounced unconstitutional for similar reasons.

In *Weinman v. Wilkensburg Railway Company*, *supra*, it was held that an Act providing for the incorporation and regulation of street railway companies, in cities of the second and third classes, was both special and local legislation, and therefore unconstitutional—special, because it relates to only a few of the general class known as street railway companies, and local, in that its operations are confined to specified localities. In that case our Brother Williams, referring to the subject of classification, said:

"For purposes of local government the State is subdivided into counties, townships, and other municipal and quasi municipal corporations. Each class of these subdivisions has purposes to subserve that are peculiar to it, and needs to be invested with the powers necessary to that end. Generally speaking, all the members of each class have the same local functions to perform. Classification, therefore, on that basis, has been recognized, and a statute relating to all the townships, all the school districts, or all the members of any particular class of the municipal divisions of the State has been held to be constitutional. It has been found desirable to divide cities into classes upon the basis of their population. The needs of a great city with half a million or more of people are somewhat different, in many respects, from the needs of a city with 10,000. The organization of their local governments and the management of their municipal affairs will be quite unlike. Each of these classes requires legislation peculiar to itself; but such legislation must be applicable to all the members of the class to which it relates, and must be directed to the existence and regulation of municipal powers and local government."

Some of the cases above cited have been quoted at considerable length for the purpose of showing that this court never intended to sanction classification as a pretext for special or local legislation. On the contrary, the underlying principle of all the cases is that classification, with the view of legislating for either class separately, is essentially unconstitutional, unless a necessity therefor exists—a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others.

Laws enacted in pursuance of such a classification and for such purposes, are, properly speaking, neither local nor special. They are

general laws, because they apply alike to all that are similarly situated as to their peculiar necessities. All legislation is necessarily based on a classification of its subjects; and, when such classification is fairly made, laws enacted in conformity thereto cannot be properly characterized as either local or special. A law prescribing the mode of incorporating all railroad companies is special in the narrow sense that it is confined in its operations to one kind of corporation only; and by the same test, a law providing a single system for organization and government of boroughs, in the State, would be a local law; but everyone conversant with the meaning of those words, when used in that connection, would unhesitatingly pronounce such statutes general laws. But, as was said in *Scowden's Appeal*, *supra*: "Classification which is grounded on no necessity and has for its sole object an evasion of the Constitution," is quite a different thing.

The purpose of the provision under consideration was not to limit legislation, but merely to prohibit the doing, by local or special laws, that which can be accomplished by general laws. It relates not to the substance, but to the method of legislation, and imperatively demands the enactment of general, instead of local or special laws, whenever the former are at all practicable.

The Act of 1874, dividing the cities of the State into three classes, viz.: those containing over 300,000 population, those containing less than 300,000 and exceeding 100,000, and those containing less than 100,000 and exceeding 10,000, was sustained, to such of its provisions as have been involved in adjudicated cases, because it was considered within the spirit, if not the letter, of the Constitution. As to the number of classes created, that Act appears to have covered the entire ground of classification. It provided for all existing as well as every conceivable prospective necessity. It is impossible to suggest any legislation that has or may hereafter become necessary for any member of either class that cannot, without detriment to other members of the same class, be made applicable to all of them.

If classification had stopped where the Act of 1874 left it, it would have been well; but it did not. Without the slightest foundation in necessity, the number of classes was soon increased to five, and afterwards to seven; and if the vicious principle on which that was done be recognized by the courts, the number may at any time be further increased until it equals the number of cities in the Commonwealth. The only possible purpose of such classification is evasion of the constitutional limitation; and, as such, it ought to be unhesitatingly condemned.

The fact that the extended classification of 1876, and more especially that of 1887, is unnecessary and therefore unwarranted, is manifest from an inspection of the Acts themselves. With very few and quite unimportant exceptions, the charter powers of the fourth to seventh classes, inclusive, under the latter Act, are precisely similar. There is nothing in either of the points of difference that can possibly be regarded as essential. Aside from the improper consideration that five classes furnish greater facilities for special legislation than one

class would do, there is nothing to prevent the last four classes from being included in the third class established by the Act of 1874, which comprises all cities of more than 10,000 and less than 100,000 population. Their needs are all so similar that no charter power required for either of them would be unnecessary or detrimental to any of the others. The larger cities of such a class—that is, a class embracing all cities over 10,000 and less than 100,000 population—would doubtless require a larger representation in each branch of councils; but that of course would be easily regulated by the adoption of a suitable ward and population basis of representation.

Reference might also be made to several special provisions of the Act of 1887, such as those relating to public schools, taxation and municipal claims, creation and continuance of tax liens, and sales of real estate therefor, etc., but it is unnecessary. In greater or less degree, they all offend against provisions prohibiting special legislation. In addition to that the subject of public schools is not even hinted at in the title of the Act. Moreover, school districts, as quasi corporations belonging to the public school system, have no necessary connection with municipal government. It is expressly required, as we have seen, that "All taxes shall be levied and collected under general laws;" and it is impossible to suggest any valid reason why they should not be thus levied and collected. When the present Constitution was adopted, local and special laws, relating to public schools, assessment and collection of taxes, etc., were in force in some of the cities, and remained unaffected by that instrument; but that fact will not justify the substitution of other local or special laws in their stead. When new legislation is resorted to, it must conform to the requirements of the Constitution.

It has been suggested that such provisions of the classification Acts as are not in harmony with the Constitution may be eliminated without destroying other provisions thereof; but that is no answer to the crowning vice of unnecessary and excessive classification which stands out in bold relief on the face of both Acts, and of which nearly all their provisions are predicated. Those Acts doubtless contain many wise and wholesome provisions; but they are so interwoven with, and dependent on, others that are unconstitutional and void, that neither of the Acts of 1876 or 1887 can be sustained, even in part.

It has also been suggested that the question of necessity for classification and the extent thereof, as well as of what are local or special laws, is a legislative, and not a judicial, question. The answer to that is obvious. The people, in their wisdom, have seen fit, not only to prescribe the form of enacting laws, but also, as to certain subjects, the method of legislation, by ordaining that no local or special law relating to those subjects shall be passed. Whether, in any given case, the Legislature has transcended its power and passed a law in conflict with that limitation is essentially a question of law, and must necessarily be decided by the courts.

To warrant a conclusion that the people, in ordaining such limitations, intended to invest

their law makers with judicial power, and thus make them final arbiters of the validity of their own acts, would require the clearest and most emphatic language to that effect. No such intention is expressed in the Constitution, and none can be inferred from any of its provisions. That those limitations were designed to establish a fixed and permanent rule cannot be doubted; but, if the ultimate application of that rule were to rest solely on the judgment of the body on which it was intended to operate, nothing could be more flexible.

As was well said in *Pell v. Newark*, 40 N. J. L. 71, 80: "No standard could be established by which the law maker could be guided, and what might be rejected at one session as improper might become a law at the next, and thus the rule would fluctuate with the ever changing membership of that body. The validity of an Act would depend not so much upon the fixed rule of the Constitution as upon the liberality or strictness with which successive Legislatures, under the pressure of local influences, might determine to interpret the restraint upon their own action. . . . That the Legislature would act in good faith must be presumed. Purity of motive and a desire to keep within the prescribed limitations must be conceded to its members at all times; but that the people should have deliberately framed and imbedded in their organic law a provision to prohibit special legislation where general laws might be passed, and, at the same time, should have intended to put legislative action beyond review, where there was a clear infraction of the prohibition, is a proposition to which it seems impossible to assent."

No such proposition can be entertained by the courts without abandoning one of the most important branches of jurisdiction committed to them by the fundamental law, viz.: the power to ultimately determine whether or not a given law is local or special, and has been passed in disregard of the constitutional limitation that has been placed upon the power of the Legislature.

It follows that the decree of the court below is correct not only on the ground that, as to the city of Wilkesbarre, the Act of 1887 is not yet operative, but also on the broader ground that the Act is unconstitutional and void.

*Decree affirmed, and appeal dismissed at the costs of appellants.*

INSURANCE COMPANY OF NORTH AMERICA, *Pf. in Err.*,  
v.

FIDELITY TITLE & TRUST CO., Trustee.

(....Pa....)

**Where a person whose property was injured by an explosion of gas brought an action against the gas company for such portion of his loss as was not covered by insurance, and gave a release which was expressly declared not to affect his claim against the insurance companies, such release is no defense to an action on policies of insurance.**

(January 14, 1890.)

2 L. R. A.

**ERROR** to the Common Pleas No. 1 of Allegheny County, to review a judgment for plaintiff in an action upon a policy of fire insurance. *Affirmed.*

The facts are fully stated in the opinion of the court.

*Mr. Isaac S. VanVoorhis* for plaintiff in error.

*Mr. Geo. P. Hamilton* for defendant in error.

*Williams, J.*, delivered the opinion of the court:

This is an action upon a policy of insurance against loss by fire in the usual form. Judgment was entered for want of a sufficient affidavit of defense, and this is the action complained of. The affidavit admits the genuineness of the policy, the fire, the loss as adjusted and the liability of the insurance company under the terms of its policy, but denies the right of the plaintiff to recover, for the following reasons:

(1) The fire resulted from the criminal negligence of the People's Natural Gas Company, which is therefore liable for the loss.

(2) Its own liability to the insured is in the nature of that of a surety, and upon payment of the loss to the plaintiff it has a right to be substituted to its right of action against the gas company.

(3) That it has demanded an assignment of such right of action, which has been refused.

(4) That the insured has settled with the gas company, and released it from liability for the fire, as appears by a copy of the settlement and release attached to the affidavit.

Two questions are thus raised: Is the refusal of the insured to make an assignment of its cause of action against the gas company, on request of the insurer, a defense in this action on the policy? Does the settlement and release attached to the affidavit cover the loss by fire now sued for? Upon the first of these questions it must be remembered that the right to subrogation or substitution does not rest on an express covenant to assign, as in the case of the *Niagara Insurance Company v. Fidelity Title & Trust Company*, decided at the present term.

In the absence of such covenant it rests on equitable principles applicable to the relations which these parties sustain to each other. If it be conceded that the insurer stands in the position of a surety for loss sustained by reason of the wrongful acts of others, and has a right to the remedies which the insured might employ against them, after it has discharged its liability under its policy, still it has no reason for demanding substitution in advance. It is not a liability to pay, but an actual payment to the creditor, which raises the equitable right to be subrogated to his remedies. *Kyner v. Kyner*, 6 Watts, 227; *Hoover v. Epler*, 53 Pa. 522; *Appeal of the Forest Oil Co.* 118 Pa. 138, 10 Cent. Rep. 899.

A demand made by the surety for subrogation, before he has discharged the liability out of which it grows, is without anything to support it; and the creditor may properly refuse it without affecting thereby his right of action against the surety. The refusal of the assignment demanded by the insurer in this

case in advance of payment of the loss is therefore no defense to this action. Nor does the settlement and release of December 30, 1887, appear to cover, and so extinguish, the plaintiff's cause of action. It is plain and explicit in its provisions, and purports to settle and release "all claims and demands of every kind of the said first party arising out of or occasioned by the explosion in the Patterson Block on October 9, 1887, including claims for loss or suspension of rent by the tenants of said first party."

These general expressions are limited and explained in a later paragraph which declares that "It is understood that the foregoing settlement and release do not affect the claim of said first party against insurance companies for loss occasioned by fire, and which claim said first party shall be entitled to receive in addition to, and independently of, the sum paid by said second party."

From the terms of this settlement and release it is evident that the loss by fire was not paid by the gas company, but was expressly excepted from its operations. The injury done by the destructive power of the explosion in shattering walls and windows, in the destruction of articles of furniture, and making rooms temporarily unfit for occupancy, is included, but the loss from fire is excluded from its operations; and the right to recover therefor as an unsatisfied claim, valid and subsisting, against the insurers, is distinctly asserted. If the fire resulted from the explosion, and the explosion was chargeable to the negligence of the gas company, the insured had an election whether to proceed against the gas company because of its negligence, or against the insurance company, on its covenant to indemnify. If the insured had proceeded against the gas company, a recovery against it for the loss by fire would,

when paid, have reimbursed the insured; and its claim being thus satisfied no recovery could have been had against the insurance company. But the insured has chosen to divide its loss into two parts, and to demand one of these not covered by its policies of insurance from the gas company, and the other which is covered, from the insurance company.

The liability of the insurer is clear. The claim is within the letter of its policy. Whether the gas company is liable to reimburse the insurer in an action brought, in the name of the insured, for its use, will depend on whether the fire was the result of criminal negligence of the gas company. This part of the demand of the insured has not been paid by the gas company, nor has it been extinguished by the terms of the release. On the other hand, it has been expressly saved from the operations of the release and asserted to be a valid claim "which said first party shall be entitled to receive in addition to, and independently of, the sum paid by said second party." After having thus asserted the existence of this claim as unpaid or subsisting, the gas company could not be heard, after a recovery against the insurance company, to deny its validity, or to assert its release or extinguishment.

The right of action and demand released were those paid by the gas company. That not paid does not purport to be released, but is asserted to subsist. It has neither been disposed of by the parties nor by the law, but remains for adjudication in the same manner and with the same effect as though the release of December 30, 1887, had not been executed. The court below was right in holding the affidavit to be insufficient, and in directing judgment to be entered for that reason.

*The judgment is therefore affirmed.*

## MARYLAND COURT OF APPEALS.

STATE, USE OF *Mary R. JANNEY et al.,*  
*Appts.,*  
*v.*

*Philip B. HOUSEKEEPER et al.*

(....Md.....)

**1. The degree of care and skill required of physicians is that reasonable degree of care and skill which physicians ordinarily exercise in the treatment of their patients.**

**NOTE.—Negligence, what constitutes.** Negligence in a legal sense is a failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. *Diamond State Iron Co. v. Giles* (Del.) 9 Cent. Rep. 577, 11 Atl. 1; 6; *Jacksonville Street R. Co. v. Chappell*, 21 Fla. 175; *Leligh & W. Coal Co. v. Lear* (Pa.) 8 Cent. Rep. 108, 9 Atl. 267; *Pa. R. Co. v. Peters*, 8 Cent. Rep. 405, 116 Pa. 206, 9 Atl. 517; 19 W. N. C. 418. It is want of ordinary care under the circumstances. *Pa. R. Co. v. Coon*, 2 Cent. Rep. 623, 111 Pa. 490. The term negligence is relative and its application depends upon the situation of the parties and the degree of care and vigilance which circumstances reasonably impose. *Diamond State Iron Co. v. Giles*, *supra*. The classification of negligence as gross, ordinary and slight only indicates that under special circum-

**2. In an action against a physician, based on his lack of care or skill, the burden of proof to show such lack is on the plaintiff.**

**3. If physicians attending a woman deem it necessary for the preservation and prolongation of her life to perform an operation, they are justified in doing so if she consents, whether her husband consents or not.**

**4. A patient who voluntarily submits to a surgical operation is presumed to consent thereto and the burden of proof to show lack of consent is on the party alleging it.**

stances great care and caution are required, or only ordinary care, or only slight care. If the care demanded is not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown. *Diamond State Iron Co. v. Giles*, *supra*. If the occupation or employment be one requiring skill, the failure to exert that needful skill, because it is not possessed or from inattention, is gross negligence. *Au v. N. Y. L. E. & W. R. Co.* 29 Fed. Rep. 72. It is a question of conduct, and not of property. *Mayhew v. Burns*, 1 West. Rep. 577, 103 Ind. 323.

**Physicians and surgeons; liability for neglect of duty.** The law requiring physicians to possess learning and skill is very ancient. *Eastman v. State*, 7 West. Rep. 421, 108 Ind. 278; *Bonham's Case*, 6 Coke, 107; *College of Physicians v. Levett*, 1 Ld. Raym. 472. This rule of the common law has been incorporated into many of the state statutes and these



(January 10, 1890.)

**A PPEAL** by plaintiffs, from a judgment of the Circuit Court for Harford County in favor of defendants in an action to recover damages for death alleged to have resulted from the unskillful performance of a surgical operation. *Affirmed.*

Argued before Alvey, *Ch. J.*, Stone, Robinson, McSherry, Irving, Miller and Yellott, *JJ.*

The facts are sufficiently stated in the opinion.

**Messrs. Geo. L. Van Bibber, William Young, W. T. Warburton and Albert Constable** for appellants.

**Messrs. Geo. Y. Maynardier, John W. Falls, William S. Evans and C. C. Crothers** for appellees.

**Yellott, J.**, delivered the opinion of the court:

An action for damages was brought against the appellees, who are physicians residing in Cecil County. It is alleged in the declaration that they caused the death of one Matilda Janney by unskillfully or wrongfully performing a surgical operation. The action was brought in the name of the State for the benefit of the appellants, one of whom was her husband, and the others were the children of the deceased.

Under the provisions of article 67 of the Maryland Code, if the death is caused by the wrongful act, neglect or default of the defendant a suit may be instituted for the benefit of the husband, wife, parent or child of the deceased.

statutes have always been upheld. *Eastman v. State*, 7 West. Rep. 421, 109 Ind. 278; *State v. State Medical Examining Board*, 32 Minn. 324; *Logan v. State*, 5 Tex. App. 306; *Antle v. State*, 6 Tex. App. 23; *Ex parte Spinney*, 10 Nev. 323; *Hewitt v. Charier*, 16 Pick. 353; *State v. Dent*, 25 W. Va. 1; *Sheldon v. Clark*, 1 Johns. 513; *Alcott v. Barber*, 1 Wend. 529; *Timmerman v. Morrison*, 14 Johns. 309; *Thompson v. Staats*, 15 Wend. 385; *Bailey v. Mogg*, 4 Denio, 60; *Finch v. Gridley*, 25 Wend. 469; *Musser v. Chase*, 20 Ohio St. 577; *Wert v. Clutter*, 37 Ohio St. 347; *Bibber v. Simpson*, 59 Maine, 181; *Thompson v. Hazen*, 25 Maine, 104; *State v. Gregory*, 83 Mo. 123. The acquisition of professional learning and skill being required by law it is the duty of a physician and surgeon to acquire the same, and they are liable for injuries caused by the failure of duty to exercise such learning and skill; and for neglect of such duty privity is not essential to the maintenance of an action of tort; therefore, *Campbell v. Portland Sugar Co.*, 62 Maine, 552. So where a surgeon unskillfully treats a patient he is liable in damages to the patient, even when the father or friend of the patient was the contractor. *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v. Stegall*, 5 Bing. N. C. 733; *Thomas v. Winchester*, 6 N. Y. 397. So where a chemist compounded a hair wash and knowingly sold it to a husband for the use of his wife, who was injured by its use, the wife sustained an action of tort against the chemist for the injury, on the ground of defendant's breach of duty. *George v. Skivington*, L. R. 5 Exch. 1. See *Nelson v. Harrington*, 1 L. R. A. 719 and note.

**Care and skill required in treatment of patient.** Doctors are only required to treat their patients with adequate care and skill. *Reber v. Herring*, 7 Cent. Rep. 841, 115 Pa. 599, 8 Atl. 830, 19 W. N. C. 293. A physician is responsible only for the exercise of such care and skill as is exercised by the average members of his profession. *Landon v. Humphrey*, 9 Conn. 209; *Ritchey v. West*, 23 Ill. 385; *Barnes v. Means*, 82 Ill. 379; *McNevin v. Lowe*, 40 Ill. 210; *Long v. Morrison*, 14 Ind. 595; *Holtzman v. Hoy*, 19 Bradw. 459; *Smothers v. Hanks*, 34 Iowa, 286; *Branner v. Stormont*, 9 Kan. 51; *Tefft v. Wilcox*, 6 Kan. 46; *Simonds v. Henry*, 39 Maine, 155; *Patten v. Wiggin*, 61 Maine, 594; *Howard v. Grover*, 28 Maine, 97; *Bellinger v. Craigue*, 31 Barb. 534; *Carpenter v. Blake*, 60 2 L. R. A.

The evidence shows that the deceased had been afflicted by the formation of a lump in her right breast. It was supposed at first to be a tumor, but afterwards was ascertained to be a cancer. The defendant, Housekeeper, a regular physician, was consulted and advised a surgical operation. A day for the performance of the operation was appointed, and the two defendants and another physician were present and performed the operation by cutting off the entire right breast. The operation was performed about the first of June, and the death occurred on the fifth of December following; and is not attributed, with any degree of certainty to the effects of the surgical operation. Some portions of the evidence tend to prove that the wound caused by the surgical instruments was entirely healed, and that death was produced by tubercular meningitis. In the conflict of testimony this was a fact to be determined by the jury.

The husband of the deceased, who is one of the equitable plaintiffs, relies upon the fact that although he expressed a willingness that there should be an operation for a tumor, he did not consent to the excision of a cancer. He says that he told Dr. Housekeeper that if the formation in the breast was a cancer, he objected to its removal. His own testimony shows that he assisted the physicians in preparing to perform the operation, and though not in the room where it was performed, was near at hand. He says he supposed that the medical men were operating for a tumor, and that he would not have consented to an operation for a cancer. There is evidence from which a jury might infer

*Barb. 488; O'Hara v. Wells*, 14 Neb. 403; *Gallaher v. Thompson*, Wright, 403; *Geiselman v. Scott*, 25 Ohio St. 88; *Heath v. Glisan*, 3 Oreg. 64; *McCandless v. McWha*, 22 Pa. 261; *Potter v. Warner*, 91 Pa. 362; *Wood v. Clapp*, 4 Sneed, 65; *Graham v. Gautier*, 21 Tex. 111; *Gates v. Fleischer*, 67 Wis. 504. He is not bound to the exercise of the highest degree of skill or the skill possessed by eminent specialists. *Small v. Howard*, 123 Mass. 131; *Almond v. Nugent*, 34 Iowa, 300; *Lanphier v. Phipps*, 5 Car. & P. 475; *Shilcock v. Passman*, 7 Car. & P. 289; *Seare v. Prentice*, 8 East, 348; *Slater v. Baker*, 2 Wils. 359. A physician or surgeon is bound to bring to the aid and relief of his patients such skill as is ordinarily possessed and used by physicians and surgeons in the vicinity or locality in which he resides, having regard to the advanced state of the profession at the time. *Gates v. Fleischer*, 67 Wis. 504; *Utey v. Burns*, 70 Ill. 162; *Alder v. Buckley*, 1 Swan, 69; *Haire v. Reese*, 7 Phila. 138.

**Degree of care and skill required.** The degree of care and skill which he is bound to possess and exercise must be at least an average of those exercised by members of the same school. *Bowman v. Woods*, 1 Greene (Iowa) 441; *Patten v. Wiggin*, 51 Maine, 594; *White v. Carroll*, 42 N. Y. 161; *Corsi v. Maretzek*, 4 E. D. Smith, 1; *Williams v. Poppleton*, 3 Oreg. 139. And this must be with regard to the progress made in his department of medicine at the time of his treatment of the patient. *Hitchcock v. Burgett*, 38 Mich. 501; *Carpenter v. Blake*, 60 Barb. 488; *Landon v. Humphrey*, 9 Conn. 209. Practitioners are bound to be up to the improvements of the day. *McCandless v. McWha*, 22 Pa. 261. They are bound to use their best judgment both as to the nature of the disease and the proper mode of its treatment, but are in general not liable for errors in judgment where they exercise reasonable care and diligence, with ordinary skill. *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 2 S. W. Rep. 703; *Mallen v. Boynton*, 132 Mass. 443; *Williams v. Gilman*, 71 Maine, 21; *Vanhooser v. Berghoff*, 8 West. Rep. 205, 90 Mo. 487; *Heath v. Glisan*, 3 Oreg. 64. Where a person relies upon his own judgment and not upon that of his physician, and insists upon performance of an operation, the physician is not responsible for the consequences. *Gramm v. Boener*, 56 Ind. 497; *Hancke v. Hooper*, 7 Car. & P. 81.



that the patient knew that the formation in her breast was a cancer. When the doctors came to the house she had already prepared herself to undergo the operation. If she consented to the operation the doctors were justified in performing it, if, after consultation, they deemed it necessary for the preservation and prolongation of the patient's life.

Surely the law does not authorize the husband to say to his wife: "You shall die of the cancer; you cannot be cured; and a surgical operation, affording only temporary relief, will result in useless expense." The husband had no power to withhold from his wife the medical assistance which her case might require. *Harris v. Lee*, 1 P. Wms. 482; *Mayhew v. Thayer*, 8 Gray, 172.

As was said by the Supreme Court of Michigan in the recent case of *Carstens v. Hanselman*, 1 Am. St. Rep. 607 (S. C. 61 Mich. 426): "It would be a cruel rule for her, if she cannot, in his absence, at least, or in his presence if he does not himself provide for her, make a binding agreement for any necessities, whether articles to be purchased or professional help, without becoming a public charge. It is not to be expected that physicians and surgeons will always feel bound to render gratuitous treatment to injured persons; and when the occasion is pressing it would be unreasonable to delay until an absent husband is communicated with to learn whether he consents or refuses to assume her contracts. Time will not allow minute inquiries, and humanity will not prompt them. It seems to us that no sensible line can be drawn between contracts for food and clothing and contracts for medical aid."

The consent of the wife, not that of the husband, was necessary. The professional men whom she had called in and consulted, being possessed of skill and scientific knowledge, were the proper persons to determine what ought to be done. They could not, of course, compel her to submit to an operation; but if she voluntarily submitted to its performance her consent will be presumed, unless she was the victim of a false and fraudulent misrepresentation, which is a material fact to be established by proof. The court below was therefore right in rejecting the first and third prayers of the plaintiffs, which place the burden of proof in regard to consent on the defendants. If the plaintiff alleges that there was no consent, he must establish his affirmation by proof. The party who allows a surgical operation to be

performed is presumed to have employed the surgeon for that particular purpose. *Gladwell v. Steggall*, 5 Bing. N. C. 783.

It was the duty of the professional men to exercise ordinary care and skill; and this being a duty imposed by law, it will be presumed that the operation was carefully and skillfully performed, in the absence of proof to the contrary. As all persons are presumed to have duly performed any duty imposed on them, negligence cannot be presumed, but must be affirmatively proved. *Best*, Presump. 68; *Jacksonville Street R. Co. v. Chappell*, 21 Fla. 175.

This principle is especially applicable in suits against physicians and surgeons for injuries sustained by reason of alleged unskillful and careless treatment. The burden of proof is on the plaintiff to show a want of proper knowledge and skill. *Leighton v. Sargent*, 81 N. H. 119; *Baird v. Morford*, 29 Iowa, 531.

The court below committed no error in determining that it was incumbent on the plaintiff to prove affirmatively that the operation was performed without the consent of the patient, and also that her death was caused by unskillful and careless treatment of the physicians. Nor did the court commit any error in granting the defendants' second prayer, which enunciates the proposition that if death was caused by tubercular meningitis or other disease not produced by the operation, the defendants are not liable.

The defendants' fourth prayer is also correct and was properly granted. In it the jury are told that even if the disease resulting in death was caused by the operation, the defendants are not liable if they performed said operation with the patient's consent, in a careful and skillful manner, and under the belief that said operation was proper to be performed.

In the defendants' third prayer the jury are told the degree of care and skill required is that reasonable degree of care and skill which physicians and surgeons ordinarily exercise in the treatment of their patients, and that the burden of proof is on the plaintiffs to establish the want of such skill and care in the performance of the operation and attendance on the deceased while under treatment. There was no error in granting this instruction.

It is proper to add that there was no evidence in the cause to sustain the plaintiff's case as stated in the first count of his declaration.

*Finding no error in any of the rulings of the court below, its judgment must be affirmed.*

#### ALABAMA SUPREME COURT.

John F. HARMON  
v.  
LEHMAN, Durr & Co.  
LEHMAN, Durr & Co.  
v.  
John F. HARMON.

(....Ala....)

1. Where a man gives his note jointly with his sons, who sign as a firm and as individuals to 3 L. R. A.

raise money for the use of the firm, and he executes a mortgage to secure a compliance with the terms of the note, all the parties are bound as principals to the lender, although, as between the borrowers, he may be merely a surety for his sons.

2. A note given for the repayment of money borrowed, with interest, stipulating in addition that, for every \$10 so advanced the borrower bound himself to deliver to the lender for storage and sale on commission one bale of cotton, in default of which he should pay as liquidated damages storage for one month, and commissions for selling, is not usurious if the advance is made

by a warehouseman or commission merchant, with a reasonable expectation that the borrower can perform the stipulation as to delivering the cotton; but if there is no reasonable expectation of his being able to deliver it, the contract is usurious.

3. A lender of money on an agreement stipulating, not only for repayment, but for the delivery to him of cotton to be sold on commission, cannot charge a larger price for the service in selling and storing the cotton than he charges for the same service where no money is loaned. If he does, the contract is usurious.

4. If a contract is usurious no custom can legalize it.

(December 18, 1888.)

CROSS appeals from a judgment of the Chancery Court of Montgomery County, refusing to enjoin the sale of lands under a mortgage, and decreeing its foreclosure. *Reversed.*

The bill was filed by Harmon against Lehman, Durr & Co., to enjoin the sale of lands under a mortgage, which the complainant and his wife had executed to the defendants, and for the redemption of the lands, and for an account. The bill contained a charge of usury. The answer denied the charge of usury, and defendants filed a cross-bill asking for a foreclosure of the mortgage.

The facts are fully stated in the following opinion, delivered in the court below by Chancellor COLKMAN:

The case made by the bill is that Harmon Bros. borrowed money from Lehman, Durr & Co., to be used in the purchase of cotton, and gave their father John F. Harmon, as security, who signed the note, and executed a mortgage upon certain lands belonging to him, which are described in the bill, with the understanding that the money was to be used in the purchase of cotton, which, when sold, was to be applied to the payment of the mortgage debt. The bill further alleges that the loan was usurious.

The bill alleges the purchase of cotton with the money, and asserts that, if the proceeds had been applied according to the agreement, the mortgage debt would be paid; and it concludes with an offer to pay any balance that might remain unpaid.

Respondents admit that Harmon Bros. desired to borrow money, and their refusal to loan without security; also the execution of the note and mortgage, and the loan of \$5,000; but they deny that the loan was to Harmon Bros., and deny that it was a part of their original agreement that the money was to be used in the purchase of cotton alone, or that the proceeds of the cotton purchased with the money was to be applied to the payment of the debt secured by the mortgage. They also deny any usurious intention in connection with the loan, and ask a foreclosure of the mortgage. This short statement presents the main points for consideration.

Taking detached portions of the complainant's testimony, it may be that his proof sustains the case made by the bill; but, considering his evidence as a whole, it is far from satisfying the court that he is entitled to all the relief asked for in the bill. In complainant's deposition T. B. Harmon uses the following language:

"We stated to him [meaning John F. Har-

mon, their father] that we wanted to make arrangements for him to borrow some money, and for him to be responsible, or bind his lands for that amount, and let us have some money to buy some cotton; and that when we sold the cotton we would take up the mortgage. Our father said that was all right."

Is there any reason why other portions of complainant's testimony should have more weight than this simple statement, which is so consistent with the entire transaction and proceedings from that time on, and with John F. Harmon's own conduct? He evidently understood that the money was borrowed in his name, or else why give the check to Harmon Brothers? If he understood that he was simply a surety, and Harmon Brothers the principals, by what process of reasoning could he come to the conclusion that the money was placed to his credit—a mere surety—by Lehman, Durr & Co., instead of to the credit of the principals?

It may be said that equity looks at the real transaction of the parties as it was, and not as it appears to be. That may be true; but equity cannot prescribe the terms and securities upon which a man may lend his money, provided those terms do not contravene some statute or public policy; nor will a court of equity change those terms. As between John F. Harmon and his sons, he doubtless borrowed the money for them. He was willing to trust them. But as between the complainant, Harmon Brothers, and Lehman, Durr & Co., the latter evidently has the right to prescribe the terms of the loan. The note and mortgage bear date January 26, 1886. T. B. Harmon testifies that it was not signed until several days after this date, but was signed before the money was drawn by them. Why do we find them on the third of February using this money for other purposes than to buy cotton, if it was to be used only in the purchase of cotton?

Considering the whole evidence of the complainant together, it fails to impress the court favorably. It must not be understood that the conversations between John F. Harmon and Harmon Brothers, in the absence of Lehman, Durr & Co., or some member or agent of the firm, are considered by the court as legal evidence, or as binding upon them, unless communicated, and so as to have entered into the making the contract for the loan. Without pressing upon the question whether Harmon Brothers were the agents of Lehman, Durr & Co. in making the trade with the complainant, as insisted by him, we simply state that one who deals with an agent does so at his peril; and the proof does not sustain the claim that Harmon Brothers were authorized by respondents to make said contract.

When the complainant's evidence is considered in connection with respondents' testimony, we cannot perceive any reason why complainant should have the proceeds of the cotton bought and paid for with the borrowed money applied to the mortgage debt. The statement by Harmon Brothers that the respondents were directed to sell the seventy-seven bales of cotton, and so apply the proceeds, is not sustained by the evidence; and the application made by them, as shown by the stated account rendered, to which there was no dissent, must be conclusive against Harmon Brothers. We think

the complainant utterly fails to sustain this branch of his case. If there was any money in the hands of respondents, belonging to Harmon Brothers, or if the evidence established the fact that Lehman, Durr & Co. were properly chargeable with cotton, or the proceeds of cotton, for which they have not accounted, after the payment of any balance that might be due them from Harmon Brothers, such money should be credited on the debt secured by the mortgage of January 26, 1886.

Let us now consider the question of usury: if, upon consideration of all the circumstances, it should appear that the language used or the stipulations made "were a mere device to evade the statute against usury, to conceal the real intent, the mere form will not relieve the contract from the consequences of usury." *Swilley v. Lyon*, 18 Ala. 552, per Dargan, Ch. J.: "The intent is the test. Was it intended to compensate for risk, trouble or expense incurred at the request of the debtor?—or was it intended to give the creditor additional profit for the loan of money?" Was it reasonably expected that the 500 bales of cotton could be delivered by the Harmons? If not, Lehman, Durr & Co. could as easily have contracted for the payment of so much money as interest, as for the storage and commissions. *Uhlfelder v. Carter*, 64 Ala. 582.

Did the respondents make the heavy outlay of \$25,000 or \$30,000, annually, in running their business as warehousemen, and in order to meet this expense, and to promote their interest as commission merchants, loan money and require a shipment of so much as ten bales on the \$100 loaned?

The witness Roman states and repeats that this expense is estimated and provided for after the money is loaned. He says: "We regulate the fall business by the advances made in the spring. We engage such force as we think necessary from the amount of money advanced in the spring. The arrangements are made by May the first, for we can tell by that time how much cotton we can handle."

We do not think that a contract made in the spring, which is at the time usurious, can be purged of the taint of usury, because respondents incur large expense to enable them to carry out their part of the usurious contract. They contract to loan a man \$100, for which he is to pay them 8 per cent interest, and, in addition thereto, make him agree to ship them bales of cotton worth \$400, or, in default thereof, pay as liquidated damages an amount equal to fifty cents per bale storage, and 14 per cent commissions; amounting to 11 per cent additional to the legal rate; total interest, 19 per cent.

A shipment of three bales would pay the interest on the \$100, yet the borrower is required to ship seven more bales; storage on the extra seven bales, \$8.50; commissions, \$4.20; total extra payments, \$7.70—or nearly double legal interest. This is usury, unless it be held that the expense incurred to serve the business of warehousemen and commission merchants frees the contract from usury. Can this be done, when the facts are as stated by Mr. Roman? "We regulate the expense after the money is loaned."

But, under the facts of this case, could Leh-

man, Durr & Co. have reasonably expected the shipment of 500 bales of cotton from the Harmons, including the cotton to be made by John F. Harmon? They did business with John F. Harmon & Son in 1884, and with all of them in 1885. They had very accurate information as to the means of these persons. In January, 1886, Harmon Brothers were not able to meet their past liabilities, and Lehman, Durr & Co. refused to lend them money, or to do business longer without security.

Respondents were reasonably advised that from thirty to fifty bales was the extent of John F. Harmon's ability to ship. From what source was the 500 bales to come, which, at \$40 per bale, required an outlay of \$20,000?

Respondents say that Harmon Brothers were to buy out some merchant or business at Union Springs. But how were they to buy out this large business? They were not then able to pay their indebtedness to Lehman, Durr & Co. Their father was to mortgage his property to obtain a loan of \$5,000. As prudent men, Lehman, Durr & Co. reasonably knew that the cotton (500 bales) would not be shipped unless they furnished the money to buy it with. No one else would loan them the money, for they were under mortgage, and in debt to Lehman, Durr & Co. The commissions to be paid are in excess of the usual rate of commissions charged in Montgomery.

Whatever view we take of the transaction, we are of opinion that the contract was usurious, which required commissions and storage of cotton not shipped.

The greatest difficulty is in determining the status of the seventeen bales sent to respondents by John F. Harmon on his wagons. This cotton was included in the mortgage, and the law would apply its proceeds to the credit of the mortgage debt, unless John F. Harmon has by some act waived his right to have it so applied. Mr. Durr was questioned as to this cotton.

Q. The negro told you, didn't he, that he came from John F. Harmon's plantation?

A. Oh yes; he carried the cotton to the warehouse.

Q. Didn't he say he came from J. F. Harmon's plantation?

A. Well, he brought cotton from Mr. Harmon's, is about the way he stated it.

Mr. Gunter says that all the cotton was shipped in the name of Harmon Brothers, and for these seventeen bales refers to Exhibit D; but this exhibit evidently refers to other cotton. The letter of October 8 states that the seventeen bales of October 6 were shipped by railroad, for which Harmon Brothers held bill of lading. The other cottons mentioned in Exhibit D do not satisfy us that they were the cottons hauled in John F. Harmon's wagons. The respondents' testimony is not satisfactory as to these seventeen bales hauled from John F. Harmon's plantation, and we presume that they had reasonable knowledge that they came from his plantation. Has J. F. Harmon lost the right to have this cotton applied to the mortgage debt? Respondents say that it was received in the name of Harmon Brothers. Complainant says, in his deposition, that he sent Lehman, Durr & Co. twenty-four bales of cotton. "Sent a part by wagons, and my son

sent a part by railway from Union Springs. I sent seventeen bales by wagon, for which they sent me back bills, or receipts, marked as 'Exhibits O, P, Q, R.' These exhibits are dated September 30, October 13, November 5, and November 10, extending over a term of five or six weeks. All of them are for cotton on account of Harmon Brothers, and none of them on account of J. F. Harmon.

Mr. J. F. Harmon testifies that some of his cotton had been shipped from Union Springs by his son. Why does he hold these receipts so long, and make no objection? and why permit his son to ship a part of the cotton? He may have been mistaken as to the financial condition of his sons. He may have had the utmost confidence in their financial ability and integrity, and supposed that they would see the mortgage debt paid. We cannot tell. But, having consented that Harmon Brothers might use the cotton for their own benefit, we are of opinion that Lehman, Durr & Co. should not suffer by reason of the fact that the cotton was included in the mortgage. If, however, Lehman, Durr & Co. have extended no further credit, or have not advanced any money upon this cotton shipped and received in the name of Harmon Brothers, then we see no reason why the cotton raised on the plantation of J. F. Harmon should not be applied to the mortgage debt.

J. F. Harmon identified the time of sending the seventeen bales by the Exhibits O, P, Q, R. Exhibit R is a receipt for five bales, and is dated September 30, 1886; Exhibit P is for two bales, and dated October 12; Exhibit Q is for five bales, and dated November 5; and Exhibit O is for five bales, and dated November 10.

By reference to the stated account of Lehman, Durr & Co., it will be seen that the least debit of Harmon Brothers was for the payment of their check for \$700 in favor of the Bullock County Bank, and dated October 9, 1886. Harmon Brothers drew no money, and received no credit from Lehman, Durr & Co., because of the two bales sent to them October 12; five bales November 1; five bales November 5; and five bales November 10—identified by Patterson, Garland and Covington. As to these twelve bales sent by wagons, Lehman, Durr & Co. have been no more damaged or injured by the receipt of this cotton, though sent in the name of Harmon Brothers, than if the same had been sent in expressly in the name of J. F. Harmon, with the directions to be applied to the mortgage debt. This being true, is there any equitable reason why the proceeds of the twelve bales should not be so applied? As for the seven bales shipped by his son from Union Springs, we have no dates given us, and cannot say, but judge from the account, that this shipment preceded the cotton sent by the wagons.

The mortgage provides for the payment of reasonable attorneys' fees incurred in the collection by foreclosure of the mortgage or otherwise, and we regard this as a proper charge. There is a written agreement attached to the answer, and signed by complainant's solicitors, providing that respondents may be granted such relief as the facts of the case show they are entitled to, to the same extent as if set up in a cross bill, and relief especially prayed. This

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would be allowable without such agreement. *McGuire v. Van Pelt*, 55 Ala. 845.

The decree declared that the defendants were entitled to a foreclosure of the mortgage for the amount of the note and interest, and to reasonable attorneys' fees for services rendered in the cause; disallowed their claim for storage and commissions on cotton not delivered, and charged them with the value of the twelve bales of cotton particularly mentioned in that opinion; and ordered a statement of the accounts by the register, and sale of the land by him, if the amount found due on the accounting was not paid within forty days.

From this decree the complainant appealed and assigned as error: (1) "that the chancellor did not allow him all he claimed in his bill; (2) that the chancellor did not allow him credit for all the cotton raised on his plantation, and delivered to Lehman, Durr & Co.; (3) that the court allowed the respondents attorneys' fees for foreclosing the mortgage." Cross assignments of error were also made by Lehman, Durr & Co., because the chancellor held the contract usurious, and refused to allow them storage and commissions on the cotton not delivered, as liquidated damages.

*Messrs. Arrington & Graham and Watts & Sons* for complainant.

*Messrs. Tompkins, London & Troy and Brickell, Semple & Gunter* for defendants.

*Somerville, J.*, delivered the opinion of the court:

We have studied the record and the able opinion of the chancellor in this case with great care and interest, and the result is that we approve and adopt the chancellor's views in every respect save those hereafter noticed. We direct that his opinion *in extenso* be published in the report of our decision.

Both the testimony and the arguments of counsel tend to show that the inquiry whether John F. Harmon, or Harmon Brothers, were principal in the debt to Lehman, Durr & Co. was deemed important in the preparation of this cause. We confess we are not able to perceive its importance. But if we concede its materiality, we are not able to discover its bearing on the case before us. It is manifest that the money raised was intended for and used by Harmon Brothers, sons of John F. Harmon. It is equally manifest that Lehman, Durr & Co. refused to advance to Harmon Brothers on terms less binding than those demanded and acceded to.

The terms were that John F. Harmon should give his note conjointly with Harmon Brothers, they signing as a firm and as individuals, and that the former, J. F. Harmon, should execute the mortgage to secure a compliance with the terms of the note. The terms were acceded to, and the money obtained in the name of John F. Harmon, and immediately checked out by him in favor of Harmon Brothers.

The plain import of all this is that, the requirements of Lehman, Durr & Co. being acceded to, the money was advanced to John F. Harmon as principal debtor, on the condition, and only on the condition, that all the other sureties and securities should be bound for its

repayment. Lending one's name by acceptance or otherwise, with a consequent pledge of primary liability, without consideration or inducement other than a spirit of accommodation, is not infrequent in commercial transactions.

In this case all the parties were bound as principals for the payment of the money to Lehman, Durr & Co. As between themselves, Harmon Brothers may have been bound to indemnify John F. Harmon for any loss he suffered. And while, as a crop lien, under the statute once of force, it is possible the facts we have been considering might exert some influence (on this question we intimate no opinion), considered as a mortgage, no question can arise growing out of the relations the parties sustain to each other under the facts disclosed in this record.

Lehman, Durr & Co. were warehousemen and commission merchants for the storage and sale of cotton on commission. As such they controlled a considerable amount of money, which it was their custom to advance to merchants and planters, as a means of increasing their business. Such, it was shown, was the general habit and custom of warehousemen and commission merchants throughout the country. Their plan was as follows: at the opening of the agricultural season they advanced to their customers a given sum of money, taking their notes for repayment, with interest from date, the payment to be made on some specified day during the next coming cotton season.

The contracts contained the following additional stipulations: that for every \$10 so advanced, the merchant or planter, as the case might be, bound himself to deliver to them for storage and sale on commission one bale of cotton. And to the extent he might fail to deliver the number of bales stipulated, he bound himself to pay to them, as liquidated damages, storage for one month, and commissions for selling, the same as if the cotton had been received, stored one month, and sold by them. These additional stipulations, it is contended, are in their nature usurious; and it is further specially contended that it was and is usurious under the facts of this case. The chancellor disallowed these charges, holding that they were usurious. In this State, following the rulings of other courts, we have held that such contracts are not necessarily and *per se* usurious. If the person by whom the money is advanced is not engaged in the warehouse or commission business, and thus has no occupation which can be promoted by a compliance with its terms, such stipulation is but a cover for unlawful interest. *Uhlfelder v. Carter*, 64 Ala. 537.

So, if the advance be made by a warehouseman or commission merchant, and there is no reasonable expectation or ground for believing that the customer can perform the stipulation, this furnishes the requisite evidence that compliance was not expected, and renders the contract usurious. On the other hand, if in entering into or obtaining such promise there is a reasonable expectation or ground for believing that such contract can be complied with, this relieves it of all stain and imputation of usury, and the stipulation, if made to a warehouseman or commission merchant, is binding. *Dozier v.*

*Mitchell*, 65 Ala. 511; *Woolsey v. Jones*, 84 Ala. 88; *Pollard v. Baylors*, 6 Munf. 433; *Cockle v. Flack*, 98 U. S. 844 [28 L. ed. 949]; *Matthews v. Coe*, 70 N. Y. 239.

The testimony in this case is very clear that there was no ground for believing that John F. Harmon, the mortgagor, would be able to deliver the 500 bales of cotton the contract bound him to deliver. He could have had no reasonable expectation of being able to deliver more than one tenth of that quantity. But Harmon Brothers, his sons, and for whose accommodation and use the money was obtained, were shown to be merchants engaged in business; and the testimony shows that they, in negotiating the advance, represented that they, in their business, would handle 800 bales of cotton; and whatever quantity their father failed to deliver they would deliver, so as to complete the 500 bales. This was sufficient ground for the reasonable expectation that the cotton would be delivered, and relieves the transaction of all imputation of usury on this account.

The stipulation in the mortgage to provide suitable storage, etc., is not an independent consideration, to uphold a promise otherwise illegal, or without consideration. Such service is incident to all lines of business or employment, and on its face indicates nothing which the relation itself does not impose as a duty. *Pfeiffer v. Adler*, 37 N. Y. 164; 1 Wait, Act. & Def. 95.

There is one phase of this contract, however, which, in our judgment, stamps the transaction as usurious. The evidence shows that the usual charge in the city of Montgomery for selling consigned cotton was fifty cents per bale where no money was advanced by the consignee. The price stipulated for in the present contract is a commission of 14 per cent on the proceeds of sale, which will aggregate from sixty-seven to seventy-five cents per bale, or from seventeen to twenty-five cents more than their usual charge, estimating the price of cotton at from nine to ten cents per pound, as it was shown to be by the testimony. It is sought to legalize this charge, which is from 84 to 50 per cent more than the price of fifty cents, by showing that it was the customary price charged by commission merchants for selling cotton where they advanced money. The service to be performed in each contingency is precisely the same—the sale of the cotton. It is no more trouble to sell when money has been loaned, than when no money has been loaned. The thing to be charged for is the service rendered in making sale of the article consigned. The additional charge, therefore, from 80 odd to 50 per cent for the service rendered cannot rest on consideration of the service. There is nothing to support it but the loan of the money, for which lawful interest is also charged.

Usury is the "taking more for the use of money than the law allows." *Woolsey v. Jones*, 84 Ala. 88, 91. If the contract is usurious, no custom can legalize it, because no custom is good which is contrary to law.

The lender, as we have often held, is not prohibited from charging an extra and reasonable amount for some incidental service, expense or risk, additional to the lawful interest, other than for the loan of money. He may

charge the usual storage and reasonable commission for selling consigned goods. *Dozier v. Mitchell*, 65 Ala. 511; *Cockle v. Flack*, 98 U. S. 844 [28 L. ed. 949].

He may charge reasonable commission, if engaged in the business of a commission merchant, for accepting bills of a customer, and providing funds for meeting such bills. This is a compensation for the service rendered in lending his credit and raising money to meet the debt of another, as in *Brown v. Harrison*, 17 Ala. 774, and cases of that class; *Trotter v. Curtis*, 19 Johns. 160, 10 Am. Dec. 211.

It is not the case of charging an additional bonus, over and above lawful interest, for the mere use of the money.

We conceive the law to be that, where the borrower of money agrees absolutely to pay commission for advancing money on goods consigned, in addition to lawful interest for the money, and based on no incidental service to be rendered by the consignee, the so called "commission" is none the less for the use of the money because called by another name than interest. To be sustained as lawful and rescue the contract from the taint of usury, we repeat, this additional charge must be shown to be based on some service rendered, some trouble encountered, or inconvenience sustained, or risk assumed by the lender, other than the advance of money. *Stark v. Sperry*, 6 Lea, 411, 40 Am. Rep. 47; *Davis v. Garr*, 6 N. Y. 124, 55 Am. Dec. 895, note and cases cited; *Fanning v. Dunham*, 5 Johns. Ch. 122, 9 Am. Dec. 283.

The charge, moreover, must be fair and reasonable, and the courts will scrutinize it with care, if suspicious, with the view of probing its true character. If it purports to be a charge

for some incidental service to be rendered by the lender to the borrower, it must be a reasonable charge, adequate to the service, not extravagant or excessive, at the risk of being pronounced a mere cover for usury.

The appellees, Lehman, Durr & Co., were entitled to charge lawful interest for their money loaned. They could stipulate for the *bona fide* consignment of cotton by the borrower, and he could lawfully agree to pay reasonable storage on such cotton, in view of the fact that the consignees were warehousemen engaged in the cotton business. They could also charge the usual and reasonable price for selling cotton, such as was customary among commission merchants in Montgomery. But they could not charge one price for this service where no money was loaned, and a larger price for the same service where money was loaned. The necessary inference is that the excess of charge was not for the service, but as a bonus for the use of the money additional to lawful interest.

From the principles declared above it necessarily follows that the Harmons, or J. F. Harmon, can take nothing by their assignments of error, and the same are disallowed. In the case of *Lehman, Durr & Co. v. Harmon*, the chancellor erred in disallowing storage and customary commissions of fifty cents per bale for the cotton promised to be delivered under the contract. To this extent the decree of reference is altered and amended; and the register will take and state an account between the parties, and report the same to the Chancellor with all convenient speed. All other questions are reserved for decision by the Chancellor.

*Reversed.*

## KENTUCKY COURT OF APPEALS.

John BOTTS *et al.*, *Appts.*,

*v.*  
SIMPSONVILLE & BUCK CREEK TURN-  
PIKE CO. *et al.*

(....Ky....)

1. In an application for an injunction against the consolidation of a corporation with another, an answer alleging that the consolidation had been made and ratified by the stockholders, if not denied will not be construed as meaning that the stockholders applying for the injunction assented thereto, where

the Act under which the consolidation was attempted, allowed a consolidation by a majority vote.

2. A stockholder may, without consulting the directors, bring an action to enjoin them from unlawfully transferring the stock to a consolidated corporation.

3. A clause in the charter of a turnpike company that it, "in matters not expressed in the charter, shall have the rights and privileges granted to the most favored turnpike companies," will not authorize a consolidation against the consent of the stockholders.

NOTE.—Consolidation of corporations. A change so fundamental as a union of several corporations under one head, constituting a body with new relations, rights and duties, cannot be made from any implied authority, but only by the express sanction of law. *Pearce v. Madison & L. R. Co.* 62 U. S. 21 How. 441 (16 L. ed. 184); *Fisher v. Evansville & C. R. Co.* 7 Ind. 407; *Clearwater v. Meredith*, 68 U. S. 1 Wall. 25 (17 L. ed. 604); *Aspinwall v. Ohio & M. R. Co.* 20 Ind. 492; 1 *Waterman, Corp.* 562. The consolidation may be authorized either by the charters of the corporations, by general laws, by an Act passed subsequent to the incorporation of the several companies, or by legislative recognition and ratification of the proceeding. *Bishop v. Brainard*, 28 Conn. 289; *Mead v. N. Y. etc. R. Co.* 45 Conn. 169; *Mitchell v. Deeds*, 48 Ill. 416; *McAuley v. Columbus etc. R. Co.* 89 Ill. 848. See *New Orleans Gaslight Co. v. La. Light & Heat Co.* 116 U. S. 650 (29 L. ed. 516). Where a statute gives a corporation power to form a consolidation with any other, whatever

other corporation it selects for a union, and finds willing to join it, may unite with it although not named in the statute. *Re Prospect Park etc. R. Co.* 67 N. Y. 371. The provisions of the Act authorizing the consolidation must be carefully observed in respect to the steps required to be taken for the accomplishment of the result. *Mansfield etc. R. Co. v. Drinker*, 30 Mich. 124; *Peninsular R. Co. v. Tharp*, 28 Mich. 509; *Tuttle v. Mich. Air Line R. Co.* 35 Mich. 247; 1 *Waterman, Corp.* 562.

*Injunction; suit to restrain consolidation.* To entitle a party to relief by injunction against illegal or fraudulent proceedings of corporate officers, he must be a stockholder of the corporation. *Boehling Sons' Co. v. First Nat. Bank*, 30 Fed. Rep. 744. The remedy by injunction extends to all acts contrary to law and prejudicial to the interests of the community for which there is no adequate redress at law. *Biscoe v. Great Eastern R. Co.* L. R. 16 Eq. 636; 2 *Waterman, Corp.* 562. If the managers of the corporation are about to engage in any enterprise

**4. Whether or not the Legislature can authorize the consolidation of a corporation** under the general power reserved to alter or annul the charter, it cannot do so when the rights of stockholders will thereby be affected by increasing their liability as such, or diminishing the value of their stock, unless the consolidation is made by the unanimous consent of the stockholders.

(December 18, 1888.)

**A** PPEAL by plaintiffs, from a judgment of the Circuit Court of Shelby County (De Haven, J.), dissolving a temporary injunction, in a suit by certain stockholders of the Simpsonville & Buck Creek Turnpike Company, against that company and its directors and the Simpsonville & Fisherville Turnpike Company and its directors to enjoin a consolidation of the defendant companies. *Reversed.*

The case is fully stated in the opinion.

*Mr. J. G. Gilbert* for appellants.

*Mr. J. C. Beckner* for appellees.

*Pryor, J.*, delivered the opinion of the court:

The appellants are members as stockholders of the Simpsonville & Buck Creek Turnpike Company. On the 20th of February, 1884, the Legislature of the State passed an Act authorizing the consolidation of the corporation of which they are members with another company styled the "Simpsonville & Fisherville Turnpike Company." The appellants, in order to prevent a consolidation of the two companies, filed their petition in equity against the directors of both corporations, and against each corporation, asking for an injunction preventing the merging of the two companies into the consolidated company. An injunction was granted, and afterwards dissolved, on the answer filed by the defendants, to the effect that the consolidation had been made, as provided by the Act, by the two boards of directors, and ratified by the stockholders, and nothing remained to be done but the election of directors for the consolidated company. The appellee maintains that, this answer or its averments not being denied, a dissolution of the injunction on the pleadings necessarily followed.

The Act under which the consolidation was made provided that, when the agreement between the board of directors of each company was entered into and ratified by a majority of the stockholders of the two companies, the consolidated company is to have all the powers

heretofore enjoyed by both companies. The answer nowhere alleges that these appellants ever consented to the consolidation; and the statement that it was ratified by the stockholders must be taken as the act of the majority and not the whole. The stock of the appellants in one company has been transferred to another, or both merged into one, and the court will not imply, from an averment that it was ratified by the stockholders, that it was by the unanimous consent of all; for, if so, it should have been so pleaded, and the statement made must be construed as meaning that a majority voted for the consolidation; in other words, that the provisions of the Act were complied with.

It is further argued that these stockholders have no right to maintain the action, because the suit is for the corporation itself, and must therefore be brought in the name of the corporation, or some legal or equitable reason given for making the corporation a defendant instead of plaintiff. We do not understand, in a case like this, that the stockholders, or any of them, are denied the right to sue. The action of the board of directors in this case is alleged to be *ultra vires*, beyond the authority conferred on them by the charter; and in all such cases the stockholder may bring his action without consulting those who manage the legitimate affairs of the corporation. This is the rule recognized in *Hawes v. Oakland*, 104 U. S. 450, and in *Shawhan v. Zinn*, 79 Ky. 300.

Here the directors are attempting to transfer the stock of these appellants by a majority vote of the stockholders to a corporation of which they are not members, or to blend the stock and make one corporation out of both. This cannot be done without the consent of the stockholder, and is in plain disregard of his contract rights when he becomes a member of the corporation. There is no authority in the charter of the company to which he belongs authorizing a consolidation with any other company; and in such a state of case there is no authority holding that his property or rights in one company can be transferred, against his will, to another company.

The clause in the charter that the company, "in matters not expressed in the charter, shall have the rights and privileges granted to the most favored turnpike companies," will not be construed as affecting rights that are fundamental, and under it a power conferred or im-

not contemplated by the charter, or are proceeding to apply the corporate funds to any other than corporate purposes, or, in general, if they are transcending their charter, equity will interfere. In such cases the court may grant relief at the suit of a single stockholder. *Rogers v. Lafayette Agricultural Works*, 62 Ind. 200; *2 Waterman, Corp.* 619. If irreparable mischief to his interests may ensue meantime, equity will administer preventive justice until such time as the will of the body of stockholders can be ascertained. *Samuel v. Holladay*, Woolw. 400; *Hawes v. Oakland*, 104 U. S. 450 (28 L. ed. 827). When he resorts to such proceedings to protect, not simply such interests, but the property and rights of the corporation, against the action or threatened action of third parties, thus assuming duties properly devolving upon directors, he must show a clear breach of duty on their part in neglecting or refusing to act in the matter. *2 Waterman, Corp.* 620. And such neglect and refusal must not be simulated, but must be real and persisted in, after earnest efforts to overcome it.

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*Detroit v. Dean*, 106 U. S. 537 (27 L. ed. 300). Yet if it be shown that a corporation cannot safely be left to obtain relief in the usual manner, equity will interfere at the suit of a stockholder without proof of a demand upon the managing agents and their wrongful neglect or refusal to proceed. *Finnay v. Bennett*, 27 Gratt. 335; *Crumlish v. Shenandoah Valley R. Co.* 28 W. Va. 623. On a bill by a stockholder praying a preliminary injunction to prevent the carrying out of a plan for the incorporation and consolidation of several joint stock associations, which plan has received the consent of nearly all of the stockholders, under a charter from the Legislature and asking the appointment of a receiver, where the charges of fraud made in the bill appear to be baseless, and it appears that no harm is apt to ensue to anyone from allowing such proceeding to go on according to the plan—the motion for an injunction and the appointment of a receiver *pendente lite* will be denied. *Mills v. Hurd*, 29 Fed. Rep. 410.



plied that will compel a stockholder to abandon his contract already entered into, and make a contract with others against his will. The stock in the one company may be worth greatly more than the stock in another company, or, if worth the same, the joint enterprise might be such as would deter the stockholder from taking his investment from one company and placing it in a joint stock company. Mr. Morawetz, in his work on Private Corporations, when treating of the consolidation of companies, says: "This can never be effected without the unanimous consent of the members of each company, and such consent cannot be inferred as an implied condition of their charter or articles of association." Section 197. See note to the left, with numerous adjudged cases.

Whether a consolidation could be authorized, under a general power reserved by the Legislature to alter or annul the charter, is not necessary to be decided. It is certain that it cannot be done when it affects the rights of the

stockholders by increasing their liability as such, or diminishing the value of their stock; and with such a radical change the burden would be placed on the consolidated company to show that no harm could be done the stockholder entering his protest. Whether the appellants would be injured by this change does not appear in this record; and if it did, this court would be reluctant to hold, in the absence of authority in the charter, where one has become a stockholder in a turnpike road of a certain description, and for a certain purpose, that the Legislature could unite him as a stockholder in another corporation, and for other or additional objects in view than are to be found in his original contract. In so doing his contract is destroyed, and another made for him, against his consent.

In our opinion, the Act of consolidation in this case is void, unless made by the unanimous consent of the stockholders.

*Judgment reversed, and remanded for proceedings consistent with this opinion.*

### OREGON SUPREME COURT.

George A. HARTMAN, *Resp't.*

John N. YOUNG, *Appt.*

(....Oreg.....)

1. **Contested election; evidence.** It is a primary rule of elections that the ballots constitute the best—the primary—evidence of the intention and choice of the voters.
  2. **In determining a contested election** the evidence of the ballots actually cast will control that furnished by the official count, provided the ballots have been preserved and protected from tampering.
  3. **The official returns, when duly certified,** are *prima facie* evidence that the result is as declared, but such return or canvass is never conclusive, unless made so by statute. As a quasi record it is entitled to the presumption of regularity, and is, *prima facie*, of its integrity.
  4. **Best evidence.** As between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the best evidence.
  5. **The burden of proof rests on the plaintiff.** He must establish to the satisfaction of the jury or trial court that the ballots have been kept intact, and are the genuine, identical ballots cast at the election; otherwise, they will receive no credence, and be rejected as unworthy of credit.
  6. **Provisions of the statute for the safe keeping** of ballots are treated by the courts as directory; and when it is shown that the ballots have been securely kept and preserved inviolate, they will not be excluded as evidence on account of some omission to comply with their directions.
  7. **Recount.** Where the court finds that the ballots have been safely kept and preserved—that no one has tampered with them, and, notwithstanding the opening of the box for the purpose stated, that the ballots were the genuine and identical ballots cast by the voters of South Pendleton precinct—the legal conclusion drawn therefrom by
- \*Head notes by LORD, J.

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the trial court, viz.: that "Such ballots are the best evidence, and entitled to be recounted," is in conformity with law, and such as it pronounces on that state of facts.

(December 19, 1888.)

**A** PPEAL from a judgment of the Umatilla County Circuit Court, in favor of plaintiff in a proceeding to contest defendant's right to the office of county clerk. *Affirmed.*

The facts are fully stated in the opinion.

*Messrs. John C. Leasure, Fred Page-Tustin and Richard Williams,* for appellant:

Some fact must be shown tending to establish the fact of misconduct, irregularity or mistake, before the court is warranted in ordering a recount of ballots, or in setting aside or going behind the returns of the canvassing board.

McCrory, Elections, § 280; *People v. Livingston*, 79 N. Y. 288; *O'Gorman v. Richter*, 81 Minn. 25.

The burden of proof is upon the plaintiff, in a case like this, when he seeks to introduce the ballots in evidence to overturn the official count, to show affirmatively that the ballots have not been tampered with, and that no opportunity has been afforded for tampering with them, before they can be admitted in evidence.

See McCrory, Elections, § 277, p. 247; § 278, p. 249; *People v. Burden*, 45 Cal. 241; *Coglan v. Beard*, 65 Cal. 58; *Hudson v. Solomon*, 19 Kan. 177; *Kingery v. Berry*, 94 Ill. 520; *Cooley*, Const. Lim. § 625; *People v. Livingston*, 79 N. Y. 290; *Newton v. Newell*, 26 Minn. 529.

*Messrs. D. W. Bailey and Ramsey & Wager,* for respondent:

The fact that ballots were in the custody of the contestant as legal custodian does not affect their admissibility as evidence.

*Coglan v. Beard*, 67 Cal. 303.

In a case of contest the ballots are the primary and best evidence of the number of votes

received by any candidate, if they are shown not to have been tampered with.

*People v. Holden*, 28 Cal. 188; *Coglan v. Beard*, 65 Cal. 58; *Coglan v. Beard*, 87 Cal. 306; *O'Gorman v. Richter*, 31 Minn. 25; *Dorey v. Lynn*, 81 Kan. 758; *People v. Livingston*, 79 N. Y. 279; *Reynolds v. State*, 61 Ind. 416; *Duson v. Thompson*, 33 La. Ann. 861.

Ballots are common-law evidence.

*People v. Livingston*, 79 N. Y. 286.

Failure to seal or keep them as required by statute does not necessarily destroy them as evidence. It merely weakens their force. Statutes as to sealing and keeping ballots are directory.

*People v. Livingston*, 79 N. Y. 287; *People v. Cicotti*, 16 Mich. 289; *Pradat v. Ramery*, 47 Misa. 24; *McCrary, Elections*, §§ 487, 488, 489; *Reynolds v. State*, *supra*.

It was incumbent upon the contestant to satisfy the court below that the ballots had been kept intact. He was not required, however, to show that there was no possibility of tampering with them.

*People v. Livingston*, 79 N. Y. 290; *O'Gorman v. Richter*, 31 Minn. 25; *Reynolds v. State*, *supra*.

Lord, J., delivered the opinion of the court:

This was a proceeding under the provisions of title 4, chap. 14, §§ 2544-2748, Code, Oreg., to contest the right of the defendant to the office of County Clerk of Umatilla County, to which he was declared elected by the board of canvassers of said county.

In substance, the facts alleged impeach the correctness of the returns as certified in the wrongful and erroneous counting of the votes of South Pendleton precinct, etc., whereby the defendant was declared duly elected, etc. The answer, after making the usual denials, alleged affirmatively and separately that the poll book of said precinct, signed and attested as required by law, was certified and returned to the plaintiff, then county clerk of said county, showing that an election had been held in that precinct at the date therein stated, giving the number of votes, and that the defendant had received the majority, etc.; that the same was duly canvassed by the board, etc., and that the defendant was duly elected county clerk of said county; that the ballots polled at said election in said precinct were duly enveloped and sealed, as required by law, and returned to said county clerk, etc.; and that he, being then and there a candidate for the office of county clerk, etc., after he had received the said ballots, enveloped and sealed as aforesaid, did unlawfully break the seal, and remove therefrom the said ballots, etc.; and ever since the same have been in the hands of said plaintiff in a loose and unprotected condition, affording an opportunity for changes and alterations of said ballots; and on account of such circumstances the said ballots ought not to be recounted, etc. The reply put in issue the affirmative matter set up, and the trial proceeded to judgment in favor of the plaintiff.

It thus appears upon the issue made by the pleadings that the subject matter upon which the contest is based is the recount of the vote of South Pendleton precinct, and which, according to the judgment, if allowable, is contrary to L. R. A.

clusive of the right of the parties. For the determination of the question presented by the record, it perhaps would have been more satisfactory to the court if counsel for the defendant had requested the court below to make its findings fuller in respect to the particular facts upon which such question is raised. The difficulty, however, seems to have been that he acted upon the hypothesis that the evidence as to the preservation of the ballots of South Pendleton precinct failed or was incompetent to establish their identity as a matter of law, and therefore inadmissible; when the only way, it would seem, that the question which he seeks to have litigated and determined can be raised on this record is: Is the judgment and legal conclusion which the trial court draws from the facts found, such as the law pronounces? It will therefore be necessary to state the substance of some of the evidence to show hereafter that it was competent and admissible, and also to show there was evidence tending to support the findings of the trial court in the particular questioned by this record.

The evidence certified to us in the record discloses that the poll book, the ballot box, and the ballots therein, of South Pendleton precinct, were duly delivered to the clerk after the election; and the ballot box, according to the testimony of Mr. Watron, one of the judges of the election, "was sealed over the slit on the top with my name on it, and had two strips of paper around it, both sealed . . . The box could not be opened without tearing the papers off;" that the contestant, who, as county clerk, received the poll book and ballot box of said precinct, and the key to the box, on the 5th day of June, and kept the box in the vault in the condition as delivered until the 12th day of that month, when he took it from the vault and carried it into the main office, where the vote was being canvassed, and in the presence of the other two members of the board, and several other persons who were present and overlooking the canvass, and opened it for the purpose of finding the poll book, on the assumption that it was locked up in the box, as was the case in some of the other precincts; that he only raised up the ballots, and, seeing that the poll book was not there, immediately returned them into the ballot box, and relocked it, and that soon after he found the poll book in the vault, where he had deposited it when handed to him by Mr. Watron; that the ballot box and its contents, so locked, but not resealed, were returned to the vault, which was made of brick, with iron doors, and which stood open during the day; and that no one had a key to the ballot box but himself; and that he and his deputy had a key to the vault; that various persons were permitted to go into the vault, such as he knew, and remain one and two hours; that the box remained on the shelf in the vault until called for by this proceeding, undisturbed; and that it had been kept by him safely, and had not been exposed to the public, or been tampered with; and that the box had never been opened except as stated, or in the possession of anyone except himself; and that the contents of the box were the same as when he received it.

Substantially upon this evidence, the trial court found "that it appeared to the satisfac-

tion of the court, and that affirmatively on part of the contestant, George A. Hartman, that the said ballots of South Pendleton precinct for Umatilla County have been kept safely by himself, the custodian of the same as by law provided; that said ballots have not been exposed to the public, or handled by unauthorized persons, and have been identified as the ballots cast by the voters of said South Pendleton precinct on June 5, 1888; and have been preserved intact; that they are genuine, and have not been tampered with; that they have been kept in the vault of the clerk's office of said county and State, locked in the ballot box of said precinct, since their delivery into the custody of said Hartman, county clerk of said county and State, on June 5, 1888, continuously, until the canvass of the votes on June 12, 1888, when said box was removed into the clerk's office of said county, and for the purpose of finding the poll book of said precinct, and then and there unlocked in the presence of the board of canvassers, and the ballots therein, tied together in one package, as such said package were lifted up and out of said box by said Hartman, and by him at once returned into said box, and the said box was relocked in the presence of said board, and upon the conclusion of said canvass the said box and ballots so locked therein were returned to the said vault by said Hartman, where it and said ballots have remained continuously since said date until removed therefrom on the trial of this action on July 16, 1888." And as a conclusion from such facts finds "that as such ballots of said precinct they are entitled to be admitted as the best evidence, and recounted," etc.

From this statement it becomes apparent why counsel for defendant is anxious to reach the evidence by his exception, and have the court pass on its admissibility as a matter of law; or, failing in that, that the court shall regard and treat the proceeding under the statute to contest the election in the nature of a suit in equity, so that the court may examine the evidence and try the case *de novo*. Upon this last proposition it is sufficient to say that the proceeding under the statute is to be tried as an action at law without the intervention of a jury; and it may be said that in all cases where the object of the action is to determine the right to an elective office, whether under the statute or by an action in the nature of *quo warranto*, the ballots actually cast by the voters are the original evidence of the result of the election.

The remaining question suggested is that the ballot box and its contents were not admissible in evidence, for the reason that they have not been properly kept, or so kept as to preclude opportunity for tampering with the ballots. The contention is that the facts in evidence so impeach and discredit the genuineness of the ballots admitted by the court, and recounted, as to destroy their character as the best evidence, and therefore it was inadmissible to recount them, because the official count as declared, under the circumstances, was the better evidence, and should control in determining the result.

It is admitted that, in determining a contested election, the evidence of the ballots actually

cast will control that furnished by the official canvass, provided the ballots have been duly preserved, and protected from the reach of any unauthorized intermeddling or tampering. But it is insisted, unless it is made to affirmatively appear that the ballots have been so carefully kept and protected as to place their identity beyond all reasonable doubt, they ought not to be allowed to overturn the official count; hence, it is earnestly urged that where the evidence in the record discloses that the ballots have not been kept and protected with that vigilant care which the law contemplates, or where they have been so exposed as to afford such opportunity for handling or tampering with them as to cast suspicion on their purity, they lose their character as the best evidence, and are not to be relied on in determining the result of an election, and therefore ought not to be admitted to overturn the official count.

At the outset it may be said that the official return or canvass, when duly certified, is *prima facie* evidence that the result is as declared. As against ballots not properly kept, and the identity of which is not shown, such official canvass, although secondary, is the better evidence. But the official canvass, unless made so by statute, is never conclusive. As a quasi record it is entitled to the presumption of regularity and *prima facie* evidence of the integrity of the result of the election as declared. But as between ballots shown or admitted to be the identical ballots cast by the voters and such official count, the ballots are the best evidence. "It is a primary rule of elections that the ballots constitute the best—the primary—evidence of the intention and choice of the voters." *Hudson v. Solomon*, 19 Kan. 177; *Reynolds v. State*, 61 Ind. 423; *McCrary, Elections*, 291, 439; *Cooley, Const. Lim.* 625.

When, therefore, it is shown to the satisfaction of the court that it has before it the identical ballots cast by the voters, as between the ballots themselves and canvass of ballots by the election officers, the ballots are controlling. To show that they are the genuine ballots cast by the voters, any evidence tending to show that they have been so kept and protected from tampering as to place their identity beyond reasonable doubt is admissible.

The burden rests on the plaintiff. He must establish to the satisfaction of the court or jury, as the case may be, that the ballots are the genuine ballots cast at the election; otherwise, they will receive no credence. When the ballot box and the ballots therein of South Pendleton precinct were produced and offered in evidence, if it was shown that they had been properly kept and protected, as the law required, they were the best evidence. On the other hand, if it was shown that they had not been kept or protected with that zealous care which the statute contemplates, or so as to preclude opportunity for intermeddling with them, they are the weakest and most unreliable evidence. But this only goes to the credibility of such evidence, and not to its competency. Evidence may be extremely weak, and, in fact, as against other evidence, entitled to no credit, yet that does not affect its admissibility. The weight to be given to the evidence, and its admissibility, are diverse matters.

In *People v. Livingston*, 79 N. Y. 288, Church Ch. J., said: "Although it must be conceded that the security of the boxes was not made so perfect as to preclude the possibility—and even some probability—that access might have been had to them for improper purposes, yet I do not think the judge would have been justified in deciding as a matter of law that they had not been preserved inviolate, and withdrawing the question from the jury." And again: "The statute requires the ballot boxes to be preserved undisturbed and inviolate, and it is incumbent on the party offering the evidence to show that they had been so kept, not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was on the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an election. They are made immediately upon canvassing the votes, and the votes are canvassed at the close of the polls in public, and presumably in the presence of the friends of both parties. . . . After the election it is known just how many votes are required to change the result. The ballots themselves cannot be identified; they have no earmarks. Everything depends upon keeping the ballot boxes secure, and the difficulty of doing this for several months in the face of temptation and opportunity, requires that the utmost scrutiny and care should be observed in receiving the evidence, etc. Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence, but if not, they are not only the weakest, but most dangerous, evidence. The jury might not be satisfied with the proof of identity, and yet be unable to find from the evidence that actual tampering or fraud had been committed."

In the same case in 18 Hun, 62, the court says: "If the ballots voted at any election are produced on the trial of a cause like this, they are the very best evidence of the result of the election. Of course the jury must be satisfied of their inviolate preservation; otherwise, they will receive no credence, but that does not affect their competency."

Judge Cooley says: "If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all; or, if received, that it should be left to the jury to determine upon all the circumstances whether they constitute more reliable evidence than the inspector's certificate, which is usually prepared at the close of the election, and upon an actual count of the ballots as then made by the officers whose duty it is to do so. Cooley, Const. Lim. 625. *People v. Sackett*, 14 Mich. 320; *People v. Scott*, 16 Mich. 268.

According to the decisions it is manifest that in a proceeding of this nature the ballots are 2 L. R. A.

receivable in evidence for the purpose of controverting the official count and ascertaining the actual result from the vote cast, and that it is for the jury or trial court, as the case may be, to determine, from all the facts and circumstances going to show that the ballots have been preserved inviolate, whether they are more reliable than the official count. Of course the jury must be instructed, or the court guided by the principle of law that, unless it is proved that the ballots are genuine—the identical ballots cast—they should be rejected, and not allowed to overturn the result as declared by the official count.

As a consequence, the ballots and the proof of their identity was competent evidence, and, if competent, it was admissible. The credibility and weight to be attached to evidence is usually for the jury, or the trial court, when it is exercising the jury function; and if it is satisfied from the evidence produced that the ballots have been preserved intact and inviolate, the court, governed by the law which makes them in such case the best evidence, would recount the ballots; otherwise, they would receive no credence, and be rejected in determining the result.

It may be admitted that the question is not free from doubt, and apparently there is some conflict in the practice; yet we have reached the conclusion—not without much hesitation, it is true—that there was such a showing as to the safe keeping of the ballots; that they were competent evidence to go to the trial court to determine as a matter of fact upon all the circumstances whether they had been so kept as to preserve their identity, and to render them more reliable evidence than the official count.

It seems to us, however, the better and more proper way, especially in proceedings to contest an election under the statute, to reach the question sought to have decided, is to inquire whether upon the facts found by the trial court the conclusion to which it has come, viz.: "The ballots are the best evidence, and entitled to be recounted," is such as the law pronounces. To do this the findings should have been fuller, and ought to have included the facts that the ballot box was delivered to its legal custodian, sealed; that the poll book was delivered to him also, and deposited in the vault; that the box was opened for the purpose stated, and relocked, and so returned to the vault; and that his deputy and other persons had access to the vault. Adding these facts to those already found, and which, upon suggestion, the court would have no doubt included in its findings, would thereby error in the conclusion already drawn upon the facts as thus presented by the finding?

The assumption on the argument is that the box, when returned to the vault duly relocked, but not resealed, created such an opportunity for tampering as to invite outrage with almost perfect immunity against discovery; that opening the box when the poll book was in the vault was without excuse, and an unlawful act, committed by the contestant, whereby he made for himself and his friends an opportunity to intermeddle with the ballots without detection, which the law had not given to him, but was designed to prevent; and that such a condition of facts as shown by the findings is inconsistent with that safe keeping which the

law contemplates as sufficient to identify the ballots and authorize them to be recounted.

Counsel says: "When he broke the bond of secrecy which the law had placed around that ballot box, why did he not then and there, in the presence of other members of the board, re-seal it, and in such a way as that its purity could not be questioned?" The trouble with this argument is that it is based on the supposition that the law directs and requires the ballot box to be sealed, when it only requires the ballots to be enveloped and sealed and deposited with the clerk.

It may be admitted that it was the duty of the plaintiff as its legal custodian to safely keep and preserve the box and its contents; and that any act, whether done by himself or others, which disturbed or violated the safeguard which the law had thrown about it, ought at least to find its justification in the particular circumstances which rendered such act necessary, and be supplemented by the doing of such things as to place it *in statu quo*, or find its equivalent in the sense of the law for that purpose. But sealing the box is but one of the safeguards which law has thrown about the ballot, besides the cases shown, when by acts of omission or commission, through inadvertence or mistake, it sometimes happens that the poll book is deposited in the ballot box, or the returns inclosed in the envelope among the ballots, and it becomes necessary to procure them to make the canvass of votes, and the box is opened, or the envelope, as the case may be, such acts or omissions are treated as irregularities; and the provisions of the law in respect thereto are directory only, and will not defeat the ballots as original evidence, provided they are properly accredited, and have been safely kept, and preserved inviolate.

In *Hudson v. Solomon*, 19 Kan. 180, the ballot box was unlocked for the purpose of taking out the poll book, and under the facts the court regarded the opportunity for tampering with the ballots, and discrediting them as too slight for serious consideration.

In *O'Gorman v. Richter*, 81 Minn. 29, 16 N. W. Rep. 416, the ballots were not enveloped and sealed, as required by section 88, and for this reason it was claimed that they were inadmissible. But the court says "that the provisions of this section are merely directory; and that where it is clearly and satisfactorily proved that the ballots have been kept intact and inviolate, in the same condition as when counted by the judges of election, they are admissible in evidence, although not sealed up in envelopes, as required by statute." And further, that the trial court, "being satisfied of the genuineness of these ballots beyond a reasonable doubt, have admitted them," and that "certainly we, acting as an appellate court, cannot say they erred."

In *Dorey v. Lynn*, 81 Kan. 760, 8 Pac. Rep. 557, the ballots were wrongfully opened and counted by the city council as a canvassing board, and they remained with the city clerk when they should have been placed in the custody of the county clerk; and yet, as "The evidence and findings of the court below show that the ballots in this case were never tampered with in any manner except as already stated," the court says "The ballots were identified be-

yond all reasonable doubt," and as a consequence entitled to be recounted as the best evidence.

In *Patten v. Florence*, 88 Kan. 501, 17 Pac. Rep. 177, the poll book was placed under cover, and sealed, except that it was inclosed in an envelope or package with the ballots, etc., and the court treated the matter under the facts as an irregularity, and not fatal to the proceeding.

The object of all such provisions is to secure the safe keeping of the ballots, so that they may be easily identified in case they need to be resorted to in some judicial inquiry; and if they have been safely kept, and protected from any tampering, the chief object of the law is subserved, although omissions or irregularities may have occurred, such as we have adverted to. The ballots are the best evidence of the will and choice of the voters; and if it is shown, or the facts find, that they have been securely kept, and preserved inviolate, they are entitled to be recounted, that the will of the electors may be carried into effect, and allowed to prevail.

Nor is there anything in *Kingery v. Berry*, relied upon by counsel, inconsistent therewith. The court says: "The ballots may have been tampered with. There is not full proof that they were not. There was a motive for such tampering, at least upon the part of the appellee, if not others engaged with him. The wrong doer should not be allowed to profit by his violation of the sanctity of the ballot box. He might do so were these ballots to be received as the identical ones cast by the voters." 94 Ill. 520. But it is to be noted in this case that "The court was not sure that it had before it the identical ballots which were deposited by the voters," and hence applied the rule which the law declares in such case—where, by intermeddling, suspicion is brought on their purity, they are not to be regarded as the best evidence, and entitled to be recounted as against the official canvass.

In *Powell v. Holman* (Ark.) 6 S. W. Rep. 508, the court found that after the vote had been canvassed and abstracted by the clerk as required by law, the ballots were placed for about one week in the library room adjoining the clerk's office, and that this was an unsafe and exposed place, which afforded opportunity for them to be tampered with, and as a conclusion from these facts finds the ballots are unworthy of credit as evidence. In commenting upon this conclusion being such as the law pronounces upon the facts found, the court says: "The authorities are abundant that where ballots have been so exposed as to have afforded opportunity to be tampered with, and have not been guarded with that zealous care which will contravene all suspicion of substitution or change, they lose their presumptive purity, and are no longer to be relied on as evidence in a contest of judicial inquiry as to the result of an election." *McCrory, Elections*, 293; *Cooley, Const. Lim.* 625. Hence the court says, with reference to the ballots, upon the facts found, that the trial court pronounced the judgment of the law when it declared such ballots as unworthy of credit as evidence, and refused to recount them. But there are no facts found in that case, as here, in respect to the safe keeping of the ballots; they were not zealously cared

for, but were so exposed as to afford opportunity for parties or their friends to tamper with the ballots, or add to or take from their number; and as a result suspicion was brought on their purity and integrity, and the court rejected them as unworthy of credit.

Here the court finds that the box and its contents were securely and safely kept and preserved; that no one had tampered with them; and that, notwithstanding the box had been opened in the manner and for the purpose stated, the ballots therein were the genuine and identical ballots cast by the voters of South Pendleton precinct; and necessarily the conclusion which the trial court reaches and finds upon this state of facts, viz.: that such ballots "are the best evidence, and entitled to be recounted," is in conformity with such as the law declares. In view of the fact that the contestant is the legal custodian of the box and

its contents, it no doubt would have been better and more circumspect, after the box was opened, to reveal it in the same presence, although there is no such requirement in the statute, and the failure to do so violated no law.

Upon the finding as to the safe preservation of the ballots we are bound to assume there was satisfactory evidence to support it; or, if we looked at the evidence in the record to ascertain whether there was any evidence tending to support such finding, we are confronted with the direct and positive, uncontradicted and unimpeached testimony of all the sworn officers who have exercised any control over the box and its ballots that it had been safely kept relocked, as the law required, and that its contents had not been handled or disturbed.

So that, in whatever way the objection raised may be regarded, *we discover no error, and must affirm the judgment.*

### TENNESSEE SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,

*Pf. in Err.,*

v.

Mary E. MUNFORD, Executrix, etc.

(....Lea ....)

1. **A telegraph company which has, by mistake, changed the first name of the person to whom the message is sent from "Sam." to "Wm."** is not liable for damages consequent on the failure of a connecting line to deliver the message promptly when, by the exercise of due diligence on the part of the latter company's agents it would have been delivered to the proper person, who would have known that it was intended for him, and thus prevented all damages.
2. **A printed condition on a telegraph blank, "This company is hereby made the agent of the sender, without liability to forward any message**

over the lines of any other company when necessary to reach its destination", is reasonable.

(January 3, 1889.)

**ERROR** to the Warren County Circuit Court (Smallman, J.), to review a judgment in favor of plaintiff in an action to recover damages alleged to have resulted from delay in the delivery of a telegraph message. *Reversed.*

The facts are fully stated in the opinion.

**Mr. J. W. Bonner** for plaintiff in error.

**Mr. Frank Spurlock** for defendant in error.

**Lorton, J.**, delivered the opinion of the court:

This is an action brought by E. W. Munford, the testator of defendant in error, in his lifetime, to recover damages alleged to have been

*NOTE.*—Telegraph companies, reasonable regulations. The reasonableness of regulations of a telegraph company is a question for the court to determine; and regulations which contravene the constitution, laws, or public policy of the place where they are set up are unreasonable. *Barrett v. Western U. Tele. Co.*, 62 Maine, 209, 213; *True v. International Tele. Co.*, 60 Maine, 9, 17; *Western U. Tele. Co. v. Graham*, 1 Colo. 230, 233; *Atlantic & P. Tele. Co. v. Western U. Tele. Co.*, 4 Daly, 527, 537; *Western U. Tele. Co. v. Reynolds*, 77 Va. 173, 184; *Ellis v. Am. Tele. Co.*, 13 Allen, 230, 234; *Gray, Tel. Co.*, 21. A provision embodied in a regulation that the telegraph company limits its liability to losses occurring on its own lines has usually been treated as an offer of special terms; as such it constitutes, with the assent of the employer of the company, a valid contract. This provision is clearly just and reasonable. *Western U. Tele. Co. v. Carew*, 15 Mich. 525; *Baxter v. Dominion Tele. Co.*, 37 U. C. Q. B. 470; *Gray, Tele. Co.*, 60. A telegraph company is, it seems, under no obligation to contract as the agent of its employer with the connecting company for the further transmission of the message, or to receive and account for the payment for such transmission. This provision in the regulation is unquestionably reasonable, and, with the assent of the employer of the company, constitutes a valid and mutually beneficial contract. *Western U. Tele. Co. v. Carew*, 15 Mich. 525; *Baxter v. Dominion Tele. Co.*, 37 U. C. Q. B. 470.

*Connecting companies, delivery of message.* Assuming that a telegraph company in simply accepting a

message directed to a place upon the route of a connecting company, contracts to obtain that transmission, the telegraph company must contract as the agent of the connecting company with the employer, or as the agent of the employer with the connecting company. *Squire v. Western U. Tele. Co.*, 98 Mass. 232; *Stevenson v. Montreal Tele. Co.*, 16 U. C. Q. B. 530; *Baldwin v. U. S. Tele. Co.*, 54 Barb. 506, 1 Lans. 126; *Gray, Tele. Co.*, 107. In simply accepting a message directed to a place upon the route of another company, it contracts merely to deliver the message to a connecting company for transmission to or toward that place and to assume liability only for a loss occurring on its own line. *Stevenson v. Montreal Tele. Co.*, 16 U. C. Q. B. 530; *Leonard v. N. Y. A. & B. Electro-Magnetic Tele. Co.*, 41 N. Y. 544; *Squire v. W. U. Tele. Co.*, 98 Mass. 232; *Baldwin v. U. S. Tele. Co.*, 45 N. Y. 744; *W. U. Tele. Co. v. Carew*, 15 Mich. 525. The carrier must prove the delivery if there was a delivery to the connecting carrier. *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1. In America the stipulation in such a contract is held invalid. *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221, 236; *Condit v. Grand Trunk R. Co.*, 34 N. Y. 500. If after due diligence used to make delivery in person to the proper party, he cannot be found, and such notice is given as the usage of telegraph companies requires, that the message is at the office, the company will be excused from further efforts to make the delivery, and its responsibility will be at an end. *Fisk v. Newton*, 1 Denio, 45; *Scott & Jarnagin, Law of Telegraph*, §193.

sustained by the delay in the transmission of a telegram.

E. W. Munford, on the 11th of April, 1887, delivered to the agent of the plaintiff in error, at its office in McMinnville, Tenn., a telegram for transmission to Tampa, Florida, of which the following is a copy:

McMinnville, Tenn., Apl. 11, 1887.

Col. Sam Tate, Tampa, Florida: Proposition accepted. Your draft for one thousand will be honored.

[Signed]

E. W. Munford.

The lines owned and operated by the Western Union Telegraph Company did not extend to Tampa, Fla., but terminated at Jacksonville, in that State. From Jacksonville to Tampa there was a telegraph line, owned and operated by the South Florida Telegraph Company, and the message in question could only be transmitted to its destination by being sent over the line of the Western Union Telegraph Company to Jacksonville, and then transferred to the South Florida Company, by whom it would be sent to Tampa. Of this fact Mr. Munford was advised by the agent, who received his message for transmission.

The telegram was promptly forwarded, reaching Tampa early in the afternoon of the same day. In transmission the address of the message was changed from "Col. Sam Tate" to "Col. Wm. Tate." This, it is agreed, occurred on the line of the plaintiff in error before it was transferred to the connecting company. The message was not delivered by the South Florida Company to Col. Tate until the 13th, it having been received at Tampa on the 11th. Plaintiff below alleged that by this delay he sustained damage amounting to \$500.

In the view we take of the case, it is only necessary to consider one of the defenses presented by the pleas of the plaintiff in error; and that, in substance, is that the delay in the delivery of the message was not occasioned by the error in transmitting the address, but resulted alone from the negligence of the agent of the South Florida Company. The facts concerning this delay, as we find them to be from the transcript, are these: the agent of the South Florida Company at Tampa personally knew Col. Sam Tate. He states that he knew of no such person as Col. Wm. Tate, and that when he received this message he believed it to be intended for Col. Sam Tate; that he instructed the messenger, whose duty it was to make personal delivery of messages, to inquire and learn if there was a Col. Wm. Tate in Tampa, and, if he could hear of no such person, to take the message to Col. Sam Tate.

The messenger thus instructed says he made inquiry, and, hearing of no Wm. Tate, undertook to deliver the message to Col. Sam Tate; that he took it to the office of S. A. Jones, where both he and the agent say they had been requested by Mr. Jones to leave messages for Col. Tate. The messenger states, upon inquiry for Col. Tate, a clerk in the office informed him that Col. Tate was then at Clear Water Harbor. This information being communicated to the agent of the telegraph company, he on the same day, instead of making further inquiry for Col. Tate, mailed the message addressed to Col. Sam Tate at Clear Water Harbor, Florida.

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The fact, as shown by the proof, is that Col. Tate was in Tampa on the 11th, and had been there for some days, and that he had never authorized delivery of messages for him at the office of Mr. Jones, but that, on the contrary, he was accustomed to receive his messages at his usual boarding place, which was known at least to some of the telegraph company's messengers.

Two days thereafter Col. Tate called at the telegraph company's office to inquire about another message, when he was handed a copy of the telegram which had been mailed to him at Clear Water Harbor. If the message had been delivered to him on the day it was received and mailed to Clear Water Harbor, it is conceded that the damage alleged to have been sustained would not have occurred. The facts, as above recited, are not disputed, and establish beyond controversy that the delay in the delivery of the message was not in consequence of the error in transmission of the address, but was the result of the subsequent and independent negligence of the South Florida Telegraph Company.

The damage alleged to have been sustained was the direct consequence of delay in delivery; for Col. Tate says that he should have had no doubt, upon seeing the message, that it was for him alone, and that he should have acted upon it. The damages to be recovered, whether the *gravamen* of the action be regarded as breach of contract or a technical tort, must be limited to such as are the natural and proximate result of the injury or wrong done.

This brings us to the consideration of the question as to whether the plaintiff in error is responsible for damages which resulted alone from the negligent delay in the delivery of the message by the agents of the South Florida Telegraph Company. The message was written upon one of the usual blanks furnished by the Western Union Company. One of the printed conditions contained in this blank reads as follows: "This company is hereby made the agent of the sender, without liability to forward any message over the lines of any other company, when necessary to reach its destination." Is this a valid limitation upon the liability of the company? Telegraph companies are not common carriers, nor are they insurers, either of the accurate transmission, or the sure and prompt delivery, of messages. They are liable, however, for losses consequent upon their negligence. *Marr v. Western U. Tel. Co.* 85 Tenn. 588.

Even common carriers are not responsible for losses occurring upon a connecting line, unless there was a contract upon their part to be so responsible. That they may by contract limit their liability to defaults occurring upon their own lines is well settled. So the fact that two lines are connected, and for their mutual convenience collect freight for each other upon goods delivered for transmission over both lines, will not make the one responsible for losses occurring beyond its own line, unless it has contracted so to be. *East Tennessee, V. & G. R. Co. v. Brumley*, 5 Lea, 401.

These principles applicable to common carriers seem to us to be alike applicable to tele-



graph companies. Mr. Gray, in his very valuable monograph upon Communication by Telegraph, in discussing the limitations found in the contract of the Western Union Telegraph Company, and quoted above, says: "Two entirely distinct provisions are embodied in this regulation. One provision is that the telegraph company, in consideration of receiving full prepayment for the delivery of a message at a place upon the line of another company, agrees to deliver the message to a connecting company, and, as the agent of the sender, to contract with that company for the further transmission of the message. This is an offer of special terms of contract. A telegraph company is, it seems, under an obligation, by its ordinary contract, only upon receipt of its own charges, to deliver the message to a connecting company. It is under no obligation by that contract to contract, as the agent of its employer, with the connecting company for the further transmission of the message or to receive and account for the payment for such transmission. This provision in the regulation is unquestionably reasonable, and, with the assent of the employer of the company, constitutes a valid and mutually beneficial contract. \* \* \* The other provision embodied in this regulation is that the telegraph company limits its liability to losses occurring on its own lines. This has usually been treated as an offer of special terms.

As such, it constitutes, with the assent of the employer of the company, a valid contract. This provision is clearly just and reasonable. In the absence of partnership relation between them, one telegraph company has no more authority over another company than an individual has. A telegraph company should be entitled, therefore, to contract specially, with one who wishes to employ it, that it shall not be liable for loss occasioned by the act of a connecting company; that that person shall seek relief, in case of a loss, directly of the company which causes, and is, under any circumstances, finally liable for the loss." Gray, Tel. § 83.

That the Western Union and South Florida Telegraph Companies were entirely distinct and independent corporations, and that no partnership relation existed between them, are admitted in the agreed statement of facts contained in the record.

The case was tried by the circuit judge without the intervention of a jury, who, being of opinion that the error in transmission of address was the proximate cause of the damage sustained, gave judgment in favor of the plaintiff below.

*This judgment is not supported by any material facts, and must be reversed, and judgment rendered here in favor of the Western Union Telegraph Company.*

## NEW YORK COURT OF APPEALS.

Arthur K. O'HARA, *Reppt.*,

v.

STATE OF NEW YORK, *App't.*

(....N. Y.....)

1. **An Act authorizing the board of claims to rehear, audit and determine and allow reasonable compensation for meritorious services, etc., rendered to the State on a claim which had been previously rejected by the board of audit because of the lack of legal authority for employing such services, does not violate New York Constitution, art. 3, § 19, which declares that "The Legislature shall neither audit nor allow any private claim or account against the State, etc."**
2. **The Legislature can ratify and approve, by subsequent legislation, any act performed for the benefit of the State which it had original authority to legislate and provide for.**
3. **When individuals voluntarily furnish property or render valuable services to the State at the request of state officers, with the expectation of payment, the Legislature may ratify the acts of such officers although previously unauthorized, and create a legal liability on the part of the State to make payment therefor.**
4. **The proviso exempting existing claims from the prohibition against allowing claims after they are barred, in the amendment to the New York Constitution, art. 7, § 14, cannot apply to any claim accruing after the adoption of that amendment.**
5. **Legislative ratification of an unauthorized contract by officers on the part of the State, gives a claim therefor a legal existence for the first time, and the fact that a claim against the**

State on the imperfect obligation previously existing would have been barred by lapse of time, does not make such legislative ratification and authority to allow such claim invalid, under the New York Constitution, art. 7, § 14, providing that no claim shall be audited or allowed or paid which, as between citizens of the State, would be barred by lapse of time.

6. **The fact that the Statute of Limitations has run against an imperfect obligation which is unenforceable by reason of some vice or defect therein, which may be cured or waived by the debtor, does not bar a cause of action on a new obligation growing out of the old one, when the vice or defect is waived.**
7. **The value of the materials furnished by the claimant in the performance of the services referred to in the New York Act of 1886, authorizing the board of claims to rehear and audit the claims of O'Hara & Co. for work and services performed by them for the State under the directions of the quarantine officials, constitutes a part of the claim.**

(January 15, 1892.)

**A** PPEAL by the State, from an award of the Board of Claims, made in favor of plaintiff. *Affirmed.*

The facts fully appear in the opinion.

*Mr. Charles F. Tabor, Atty-Gen., for appellant.*

*Mr. William B. Ruggles for respondent.*

*Ruger, Ch. J., delivered the opinion of the court:*

This is an appeal by the State from an award

made by the board of claims for services rendered and materials furnished at the request of the quarantine officials, by the claimant in the years 1875 and 1876, in repairing and fitting up vessels and property used in quarantine affairs in the Harbor of New York.

There can be no question but that the maintenance of the quarantine station in that harbor is of great public benefit and importance; nor but that the legitimate expenditures therefor are a public necessity justifying their incurrence and payment by the State. The organization of the quarantine system was created by the State for the benefit of the people: is under its control; its officers are appointed by it, and it has uniformly provided, in some form or another, for their compensation and for the procurement of the supplies necessary to its efficient operation, and it was the moral duty of the State to see that their agents properly discharged their obligations to the persons employed by them in the service of the State.

The services and materials in question were rendered and furnished at the request of the state officials, and compensation therefor was honestly earned by the claimant a long time since; and it is a reproach to the State that satisfaction of them should have been postponed so long by controversies among the state officials as to the department responsible for their payment.

The board of claims have found that in the years mentioned the claimant performed services and furnished materials in the repair of the quarantine steamers and other property of the State, under the direction of the quarantine official, of the value and for the amount named by them in the award appealed from. The undisputed evidence showed that the claimant, originally supposing the health officer to be liable for his claim, sued him in a state court and was defeated, upon the ground that that officer had incurred no personal liability by reason of the rendition of such services, and that the claim therefor was against the State.

Thereupon, in 1878, he filed his claim against the State before the board of audit, and after a hearing thereof before such board, it rendered a decision holding that the State was not liable therefor, but that the health officer was, and, therefore, refused to make an award in his favor, and dismissed the claim. Applications were thereafter made, on behalf of the claimant, to each successive Legislature for relief in every year, including that of 1885, and excepting that of 1880, with unavailing effect. In 1886, however, an Act was passed, being the law under which the board of claims based its authority to make the award in question, which is as follows:

"The board of claims is hereby authorized to rehear, audit and determine the claims of A. K. O'Hara & Co., for work and services done and performed by them for the State under the directions of the quarantine officials, and to award to them such sums as upon due proof before said board, shall be a reasonable compensation therefor."

It is now claimed by the Attorney-General for the State that this Act violates section 19, article 3, and section 14, article 7, of the Constitution, and is therefore unconstitutional and void.

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The provisions of the Constitution are as follows:

Article 3, § 19: "The Legislature shall neither audit nor allow any private claim or account against the State, but may appropriate money to pay such claims as shall have been audited and allowed according to law."

Article 7, § 14: "Neither the Legislature, canal board, canal appraisers, nor any person or persons, acting in behalf of the State, shall audit, allow or pay any claim which, as between citizens of the State, would be barred by lapse of time. The limitation of existing claims shall begin to run from the adoption of this section; but this provision shall not be construed to revive claims already barred by existing statutes, nor to repeal any statute fixing the time within which claims shall be presented or allowed, nor shall it extend to any claims duly presented within the time allowed by law and prosecuted with due diligence from the time of such presentment. But if the claimant shall be under legal disability, the claim may be presented, within two years after such disability is removed."

It was held by us in *Cole v. State*, 2 Cent. Rep. 884, 103 N. Y. 54, 1 N. Y. S. R. 354, that an Act of the Legislature recognizing meritorious services, rendered to the State without previous authority of law, and authorizing the board of claims to hear claims for compensation therefor and award such sum as they might think proper and just, was neither an audit nor allowance of a claim against the State within the meaning of section 19, article 3, of the Constitution. We think our decision in that case disposes of the objection to the Act under consideration. A brief reference to the history of this claim seems to show that it comes within the principle laid down in that case.

Under Laws 1876, chap. 444, the board of audit was organized and was authorized to hear all private claims and accounts against the State (except such as are now heard by the canal appraisers), and to determine the justice and amount thereof, and to allow such sums as it shall consider should equitably be paid by the State.

The hearing of the claim in question by that board in 1878 was had under this law, and no other tribunal then existed or was thereafter created by the State competent to hear and determine such a claim until 1883, more than six years after the service had been rendered, and that tribunal was authorized to hear only such claims as should arise within two years previous to the time of filing the claim before it.

The board of audit had no power to reopen and rehear claims once determined by it, and no appeal lay from its decisions except those provided by chapter 211, Laws of 1881, which were confined to awards made subsequent to January 1, 1879, and did not reach the award made upon the claim of the respondents. Their decision upon the claim, therefore, was final and conclusive between the parties, and determined the fact that for the services in question no legal claim then existed against the State on behalf of the claimants. That determination necessarily proceeded upon the ground that the persons upon whose request the services were rendered, had no authority to bind the State and, therefore, that no legal cause of ac-

tion existed against it. It was undoubtedly within the province of the Legislature originally to have provided for the rendition of these services and the purchase of materials for the use and benefit of the quarantine station, and it is equally clear that it could, by subsequent legislation, ratify and approve any act performed for the benefit of the State, for which it had original authority to legislate and provide. *Brown v. New York*, 68 N. Y. 240; *People v. Denison*, 80 N. Y. 656; *People v. Stephens*, 71 N. Y. 539.

It cannot be questioned, we think, but that when individuals voluntarily furnish property or render valuable services to the State at the request of state officers for state purposes, but with the expectation of payment for the same, the Legislature may ratify the acts of such officers, although previously unauthorized, and create a legal liability on the part of the State to pay for such property and services enforceable in its tribunals. The Act of the Legislature in supplying defects or omissions in pre-existing legislation wherever a liability may be predicated against the State, is clearly not the audit of a claim, neither is it an allowance thereof. The power of auditing and allowing is expressly referred to the tribunal authorized to hear and determine such claims, and they may allow or reject them as in their judgment and discretion seems just.

This, we understand, to be the decision in the *Cole Case*, and we think it is founded on correct principles. As was there said, the exercise of such a power by the Legislature does not, in any just or reasonable sense, conflict with the provisions of the Constitution prohibiting it from auditing or allowing private claims or accounts against the State. It has undoubted power to authorize state officers and agents to contract debts, under certain circumstances against the State, and, as we have before said, it can legalize such as have been theretofore illegally contracted, by a subsequent exercise of its legitimate legislative power. It may create tribunals to hear and determine cases between the State and individuals, and it may by law enlarge the authority of existing tribunals to hear the same. In all this it neither audits nor allows claims, nor authorizes their payment. It simply provides a tribunal before which the State may be prosecuted, and enacts that a limitation upon the authority of the tribunal shall not apply to certain obligations. Such a limitation is created by and may therefore be removed by legislative authority.

It would certainly be very strange and would subject the State to great loss and damage, if, in cases of emergency, and when legislative authority could not be previously obtained to authorize the same, its servants should be powerless to obtain labor and materials necessary to save it from the destruction of its property and be compelled to lose advances made in reliance upon the justice and honor of the State, and believing that they would be subsequently reimbursed for expenditures made for its benefit.

It cannot, we think, be said that the section in question was intended to disable the State from paying for property or valuable services received by it from individuals, because they

were furnished under the stress of an imminent necessity without previous authority of law. Although such acts constituted no legal claim against the State, and could not be enforced in an action at law, they formed in justice and right irresistible claims upon the honor of the State and are, we think, within the power of the Legislature to legalize, and, when authorized and approved by legal tribunals, within its power to provide for and pay. We conclude, therefore, that no constitutional objection to the act in question exists against it as a legitimate exercise of the power of the Legislature.

A more serious question arises over the prohibition imposed upon the board of claims against auditing or allowing claims which, as between individuals, would be barred by lapse of time. Would this claim have been so barred as between citizens of the State at the time this statute was passed? If it would, then it must come within the prohibition of the constitutional provision.

We are of the opinion that it is not saved therefrom by the proviso in the Constitution exempting existing claims which have been duly presented within the time allowed by law and prosecuted diligently thereafter. We think that proviso, by its express terms, applied only to claims existing at the time of the adoption of the Amendment, in 1874, and did not embrace future cases which were clearly covered by the first paragraph of the section. That paragraph stands alone and states the rule to be applied to all claims subsequently arising. The claim in question, having accrued after the adoption of the Amendment, must be determined by the rule of limitation which obtains "between citizens," as specified in the first paragraph.

It is not clear, precisely what the framers of the Amendment intended by this phrase; because there is but little analogy between the position of the State in reference to the prosecution of claims against it, and the condition of a citizen, subject at all times and in numerous tribunals, to be brought into court and prosecuted for his liabilities. The State can be prosecuted, in a legal sense, only by its own consent, and after it has created a tribunal to hear and decide claims against it.

It would be manifestly unjust to allow an honest claim against the State, to be defeated on account of its omission to provide a tribunal where it might be prosecuted. *Hanger v. Abbott*, 78 U. S. 6 Wall. 532 [18 L. ed. 939].

In view of this condition, it was held by this court in *Corliss v. State*, 1 Cent. Rep. 77, 99 N. Y. 491, that presentation to and prosecution of claims before the Legislature, in the absence of other tribunals competent to hear them, would be sufficient to save them from the bar presented by the constitutional amendment against existing claims.

We are therefore compelled to consider the naked question whether, as between individuals, this claim would have been barred by the lapse of time, according to the general law of the State, when the statute was passed. In the consideration of that question, it must be taken as an established fact in the case, that prior to the passage of chapter 472, Laws of 1886, no legal claims, enforceable in any court, existed

against the State for the demand in question. That question was adjudicated in 1878, by the board of audit, in favor of the State.

By the legislation of 1886 the authority of the quarantine officials, to contract for the services and materials in question on the part of the State, was adopted and approved by the Legislature, and the claim for compensation therefor then had for the first time a legal existence against the State. When, then, did a cause of action arise therefor in favor of the claimant against the State? Obviously not until the legislative recognition. The language of the Act of 1886 by clear implication recognizes the authority of the quarantine officials to contract for the services and materials in question, and acknowledges the liability of the State therefor, and the claim in question then had its origin.

It is conceded by the appellant that the award of the board of audit was not such an adjudication as would bar the claim presented to the board of claims; and it would seem to follow therefrom, that in the opinion of the appellant, the statute would not commence to run against the latter claim until its legislative recognition.

It is undoubtedly true that the Statutes of Limitation are equally effectual in ordinary cases against equitable and invalid claims as well as valid and legal ones; but we think in the case of an imperfect claim or obligation which is unenforceable by reason of some vice or defect therein which may be cured or waived by the debtor, that a right of action thereon arises at the time the claim becomes purged of the vice by the action of the debtor and not before. The Statute of Limitations commences to run only after a cause of action has accrued; and it does not follow that, because the statute has run against an imperfect obligation, the debtor may not create a new obligation although founded on one which has outlived.

In the case of an individual contracting with pretended agent, who sues the supposed principal for an alleged breach of contract and has been defeated upon the ground of want of authority in the agent to make the contract, such an adjudication would not defeat an action brought upon the same contract legalized by a subsequent ratification, even though the liability upon the original contract had in the mean while become outlawed. The imperfect obligation imposed by the original contract would have been perfected by the ratification and the cause of action, although supported by the

moral consideration afforded by the contract, would have been legally completed and made enforceable by the ratification alone.

Suppose the quarantine officials had purchased lands on the Harbor of New York for quarantine purposes without authority, and the State had afterwards refused to pay for them, but, after the statute had run against such claim, should by legislative action authorize and direct such officials to take possession of such lands and appropriate them to the use of the State, can anyone doubt that a cause of action would then arise against the State for the value of such lands? We think not.

It was said by Rapallo, J., in the *Cole Case*: "As a general rule money expended or services rendered by one individual for the benefit of another do not create a legal liability on the part of the person benefited to make compensation. But a law which should provide that in every such case if the party benefited ratifies the acts of the other and accepts the benefits, he should be liable, would be free from objection, so far at all events as it should apply to future transactions. When the Legislature is dealing with the imperfect obligation arising from such a state of facts, it seems to us it does not transcend its powers by passing a law affording a remedy even in respect to past transactions, where the State adopts the act and is the party to make the compensation."

The case of *McDougall v. State*, 11 Cent. Rep. 917, 109 N. Y. 80, 14 N. Y. S. R. 791, is not in conflict with any views herein presented. That claim arose upon a cause of action for damages in tort accruing in 1860. Liability for claims of this character was assumed by the State by chapter 821 of the Laws of 1870, and authority given to the canal appraisers to hear and determine them. It was saved as an existing claim from the operation of the Amendment to the Constitution in 1874 by the provision exempting claims duly presented and diligently prosecuted. It was held, although it had been duly presented, it had not been diligently prosecuted thereafter and was therefore barred by the Statute of Limitations.

We think the value of the materials furnished by the claimant in the performance of the services referred to in the Act constituted a part of the claim and was fairly within the spirit of the provision authorizing the hearing by the board of claims.

We are therefore of the opinion that the award appealed from should be affirmed.

All concur except Danforth, J., dissenting.

## IOWA SUPREME COURT.

Trustees, etc. of PROTESTANT EPISCOPAL CHURCH, *Appts.*,

v.

City of ANAMOSA.

(.....Iowa.....)

**A city is liable for the damages to private property occasioned by grading a street without**

**NOTE.**—Municipal corporation liable for injuries caused by grading street.

If an ordinance is enacted in compliance with the statute, it will not be invalidated because in its passage L. R. A.

the authority of an ordinance, passed as required by Iowa Code, § 465, providing that no street of a city shall be graded unless it is ordered to be done by the affirmative vote of two thirds of the city council or trustees.

(January 13, 1893.)

**A**PPPEAL by plaintiffs, from a judgment of the Jones County District Court (J. H.

sage one of the parliamentary rules of the council was violated. McGraw v. Whitson, 60 Iowa, 248.

The principle that corporate acts outside of the powers of a corporation or of the officers appointed

Preston, P. J.) sustaining a demurrer to a petition filed to recover damages for injuries sustained by the change of grade in a street. *Reversed.*

The facts are sufficiently stated in the opinion.

*Meers, Sheean & McCarn* for appellants.  
*Mr. Ezra Keeler* for appellee.

**Beck, J.**, delivered the opinion of the court:

1. The part of the petition assailed by demurrer is in the following language:

"*First count.* Now comes the above-named plaintiff, and for its amended petition, in said case says that prior to the 5th day of February, 1877, it was, and has since continued to be, and now is, a corporation, duly organized under the Laws of the State of Iowa. That the above-named defendant, prior to the year 1871, was, and yet is, a municipal corporation, organized and existing under the laws of said State. That said plaintiff since said 5th day of February, 1877, has been, and now is, the absolute owner in fee simple of the following described real estate, situated within the corporate limits of said City of Anamosa, Iowa, to wit: Lot No. 6, in block No. 4, in Shaw's Addition to said city. That said real estate fronts for sixty feet, on the north end thereof, on Pine Street, and on the west side for 110 feet, on Garnaville Street, in said city. That prior to the year 1886 there was erected on said real estate a church edifice, and a costly stone wall along the north front and along a portion of the west side; also sidewalks and other improvements—all of which are yet on said premises. That in 1871 said defendant made a survey of the grades of said streets adjacent to said real estate, where said streets run along the west and north lines of said real estate, and set grade stakes to correspond with said survey, made a plat of said grade as thus surveyed, and kept the same since said time in the office of the city clerk of said city for the guidance of the officers of said city, and owners of abutting lots, in putting down sidewalks, curbing, and crossings along said streets. That prior to the year 1886 said defendant put down stone crossings on said streets in front of, and north and east and west of, said real estate, on the grade thus surveyed and platted in accordance with said grade, and that under the orders and directions of said defendant the owners of said real estate cut down the grade thereof along the whole north front, and along the whole of the west side, so as to correspond with said grade, and put down sidewalks along said whole north front and west side thereof in accordance with said grade, and also erected expensive stone walls along the whole of said north front, and along a portion of said north front, and along a portion of said west side, and made other improvements corresponding with said grades. That during the year 1886 said defendant unlawfully, wrongfully, and in violation of plaintiff's rights, excavated, cut down, and removed the earth from said streets adjacent to said real estate, along the whole north front,

to the depth of about five feet below said grade, and along the whole of the west side thereof, to the depth of about six feet below said grade. That said cutting down of grading of said streets was not ordered to be done by the affirmative vote of two thirds of the city council or trustees of said city, as required by law, nor did said defendant, by resolution, ordinance or other legislative proceedings, provide for the grading, nor establish the grades, of said streets, before cutting down or grading the same, as required by law; nor did said defendant before thus changing the physical grade, of said streets, nor at any time, have the damages caused by said change assessed, appraised, or paid as required by law; but, on the contrary, the said defendant proceeded, as aforesaid, unlawfully, wrongfully, and in violation of plaintiff's rights, to cut down, excavate and remove the earth from said streets, to the injury of said real estate, and the damage of said plaintiff in the sum of —," etc.

The defendant demurred to the petition, on the ground that "The facts therein stated do not entitle the plaintiff to the relief demanded, because it does not appear that any grade was ever established on the streets mentioned, or that plaintiff made any improvements to conform to any established grade on said streets, or that defendant ever caused the grade of said streets to be changed, or that plaintiff has sustained any damage on account of any unlawful act or negligence of said defendant."

The demurrer was sustained, and, plaintiffs standing on their petition, judgment was rendered for defendant.

2. In our opinion, the petition alleges a sufficient cause of action against defendant. The following provisions of the Code are to be considered and applied in the determination of the case: "Sec. 465: They [cities] shall have power to provide for the grading and repairs of any street, avenue, or alley, and the construction of sewers . . . but no street shall be graded, except the same be ordered to be done by the affirmative vote of two thirds of the city council or trustees."

Section 469 provides, that "When any city or town shall have established the grade of any street or alley, and any person shall have built or made any improvements on such street or alley according to the established grade thereof, and such city or town shall alter said established grade in such a manner as to injure or diminish the value of said property, said city or town shall pay to the owner or owners of said property so injured the amount of such damage or injury, which shall be assessed by three persons," etc. Prior to this statute, cities were not liable for injuries resulting from establishing or changing the grade of their streets, if it were prudently done, in the exercise of its authority as prescribed by law. *Creal v. Keokuk*, 4 G. Greene, 47.

The powers of the city are to be carried into effect and discharged through the provisions of ordinances enacted by the city. Code, § 482.

It cannot be claimed that the city, without

to act for it, are void as respects the corporation, and that the corporation is not liable for injuries resulting from such acts, is distinguishable from that announced in the principal case. See 2 Dillon, Mun. Corp. § 707, 768.

2 L. R. A.

For liability of municipal corporations for negligent exercise of its powers, see *Chapman v. Rochester*, 1 L. R. A. 296, note. For torts of its agents and officers, see *Hines v. Charlotte*, 1 L. R. A. 844, note.

the enactment of an ordinance prescribing therefor, may establish or change the grade of its streets, or may order or cause the work of grading to be done upon the street, which results in injury to a property owner, and escape liability to him. If the city may establish and change the grades of a street, and direct the work to be done without the required ordinances, and incur no liability therefor, then could it, by dispensing with ordinances, make and change grades without incurring liability to the property owner who is injured thereby, thus defeating the requirements of law.

The city must exercise its power in the manner prescribed by its charter. If authority be conferred upon it to establish grades, and cause streets to be graded by ordinances, these things cannot be done in any other way. The city must pursue the law granting it authority. It cannot do, by the acts of its executive officers, or by simple resolution or direction of a major-

ity vote of its council, that which its charter says shall be done by ordinance adopted by a two thirds vote. *Burlington v. Kellar*, 18 Iowa, 59; *Noyes v. Mason City*, 53 Iowa, 418.

Now, whether we regard the act complained of in the petition as the change of grade, or the original establishing of a grade, and the construction of the street in accord therewith, it was not done by an ordinance, resolution or other action of the city had in the manner and upon the vote of the council prescribed by the statute (Code, § 465); and if it be, indeed, a change of grade, the requirements of the Code, § 469, were not observed. In either view, we must regard the act complained of in the petition as not done in compliance with law, and hold that defendant is liable therefor.

In our opinion, the district court should have overruled the demurrer.

*Reversed.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Dennis McCARTHY,

v.

BOSTON & LOWELL R. CO.

(.....Mass.....)

In an action of tort brought by a father to recover for the loss of his son's services, the father will not be permitted to testify that in his own mind he did not intend to emancipate the son, if the facts in the case warrant a finding by the jury of an implied emancipation which would cut off the father's right to maintain the action.

(February 23, 1890.)

ON plaintiff's exceptions. *Overruled.*

This was an action of tort for damages incurred by the loss of the earnings of plaintiff's minor son, in consequence of injuries received by him by reason of the negligence of the defendant in the management of its railroad.

Trial was had in the superior court, before Sherman, J., where the verdict was for the defendant, and plaintiff excepted.

Further facts appear in the opinion.

Mr. Charles Cowley for plaintiff.

Messrs. G. F. Richardson and W. H. Coolidge for defendant.

C. Allen, J., delivered the opinion of the court.

The facts disclosed in the present case were sufficient, if taken by themselves alone, to warrant the jury in finding an implied emancipation by the plaintiff of his son, which would

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cut off the father's right to collect and have the son's earnings, or to maintain an action of tort founded on the loss of the son's services. *Nightingale v. Withington*, 15 Mass. 272; *Wedell v. Coggeshall*, 2 Met. 89; *Abbott v. Converse*, 4 Allen, 530, 533; *Dumaine v. Greyana*, 10 Allen, 270, 272; *The Etna*, 1 Ware, 462; *Stansbury v. Bertron*, 7 Watts & S. 362.

But the plaintiff contends that he did not, in his own mind, intend to emancipate his son, and the only question presented by the bill of exceptions is whether the plaintiff's undisclosed intent was a material element to be considered. If it was material, no doubt the plaintiff might testify to it directly. But we think it was not material.

If a father drives his minor son out of doors, and turns him upon the world to shift for himself, and then sues for his wages, he cannot be heard in court to say that in his own mind he nevertheless retained the intention of claiming them. Emancipation is a practical thing, and may be proved by conduct and acts; and the father's secret intent, contrary to the effect of his acts, could not affect the son's rights. By way of illustration, see *West v. Platt*, 127 Mass. 387, 372, and cases there cited; *Ford v. Ford*, 8 New Eng. Rep. 785, 143 Mass. 577, 578; *O'Donnell v. Clinton*, 5 New Eng. Rep. 433, 145 Mass. 461, 463.

The father's claim to recover damages for a personal injury to the son rests on the same ground as a claim to recover for his wages. He had forfeited his rights by his acts.

*Exceptions overruled.*

## MICHIGAN SUPREME COURT.

PEOPLE, *ex rel.* Frank M. HART,

v.

Frank McELROY *et al.*, Appts.

(.....Mich.....)

1. Although the courts of Michigan may take cognisance of legislative journals for the purpose of determining whether constitutional methods have been followed in the passage of a law they cannot act upon anything not found in the journal, or presume that any requirement of the Constitution has not been fulfilled, in determining the validity of a statute.
2. Every *intendment* is to be made in favor of the constitutionality of a statute.
3. A statute whose object as expressed in the title is to incorporate a city, which is substituted for a statute whose object as expressed in the title is to organize a new township, cannot be considered a new bill, so as to be invalid under Michigan Constitution, art. 4, § 28, because not introduced within the first fifty days of the session, when the lands to be affected in both the bill and the substitute are shown to belong to the same county, and the body of the original bill does not appear in the legislative journals.
4. The legislative practice of reading a bill twice by title and only once at length, having long been maintained in Michigan, must be regarded by the courts as a substantial compliance with Michigan Constitution, art. 4, § 19, which provides that "Every bill and joint resolution shall be read three times in each House before final passage thereof."

(November 28, 1888.)

NOTE.—Title to Act must have but one object expressed.

A constitutional provision that a statute shall relate to one subject only, which shall be expressed in the title, is substantially complied with if the statute has but one general object, and that object is fairly expressed in the title. *Carter Co. v. Sinton*, 129 U. S. 517 (30 L. ed. 701); *Cooley, Const. Lim.*, 1st ed. 144, § 2; (4th ed.) 175. See, generally, *Titusville Iron Works v. Keystone Oil Co.* 1 L. R. A. 381 and note.

The title to an Act must express the subject so clearly as to give notice of the legislative purpose to those interested therein. *Re Pottstown*, 10 Cent. Rep. 801, 117 Pa. 538, 20 W. N. C. 494; *Carothers' App.* 11 Cent. Rep. 48, 113 Pa. 468, 20 W. N. C. 434.

Where after stating the object of the Act, the title does no more than add a notice of the repealing clause, where such repeal would be effected by implication by the enactment of the law itself, it is not duplicity. *Telford v. Church* (Mich.) 9 West. Rep. 885.

## Instances.

An Act entitled "An Act to Revise and Amend the Charter of West Bay City, and to Repeal all Acts and Parts of Acts in Conflict Therewith," embraces but one object, and is not contrary to the Constitution. *Hargrave v. Weber*, 9 West. Rep. 564.

The title "To Revise an Act to Incorporate Bay City," conferring power on the police court, does not embrace more than one object. *People v. Pond* (Mich.) 10 West. Rep. 568.

The title of an Act "To Provide for a State Board of Equalization," is sufficiently indicative of its object. *Boyce v. Sebring* (Mich.) 10 West. Rep. 178.

The object of Michigan Laws 1883, Act No. 167, restricting the right to practice medicine, entitled "An Act to Promote Public Health," is clearly indicated in its title. *People v. Phippin* (Mich.) 14 West. Rep. 247.

The Act of June 11, 1879, entitled "A Supplement to an Act for the Regulation of Boroughs," of April 3, 1851, expresses its object in the title. *Re Pottstown*, 10 Cent. Rep. 800, 117 Pa. 538, 20 W. N. C. 494.

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ERROR to the Circuit Court of St. Clair County (Canfield, J.), to review a judgment of ouster in an action in the nature of *quo warranto*. *Reversed*.

The facts and questions presented are stated in the opinion.

*Messrs. Atkinson & Vance*, for respondents, appellants:

Changes in the object of a proposed statute from that indicated in the title do not conflict with the constitutional prohibition against introducing new bills after a new stage.

*Pack v. Barton*, 47 Mich. 520; *Suite v. Buckley*, 54 Ala. 599; *Harrison v. Gordy*, 57 Ala. 49; *Leftin v. Watson*, 82 Ark. 414; *Underwood v. McDuffee*, 15 Mich. 361; *People v. Campbell*, 8 Ill. 466; 1 How. Stat. 46, 47, art. 4, §§ 19, 28; *Cushing, Legislative Assemblies*, § 2141, cited in *Weill v. Kenfield*, 54 Cal. 113, 114.

The legislative journals are not conclusive upon anything except what appears therein; and no presumption should arise that a step was not taken, because it is not found of record.

*Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 16; *Schuyler County v. People*, 25 Ill. 181; *Milner v. State*, 8 Ohio St. 481; *People v. Rice* (Mich.) 7 West. Rep. 642.

The courts cannot look beyond the enrolled Act to ascertain whether there has been a compliance with the requirements of the Constitution upon its passage or what time it was presented to the Governor.

*State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721;

## Construction of constitutional provision.

The object of the constitutional provision in the Constitutions of different States, is to prevent the union of incongruous matters having no relation to each other; and where the law embraces several objects, all of which are matters properly connected with its chief object, it is unnecessary that the title of the Act shall contain every purpose of the law. *Baltimore & O. R. Co. v. Jefferson Co.* 29 Fed. Rep. 305.

A law is not invalidated because it contains several particular objects, all of which are properly referred to, and are subdivisions of a single general object. *Excelsior Planting & Mfg. Co. v. Green*, 39 La. Ann. 455.

The constitutional provision as to the entitling of statutes must receive a reasonable interpretation; and whenever a matter contained in the statute may be fairly considered germane to the subject expressed by the title, it is sufficient. *Dallas v. Redman*, 10 Colo. 207.

None of the provisions of an Act should be regarded as unconstitutional when they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title. *Montclair v. Ramsdell*, 107 U. S. 147 (27 L. ed. 431); *Jonesboro v. Cairo & St. L. R. Co.* 110 U. S. 192 (28 L. ed. 116); *Mahomet v. Quackenbush*, 117 U. S. 509 (29 L. ed. 982); *Otoe Co. v. Baldwin*, 111 U. S. 1 (28 L. ed. 331); *Ackley School Dist. v. Hall*, 113 U. S. 135 (28 L. ed. 954).

The title of a statute need not enunciate the various ways and means to which the law giver may resort to accomplish the purpose in view. *Edwards v. Police Jury*, 39 La. Ann. 855.

Where it was the purpose of a statute to revise a city charter and amend it, and this is expressed in the title to the amendatory Act, the manner of making the amendment, by extending the territorial limits of the municipality or the particular municipality from which the added portion is to be taken, need not be inserted in the title. *Hargrave v. Weber* (Mich.) 9 West. Rep. 564.

The title of a supplemental Act is sufficient if it contains a reference to the original Act and declares the Act of which it is the title supplemental



*Bender v. State*, 53 Ind. 254; *Evans v. Browne*, 80 Ind. 514; *Stout v. Grant Co.* 5 West. Rep. 685, 107 Ind. 843; *Turbeville v. State*, 43 Ind. 490; *Madison Co. v. Burford*, 98 Ind. 888.

The Act refers to Fort Gratiot, Frankfort and Marine City, all in St. Clair County. It relates throughout to purposes for organizing municipalities or municipal government and granting rights to the people. All such changes are within legislative power.

*Pack v. Barton*, 47 Mich. 520; *People v. Rice* (Mich.) 7 West. Rep. 642. Also Alabama cases cited in 47 Mich. 521.

The Constitution of Michigan in reference to requirements for the enactment of statutes is not so strict as in many other States, and yet statutes like this have been sustained in other States.

*Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 16; Ohio Const. art. 4. See 17 Ohio Stat. 1841, 24; 1 How. Stat. 46; Nevada Const. See 21 Am. Rep. 726; Cal. Const. See 54 Cal. 111, 112; *Stout v. Grant Co.* 5 West. Rep. 685, 107 Ind. 843; *Evans v. Browne*, 80 Ind. 514; *Bender v. State*, 53 Ind. 254; *Madison Co. v. Burford*, 98 Ind. 888; *Ill. Cent. R. Co. v. Wren*, 43 Ill. 77; *State v. Peterson*, 88 Minn. 143.

In *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721, the court states the English maxim that "Matters of public law are not the subject of allegation or denial in pleading nor proof," and says: "The Act imports absolute verity and cannot be impeached by the journal of Parliament. This question arose early in England, but the rule was uniformly maintained that the

courts would look to the statute roll and to that alone."

See English cases examined and their results stated in *Sherman v. Story*, 30 Cal. 256. Approved in *State v. Keesewetter*, 10 West. Rep. 495, 45 Ohio St. 268; *Pangborn v. Young*, 33 N. J. L. 41.

This rule is sustained in Connecticut, New York, New Jersey, Maryland, Missouri, Iowa, North Carolina, Indiana, California and Ohio.

*Thomas v. Dakin*, 22 Wend. 9; *Warner v. Beers*, 23 Wend. 108; *People v. Purdy*, 2 Hill, 81; *De Bou v. People*, 1 Denio, 9; *Commercial Bank v. Sparrow*, 2 Denio, 97; *People v. Chenango Co.* 8 N. Y. 817; *People v. Devlin*, 33 N. Y. 269; *Eld v. Gorham*, 20 Conn. 16; *Sherman v. Story*, 30 Cal. 256; *Pacific R. Co. v. Governor*, 23 Mo. 353; *Pangborn v. Young*, 33 N. J. L. 29; *Brodnax v. Groom*, 64 N. C. 244; *Fouke v. Fleming*, 18 Md. 412; *Duncombe v. Prindle*, 12 Iowa, 1.

**Messrs. B. C. Ferrand, Pros. Atty., and Avery Brothers**, for relator, appellee:

The original bill referred to lands situated in the Township of Fort Gratiot. This township is organized from town 7 north, of range 17 east, Laws 1867, 2, 1188.

This is a matter of judicial knowledge.

*LaGrange v. Chapman*, 11 Mich. 500; *Wright v. Dunham*, 13 Mich. 418.

The substitute relates to territory located in town 8 north, of range 16 east.

The substitute, then, was in no sense germane to the original bill, and was simply a new bill, and is within the inhibition of the Constitution.

thereto. *Re Pottstown*, 10 Cent. Rep. 800, 117 Pa. 588, 20 W. N. C. 494.

An early assumption and continued exercise by the Legislature of the power of passing statutes, entitled merely as "supplements," and giving no further intimation of their contents, settles the sufficiency of such description under a provision requiring the subject matter of an Act to be expressed in the title. *State Line & J. E. Co's App.* 77 Pa. 429; *Endlich, Interpretation of Statutes*, 744.

#### Title violates of constitutional provision.

The title, "An Act to Change the Time of Electing Certain Officers in a County," where the main subject of the Act was the change of the composition of the board of supervisors in the county, mode of election, etc.—this subject not being expressed or in any way germane—violates the Constitution. *Leach v. People*, 10 West. Rep. 617, 123 Ill. 480.

The Act of April 12, 1867, "To Prohibit Issuing of Licenses within Two Miles of the Normal School at Mansfield," section 2, making it an offense to sell liquors for drinking purposes within the prescribed territory, is unconstitutional, its object not being expressed in its title. *Mansfield v. Com.* 13 Cent. Rep. 513, 120 Pa. 305, 21 W. N. C. 455.

In "An Act to Amend Certain Sections of an Act Relating to Township Organizations," provisions for a change of boundaries of cities and villages are invalid as not being within the title of the Act. *Dolese v. Pierce*, 13 West. Rep. 836, 124 Ill. 140; authorities cited in *Hyde Park v. Chicago*, 13 West. Rep. 870, 124 Ill. 154.

The provision of an Act entitled "An Act to Exempt from Taxation Public Property Used for Public Purposes," etc., declaring all other property subject to taxation, is an attempt to impose taxation not indicated in the title, and conflicts with the Constitution. *Borough of Sewickley v. Sholes*, 10 Cent. Rep. 602, 118 Pa. 165, 20 W. N. C. 413.

"An Act Making Appropriations for State Expenses for the Years 1885, 1886, and to Provide a Tax for the Payment of the Same," is void as to provisions for raising money to pay interest to counties, on money realized by the sale of public swamp lands therein, such matter being outside the 2 L. R. A.

title of the Act. *Sanilac County v. Apin* (Mich.) 13 West. Rep. 746.

#### Title no part of Act, but may aid in its construction.

A statute must be construed together with a constitutional provision in *part materia*. *Esbridge v. State*, 25 Ala. 30; *Banger's App.* 109 Pa. 79; *Aultman's App.* 98 Pa. 505; *Johnson's Case*, 1 Maine, 230; *Billingsley v. State*, 14 Md. 368; *Bish. Written Law*, § 89; *Endlich, Interpretation of Statutes*, p. 248.

Under a constitutional prohibition against more than one subject in any statute, and a requirement of its clear expression in the title, the latter necessarily becomes a part of the statute, "and aids, if need be, as a very important guide in its construction." *Pa. R. Co. v. Riblet*, 66 Pa. 164; *Eby's App.* 70 Pa. 311; *Halderman's App.* 104 Pa. 351.

While the title of a statute is not, in general, regarded as a part of the same, it is nevertheless regarded as a legitimate aid in ascertaining the intention of the Legislature when the language and provisions in the body of the Act are ambiguous and of doubtful meaning and application. *U. S. v. Palmer*, 16 U. S. 3 Wheat. 610 (4 L. ed. 471); *Hines v. Wilmington & W. R. Co.* 95 N. C. 434.

The propriety of such reference is especially manifest where the title is referred to in the body of the Act (*Wilson v. Spaulding*, 19 Fed. Rep. 304); and all the more justifiable, in cases of uncertainty, where the Constitution gives significance and assigns particular importance to the title. *Myer v. Western Car Co.* 102 U. S. 1 (26 L. ed. 359; *Endlich, Interpretation of Statutes*, 74).

It may control the statute or some portion of it. See *Nazro v. Merchants Mut. Ins. Co.* 14 Wis. 235; *Dodd v. State*, 13 Ind. 68.

#### Passage of Acts.

The "passage" of an Act, in general, means its completion as a law, by the approval of the Executive, its passage over his veto, or the expiration of the time limited for its return if neither signed nor vetoed. *Logan v. State*, 8 Heisk. 442; *Endlich, Interpretation of Statutes*, 548.

An issue of fact whether a particular bill has been passed by the Legislature in conformity with the

*People v. Rice* (Mich.) 7 West. Rep. 642; *Atty-Gen. v. Amos*, 60 Mich. 872.

The provision of the Constitution as to the three readings is as mandatory as that in respect to the nonintroduction of new bills after the fifty day limit; and noncompliance shown of record renders the law a nullity.

*Weill v. Kenfield*, 54 Cal. 117.

The questions involved are proper to be raised by demurrer. The journals are constitutional records, and the court takes notice of their contents (*People v. Rice, supra*), and the court also takes cognizance of the boundaries of the municipal subdivisions of the State.

*LaGrange v. Chapman*, 11 Mich. 500; *Wright v. Dunham*, 18 Mich. 418.

There was therefore no proof necessary to be offered, none in fact which could be given, the question being one of law solely.

*People v. Mahaney*, 18 Mich. 492.

**Morse, J.**, delivered the opinion of the court:

The Prosecuting Attorney for the County of St. Clair filed an information in the circuit court for that county to test the validity of Act No. 500 of the Local Laws of 1887, purporting to incorporate the City of Marine City, in said county. The defendants are officers of said city, elected and holding public offices by virtue of said Act. The Act is claimed to be void because it was not introduced in the Legislature until after the expiration of fifty days, and was read but once in the Lower House of the Legislature, and was not read three times, as the Constitution requires.

The replication to the plea of the respondents sets forth that the session of the Legislature of 1887 began on the 5th day of January; that

on February 18 a bill, denominated "House Bill No. 491," entitled "A Bill Detaching Certain Lands from the Township of Ft. Gratiot, in the County of St. Clair, and Organizing the Same into a New Township, to be Known as the Township of 'Huron,'" was introduced by Representative Wellman, and referred to the committee on towns and counties.

The bill was discharged from this committee, May 26, and referred to the committee on municipal corporations, May 27. This last committee reported a substitute for said bill, which substitute was entitled "A Bill to Incorporate the City of Marine City, in the County of St. Clair, and to Repeal Act No. 328 of Local Acts of 1885, Entitled 'An Act to Reincorporate the Village of Marine City,' Approved April 23, 1885." The substitute was at once placed on the general order, and on June 3 discharged from such order, and under a suspension of the rules passed, and ordered to take immediate effect. On the same day it was sent to the Senate, and there passed, after but one reading, under a suspension of the rules, and the order for immediate effect concurred in. It was returned to the House, and on June 7 referred to the committee on engrossment and enrollment. Being duly enrolled, it received the signature of the Governor, June 8, 1887.

It is claimed under these circumstances, in said replication, that the bill as passed was not introduced in either House of the Legislature until May 27, 1887, when it appeared as a substitute in the report of the committee on municipal corporations; that the substitute was in no way germane to the subject matter of said house bill 491, as introduced in the first place, and that the territory embraced within the Township of Fort Gratiot does not include

Constitution will not be submitted to a jury. *Blessing v. Galveston*, 42 Tex. 641.

For the purpose of ascertaining by what vote an Act was passed, courts may look beyond the printed statute book to the certificate upon the original engrossed bill on file with the Secretary of State. *Purdy v. People*, 4 Hill, 384.

An amended title may be passed by a majority of a mere quorum. *Johnson v. People*, 83 Ill. 431.

When a section has been stricken out by the House, and the bill so amended has never passed the Senate, it is a nullity. *Prescott v. Ill. & M. Canal Co.* 19 Ill. 324.

#### *Bill to be read on three several days.*

Where a constitutional provision clearly leaves something to the discretion of the Legislature—as where it requires that a bill, before becoming a law, shall be fully and distinctly read on three different days—it manifestly addresses itself to the judgment of that body, and must obviously be deemed directory. *Miller v. State*, 3 Ohio St. 475; *Cooley, Const. L. 98*; *Endlich, Interpretation of Statutes*, 755.

That a bill should be read on three several days does not require that everything to become a law should be thus read. *Dew v. Cunningham*, 28 Ala. 466; *Ramsey Co. v. Heenan*, 2 Minn. 330.

It is not necessary to the validity of an Act that the journal of either House should show affirmatively that it was read three times. *State, Hunt v. Ill. Cent. R. Co.* 33 Fed. Rep. 721.

Where it appears from the journal of the Senate that the rule was suspended by a vote of three fourths of the House, while it is silent as to the reason, the presumption is that the case was urgent. *Hull v. Miller*, 4 Neb. 507.

#### *When a bill becomes a law.*

A bill becomes a law when it has gone through all the forms necessary. These forms are provided for in the Constitutions of the various States. *Jones v. Hutchinson*, 43 Ala. 721. *Hull v. Miller*, 4 Neb. 507.

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It must be passed by the Legislature and approved by the Governor. *Wartman v. Philadelphia*, 33 Pa. 202.

In approving a statute the Governor acts as a part of the Legislative Branch of the Government. *Fowler v. Peirce*, 2 Cal. 163.

So a repealing Act does not become a law till its approval. *Memphis v. U. S.* 97 U. S. 238 (24 L. ed. 930).

#### *Presumption in favor of constitutionality of its passage.*

A legislative intent to violate the Constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construction. *New York & O. M. R. Co. v. Van Horn*, 57 N. Y. 473; *French v. Teschemaker*, 24 Cal. 518; *Atty-Gen. v. Eau Claire*, 37 Wis. 400; *Brown v. Buzan*, 24 Ind. 194; *Slack v. Jacob*, 8 W. Va. 612; *Endlich, Interpretation of Statutes*, § 178, p. 246.

Wherever a statute is susceptible of two constructions, of which the one would make it unconstitutional, the other constitutional, the latter is to be adopted. *Roosevelt v. Godard*, 32 Barb. 533; *Colwell v. May's Landing Water Power Co.* 19 N. J. Eq. 245; *Duncombe v. Prindle*, 12 Iowa, 1; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221; *Com. v. Bennett*, 16 Serg. & R. 243. See also *Mardre v. Felton*, Phil. L. (N. C.) 279; *McGwigan v. Wilmington & W. R. Co.* 95 N. C. 428.

Where an unconstitutional effect would be the result of a strict or narrow construction, a broad or liberal one is commanded. Thus, where a strict construction would have the effect of limiting and destroying, while some popular acceptance would support, the Act, the latter must be adopted. *Com. v. Butler*, 99 Pa. 535, 540; *Farmers & M. Bank v. Smith*, 3 Serg. & R. 68; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101.

So, a law speaking of officers by their titles of office will be presumed to be intended to operate upon future incumbents also, in order to escape the objection of unconstitutionality as a private or lo-

any of the territory incorporated in Marine City by the substitute.

After the filing of this replication, the respondents obtained leave to file an amended plea and answer, and did so. In this amended answer they set forth the Act under which the city was organized, and averred its proper and correct passage by the Legislature according to law, showing the certificate of the proper officers that it passed both Houses, and was ordered to take immediate effect; also the approval of the Governor, and the certificate of the Secretary of State that it had become a law. It also appears upon the statute books as one of the Local Acts of 1887. See Local Acts 1887, p. 665.

To this amended plea and answer the prosecuting attorney replied that "Act No. 500 of the Laws of 1887 is not, and never has been, of any validity or force, and is now and always has been, void and of no effect, because the same was not introduced into or brought before the said Legislature until after the expiration of more than fifty days from and after the commencement of said session, and because the same was only read once in the Lower House of said Legislature, and was not read therein three times, as the Constitution of this State requires," and set forth the same, with other matters not necessary here to be mentioned, as causes of demurrer to said plea and answer. The respondents joined in said demurrer, and prayed the quashing of said information.

Upon the hearing, the journals of the two Houses were used, and it was shown therefrom the state of facts set forth in the replication, except that the bill, before it was referred to a committee, was read twice by its title, and the substitute once at length before its passage in the House, and also that the bill, in the shape of the substitute, was read twice by its title,

and once at length in the Senate before its passage.

We held, in *People ex rel. Attorney-General v. Rice*, 7 West. Rep. 642, 81 N. W. Rep. 203, that parties could not stipulate or agree, or admit by pleading, that a statute was not properly or constitutionally passed by the Legislature, and that no parol proof could be used for that purpose. In that case we took judicial knowledge of the contents of the legislative journals, and found no flaw in the passage of the Act then under consideration. But it is held by reputable authority, and with some show of reason, that courts cannot look beyond the enrolled Act to ascertain whether the Constitution has been complied with in its passage.

If the Act, as in this case, is authenticated by the signature of the presiding officers of both Houses, approved by the Governor, and certified in the published laws by the Secretary of State, it is declared by the courts of last resort in many of the States that the court will not go behind these certificates, and search further to ascertain whether such facts existed as gave these officers constitutional warrant for their action. *State v. Swift*, 10 Nev. 176; *Evans v. Browne*, 30 Ind. 514; *Sherman v. Story*, 30 Cal. 256; *Bender v. State*, 53 Ind. 254; *Pangborn v. Young*, 32 N. J. L. 41; *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 8; *Pacific R. Co. v. Governor*, 28 Mo. 353; *People v. Devlin*, 83 N. Y. 269.

The courts of some of the States have taken cognizance of the journals, and have looked into them for the purpose of determining whether the constitutional methods have been followed in the passage of laws. But it is held, in all cases, that the presumption is always strong that the Legislature has not violated the Constitution in the passage of an Act, duly authenticated, as stated above; and that the proof fur-

cal law. *Seneca County v. Allen*, 1 Cent. Rep. 71, 90 N. Y. 532.

It is a safe and wholesome rule to adopt the restricted construction of a statute, when a more liberal one will bring it in conflict with the fundamental law. *People v. Board of Education*, 18 Barb. 400, 409. See also *Com. v. Butler*, 99 Pa. 541; *Endlich, Interpretation of Statutes*, 744.

When a law is signed by the speakers of both Houses, and approved by the Governor, it is presumed to have been passed in conformity to constitutional requirements. *Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 11; *Turley v. Logan Co.* 17 Ill. 151.

Courts cannot go behind these to inquire into the form of its passage. *Kilgore v. Magee*, 85 Pa. 401.

The certificates of the speakers of the two Houses respectively, that an Act has passed both Houses, conclude the court upon any inquiry in that direction. *Stout v. Grant Co.* 5 West. Rep. 636, 107 Ind. 243; *Evans v. Browne*, 30 Ind. 514; *Bender v. State*, 53 Ind. 254; *Madison Co. v. Burford*, 93 Ind. 383.

Where a statute is of doubtful or uncertain meaning a recurrence to the circumstances under which it was passed may be had to ascertain the probable intention of the Legislature in enacting it; and to that end the legislative history of the statute may be inquired into. *Walter A. Wood Mowing & R. Mach. Co. v. Caldwell*, 54 Ind. 270.

And for this purpose Acts *in part materia* may be referred to. *Prather v. Jeffersonville, M. & I. R. Co.* 52 Ind. 32; *Douglass v. Howland*, 24 Wend. 45; *Taylor v. Washington Co.* 67 Ind. 383.

#### Joint resolutions.

A joint resolution, when duly enrolled, signed and approved, is equal in dignity and equally effectual to modify or repeal existing laws. *Swann v. Buck*, 40 Miss. 268.

But a joint resolution on a subject which by the Constitution requires an Act thereof is void. *Boyers v. Crane*, 1 W. Va. 176.

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#### Judicial notice taken of legislative journals.

For the purposes of construction, and of ascertaining whether an Act has been passed according to the forms required by the Constitution to give it validity, the courts judicially notice the contents of the legislative journals, which need not, therefore, be pleaded or given in evidence. *Mcody v. State*, 43 Ala. 115; *Clare v. State*, 5 Iowa, 500; *People v. Mahaney*, 13 Mich. 481; *Re Division of Howard Co.* 15 Kan. 194. But see, *contra*, *Grob v. Cushman*, 45 Ill. 119; *Coleman v. Dobbins*, 8 Ind. 156; *Madison Co. v. Burford*, 93 Ind. 383; *Auditor v. Haycraft*, 14 Bush. 234; *Endlich, Interpretation of Statutes*, 44.

Journals kept by the two Houses may be resorted to in ascertaining whether an Act was passed by a vote of two thirds. *Purdy v. People*, 4 Hill, 334; *Turley v. Logan Co.* 17 Ill. 151.

A bill was duly passed, but was not copied upon the journal of either House, nor signed by the presiding officer of either House, or enrolled, filed or published. It was held that a printed bill bearing a similar title and number, deposited in the state library, could not prove contents of the bill in question; the bill did not become a law. *State v. Kleewetter*, 10 West. Rep. 495, 45 Ohio St. 233.

#### Presumptions in favor of published statutes.

The presumption is that a published law was correctly passed as to matters of form. *People v. Obango Co.* 8 N. Y. 817.

When the Constitution does not require the journals of the General Assembly to affirmatively show that a particular thing necessary to the validity of legislative action was done, it will be presumed in their silence, unless the contrary is shown, that the legislators observed their obligation. *Hall v. Steele*, 82 Ala. 532.

The certificate of the Secretary of State to a volume of the Revised Statutes is *prima facie* evidence of a section embodied therein. *Selders v. Kansas City, F. & G. R. Co.* 1 West. Rep. 438, 19 Mo. App. 234.

nished by the journals must be clear, in order to overcome this presumption. *State v. Peterson*, 38 Minn. 148, 86 N. W. Rep. 443; *Miller v. State*, 3 Ohio St. 475; *Williams v. State*, 6 Lea, 549; *Schuyler Co. v. People*, 25 Ill. 188; *Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 11; *Worthen v. Badgett*, 82 Ark. 496.

It would seem that in this State the practice of this court has been to look into the legislative journals, and to go behind the authentication of the Act, to ascertain whether the provisions of the Constitution have been complied with in the procedure to its passage.

In *Green v. Graves* the court evidently did this, and decided "an Act to organize and regulate banking associations" to be unconstitutional because it did not receive the assent of two thirds of the members of each house. See 1 Doug. (Mich.) 351.

In *People v. Onondaga*, 16 Mich. 254, the court examined the journals, and ascertained that the title of the Act as engrossed and signed by the Governor differed from the title of the bill as passed. Campbell, J., in his opinion, says: "We have certainly the right to look behind the enrollment of a statute for some purposes, in order to determine whether it passed the Legislature under the conditions required by the Constitution; as, for example, to ascertain what the vote was upon it;" citing *Green v. Graves*, *supra*.

And in *People, ex rel. Attorney-General, v. Rice*, 7 West. Rep. 642, 81 N. W. Rep. 203, this court again examined the journals.

But in none of these cases does it appear that the right to do so was questioned upon the argument.

I am of the opinion that the right of the courts to look into the journals for certain purposes, and especially in such cases as *Green v. Graves* and *People v. Onondaga*, should be sustained, rather than to hold that the enrollment and authentication of the Act, as enrolled by the proper officers, is conclusive. The courts certainly ought to have the right to open the journals of the Legislature to ascertain whether the fraud or mistake of some clerk or employé of the Legislature or its committees has not imposed upon the statute books a different law from the one actually passed by the Legislature, or to determine whether the requisite number of votes have been given under the Constitution to pass a law, when the Constitution requires that the ayes and noes shall be entered upon such journals. It must have been intended by the framers of that instrument, on such requirement, that the courts should look into the journals to determine whether the ayes were sufficient to pass a bill in either House as recorded in the journals.

How far the journals may be examined, to impeach duly authenticated Acts of the Legislature, it is not necessary here to determine. We certainly cannot act upon anything not found in the journals, nor can we presume that any requirement of the Constitution has not been fulfilled unless the fact appears affirmatively in such journals; and every intendment is to be made in favor of the constitutionality of the passage of the Act.

We held in *People, ex rel. Attorney-General*, 3 L. R. A.

*v. Rice, supra*, that if the object of the Act as passed is fully expressed in its title, the form or status of such title at its introduction, or during any of the stages of legislation before it becomes a law, is immaterial. In the present case, therefore, the Act is not unconstitutional because the title of the bill as introduced differed from the title of the substitute or the Act as passed. The body of this bill, as introduced by Mr. Wellman, does not appear in the house journal, nor does the Constitution require that it should. We have no right to presume that the body of the substitute was not germane to the body of the bill. The title throws some light upon the subject in both the bill and substitute, and from these titles it would appear that the subject to be legislated upon related to the same matter, to wit: the incorporation of certain territory in the same County of St. Clair into a new political organization or municipality—the bill, to take territory from the Township of Fort Gratiot, in the County of St. Clair, and organizing therefrom a new township to be called "Huronin," and the substitute to incorporate the City of Marine City within the same county. See *Attorney-General v. Amos*, 60 Mich. 372, 380, 27 N. W. Rep. 571.

We are not informed by the journal what the description of this particular territory was in the body of the bill as introduced, and we cannot go outside of the journals to ascertain it; nor do we consider that it was necessary that the description of the territory in the bill should have been identical with that of the substitute. The lands and property to be affected in both the bill and substitute evidently, from the titles, being in the same county, we are not prepared to say that even the spirit of the constitutional provision was violated. Certainly there is no affirmative showing from the journals that the letter of the constitutional requirement was not observed. The bill was introduced within the fifty day limit. The substitute cannot be considered a new bill. Article 4, § 28.

As to the reading of the bill and substitute twice by the titles and only once at length, it cannot be considered, at this late day, a violation of section 19, article 4, of the Constitution, which provides that "Every bill and joint resolution shall be read three times in each house before the final passage thereof. The legislative practice of reading the same twice by title and only once at length has been maintained too long in this State to be now overthrown by the courts. It would deprive us of all statutory law. The Constitution, in terms, does not direct that the reading shall be at length, and, while such reading might be the better practice, we cannot hold that it is imperatively required that it should be so read more than once. This Act, as it passed, was read once in each House at length, as appears from the journals.

*The judgment of the Court below must be reversed and vacated.* Judgment will be entered here for the respondents, with costs of both courts against the relator, Frank Hart.

Long, J., did not sit. The other Justices concurred.

## INDIANA SUPREME COURT.

Frederick O. STRINGER, *Appt.*,

Harriet FROST.

(....Ind.....)

1. **A general verdict** must control special interrogatories, unless there is irreconcilable conflict.
2. **Riding a horse at an improper speed** along a much used public street in a populous city and at the same time looking in another direction from that in which the rider is going, is culpable negligence.
3. **A footman about to cross a public street** is not required to exercise the same high degree of vigilance in order to avoid contact with a horseman that is required at railroad crossings. Foot passengers have equal rights in the streets with those mounted on horseback or driving in carriages. Neither has a priority of right over the other; both are bound to use reasonable care to avoid collision.
4. **A general objection** to evidence as "incompetent, immaterial and irrelevant," is not sufficient to present any question on appeal.
5. **On the question of negligence in riding at an improper speed** on a street, evidence is admissible that there is more travel on that street than on any other in the city.

(January 8, 1899.)

**APPEAL** by defendant, from a judgment of the Circuit Court of Allen County (Hurch, J.), in favor of the plaintiff in an action for damages for a personal injury. *Affirmed.* The questions presented are stated in the opinion.

*Mr. Myer L. Groff* for appellant.  
*Messrs. J. B. Harper and W. G. Cole-  
rick* for appellee.

*Mitchell, J.*, delivered the opinion of the court:

Action by Harriet Frost against Elza T. Stringer, and his minor son, Frederick O. Stringer, to recover damages alleged to have been wrongfully inflicted by the defendant, Frederick O. Stringer, upon the plaintiff, in negligently riding his father's horse upon her while she was crossing a public street in the City of Fort Wayne. The jury returned a general verdict in favor of the father, and against Frederick O. Stringer; and they also returned answers to special interrogatories submitted to them by the parties, respectively. On the appellant's behalf it is contended that the answers to special interrogatories make it apparent that the plaintiff was guilty of contributory negligence, and that it was therefore error for the court to overrule his motion for judgment notwithstanding the general verdict.

It is doubtless the rule in cases of this nature that a recovery will not be sustained whenever there is negligence on the part of the plaintiff contributing directly, or which was a proximate cause, to the occurrence from which the injury arises, and that the burden is upon the plaintiff to show that the injury is not attributable to any want of proper care on his part.

2 L. R. A.

*Murphy v. Deane*, 101 Mass. 455. We do not, however, concur in the view that this rule was violated by overruling the appellant's motion for judgment. The general verdict affirmed the defendant's negligence, and that the plaintiff was herself in the exercise of due care; and it is too well settled to justify the citation of authority that, unless the facts specially found are in irreconcilable conflict with the general verdict, the general verdict must control.

It would serve no useful purpose to set out the interrogatories and the answers of the jury. It is quite sufficient to say they show beyond question that the defendant was culpably negligent, in that at the time of the collision he was riding his horse at an improper rate of speed, along a much used public street, in a populous city, and at the same time looking in another direction from that in which he was rapidly proceeding, and that they do not show the neglect of the plaintiff to take any reasonable precaution which would have prevented the collision that occasioned the injury.

We agree that it is the duty of a person crossing, or about to cross, a public street on foot, to look and take precautions according to the character of the thoroughfare, so as to avoid collision with approaching horsemen or vehicles; but it is obviously not necessary that the same high degree of vigilance should be demanded of a footman about to cross a public street, in order to avoid contact with a horseman who is likewise under a duty to be on the lookout, and to have his horse under careful control, as is required at railroad crossings over which engines and trains of cars are necessarily run at a rate of speed not readily governable. *Wendell v. New York Cent. & H. R. Co.* 91 N. Y. 420; *Barker v. Savage*, 45 N. Y. 191; *Williams v. Grealy*, 112 Mass. 79.

Unless the occasion is of an extraordinary character, persons have no right to ride or drive through the streets of a populous city at a rate of speed which makes it dangerous to foot travelers using ordinary care; while trains of cars cannot be moved so that their speed may be averted in a moment, when footmen are seen in the way.

The court committed no error in overruling the appellant's motion for judgment, notwithstanding the general verdict.

It is not necessary to discuss the sufficiency of the evidence. The plaintiff's testimony, which the jury must have accepted as true, sustains the verdict to the fullest extent. Accepting the plaintiff's testimony, it cannot be said that she was guilty of contributory negligence, or that the want of ordinary care on her part proximately or directly contributed to the injury. Foot passengers have equal rights in the streets with those mounted on horseback or driving in carriages. Neither have a priority of right over the other. Both are bound to use reasonable care to avoid collision. *Belton v. Baxter*, 54 N. Y. 245; *Cotton v. Wood*, 8 C. B. N. S. 571.

The plaintiff had the right to cross the street at the crosswalk or elsewhere, exercising such caution and prudence as the circumstances demanded to avoid being injured, while the de-

fendant had the right to ride along the street, observing such watchfulness for footmen, and having his animal under such control, as would enable him to avoid injury to others, who had corresponding and reciprocal rights in the street. *Simons v. Gaynor*, 89 Ind. 165; *Murphy v. Orr*, 96 N. Y. 14; *Moebus v. Herrmann*, 106 N. Y. 849, 11 Cent. Rep. 90, 15 N. E. Rep. 415; *Brooks v. Schwerin*, 54 N. Y. 843; *Daniels v. Clegg*, 28 Mich. 82; *Shapleigh v. Wyman*, 134 Mass. 118.

Children and infirm persons, as well as those who are of mature years, and in the vigor and activity of health, have the right to walk along or across the streets of a city, observing such care as persons of like age and condition are accustomed to use; and all have a right to assume that carriages will not be driven or horses ridden over the streets at an improper rate of speed. *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504, 13 Cent. Rep. 421, 18 N. E. Rep. 103.

It cannot, therefore, be said, as a matter of law, that one is guilty of negligence who does not anticipate and take special precautions against injury from the reckless and improper conduct of others in riding or driving at an

unusual and dangerous rate of speed. *Coombs v. Purrington*, 43 Maine, 382; *Boss v. Litton*, 5 Car. & P. 407; *Williams v. Richards*, 8 Car. & K. 81.

Some questions were asked of witnesses produced by the plaintiff below which were objected to as "incompetent, immaterial and irrelevant." It has often been decided that an objection of this general character, without more, presents no question for decision. *Bundy v. Cunningham*, 107 Ind. 800, 5 West. Rep. 540, 8 N. E. Rep. 174; *Chapman v. Moore*, 107 Ind. 228, 5 West. Rep. 269, 8 N. E. Rep. 80; *Ohio & M. R. Co. v. Walker*, 118 Ind. 198, 13 West. Rep. 731, 15 N. E. Rep. 234.

A witness was also permitted to testify, over objection, that there was more travel upon the street over which the defendant was riding at the time he ran upon the plaintiff than upon any other street in the City of Fort Wayne. As tending to show the impropriety of the defendant's conduct in riding at an immoderate rate of speed, this evidence was competent.

The alleged modification of the instructions asked by the appellant presents no question which requires a reversal of the judgment.

*The judgment is affirmed, with costs.*

## NEVADA SUPREME COURT.

Mary Jane POWELL, *Resp't.*,

v.

D. C. CAMPBELL, *Appt.*

(....Nev.....)

1. When a divorce is granted to a wife for causes other than adultery, if the accomplishment of her support renders it necessary, the court may decree to her the title of either real or personal property belonging to her husband, under Nevada General Statutes, § 496, authorizing property, in certain cases, to be "set apart" for the support of the wife under such circumstances.
2. The rule of *lis pendens* applies to one who purchases real property from a husband, with actual notice of a pending divorce suit in which the wife seeks a decree giving her the title to the property.

**NOTE.—Divorce; rule of *lis pendens*.**

Jurisdiction in a suit for divorce may be acquired by a procedure against the property of the defendant within the jurisdiction of the court. In such case the defendant is not personally bound by the judgment beyond the property in question. *Pannoyer v. Neff*, 95 U. S. 714 (24 L. ed. 685).

The only ground on which a *lis pendens* is created in a divorce suit is where by the allegations of the bill some property is so put in litigation and brought under the jurisdiction of the court as to be bound to abide the decree of the court. *Spencer v. Spencer*, 9 R. I. 163; *Bennett, Lis Pendens*, 160.

As a general rule bills filed for alimony and maintenance merely do not constitute *lis pendens*. *Brightman v. Brightman*, 1 R. I. 112; *Almond v. Almond*, 4 Rand. 682; *Gilmore v. Gilmore*, 5 Jones, Eq. 284; *Baird v. Baird*, Phil. Eq. 817.

The rule of *lis pendens*, if applicable at all to a simple petition for divorce, alimony, etc., where the property sought to be charged is described, is only applicable because it rests upon the latter ground; and therefore notice of the filing of the petition to third persons, who are creditors of the respondent's husband, is not, as to such persons, equivalent to service so as to postpone their *bona fide* attachments of the property described. *Spencer v. Spencer*, 9 R. I. 163. See *Hopkins v. McLaren*, 4 Cow. 667; 2 Sugd. Vend. 1045, note 2; *Newman v. 2 L. R. A.*

3. A sale of property by a husband, pending a divorce suit in which a decree is asked setting apart the property to the wife, is not taken out of the rule of *lis pendens* by the fact that the wife told him he could sell it if he wanted to, and that she wished he would, where the purchaser had no knowledge of such statements.

4. A suit in equity by a woman to set aside a deed made by her former husband pending a divorce suit, in which a decree was made giving her the land, will not be defeated on the ground that she has a complete remedy at law.

(January 5, 1899.)

**A**PPPEAL by defendant, from a judgment of the Washoe County District Court in favor of plaintiff in an action to set aside a conveyance of land. *Affirmed.*

*Chapman*, 2 Rand. 93; 1 Story, Eq. Jur. § 404; *Belamy v. Sabine*, 1 De G. & J. 586; *Ex parte Thornton*, L. R. 2 Ch. App. Cas. 171.

The pendency of a suit involving the legal title to the property will not affect the holder of an antecedently acquired equity so as to prevent his clothing himself with the legal title. *Parks v. Jackson*, 11 Wend. 442; *Gibler v. Trimble*, 14 Ohio, 323; *Clarkson v. Morgan*, 6 B. Mon. 441; *Fogarty v. Sparks*, 22 Cal. 143; *Irvin v. Smith*, 17 Ohio, 226; *Wade, Notice*, 200. See, as to doctrine of *lis pendens*, *Green v. Rick*, ante, 48.

*Of what notice.*

The rule is that notice arising from a bill filed is notice of what that bill contains and nothing more, and should not be extended beyond the property which is the subject of the suit. If land is affected by collateral proceedings actual notice of such proceedings must be proven to charge a purchaser. *Murray v. Lylburn*, 2 Johns. Ch. 441, note; *Griffith v. Griffith*, Hoffm. Ch. 159; *Carr v. Callaghan*, 3 Litt. 365; *Frakes v. Brown*, 2 Blackf. 205; *Edmonds v. Crenshaw*, 1 McCord, Ch. 264.

A purchaser pending the suit is bound by the result of the suit, when at the time of the purchase the nature of the claim upon the property was disclosed by the pleadings. *Wilson v. Heflin*, 81 Ind. 41; *Kern v. Hazlerigg*, 11 Ind. 443; *Britz v. Johnson*, 65 Ind. 561; *Leitch v. Wells*, 48 N. Y. 585.

Pending a suit for divorce brought by the present plaintiff against her husband, he conveyed certain land to defendant. This land was set apart to plaintiff by the decree in the divorce suit, and this action was brought to set aside the conveyance by the husband.

Further facts appear in the opinion.

**Messrs. R. H. Lindsay and R. M. Clarke**, for appellant:

The decree in *Powell v. Powell* did not operate to clothe respondent with title.

Pom. Eq. Jur. §§ 184, 185, 170, 428, 1817, 1818.

If the court had the power to do so at all, that could have been done only by enforcing Powell's appearance and ordering him to convey and, upon his neglect or refusal so to do, to appoint a commissioner to execute such conveyance.

Gen. Laws, Nev. § 492.

Respondent, having failed to avail herself of the provisions of the statute, and of the law, in the divorce case, cannot now be heard to complain, in another and a separate action, and subsequent to the term of court at which the divorce suit was tried.

Stewart, Marriage & Divorce, § 326, and cases cited; *Harris v. Harris*, 36 Barb. 88; *Clemens v. Clemens*, 87 N. Y. 59, 78; 2 Smith, Lend. Cas. 787.

It was material for appellant to show that respondent consented to the sale of the property pending the divorce suit. But for the divorce suit Richard Powell could have sold without respondent's consent, and respondent could relieve him from any disability which the divorce proceedings imposed, granting that the divorce proceedings deprived him of such power. The question is not one of estoppel of respondent, but authority in Richard Powell to sell. If the divorce proceeding suspended this authority, respondent's consent revived it.

*Kottman v. Peyton*, 1 Speers, Eq. 46; *Terry v. Hopkins*, 1 Mill, Eq. 1; *Cheshire v. Payne*, 16 B. Mon. 618.

**Messrs. William Webster and S. D. King**, for respondent:

Defendant intruded himself into the controversy by taking, from the former defendant, title to the subject matter of the controversy, with actual knowledge of the rights and claims of plaintiff therein; and he is now bound by the adjudication therein.

*Barber v. Barber*, 62 U. S. 21 How. 582 (16 L. ed. 226); *Chester v. Wilson*, 76 U. S. 9 Wall. 108 (19 L. ed. 604); *Tilton v. Cofield*, 98 U. S. 168 (23 L. ed. 858).

Any claim that Jane Powell, by her declarations, vested Richard Powell with a power to convey seems fallacious.

Gen. Laws, 2624, 2648; *Hepburn v. Dubois*, 87 U. S. 12 Pet. 345 (9 L. ed. 1111).

Jane and Richard Powell were husband and wife at the time; and the declarations, if made, were communications between husband and wife, and hence not admissible in evidence.

Gen. Stat. § 8408; *Terry v. Lecker*, 1 Bailey, L. 568; *Com. v. Hayes*, 5 New Eng. Rep. 268, 145 Mass. 289; *Bowman v. Patrick*, 82 Fed. Rep. 866; *Brock v. Brock*, 8 Cent. Rep. 150, 116 Pa. 169; *Dexter v. Booth*, 2 Allen, 559; *Jacobs v. Hesler*, 118 Mass. 157; *Drew v. Tarbell*, 117 Mass. 90; *Brown v. Wood*, 121 Mass. 137. 2 L. R. A.

The judgment in a matrimonial suit is conclusive; it is an adjudication upon the status of the parties (Freeman, Judgments, 8d ed. § 610); yet the power conferred on our courts to grant divorces is conferred by statute, and is as much so conferred as any of the powers given to our courts in divorce matters—upon which theory a collateral attack upon *Powell v. Powell* is excluded.

*Hampson v. Weare*, 4 Iowa, 18; *Grassmeyer v. Besson*, 18 Tex. 753; *Ellis v. Clarke*, 19 Ark. 420; *Bauman v. Bauman*, 18 Ark. 820, 882, 883; *Wallace v. Brown*, 22 Ark. 118, citing *Gaylord v. Scarff*, 6 Iowa, 180.

Strangers to the record cannot collaterally interpose objections, which can alone be made in a direct proceeding by motion or writ of error.

*Phillips v. Coffee*, 17 Ill. 154; *Ooit v. Haven*, 50 Conn. 190.

**Leonard, Ch. J.**, delivered the opinion of the court:

On the — day of March, 1886, respondent commenced an action in the District Court of Washoe County, to obtain a decree of divorce *a vinculo* against her husband, Richard Powell, on the ground of extreme cruelty. In her complaint she fully and specifically described certain lands, whereon was the residence of Powell and wife, and certain personal property, all the separate property of the said Powell, of the value of about \$1,000, which she alleged might, by order of the court, be applied to her support and maintenance, and in aid of the prosecution of her action against the defendant. She also alleged that said property was all the property owned by the defendant; that she was without means to prosecute her action, that she was impecunious, and in delicate health; that her health had suffered because of the defendant's cruelty towards her; that she was dependent upon her friends and relatives for support and subsistence. She prayed for a decree of divorce, and that all the real and personal property of the defendant be set apart to her for her support and maintenance, except such as might be appropriated for her maintenance, and in aid of her action against the defendant pending litigation; that the title to the real property of defendant be decreed to her; and for such other relief as she might be entitled to receive.

Personal service of summons, attached to a certified copy of the complaint, was made upon the defendant, Powell, in Washoe County, March 3, 1886. Defendant appeared for the purpose of contesting plaintiff's application for an allowance for suit money and support pending the litigation; but he failed to answer the complaint, or to appear in the action, except as before stated.

On the 30th day of March, 1886, the case came on for trial. Plaintiff introduced her evidence, and, it appearing that defendant's default had been entered, the court entered a decree dissolving the marriage of plaintiff and defendant, "and that the plaintiff do have for her support, from and out of the separate property of the defendant, two horses and their harness and one wagon . . . described in the complaint and findings of fact filed in said action . . . that plaintiff have title to said property, and all of it, against the defendant, and



that she have possession thereof; that plaintiff do have against the defendant, and from and out of his separate property, the following described real property, and real property interests and appurtenances, to wit: [Then following a definite description, as stated in the complaint.] It is ordered, adjudged and decreed by the court that the title to said land and water, and the use of said water, together with the improvements and appurtenances with said lands and water, and the use of said water, be, and the same is, taken from and out of the defendant, and placed in and confirmed to the plaintiff, and to her heirs and assigns, and that she have possession thereof as against the defendant."

March 25, 1886, pending the divorce suit, defendant in this action took a deed of conveyance to himself from Richard Powell of all the real property and property rights described in the complaint and decree in the divorce case, and a transfer and assignment of all the personal property described therein; and at the commencement of this action this defendant still held the title and possession of said real property. The decree in the divorce case remains unreversed and unmodified.

Prior to and at the time he received said conveyance, and before making any payment on account of said purchase, defendant had actual personal knowledge of the pendency of the divorce suit of *Powell v. Powell*, and that the title and disposition of all of said property, real and personal, was involved in said action, and that the plaintiff therein claimed and demanded relief therein in respect to all of said property. The value of the property sold by Powell to defendant was at least \$3,000, while the price paid was but \$1,400.

This action was commenced June 26, 1886, to annul the deed from Powell to defendant, and to compel the latter to convey to plaintiff, by good and sufficient deed, the real property described in Powell's deed to him. Defendant, Campbell, appeared and answered. In her complaint plaintiff charges that Powell gave, and Campbell received, the deed above mentioned, with intent to cheat and defraud plaintiff, and to defeat the operation of any judgment that might be recovered in the said divorce suit; but the findings do not cover this issue.

The court proceeded upon the theory that defendant was a purchaser *pendente lite*, with actual knowledge of the then pending suit for divorce, the property to be affected thereby, and the relief demanded; that in this action he was as conclusively bound by the decree in that case as he would have been if he had been made a party defendant; and that plaintiff could maintain this action to acquire from him the legal title to property to which she had acquired the equitable title in the divorce suit. A decree was entered accordingly. From that decree, and an order overruling defendant's motion for a new trial, this appeal is taken.

At the trial plaintiff offered, and the court admitted, in evidence the judgment roll in the case of *Powell v. Powell*, against defendant's objections, based upon several grounds stated, the first and most important of which was as follows: "That said judgment roll, decree and each and all of said papers, are irrelevant, immaterial, and incompetent as evidence for any

purpose in this case, for the reason that the said decree is a nullity, in so far as it attempts to divest the title of the property mentioned in said decree out of Richard Powell, and vest it in the plaintiff in this action." The fourth is as follows: "It being admitted by the pleadings in this action that all the property in dispute herein was, before the commencement of the action of *Powell v. Powell*, the separate property of said Richard Powell, the court which tried said action had no power to decree the title to any of it to the plaintiff in said divorce case."

These grounds of objection may be considered together. If, under the statute, the district court has power, in any suit for divorce on the ground of extreme cruelty of the husband, to divest him of the title to his separate property, and invest the wife with the same, so far as that may be done by a decree, then the objection made upon the grounds above stated was not well taken; because, if there was power, then the most that can be claimed is that it was error to decree the title, and the decree cannot be assailed collaterally. It is undoubtedly true that if the court had power to decree the title, such power must be found in the statute. *Perkins v. Perkins*, 16 Mich. 167; *Bacon v. Bacon*, 48 Wis. 202; *Donovan v. Donovan*, 20 Wis. 586; *Barker v. Dayton*, 28 Wis. 879.

Does our statute, in a proper case, confer such power?

In *Wuest v. Wuest*, upon the facts shown, this court upheld a decree awarding certain real estate to the wife absolutely. 17 Nev. 221.

In *Lake v. Bender*, 18 Nev. 861, we did say, and now reiterate the same, that the object of the statute was to provide proper support for the wife and minor children, and that the legislative intent to limit the disposition of the husband's property to their proper support was manifest. In that case, where there was a direct appeal, and where, consequently, we could consider mere errors, the court below had decreed to Mrs. Lake \$150 per month for her support, and made the same a charge and lien upon certain real estate. She appealed, and it was urged in her behalf that Lake's separate property should have been divided between the spouses, and that in making an order for a monthly payment of \$150 the court abused its discretion. It was to this claim for a division, under the circumstances, that we directed our argument; and we tried to show that, in the case then in hand, a decree investing Mrs. Lake with the title to specific property was not necessary for her proper support, and consequently that it should not be granted.

If, in an action of this character, the statute permits the court to decree to the wife any portion of the husband's separate property absolutely, it should never be done unless such action is reasonably necessary for the accomplishment of the primary object of the statute—support of the wife and minor children; and if, in any case, the discretion of the trial court should be abused, this court, upon direct appeal, would not fail to correct the error.

The statute provides that "When the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery committed by the husband, the wife shall be en-

titled to the same proportion of his lands and property as if he were dead; but in other cases the court may set apart such portion for her support and the support of their children as shall be deemed just and equitable." Gen. Stat. § 496.

The court may "set apart" so much of the husband's separate property, in case of divorce for extreme cruelty, as, under the circumstances, is just and reasonable for the support of the wife and their children. If more is set apart than is just and reasonable for support, it is error; but, until reversed or modified on appeal, the decree in this respect is not void. Does the power to set apart include the power to decree the husband's title to her, if in a given case it is necessary to do so in order to provide proper support for the wife and children? In this, as in all other cases of statutory construction, we must find, if possible, the legislative intent; and, in an earnest endeavor to do so in this case, the first thought that comes to our minds is, as before stated, that the primary object of the Legislature was to give the wife and children a support out of his property; and, if the accomplishment of this object depends upon decreeing to her the title, what good reason can be given for withholding it? Is the entire title any more sacred than the absolute right of use for life, if the whole is required?

The learned counsel for appellant say: "The pretense that clothing the wife with the absolute title to the husband's property, and imposing no restrictions upon its disposal, is doing nothing more than setting it apart for her support, is too absurd for argument." Let us see:

The section of the statute under consideration was first passed by the Legislature of 1861, Stat. 1861, p. 99, § 27. That section was amended in 1865 (Stat. 1864-65, p. 99), although the amended section, in respect to the part under consideration, is substantially the same as the original. The Divorce Act of 1861 was passed November 28, 1861. The following day the Probate Act was passed (Stat. 1861, p. 186); and yet, in the last named Act these words are used: "If there is no law in force exempting property from execution, the following shall be set apart for the use of the widow or minor child or children, and shall not be subject to administration . . . When property shall have been set apart for the use of the family, in accordance with the provisions of this chapter, if the deceased shall have left a widow, and no minor child, such property shall be the property of the widow. If he shall have left, also, a minor child or children, the one half of such property shall belong to the widow, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow, the whole shall belong to the minor child or children."

And in the fourth section of the Homestead Act of 1865 (Gen. Stat. § 542) is this language: "The homestead and all other property exempt by law from sale under execution shall, upon the death of either spouse, be set apart by the court as the sole property of the surviving spouse, for his or her benefit, and that of his or her legitimate child or children."

So we see that, in the Probate Act and Homestead Law, the words "set apart," were

used in the sense that property set apart should belong absolutely to the persons for whose benefit the statute made provisions. It is true that in the Divorce Act it is not declared that the property set apart for the support of the wife and children shall belong to the wife, and for a good reason. The Legislature intended only to provide support out of his property, and it was not intended that the title should be set apart unless necessity required it. But if such necessity exists, why may not the words "set apart" have as broad meaning as they are declared to have in the other statutes quoted?

Again; if in no case can the court decree to the wife any portion of the husband's real estate in its entirety, then the same is true in relation to his personal property. No greater power is given in one case than in the other. Did the same Legislature that gave to widows and fatherless children, absolutely, a liberal amount of property, including household goods, intend in all cases to prohibit courts from providing the same security of home and support to the woman who is compelled to seek the law's protection against the husband's cruelties and indignities? The language and spirit of the Divorce Law do not show such intention, and the same words used in the other statutes referred to lead the mind to an opposite conclusion. Authorities upon this question differ greatly, because they are generally based upon dissimilar statutes. But an examination as brief as possible of some of them will, we think, sustain our conclusion.

Counsel for appellant refer us to *Maguire v. Maguire*, 7 Dana, 187; *Rogers v. Vines*, 6 Ired. L. 298; *Darrenberger v. Haupt*, 10 Nev. 43; *Lake v. Bender*, 18 Nev. 402, 4 Pac. Rep. 711, and 7 Pac. Rep. 74.

The last two are not opposed to our construction.

In *Maguire v. Maguire* the court decreed a divorce *a vinculo*, allowed the wife to marry again after two years, interdicted a future marriage by the husband, and secured to the wife all the property owned by her in her own right at the time of her marriage. The case was taken to the court of appeals by writ of error for a revision of the decree. The court said:

"But the decree itself is not for alimony; and if it had been such, it would be erroneous, because it does not secure to the wife, as wife, an annuity or other personal right to maintenance; but it purports to confirm to her, as a *feme sole*, the absolute title to property, which should never be done in case of mere alimony."

The seventh section of the Statute of 1869, under which the chancellor proceeded in that case, was as follows: "The court pronouncing the decree of divorce shall regulate and order the division of the estate, real and personal, in such way as to them shall seem just and right, having due regard to each party, and the children, if any; *Provided, however*, That nothing herein contained shall be construed to authorize the court to compel either of the parties to divest himself or herself of the title to the real estate." 1 Litt. & S. Dig. Ky. 1822, p. 443.

Under such a statute, the decision is not an authority against our conclusion under our statute. The same may be said of *Quisenberry v. Quisenberry*, 1 Duv. 198; *Lovett v. Lovett*, 11 Ala. 767; and *Fishli v. Fishli*, 2 Litt. 343.

But *Berthelemy v. Johnson*, 8 B. Mon. 90, does throw light upon our case. We quote from the opinion: "Jacques C. Berthelemy seeks the reversal of a judgment in bar of an action of ejectment brought by him against Cave Johnson, the defendant in error. The plaintiff claims a legal right of entry in the land in contest, as sole heir of his deceased father, to whom the defendant had conveyed the title in fee, in the year 1797. The defendant relies on a divorce *a vinculo* of the wife of the decedent, adjudged in virtue of an Act of Assembly passed in December, 1803; a judicial sentence declaring that the fee simple title to said land should vest absolutely in the divorced wife; and a subsequent sale and conveyance of it by her to him . . . The same enactment [1803] authorized the court, without qualification as to mode, to secure to the wife support out of the husband's estate; and the court adjudged that the fee simple title to the said tract of land should vest in her as one of the means of securing that support. This did not, in our opinion, exceed either the legislative power, or the plenary discretion confided to the court; and therefore, were it deemed erroneous, it would not be void."

We have not been able to find the Act of Assembly referred to, but, taking the court's statement of its provisions as correct, they were, in substance and effect, like ours.

In *Rogers v. Vines* the question was whether under the statute, when slaves were assigned to the wife for alimony out of the husband's estate, she had the absolute property in them. The statute authorized the court to allow her such alimony as her husband's circumstances would permit, not exceeding one third of the annual income or profits of his estate or occupation, or to assign to her separate use such part of the real and personal estate of the husband as the court should think fit, not exceeding one third part thereof, as the justice of the case might require, which should continue until a reconciliation should take place between the parties. The court held that the provision that her separate use should continue until reconciliation was absolutely inconsistent with a power of sale in the wife; because either the sale would prevent the revesting of the property in the husband upon a reconciliation, which would defeat the policy of the Legislature, and directly contradict the Act, or the wife would have the power of defeating her sale by returning to her husband—which the Legislature could not have intended. The conclusion of the court was that the separate enjoyment of specific things was given as alimony in lieu of money, and that the wife's right was, by its nature and the terms of the statute, limited to the period of separation, and that it terminated by the death of either.

In *Calame v. Calame*, 25 N. J. Eq. 548, the decision was similar to that in *Rogers v. Vines*. The statute provided that the court might make such order touching alimony and maintenance of the wife and children by the husband as should be fit, reasonable and just. It then provided the manner and means of enforcing payment. The court held that the modes appointed to enforce payment of the alimony, such as requiring security from the husband,

and authorizing the sequestration of his personal estate, and the rents and profits of his real estate, were in opposition to the idea that a part of the land itself could be set apart for the wife; and from the entire statute it was held that the words "alimony" and "maintenance" were used in their established technical sense; that is, money payments of the character of an annuity.

The two cases last referred to are not against our conclusion. The words *alimony* and *maintenance* are not used in the body of our statute, and there are no similar provisions indicating such an intention as is shown in the North Carolina and New Jersey Statutes.

In Illinois the statute authorizes courts to make such order touching alimony and maintenance of the wife, and the care, custody and support of the children, as shall be fit, reasonable and just; and, when the wife is complainant, to order the husband to give reasonable security for such alimony and maintenance, or to enforce the payment of such alimony and maintenance in any other manner consistent with the practice of the court. And the court may from time to time make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper. *Scates*, Stat. 151, § 6.

Yet, under this statute, similar in most respects to that of New Jersey, the supreme court has held in many cases that courts have power to assign, as alimony, to the wife a part of the real estate of the husband, but has said at the same time that this should not be done except under special circumstances, rendering such action necessary for the support of the wife and children.

In Ohio, under a statute allowing alimony out of the husband's real and personal property, "which may be allowed in real or personal property," the supreme court held that, if allowed in real property, it was not error to decree to her the absolute title in fee. *Broadwell v. Broadwell*, 21 Ohio St. 657.

Without a further examination of authorities, our conclusion is that if, in the proper accomplishment of the primary object of the statute—the support of the wife and children—it is reasonably necessary to invest the wife with the husband's title to property; if, in other words, without an investiture of the title, the object of the statute will be defeated—then the statute permits such investiture in the wife, as one of the means of securing her support.

In an action for divorce, where the complaining wife alleges her necessities and the defendant's abilities, and asks that certain particularly described real estate be set apart and decreed to her for her support, can the rule of *lis pendens* be invoked by the wife against one who purchases *pendente lite*, with actual notice of the divorce suit and other facts before stated? We think it can, upon reason and authority. The statute provides that if either party is about to do any act that may defeat or render less effectual any order which the court may ultimately make concerning property, an order shall be made for the preservation thereof. It is claimed that this remedy is exclusive; that, unless restrained, Powell's sale to defendant was valid. Our opinion is that this preventive

remedy does not affect the ordinary rule as to purchasers *pendente lite*, if this is a case where that rule can be invoked.

"In order to bring the doctrine of *lis pendens* into effect, it is indispensable that the litigation should be about some specific thing, which must necessarily be affected by the termination of the suit. . . . It is further essential to the existence of *lis pendens* that the particular property involved in the suit must be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril." Freem. Judgm. §§ 196, 197.

The same author says: "*Lis pendens* is notice of all facts apparent on the face of the pleadings, and of those other facts of which the facts so stated necessarily put the purchaser on inquiry." *Id.* § 198.

In many cases where, in divorce proceedings, the application is for alimony proper—that is, an allowance to be paid at regular periods for the wife's support—and especially where there was no statute allowing her any specific part of the husband's estate, it has been held that the rule of *lis pendens* does not apply, because such a suit is *in personam*, and does not apply to any specific part of the personal or real estate of the husband. *Almond v. Almond*, 4 Rand. (Va.) 662; *Brightman v. Brightman*, 1 R. I. 112; *Feigley v. Feigley*, 7 Md. 562.

But where the statute permits the husband's estate to be set apart to the wife for life, or, if necessary, in fee, for her support, and in her complaint she specifically describes property which she asks the court to decree to her for her support, there seems to be no well founded reason why the rule of *lis pendens* should not apply. True, it may be said that the decree of divorce is the first object of the suit, and that support is but an incident. But it is also true that when divorce is sought and granted, and support is required from the husband, the law permits the court, and it is the court's duty, to provide such support as is reasonable and just under all the circumstances. In such a case a purchaser *pendente lite*, with notice of the suit and its objects, knows that the property described may be decreed to the wife, and that one of the objects of the suit is to obtain a decree awarding such property to her.

"The primary object for which the suit is brought is not material, provided the court has jurisdiction of the property for secondary purposes; and so it would seem that where a bill for divorce and alimony is filed by the wife against the husband, and there is no special allegation in it pointing out any particular property which is sought to be charged with the payment of the alimony, there will be no *lis pendens* as to either real or personal property of the defendant. Such a case cannot be distinguished from those where the action is professedly *in personam*, and where the contention in the case is entirely independent of any particular property. . . . If, however, the bill should contain special allegations—should point out particular real or personal property—and, within the limits of the manifest jurisdiction and powers of the court to grant the relief, should seek to have alimony assigned out of such specific property, there would be constructive notice of the *lis pendens*." Bennett, *Lis Pendens*, § 99. See also section 219. *Daniel* 2 L. R. A.

*v. Hodges*, 87 N. C. 98, supports the text just quoted.

In *Ulrich v. Ulrich*, 8 Mackey, 200, the court followed *Daniel v. Hodges*, and held that while the rule is that, in a bill for alimony and maintenance, there is no *lis pendens* as to the property generally; yet where, as in that case, a certain lot is described in the bill, and it is alleged that the lot constitutes the principal property of the defendant, out of which alimony should be decreed, there is *lis pendens* as to such property. And see *Draper v. Draper*, 68 Ill. 22; *Vanzant v. Vanzant*, 23 Ill. 543; *Tolerton v. Willard*, 80 Ohio St. 588; *Sapp v. Wightman*, 103 Ill. 158.

We are satisfied that the rule of *lis pendens* applies in this case as to the property in question; and it follows that the defendant occupies the attitude of a *pendente lite* purchaser, and is therefore bound by the decree in the divorce case, and by all the proceedings therein that are not *coram non judice*, unless other facts existed which, if proven, would relieve him from the operation of the general rule.

This leads us to an exception taken at the trial, to the exclusion of testimony. On cross examination plaintiff was asked this question: "During the pendency of the divorce suit between you and Richard Powell, and before the trial of said cause, and before Powell sold the property to Campbell, at the house of George Anderson, in this county, did you not state to Richard Powell words as follows, or to this effect: 'You can sell the ranch if you wish to [meaning the ranch sold to Campbell]. I wish to God you would sell it, as it has always been a millstone around our necks?'" It was not claimed that these words, if uttered, were communicated to Campbell, and the court sustained plaintiff's objection to the question.

Counsel for appellant say: "The question is not one of estoppel of respondent, but authority in Richard Powell to sell. If the divorce proceeding suspended this authority, respondent's consent revived it."

Since there is no element of estoppel in the case, the objection raised is easily disposed of. Powell required no authority from his wife or anybody else to sell. He had the power to sell, and the sale between him and Campbell was valid; but he could not affect her rights by a sale *pendente lite*, at least without a valid release or satisfaction of her claim for support, and neither release nor satisfaction was effected by her statement to Powell, if she made it. Nothing less than a valid contract, based upon a sufficient consideration, could release the property from the claim already impressed upon it. Suppose, pending the divorce suit, plaintiff had said to Powell, "You may keep the property—I do not want it," and Powell, without selling the property, had set up that statement in answer to her claim for support, and had offered evidence showing what she stated. It would hardly be claimed that such a statement would have deprived her of provision for support, if at the trial she had insisted upon her rights. The court did not err in excluding this testimony.

At the close of plaintiff's case in chief, defendant moved the court to require plaintiff to make Richard Powell a party defendant to this action, and that he be brought in as a party de-

fendant, for the reason that the pleadings and proofs showed that a complete determination of the controversy could not be had without his presence. The motion was denied, and it is claimed that the court erred.

We do not think so. In the divorce case, the court had jurisdiction of the person of the defendant and the entire subject matter of the action. He did not answer or defend, but, in a legal sense, he had his day in court. Neither he nor Campbell, in this action, could assail the decree in the divorce case, or any proceeding therein, except for want of jurisdiction. The record before us does not show that in the divorce case the court exceeded its jurisdiction. Powell's rights were determined in that case, and could not be retried in this. Campbell had the same defenses that he and Powell would have had. The decree in the divorce case being in force, we are unable to see that Powell has any interest in this case, or is affected by the decree.

It is further urged that "If the judgment in the divorce suit is valid and binding in so far as it attempts to vest title in respondent, then such title is complete by the terms of the decree, and respondent has a complete remedy at law, and this equitable action cannot be maintained; that a defendant cannot, by a transfer *pendente lite*, defeat the action; the plaintiff may notwithstanding proceed to judgment and effect the assignee."

In support of the statement last made, three cases in ejectment are cited. Undoubtedly, in an action of ejectment, plaintiff prevailing, all persons entering under the defendant, *pendente lite*, may be dispossessed under the judgment. *Freem. Judgm. § 171.*

But we are cited to no authorities holding that this may be done under a decree like that in *Powell v. Powell*, or that Mrs. Powell could have sustained ejectment against Campbell after obtaining her decree against Powell. Campbell had the legal title and possession. She had only an equitable right to both. The original equity doctrine was that a decree was not, of itself, a legal title, and did not transfer title. 8 Pom. Eq. Jur. § 1817.

But in many of the States statutes have been passed providing that a decree shall operate as a conveyance. "When the object of a suit is to compel the conveyance of the legal title by the defendant, and the decree does not require a sale, the title will not pass until the deed is executed, unless it be provided, as has been done in some of the States, by statute, that the de-

creed itself shall operate as a conveyance." *Miller v. Sherry*, 60 U. S. 2 Wall. 248 [17 L. ed. 829].

It is probable that plaintiff might have made Campbell a party to the divorce suit after the conveyance to him from Powell, if she was aware of the sale—a fact not disclosed by the record. Still, was she not entitled to maintain this action to recover a conveyance by defendant of a legal estate corresponding to her equitable title? 1 Pom. Eq. Jur. § 152. Such actions have been sustained by the most distinguished courts.

In *Bishop of Winchester v. Paine*, 11 Ves. Jr. 199, the court said: "This is not the case of the legal estate acquired during the pendency of the suit, in which instance it might be necessary, in order to avoid it, to have recourse to a new suit." "Although the maxim is, *Pendente lite nihil innovetur*, that maxim is not to be understood as warranting the conclusion that the conveyance so made is absolutely null and void, at all times and for all purposes. The true interpretation of the maxim is that the conveyance does not vary the rights of the parties in that suit, and they are not bound to take notice of the title acquired under it, but with regard to them, the title is to be taken as if it had never existed." "If, however, the purchaser *pendente lite* be a purchaser of the legal estate, and not of a mere equitable estate, it may, after the determination of the pending suit, be necessary, in order to compel a surrender of his title, or to declare it void, to institute a new suit against him." 2 Story, Eq. Jur. § 908, and note 8.

Besides, it is admitted by counsel for appellant that Campbell could have been made a party defendant in the divorce suit; and if the facts and law warranted it, he could have been made to pass the title to the property in question to plaintiff. The record does not show that plaintiff knew, or had reason to know, of the conveyance from Powell to Campbell, before the trial, or until after it was completed.

It is shown by the court's findings that the divorce suit was commenced March, 1836; that during its pendency, March 25, 1836, Powell conveyed to Campbell; but it nowhere appears that plaintiff had any knowledge of the conveyance, or of any facts making it incumbent upon her to make inquiries concerning it, until after trial.

*The judgment and order appealed from are affirmed.*

## PENNSYLVANIA SUPREME COURT.

PENNSYLVANIA R. CO., *Plff. in Err.*,  
v.

Mary BOWERS.

(...Pa....)

**The Pennsylvania Act of 1868 (P. L. 53),** limiting the amount to be recovered in actions against railroad companies and common carriers for negligence to \$3,000 in cases of personal injuries and \$5,000 in case of death, providing that "Upon the acceptance of the provisions hereof by any 2 L. R. A.

carrier or corporation the same shall become a part of its Act of incorporation." does not constitute a contract with a corporation, and is abrogated by the new Constitution of Pennsylvania, art. 8, § 21, providing that no statute shall limit the amount of recovery for injuries resulting in death, or for injuries to persons or property.

(February 11, 1889.)

**ERROR** to the Common Pleas No. 1 of Philadelphia County, to review a judgment in favor of plaintiff in an action brought to re-

cover damages for personal injuries resulting in death alleged to have been occasioned by defendant's negligence. *Affirmed.*

At the trial before Bregy, J., a verdict was returned for plaintiff for \$14,500. A remittitur was filed for all above \$10,000 and judgment entered for that sum; whereupon defendant took this writ, assigning for error, *inter alia*, the affirmance of plaintiff's second point, which appears in the opinion.

**Mr. George Tucker Bispham**, for plaintiff in error:

A consideration for the Act of 1868 passed to the State from the company, to wit: the subjection of the latter to the Fourth Constitutional Amendment of 1867, as follows: "The Legislature shall have the power to alter, revoke or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of this Commonwealth—in such manner, however, that no injustice shall be done to the corporators."

*Pa. R. Co. v. Duncan*, 2 Cent. Rep. 551, 111 Pa. 362.

The Act of 1868, therefore, when accepted, amounted to a contract between the company and the Commonwealth.

*Hays v. Com.* 83 Pa. 523; *Pa. R. Co. v. Langdon*, 92 Pa. 21.

**Mr. P. F. Rothermel, Jr.**, for defendant in error:

The limitation of liability claimed by the defendant corporation, by virtue of their alleged acceptance of the Act of April 4, 1868, has been avoided by section 21 of article 3 of the Constitution of 1874.

*Pa. R. Co. v. Langdon*, 92 Pa. 34; *Lewis v. Hollahan*, 108 Pa. 425; *Pa. R. Co. v. Duncan*, 2 Cent. Rep. 551, 111 Pa. 352.

**Paxson, Ch. J.**, delivered the opinion of the court:

The fifth assignment squarely raises the important question of this case. It alleges that the learned court below erred in affirming the plaintiff's second point. The point is as follows: "That the limitation of liability for damages claimed by the defendant under and by virtue of the Act of April 4, 1868, has been revoked and avoided, as to the defendant corporation, by the provisions of the 21st section of article 3 of the Constitution of Pennsylvania, known as the New Constitution."

The second section of the Act of 1868 (P. L. 53) limits the amount to be recovered in actions against railroad companies and common carriers for negligence, to \$3,000 in cases of personal injuries, and \$5,000 in case of death. The 4th section of said Act provides that "Upon the acceptance of the provisions hereof, by any carrier or corporation, the same shall become a part of its Act of incorporation."

Upon the trial below the defendant company proved its acceptance of the provisions of this Act, and claimed that by such acceptance the Act of 1868 was written into its charter. The manner of the proof of this fact has been criticised. The acceptance, as shown upon the trial, was by resolution of the board of managers, and not by vote of the stockholders. We prefer, however, not to decide this case upon technical grounds, and shall treat the

action of the managers as an acceptance by the company.

Section 21 of article 3 of the Constitution is as follows: "No Act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No Act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons; and such Acts now existing are avoided."

This clause of the Constitution first came up for consideration in connection with the Act of 1868, in *Pennsylvania Railroad Company v. Langdon*, 92 Pa. 21. It was there held, *Mr. Justice Trunkey* dissenting, that the Act of 1868 was not avoided by the above recited clause in the Constitution. The writer of this delivered the opinion in that case. It was followed by *Lewis v. Hollahan*, 108 Pa. 425, where it was said by *Mr. Justice Sterrett*:

"The case of *Pennsylvania Railroad Company v. Langdon*, cited and relied on by the plaintiff in error, was well decided on other controlling questions; but we do not see our way clear to follow it as authority on the precise constitutional question involved in this case. One of the questions in that case was as to the acceptance by the company of the Act of 1868. In this case the question does not arise."

There was no dissent in that case. In a subsequent case—*Philadelphia, Wilmington & Baltimore Railroad Company v. Conway*, 8 Cent. Rep. 244, 112 Pa. 51—there was an attempt to raise the same question on the part of the above named railroad company. There was no proof on the trial below that the company had accepted the provisions of the Act of 1868, and that case was decided upon other grounds. In delivering the opinion of the court I said:

"It may not be out of place just here to correct a misapprehension of the learned Judge below in regard to *Pennsylvania Railroad Company v. Langdon*. That case has not been overruled, as he supposes. Some of the reasoning by which it was supported is not sustained by the late case of *Lewis v. Hollahan*; and as my brethren are wiser than myself I cheerfully submit to their views. Moreover, if, when the main question comes up again, *Pennsylvania Railroad Company v. Langdon* shall be found to be a mistake, it will afford me pleasure to join in overruling it."

This was our latest deliverance upon this subject. The broad question is now fairly presented again. We have been aided by an exceptionally able argument, and it is fitting that we should now review our former ruling, and if necessary, correct it. I am free to say that my own views upon this question have undergone a serious change.

The first thought which an examination of it suggests is the effect of the acceptance by the defendant company of the Act of 1868. If it was a contract with the State, based upon a sufficient consideration, and a contract which

the State had the power to make, there would be room for the argument that it came within the principle of the well known line of cases commencing with *Dartmouth College*. The Act of 1868, however, was not a part of the original charter of the company; its road was not constructed, nor was a dollar expended upon the faith of it. So far as appears by this record no consideration was paid for it. It was an additional franchise or right which the State granted to the company, and which does not necessarily involve a contract.

At common law a promise without consideration is not binding; so, I apprehend, a franchise granted without a consideration moving from the grantees of such franchise, is not binding upon the State. The rule as laid down in 2 *Morawetz on Private Corporations*, § 1050, is as follows: "A franchise is a mere legal right or privilege and may result from a simple legislative enactment without any contract between the State and the possessors of the privilege. There is a plain distinction between a simple legislative enactment that a person or association shall be authorized to exercise certain rights or powers, and a contract or treaty made by the State through its Legislature, that the person or associations shall be entitled to exercise the rights or powers. If a franchise is the result of a mere legislative enactment, it may be undoubtedly cut short by repeal of the enactment. If, however, the franchise is conferred by a contract or treaty on the part of the State, and is absolute in terms, it must be regarded as an irrevocable right."

Based upon the same common-law rule, that a promise without a consideration is not binding, a grant of exemption from taxation by the Legislature, unless based upon a consideration, does not bind the State, and property thus exempted by one Legislature may be taxed by the next. In the recent case of *Philadelphia & Gray's Ferry Passenger Railway Company's Appeal*, 103 Pa. 128, in which I had the honor to deliver the opinion of the court, the rule is thus stated: "There is reason and authority for holding that a supplement to a charter of incorporation, which merely confers upon it a

new right, or enlarges an old one, without imposing any new or additional burden upon it, is a mere license or promise by the State, and may be revoked at pleasure. It is without consideration to support it, and cannot bind a subsequent Legislature. *Johnson v. Orov*, 87 Pa. 184; *Christ Church v. Philadelphia County*, 63 U. S. 24 How. 300 [16 L. ed. 602]. In the present age of corporate greed it would be dangerous to hold the contrary doctrine. Were we to do so, corporations, instead of being the creatures of the State, might become its masters."

In the same line are *Tucker v. Ferguson*, 89 U. S. 23 Wall. 574 [23 L. ed. 816]; *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595 [23 L. ed. 814]; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 80 U. S. 18 Wall. 373 [20 L. ed. 611]; *Hewitt v. New York & O. M. R. Co.* 12 Blatchf. 453.

The right to recover damages for acts of negligence resulting in death did not exist at common law. It was conferred by the Legislature, and the authority which gave it can take it away. It follows that it may limit it. The right of the Legislature to barter away this right to a corporation, or to limit it so as to make it a binding contract beyond the reach or power of subsequent Legislatures may well be doubted.

It was within the power of the Legislature at any time to repeal the Act of 1868. It follows that it came within the power of the constitutional repeal, and we are all of opinion that the provisions referred to of said Act are avoided by the present Constitution. I make no apology for my change of views. Had I adhered to those formerly expressed there might have been occasion for one.

*Pennsylvania Railroad Company v. Langdon*, as was said by our Brother Sterrett in *Lewis v. Hollahan*, *supra*, was well decided on other controlling questions, and upon all of those questions it stands as authority. To the extent, however, that it refers to the effect of the present Constitution upon the Act of 1868 it is now overruled.

*Judgment affirmed.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

### COMMONWEALTH OF MASSACHUSETTS.

v.

Thomas DONAHUE.

(....Mass.....)

One from whom property has been wrongfully taken may regain his momentarily interrupted possession thereof by the use

of reasonable force short of wounding or the employment of a dangerous weapon, especially after making demand for its return. Whether or not the force used is excessive is a question for the jury.

(February 23, 1889.)

ON defendant's exceptions. *Sustained.*  
This was an indictment for robbery. At

#### *NOTE.—Right to recapture property.*

A man cannot be convicted for taking his own property. *People v. Mackinley*, 9 Cal. 250.

A party has a right to recapture his property from the taker and to use reasonable force to effect the recapture. 1 *Whart. Cr. Law*, 621; *Com. v. Kennard*, 8 Pick. 133; *Hodgden v. Hubbard*, 18 Vt. 504; *Gyre v. Culver*, 47 Barb. 592.

Whether a party is justified in assaulting another, to get his own money is a question of fact to be determined by the jury. *Com. v. Clark*, 2 Met. 23; *Com. v. Goodwin*, 8 Cush. 154; *Com. v. Bush*, 112 Mass. 280.

2 L. R. A.

#### *Right of self defense and defense of property.*

The right of self defense is based on necessity (*People v. Poole*, 27 Cal. 572), and arises where one manifestly intends and endeavors, by violence or surprise, to commit a known felony on the person, habitation or property of another. *Com. v. Riley*, *Thach*, C. C. 471; *State v. Thompson*, 9 Iowa, 188; *State v. Kennedy*, 20 Iowa, 569; *State v. Collins*, 32 Iowa, 36; *Carroll v. State*, 23 Ala. 23; *Kenner v. State*, 18 Ga. 194; *Bohannon v. Com.* 8 Bush, 481; *Patten v. People*, 18 Mich. 814; *Pond v. People*, 6 Mich. 150; *Young v. Com.* 6 Bush, 312; *Stoffer v. State*, 15 Ohio St. 47; *Stewart v. State*, 1 Ohio St. 606.



the trial in the superior court before Hammond, J., defendant was found guilty of an assault, and he thereupon alleged exceptions.

The facts are fully stated in the opinion.

*Mr. John McIlvene* for defendant.

*Mr. Andrew J. Waterman, Atty-Gen.,* for the Commonwealth.

**Holmes, J.**, delivered the opinion of the court:

This is an indictment for robbery, in which the defendant has been found guilty of an assault. The evidence for the Commonwealth was that the defendant had bought clothes amounting to \$21.55 of one Mitchelman, who called at the defendant's house by appointment, for his pay; that some discussion arose about the bill, and that the defendant went up stairs, brought down the clothes, placed them on a chair and put \$20 on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money and put it in his pocket and told the defendant he owed him \$1.55, whereupon the defendant demanded his money back, and on Mitchelman refusing, attacked him, threw him on the floor and choked him until Mitchelman gave him a pocketbook containing \$29.

The defendant's counsel denied the receiving of the pocketbook and said that he could show that the assault was justifiable under the circumstances of the case—as the defendant believed that he had a right to recover his own money by force, if necessary.

The presiding Justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by his violence to get from Mitchelman, by force, money which the defendant honestly believed to be his own." Upon this the defendant saved his exceptions and declined to introduce evidence. The jury were instructed as stated, and found the defendant guilty.

On the evidence for the Commonwealth it appeared that the defendant offered the \$20 to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money and at the same moment or just afterwards as part of the same transaction, repudiated the condition. If this was the case, since Mitchelman of course, whatever the sum due

him, had no right to that particular money except on the conditions on which it was offered (*Com. v. Stebbins*, 8 Gray, 492), he took the money wrongfully from the possession of the defendant, or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud. *Com. v. Deslin*, 2 New Eng. Rep. 101, 141 Mass. 423; *Chiffer's Case*, Sir T. Raym. 275, 276; *Reg. v. Thompson*, Leigh & Cave, 235; *Reg. v. Stunley*, 12 Cox, C. C. 269; *Reg. v. Rodway*, 9 Car. & P. 784; *Rez v. Williams*, 5 Car. & P. 890; 2 East, P. C. chap. 16, §§ 110-113. See *Reg. v. Cohen*, 2 Den. C. C. 249, and cases *infra*.

The defendant made a demand, if that was necessary, which we do not imply, before using force. *Green v. Goddard*, 2 Saik. 641; *Polkinhorn v. Wright*, 8 Q. B. 197; *Com. v. Clark*, 2 Met. 23, 25, and cases *infra*.

It is settled by ancient and modern authority, that, under such circumstances, a man may defend or regain his momentarily interrupted possession, by the use of reasonable force, short of wounding or the employment of a dangerous weapon. *Com. v. Lynn*, 123 Mass. 218; *Com. v. Kennard*, 8 Pick. 133; *Anderson v. State*, 6 Baxter, 609; *State v. Elliot*, 11 N. H. 540, 545; *Rez v. Milton*, Mood. & M. 107; Y. B. 9 Edw. IV. 23, pl. 42; 19 Hen. VI. 31, pl. 59; 21 Hen. VI. 27, pl. 9. See *Seaman v. Cuddledick*, Owen, 150; *Taylor v. Markham*, Cro. Jac. 224; 8 C. Yelv. 157; 1 Brownlow, 215; *Shingleton v. Smith*, Lutw. 1481, 1483; 2 Inst. 316; Finch, Law, 203; 1 Hawk. P. C. chap. 60, § 23; 3 Bl. Com. 121.

To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. *Baldwin v. Hayden*, 6 Conn. 453; Y. B. 19 Hen. VI. 31, pl. 59; *Rogers v. Spencer*, 18 Mees. & W. 579, 581; 1 Hawk. P. C. chap. 60, § 23; 3 Bl. Com. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self defense, but involve other considerations of policy. It has been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession in like manner as he might have protected it, without civil liability. Whatever the true rule may be,

*Drake v. State*, 5 Tex. App. 649; *Hinchcliffe's Case*, Lewin C. C. 161.

It extends to the defense and protection of property before taken, but not to its recovery after it is taken (1 Whart. Cr. Law, 8th ed. § 102); unless it can be retaken without undue violence. *State v. Elliot*, 11 N. H. 540.

The degree of force must not exceed the bounds of defense and prevention. *Gallagher v. State*, 3 Minn. 270; *State v. Quin*, 3 Brev. 515.

#### *Degree of force employed.*

The degree of force which may be used in the exercise of the right of defense of person or property depends on the circumstances of each case and the condition of both parties. *People v. Doe*, 1 Mich. 451; *Patten v. People*, 18 Mich. 314; *Cotton v. State*, 31 Miss. 504; *Jackson v. State*, Horr & T. 476; *Oliver* 2 L. R. A.

*v. State*, 17 Ala. 547; *Com. v. Seibert*, Horr. & T. 633.

An attack on property may be forcibly repelled, and the property may be rescued from another's hand. *State v. Miller*, 12 Vt. 437; *Johnson v. Tumkins*, Bald. 571; *Com. v. Lakeman*, 4 Cush. 507; *Filkins v. People*, 69 N. Y. 101; *Harrington v. People*, 6 Barb. 603.

The owner of property may retake it, but not with an excess of violence (*Com. v. McQue*, 16 Gray, 227; *Overdeer v. Lewis*, 1 Watts & S. 90); but in retaking stolen property the owner has no right to retake it by a breach of the peace. *Henrix v. State*, 50 Ala. 143; 2 Bush. Cr. Law, 8th ed. § 790, 791; 2 Russ. Cr. 9th ed. 233; *Dosty*, Cr. Law, § 145 c.

If a party vindicting his rights uses excessive force, he is guilty of an assault, otherwise not. *Golden v. State*, 1 S. C. 233; *Glass v. O'Grady*, 12 Up. Can. C. P. 233.

probably there is no difference in this respect between the civil and the criminal law. *Blades v. Higgs*, 10 C. B. N. S. 718; *S. C.* 12 C. B. N. S. 501; 18 C. B. N. S. 844; 11 H. L. Cas. 621; *Com. v. McCue*, 16 Gray, 226, 227.

The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. *Hodgeson v. Hubbard*, 18 Vt. 504. See *Johnson v. Perry*, 56 Vt. 708.

On the other hand a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. *Bobb v. Bosworth*, Litt. Sel. Cas. 81. See *Barnes v. Martin*, 15 Wis. 240; *Andre v. Johnson*, 6 Blackf. 375; *Davis v. Whtridge*, 2 Strobb. L. 232; 8 Bl. Com. 4.

It is unnecessary to decide whether, in this case, if Mitchelman had taken the money with a fraudulent intent but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain if he could, even if he knew that Mitchelman still had the identical money upon this person.

If the force used by the defendant was excessive the jury would have been warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as matter of law. *Com. v. Clark*, 2 Met. 28.

Therefore, the instruction given to them, taken only literally, was correct. But the preliminary statement went further and was erroneous; and coupling that statement with the defendant's offer of proof and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed, to the case of excessive force, which, so far as appears, had not been mentioned; but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge of robbery had been persisted in, and the difficulties which we have stated could have been got over, we might have had to consider cases like *Reg. v. Boden*, 1 Car. & K. 895, 897; *Reg. v. Hemmings*, 4 Fost. & F. 50; *State v. Hollyway*, 41 Iowa, 200. Compare *Com. v. Stebbins*, *supra*; *Com. v. McDuffy*, 126 Mass. 467.

There is no question here of the effect of a reasonable but mistaken belief with regard to the facts. *State v. Nash*, 88 N. C. 618. The facts were as the defendant believed them to be.

*Exceptions sustained.*

Henry J. BARTLETT

v.

Anson G. STANCHFIELD.

(.....Mass.....)

**A written contract for building a house, stipulating that no charge for extra work or materials shall be made, unless ordered**

3 L. R. A.

in writing, will not prevent the contractor from recovering for extra expense incurred on the express agreement of the other party to pay for it, or on his request therefor, under circumstances implying a consent to be liable for it, irrespective of the written contract. Parties cannot, by contract, tie up their freedom of dealing with each other.

(January 5, 1890.)

ON defendant's exceptions. *Overruled.*

The action was brought in the Superior Court of Suffolk County, before Blodgett, J., to recover the amount alleged to be due upon a building contract.

The facts sufficiently appear in the opinion.

*Mr. B. Wadleigh* for defendant.

*Messrs. Morse & Allen* for plaintiff.

*Holmes, J.*, delivered the opinion of the court:

The only question presented by the exceptions concerns the defendant's liability for extra work and materials furnished in connection with a house which the plaintiff had been building for the defendant under a written contract.

The contract contained the following clause:

"And it is further agreed that should the owner, during the progress of said construction, request any alteration of, addition to, deviation from or omissions concerning the construction of said houses, as set forth herein; and in said plans and specifications, the same shall be made by the said Bartlett, and shall in no way affect this agreement, but shall be added to or deducted from the amount thereof, by a fair and reasonable valuation; and that no charge shall be made for extra work or materials, unless the same is ordered in writing, and the price thereof agreed upon."

The plaintiff's evidence was that the blind drains—one item in question—were put in during the progress of the work, and that the defendant promised to pay for them; and that the other items—picture moldings, covers for trays and shelves—were furnished at the defendant's oral request, "after the completion of the house in conformity to the written contract."

The evidence was objected to, and the court was asked to rule that, as the work and materials were not ordered in writing, and no price was agreed upon, the plaintiff could not recover. To this it might be enough to answer that except as to the drains there was evidence that the work was done after the contract had been performed, and independent of it. But, under the instructions of the court, the jury probably found that the terms of the written contract, if applicable, had been waived, and that the items had been furnished under a substituted oral contract.

The main argument for the defendant is that, if the work fell within the provisions of the contract, there was no evidence of a waiver. We are of opinion that there was evidence for the jury. Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and defendant, no doubt. But it cannot be assumed, as matter of law, that the contract governed all that was done until it was renounced in so many words,

because the parties had a right to renounce it in any way, and by any mode of expression, they saw fit. They could substitute a new oral contract by conduct and intimation, as well as by express words. ¶

In deciding whether they had waived the terms of the written contract, the jury had a right to assume that both parties remembered it, and knew its legal meaning. On that assumption, the question of waiver was a question as to what the plaintiff fairly might have understood to be the meaning of the defendant's conduct. If the plaintiff had a right to understand that the defendant expressed a consent to be liable, irrespective of the written contract, and furnished the work and materials on that understanding, the defendant is bound. *West v. Platt*, 127 Mass. 867, 872; *O'Donnell v. Clinton*, 5 New Eng. Rep. 433, 145 Mass. 461, 463.

As to the drains, the evidence was that the defendant requested the plaintiff to build them, and promised to pay for them. The jury had a right to infer that the request and promise imported a renunciation of any terms in the written contract inconsistent with a duty to pay. As to the other items furnished later, it is stated that there was evidence tending to show that they were furnished at the defendant's own request; but it does not appear what the evidence was, or what were the circumstances or form of the request. So far as appears, certainly, the jury had a right to infer that the request imported a promise to pay, and a like substitution of an oral contract. The furnishing of the items was sufficient consideration for the substitution, as well as for the contract substituted.

*Exceptions overruled.*

## NEW YORK COURT OF APPEALS.

Anne B. PHELPS, *Appt.*,

v.

MAYOR, Aldermen & Commonalty of the City OF NEW YORK, *Respt.*

(...N. Y....)

1. A voluntary payment, without duress of person or goods, of an assessment for the expense of grading and paving a street under an ordinance which was void on its face, is a mistake of law, and no action will lie to recover back the money so paid.
2. Under the New York City charter (Acts 1873, chap. 335, § 91), embodied in the Consolidation Act of 1882, § 64, conferring upon the Common Council of New York City the power and duty of deciding in each particular case whether

the provisions as to letting a contract by public advertisement shall be dispensed with, where work for the corporation is to be performed requiring an aggregate expenditure of more than \$1,000, an ordinance delegating to the Commissioner of Public Works power to decide whether work for the city shall be done by contract or otherwise is void as being an unlawful delegation of authority.

(January 15, 1890.)

**A**PPEAL by plaintiff, from an order of the General Term of the Supreme Court, First Department, reversing a judgment of special term in favor of the plaintiff and ordering a new trial in an action to recover the amount of a city assessment paid by plaintiff. *Affirmed.*

### *NOTE.—Taxes, voluntarily paid, not recoverable back.*

An action will not lie to recover back taxes illegally assessed and voluntarily paid. *Dunnell Mfg. Co. v. Newell*, 1 New Eng. Rep. 877, 15 R. I. 233.

Where a party pays an illegal demand with a full knowledge of all the facts, it cannot be recovered back. *Union Pac. R. Co. v. Dodge County*, 98 U. S. 543 (25 L. ed. 197); *Lamborn v. Dickinson County*, 97 U. S. 181 (24 L. ed. 928); *Wabaunsee County v. Walker*, 8 Kan. 431. See *Union Pac. R. Co. v. McShane*, 80 U. S. 22 Wall. 444 (22 L. ed. 747); 2 *Desty*, *Taxn.* 791, 792.

A voluntary payment cannot be recovered back on the mere ground that the one party was under no obligation to pay, and the other had no right to receive. *McCrickart v. Pittsburgh*, 88 Pa. 136; *Taylor v. Board of Health*, 31 Pa. 73; *Allentown v. Saeger*, 20 Pa. 421.

A payment is voluntary if made by a party informed of all the facts connected with the subject matter of the payment, and under the influence of no duress or coercion, even though accompanied with a protest. *Sowles v. Boule*, 3 New Eng. Rep. 591, 59 Vt. 131; *Shane v. St. Paul*, 26 Minn. 543; *Powell v. St. Croix County*, 46 Wis. 210; *Phillips v. Jefferson County*, 5 Kan. 412; *Brumagim v. Tillinghast*, 18 Cal. 268; *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 587; *Ralsler v. Athens*, 66 Ala. 198; *Cahaba v. Burnett*, 84 Ala. 400; *Peterborough v. Lancaster*, 14 N. H. 382; *Wabaunsee County v. Walker*, 8 Kan. 430; *Bucknall v. Story*, 46 Cal. 589; *Babcock v. Fond du Lac*, 58 Wis. 230; *Baker v. Big Rapids* (Mich.), 8 West. Rep. 184; *Baltimore v. Leferman*, 4 Gill. 425; *Union Pac. R. Co. v. McShane*, 80 U. S. 22 Wall. 444 (22 L. ed. 747); *Desty*, *Taxn.* 791, 792.

If persons voluntarily pay illegal taxes, their own remedy is appeal to the justice of the law-making power. *Shoemaker v. Grant Co.* 36 Ind. 173, 2 L. R. A.

One who pays without protest is estopped from disputing the legality of the tax. *Busby v. Noland*, 39 Ind. 234; *Cooley*, *Taxn.* 512.

Where a payment is made without protest, the fact that a bill is brought by others to have the tax declared void is not enough to entitle the parties paying to recover back. *McCrickart v. Pittsburgh*, 88 Pa. 136.

Money voluntarily paid through ignorance or mistake of law, with full knowledge of all the facts, cannot be recovered by action. *Ralsler v. Athens*, 66 Ala. 198; *Cahaba v. Burnett*, 84 Ala. 400; *Babcock v. Fond du Lac*, 58 Wis. 230; *Peterborough v. Lancaster*, 14 N. H. 382; *St. Joseph County v. Ruckman*, 57 Ind. 96; *Goddard v. Seymour*, 30 Conn. 394.

When title to real estate is in controversy and taxes thereon are voluntarily paid by one of the parties in the controversy whose claim is afterward adjudged invalid, he cannot recover the amount so paid from the owner. *Garrigan v. Knight*, 47 Iowa, 525.

### *Payment under threatened duress is voluntary.*

Merely because the collector holds a warrant to collect by levy or distress does not make payment by compulsion. *Dunnell Mfg. Co. v. Newell*, 1 New Eng. Rep. 877, 15 R. I. 233. But compare *Babcock v. Beaver Creek Twp.* (Mich.), 7 West. Rep. 846.

So of payment of an illegal and void assessment, even if paid under protest after a threatened sale. *De Baker v. Carillo*, 52 Cal. 473; *Union Pac. R. Co. v. Dodge Co.* 98 U. S. 543 (25 L. ed. 197); *Lamborn v. Dickinson Co.* 97 U. S. 181 (24 L. ed. 928).

A payment made where the officer threatened to sell property for a tax not then delinquent, having at the time no power to carry out his threat, is voluntary (*Taylor v. Board of Health*, 31 Pa. 73; *Detroit v. Martin*, 84 Mich. 173; *Bank of Santa Rosa v. Chalfant*, 52 Cal. 170; *Merrill v. Austin*, 58 Cal. 379; *Bank of Woodland v. Webber*, 53 Cal. 73); al-

The questions presented are stated in the opinion.

**Mr. David D. Acker** for appellant.

**Mr. D. J. Dean** for respondent.

**Gray, J.**, delivered the opinion of the court:

If the ordinance of the board of aldermen, under which the work of regulating, grading and paving Broadway was done, appeared on its face to be contrary to the law, and therefore to be void, this action to recover back the moneys paid by plaintiff should fail. This appears to be substantially conceded, as a proposition, by plaintiff's counsel, where, under his second point, that the payment was not voluntary, he says: "As a matter of law, the assessment being valid on its face, the payment was not voluntary."

As a matter of fact, the payment of the assessment in question was effected by the mortgagee of the property, who, upon making the mortgage loan, deducted its amount from the moneys payable to the plaintiff, and satisfied the lien of record. This fact, of course, frees the case from the element of a payment under duress of person or of goods, through the coercive action of the municipal authorities. The issue before the trial court was as to the legality of the assessment with respect to the ordering of the work, and the manner of its performance; and upon that point proof was had. The resolution or ordinance under which the work was done provided for "the same to be done in such manner as the said commissioner may deem expedient and for the best interests of the city and of the property owners."

It appears that the commissioner of public works, who was referred to, contracted in

writing with one Tracy for the performance of the work at the price of upwards of \$140,000; and it also appears that this contract was not made after any public advertisement for bids. But, for the purposes of this case, the sole question which we shall consider is whether this ordinance, on its face, carried notice of the illegality of the corporate Act—not whether matters of proof *dehors* the record otherwise established the invalidity of the assessment. If the ordinance was on its face void, then the plaintiff cannot plead her ignorance of the law in justification of the payment. The principle is elementary that a party cannot recover back money paid, upon the ground that he supposed he was bound in law to pay it.

The ordinance delegates to the commissioner of public works a discretion in the performance of the work which it orders done; for it reads that it is "to be done in such manner as the said commissioner shall deem expedient," etc.

In *Re Emigrant Industrial Savings Bank*, 75 N. Y. 388, this court held that where an aggregate expenditure of more than \$1,000 was involved in the completion of any particular work for the corporation, the same must be by contract, to be awarded to the lowest bidder, after advertisement for sealed proposals, unless otherwise ordered by a vote of three fourths of the members elected to the common council. This was deemed an imperative requirement of the law, under the provisions of section 91 of chapter 335 of the Laws of 1873; and as its provisions were embodied in the consolidation Act of 1882 (section 64), they are equally imperative here. In the case cited, *Judge Rapallo* said, with respect to words in the ordinance precisely similar to those quoted from this record, and which were there claimed to author-

though the levy and tax were illegal. *Lea v. Memphis*, 9 Baxt. 103. It would be otherwise if payment were made after delinquency. *Smith v. Farrelly*, 52 Cal. 77; *De Fremery v. Austin*, 53 Cal. 380; *Cooley, Taxn.* 312.

Such a threat is idle and does not constitute coercion (*Williams v. Corcoran*, 46 Cal. 556); so of a threat to close up a shop if the tax was not paid (*Vicksburg v. Butler*, 56 Miss. 72); or to stop a hack. *Jackson v. Newman*, 59 Miss. 385.

#### *Other instances of voluntary payment.*

Where a court without authority made an order for the payment of a tax, and payment was made accordingly. *Drake v. Shurtliff*, 24 Hun, 422; *Bailey v. Buell*, 50 N. Y. 602.

A payment made to save property from being sold under an authority void on its face, and without possession or control of the property, is voluntary. *Sonoma County Tax Case*, 13 Fed. Rep. 738.

So is a payment made where the tax could only be enforced in judicial proceedings in which the party would have a right to be heard, but which are not yet taken. *Oceanic Steam Nav. Co. v. Tappan*, 16 Hatchf. 236.

A payment made before demand, or before any threat or step indicating an intention to levy under the warrant, is voluntary; it is not necessary to await an actual seizure. *Balsler v. Athens*, 66 Ala. 106; *Union Bank v. New York*, 51 Barb. 159; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541 (25 L. ed. 136).

Where there is no legal duress of person or property, payment when made must be considered as voluntary, and, upon well settled principles, cannot be recovered. *Bank of Woodland v. Webber*, 52 Cal. 73; *Bucknall v. Story*, 46 Cal. 598; *Wills v. Austin*, 53 Cal. 152; *Thomson v. Norris*, 62 Ga. 538.

The fact that the collector's warrant is a lien on goods after it comes to his hands is not enough to make a payment to him compulsory. *Chicago v. Fidelity Sav. Bank*, 11 Ill. App. 165.

A mere agreement to pay, though made under 2 L. R. A.

duress, will not render the subsequent payment involuntary if no legal steps be taken to resist, and the payment is voluntary. *Savannah v. Feeley*, 66 Ga. 31.

#### *Payment under protest; when deemed voluntary.*

A protest cannot alone change what would otherwise be a voluntary payment into an involuntary payment or change the rights of the parties. *Sonoma Co. Tax Case*, 13 Fed. Rep. 731.

A payment before the tax becomes delinquent is voluntary, although accompanied by a protest. *Merrill v. Austin*, 53 Cal. 379.

The payment of an assessment which is illegal and void will be regarded as voluntary, and not recoverable back, even if paid under protest after a threatened sale. *De Baker v. Carillo*, 52 Cal. 473; *Bucknall v. Story*, 46 Cal. 593.

Where the owner tendered the treasurer all the taxes legally due, except a certain assessment on a city lot, which tender the treasurer refused to accept, and to prevent a sale, and under protest he paid the assessment and also the taxes, it was held the payment was voluntary. *Stephan v. Daniels*, 27 Ohio St. 527.

Where a town offers a discount to those who make payment promptly, a payment made to obtain this discount has been held to be voluntary though made under protest (*Lee v. Templeton*, 13 Gray, 478; *Cooley, Taxn.* 312); so where on the day fixed for the sale of his property for the illegal tax, he proposed to make payment on the next day if the sale should be postponed. *Gachet v. McCall*, 50 Ala. 307.

But if the payment is caused on the one part by an illegal demand and made on the other part reluctantly and in consequence of that illegality, and without being able to regain or retain possession of the property except by submitting to the payment, it is not voluntary. *Sowles v. Boula*, 8 New Eng. Rep. 552, 59 Vt. 131; *Marwell v. Griswold*, 51 U. S. 10 How. 242 (13 L. ed. 405); *Harmony v. Birmingham*, 12 N. Y. 90; *Astley v. Reynolds*, 2 Strange, 915.

ize the commissioner of public works to do the work without contract.

"Assuming that the power intended to be given to the commissioner by this clause related to the manner of employing the persons to do the work, and to the purchase of the supplies necessary therefor, and not merely to the mode in which the work should be performed, we think that it was ineffectual to dispense with the provisions of the charter requiring advertisement for sealed proposals, and a contract with the lowest bidder. The law confers upon the common council the power and duty of deciding in each particular case whether those provisions shall be dispensed with, and requires a vote of three fourths of all the members elected, to accomplish that purpose. This is eminently a discretionary power, which cannot be delegated. It is their judgment which the law requires, and not that of any officer they may designate. There is no provision in the law itself authorizing them to delegate this power, and the case falls within the settled principle that powers of this description, involving the exercise of judgment and discretion, cannot be delegated—a principle which applies to public bodies and officers as well as to private individuals."

The reasoning of the learned Judge is conclusive. In his opinion, what was there left to the commissioner's discretion was the mode in which the work should be performed, and not merely the manner of employing persons to do the work, or of the purchase of necessary supplies.

We think that the Legislature in conferring the exercise of a power sovereign in its attributes, as is the power to tax or assess, upon the common council, must be held to have confined its exercise exclusively to that body as such. The common council is a representative body of the taxpayers, and it would not do to hold that the power to take or to burden the property of citizens might be exercised by others than by those to whom the power was given. In this case the mode of performance of an important and expensive work was, by the language of the ordinance, left to the sole discretion of the commissioner of public works, where it was the imperative duty of the common council to provide specifically as to how it should be done. They might direct the work to be done otherwise than by contract; but the exercise of that discretion was carefully provided for in a certain manner. The law intended that the expense of doing work for the corporation, where it would exceed \$1,000, should only be incurred after public competition for the contract. It intended that the common council should determine whether the expense should be incurred through a contract or otherwise, and it never intended that the determination, which it indeed commanded they should make, should be left to an officer. This they had no power to do.

This court has in the past, as recently, considered the question of what is a delegation of power, and a consequent violation of the law by the common council.

In *Thompson v. Schermerhorn*, 6 N. Y. 92, their ordinance provided for the work in pitching and flagging a street, to be done "in such manner as the city superintendent, under the

direction of the committee on roads of the common council, shall direct and require." It was held that it was contrary to law, for failing to specify the manner in which the improvement was to be made; and this court affirmed the judgment against the city.

In *Re Emigrant Industrial Savings Bank*, which we have quoted from, the assessment was avoided, and *Thompson v. Schermerhorn*, is cited, as is the case of *Birdsall v. Clark*, 78 N. Y. 73, where the question was whether a general resolution, directing the superintendent of streets, where the owner neglected to do the work by the time limited, "to cause the same to be done," was a proper exercise of the power conferred upon the common council. It was held not to be, for the reason that the power conferred by the charter to cause work to be done by contract or otherwise involved the exercise of a discretion as to the manner of its performance, which was vested solely in the common council.

Then, in *Stuart v. Palmer*, 74 N. Y. 138—an action to vacate an assessment on lands, and to restrain collection—this court affirmed a judgment for the defendants, on the ground that the Acts under which the assessment was laid were unconstitutional and void; and hence no assessment laid under them could be a cloud upon title to land.

In *Wells v. Buffalo*, 80 N. Y. 253—a similar action to the last—it was held that the complaint was properly dismissed, *Rapallo, J.*, saying: "If the Act is unconstitutional, no assessment imposed under it could be a cloud upon the plaintiff's title. It is void upon its face."

It should be a logical conclusion from the authorities and from the reasoning upon the case, that where the ordinance directing an assessment is essentially illegal, as violating in its provisions the statutory power conferred upon the common council, the payment of an assessment imposed for the expense incurred under its authority is a mistake of law, and in such a case relief cannot be granted. Nothing in the argument advanced by the appellant militates against this view. She was under no compulsion to pay the assessment, for there was concededly no duress of person or goods, and the payment was not forced by warrant or seizure. We do not understand that the rule goes further in its authority to permit of a recovery back of moneys paid under a tax or assessment than in a case where its payment, being compelled by an actual or threatened seizure of his person or devestiture of his goods, he asserts by action, and successfully maintains its illegality. If the tax or assessment is patently illegal, and its payment is coerced, an action, on the equity side of the court, to have it declared void, and the moneys paid returned, would be a proper form of remedy; but, lacking the element of coercion in the form of a duress of person or property, payment must be held to be voluntary.

The court below thought the action was barred by the Statute of Limitations. We have had occasion to review the question raised by the defense of the statute in such cases, in the case decided in November Term of *Friend v. New York*, 111 N. Y. 331, and it is unnecessary to discuss it in this case.

*The order of the General Term reversing the judgment of the Special Term should be affirmed on the grounds stated in this opinion, and judgment absolute ordered for the defendants on the stipulation, with costs.*

All concur.

Henry BEDLOW *et al.*, *Appls.*,

v.

NEW YORK FLOATING DRY DOCK CO., *Repts.*

(....N.Y....)

1. **Exceptions to alleged findings of fact** when they are supported by evidence, and to the refusals to find, when they are established by undisputed proof, present questions of law reviewable in the New York Court of Appeals.
2. **The right of the City of New York to erect structures** in the navigable waters of the State is subject to the sovereign authority over such highways.
3. **The authority of the City of New York to grant rights under water** in the harbor to others than the littoral owners on certain conditions, by necessary implication, inhibits the granting of such rights to others except upon compliance with the conditions annexed to the exercise of such authority.
4. **The authorities of the City of New York have power to grant the privilege of constructing piers in front of wharves and bulkheads** to others than the owners of such structures, provided they comply with the conditions prescribed by the Act of 1806.
5. **Lessees of a wharf have the right to extend and improve it so as to increase its facilities, or to build a pier attached thereto for their use and occupancy so far as their acts are not prohibited by the terms of the lease and do not constitute waste.**
6. **The surrender of leased premises by operation of law vests the landlord with the title of any structures remaining thereon.**
7. **Where tenants of a wharf obtained the right to build a pier attached thereto upon their claim as "lessees having the same rights and privileges as the owners of the soil," they are estopped against setting up any right to the pier against their landlords except under the lease.**
8. **A pier erected by a tenant as an addition to a wharf, the effect of which, separately maintained, would be to destroy the essential and profitable use of the wharf, becomes an accretion to the wharf, belonging to the owners after the expiration of the tenancy unless removed.**
9. **A tenant that has never attempted to surrender his rights during the existence of the term or committed any act which authorized a re-entry thereunder, can acquire no rights during that time by adverse possession.**

(January 22, 1890.)

**A** PPEAL by plaintiffs, from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term in favor of defendant in an action to recover possession of a certain pier, and for an account of the rents and profits and for damages. *Reversed.*

The facts are fully stated in the opinion.

Mr. Herbert B. Turner, with *Messrs.*

3 L. R. A.

Turner, McClure & Rolston, for appellants.

*Messrs.* Robert D. Benedict and Enos N. Taft for respondent.

Ruger, *Ch. J.*, delivered the opinion of the court:

In 1877, upon the termination of a lease, given originally in 1834 by the plaintiffs' ancestors to the defendant's assignors, of lands lying on the East River in the City of New York, upon which was a wharf and a bulkhead, the assignees of the original lease surrendered to the plaintiffs the demised premises, with the exception of an easement of access over the water of the harbor pertaining to the wharf. The property thus surrendered was then found by the plaintiffs to be substantially excluded from communication with the harbor by a pier attached to the wharf, thirty-five feet in breadth and upwards of 800 feet in length, extending into the river, and together with the space occupied by vessels and water crafts lying at the pier for commercial and traffic purposes, effectually obstructing access to and egress from the water side, and substantially destroying its value as a wharf.

This action was brought after the expiration of the lease, against its assignees to recover possession of said pier and the waterways appurtenant to the wharf, and to obtain an accounting of rents, income and profits arising from the use of said pier subsequent to the expiration of the lease. The defendant resists the action upon the alleged ground that it is the lawful owner of the pier.

The case presents the question whether the lessees of wharf rights upon navigable waters in New York Harbor can as against their lessors during the existence of a lease acquire absolute right to occupy by a permanent structure the waters in front of said wharf to the destruction of their value and usefulness, without the consent and in defiance of the will of their lessors, and, if they can, whether they have done so in this case.

The questions involved, although treated generally by the trial court as questions of fact, depend mainly, if not altogether, upon the effect of statutes and ordinances relating to the subject, and the construction of certain conveyances and leases, and the rights, duties and disabilities of the respective parties thereunder. We have been unable to discover any question of fact depending upon conflicting evidence in the case, and, indeed, the testimony is quite undisputed and leaves the questions therein to be determined mainly by the court as those of law and not of fact.

Exceptions to alleged findings of fact, when they are supported by evidence, and to the refusals to find, when they are established by undisputed proof, present questions of law reviewable in this court. There are several of such exceptions which will appear from the views we shall have occasion to express in the case, and they need not be more particularly referred to here.

The undisputed evidence, both documentary and oral, shows that Henry Rutgers and his ancestors had for upwards of three quarters of a century, previous to 1806, owned and occupied a parcel of land in said city lying upon

tide water in the East River, between Clinton and Montgomery Streets, bounded on the south by high-water mark in the East River. Rutgers had, before 1806, succeeded to the ownership of this land, and, in that year obtained from the mayor, aldermen and commonalty of New York, under chapter 80 of the Laws of 1798, authorizing the granting of land on and in the East River for the purpose of building a street and bulkhead which should constitute an extension line on the harbor, a conveyance in the following language: "A certain lot, piece or parcel of ground between high and low-water mark, situate, lying and being between Clinton Street and Montgomery Street in the seventh ward of the City of New York opposite to that part of the ground belonging to the said Henry Rutgers, distinguished by lot number 658, containing in depth on the west side ninety-four feet, and on the east side sixty-eight feet, and in front, on the East River or harbor of the said city, ninety-two feet and six inches; bounded southerly in front by the East River or harbor of the said city; northerly in the rear by the said lot of ground No. 658, belonging to the said Henry Rutgers, together with all and singular the easements, profits, commodities, advantages, emoluments, hereditaments and appurtenances to the said lots, pieces or parcels of ground, and premises above mentioned, belonging or in any wise appertaining unto the said Henry Rutgers, his heirs and assigns, to the only proper use, benefit and behoof of them, the said Henry Rutgers, his heirs and assigns forever."

In consideration of this conveyance Rutgers covenanted to build, erect and make, at his own cost and expense, "a good, sufficient and firm wharf, pier or street of seventy feet, English measure, in breadth on the south side of the first described lot of ground, number 658, hereby granted, contiguous to the East River or harbor of the said city, and distinguished in the map or plan hereto annexed by Front Street," and that he would forever thereafter keep and maintain said wharves, piers and streets in good repair and condition, and for the free and common passage of the inhabitants of said city. The city covenanted that it had full power and lawful authority to convey said premises and warranted the peaceable and quiet possession in the said Rutgers, his heirs and assigns forever thereafter.

It further appeared that at some time thereafter, but at what precise time is not clearly shown, the said street, wharf and bulkhead were constructed, and the said Rutgers was in possession thereof, collecting the wharfage accruing thereat.

It further appeared that the wharf and bulkhead connected with said street, as built, extended some sixteen feet into the harbor beyond the southerly line of a seventy foot street. The actual location of the line seems to have been acquiesced in by all parties, and has for a period of over fifty years constituted the southerly extension line of the city at the place indicated, under the name of Front Street—it having been changed from South Street at an early period.

Henry Rutgers having died, his executors, in 1834, under power contained in his will, executed and delivered to Jonathan D. Stevenson 2 L. R. A.

and Nathaniel Pearce a lease of the said premises, "together with all and singular the easements, profits, commodities, emoluments, rights and appurtenances whatsoever to the premises above described, and every part thereof belonging or in any wise appertaining, and particularly the wharf and water privileges to the extent of the rights of said parties of the first part" for the term of twenty-one years, with a covenant for the renewal thereof for the further term of twenty-one years, upon terms which were to be fixed by a certain rate of interest to be computed upon a valuation by appraisers of the demised premises, exclusive of the erections thereon, and which renewal was duly executed by the assignees of said lessors in 1857. The said lessees immediately thereafter entered into possession of said demised premises, and either themselves or by their assignees have ever since continued to occupy and enjoy them under said lease until the termination thereof.

On November 30, 1838, at the request of the said lessees, the mayor and common council authorized by resolution a pier to be built, under the direction of the street commissioner, in the slip between Clinton and Montgomery Streets at the expense of the owners on the said slip, to be thirty feet wide and to extend from South Street into the East River 243 feet, distant 140 feet from the pier at Clinton Street, and required the said street commissioner to give due publication of said resolution in the daily newspapers. This resolution located the proposed pier wholly upon and near the center of the bulkhead constituting the southerly boundary of lot number 658 as extended by the grant hereinbefore referred to. Notice of the resolution was published in the city daily newspapers for a period of six weeks successively.

Within two weeks after the commencement of said publication, said lessees addressed and delivered a communication to the street commissioner to the following effect, viz.:

The undersigned lessees, having the same rights and privileges as the owners of the soil to the bulkhead between Clinton and Montgomery Streets, adjoining the contemplated pier ordered to be built between the said streets, do hereby signify their willingness to build said pier at their own expense, according to the ordinance of the common council.

J. D. Stevenson,  
N. Pearce.

New York, December 12, 1838.

No other application was presented for the building of said pier, and on the 23d day of January, 1839, the street commissioner gave to said Stevenson and Pearce an instrument reading as follows:

"Permission is hereby given to Jonathan D. Stevenson and Nathaniel Pearce to build a pier in the slip between Clinton and Montgomery Streets, said pier to be thirty feet wide, and to extend from South Street 243 feet into East River, distant 140 feet from the pier at Clinton Street, the pier to be built at their expense and for their benefit."

The said Pearce soon thereafter, having acquired by assignment the rights of his co-lessee, Stevenson, constructed said pier of the width of thirty-five feet, at an expense of about \$12.-



000. In November, 1840, Pearce, to satisfy the doubts of certain persons as to the power of the street commissioner under the statute to give the permission referred to, requested the mayor and common council to confirm the same, and thereupon a resolution was adopted, which was approved by the mayor April 10, 1841, to the following effect:

"Resolved, That the permission given by the street commissioner to J. D. Stevenson and N. Pearce to build a pier into the East River between Clinton and Montgomery Streets be confirmed subject to such authority and directions in relation to the said pier as the mayor, aldermen and commonalty of the City of New York may exercise according to the laws of this State and the ordinances of the said corporation, and subject also to any and all such rights, if any, which the owners of the fee may at any time have in or to the same."

In May, 1844, further permission was given by said city authorities to Pearce to extend said pier seventy feet further into the river, at his own expense, and an extension of eighty-seven feet was soon afterwards made thereto by Pearce. Prior to 1848, and during his occupation of said pier, Pearce twice mortgaged it as security for loans made by him, and in 1848 conveyed to Algernon S. Jarvis, by assignment, an undivided half of all of the property held by him under the lease from Rutgers' executors.

In 1848 Pearce and Jarvis executed and delivered to the defendant herein a conveyance of the interest in the bulkhead and water privileges in front of the premises acquired under the lease from Rutgers' executors; and also by a separate conveyance, at the same time, granted, bargained and sold to the said defendant by warranty deed the said pier with its appurtenances.

Upon the trial before the court, without a jury, the complaint was dismissed, and the judgment entered thereon for the defendant was, upon appeal, affirmed by the general term.

The rights of the city in the lands under water around the Island of Manhattan from high-water mark to 400 feet beyond low-water mark were acquired, at an early period through the Dongan and Montgomery Charters, from the Crown of England, and the grants therein contained have been ratified and confirmed by numerous conveyances from the State and Acts of the Legislature since the separation of the Colonies from the English Crown. These grants were obviously made to extend municipal control over said lands and enable the city to regulate the erection of necessary structures upon the land under water around the island with a view of promoting the facilities for the accommodation of the growing commerce and trade of the Port of New York, and to regulate and preserve the rights of riparian owners in such lands and the navigable waters covering them.

The extent of the interest and authority of the city over such lands has been the subject of much controversy, and divers views have been expressed thereon by various judges from the earliest times. It has been sometimes said that the ownership of the fee in such lands gave the city, as matter of legal right, authority to erect and build such structures thereon as they saw fit to make.

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We are inclined to think that this proposition to its full extent cannot be maintained. The right of control over the navigable waters of the State is a legislative power and cannot be destroyed by any authority whatever. The right of the people to use the natural public highways of the State is *jus publica*, and cannot be taken away or seriously impaired by any legislation whatever. *Smith v. Rochester*, 92 N. Y. 477; *Ledyard v. Ten Eyck*, 36 Barb. 102.

The power of regulating, controlling and improving such waters in the interest of commerce undoubtedly exists. The right, therefore, of the city to erect structures in the navigable waters of the State must necessarily remain subject to the sovereign authority over such highways.

These propositions are quite apparent from the course of legislation on the subject. One of the earliest, if not the first, Act on the subject, is chapter 88, Laws of 1787, which provided, among other things, that the mayor, aldermen and commonalty of New York should have authority to make by-laws, rules and ordinances for the better regulating and altering the streets, wharfs and slips in such manner as shall be most commodious for shipping and transportation.

A clear view, however, of the general condition of the law with reference to these rights and the difficulties and controversies which have arisen over them, may be obtained by a brief synopsis of the provisions of the Act of 1798, one of the earliest statutes on the subject, and the petition of the city upon which it was founded. That petition states in substance that "as well for the ornament and improvement of the city as for the encouragement of the trade and commerce of the State, and the safety of the shipping at the wharfs of the city, your petitioners have lately directed a permanent street of seventy feet wide to be laid out and completed at and on the extremity of the grants already made and hereafter to be made to individuals on the East River, called South Street, and on the North or Hudson River called West Street, south and west of which streets no buildings of any description are to be permitted to be erected, so that vessels lying at the wharves may be secured from fires." That by reason of the curving and otherwise irregular state of the shore at low-water mark in the East and North Rivers, at the time of the making of the grants by the predecessors of your petitioners, a general map of which, if ever made, cannot now be found, the grants heretofore made are deemed to extend to unequal distances into both rivers, which occasions difficulties in making the permanent streets aforesaid regular, and that in many instances, although your petitioners are willing gratuitously to give the soil under water, on which those streets of seventy feet wide are to be made, yet doubts are entertained whether your petitioners can compel any of the proprietors of lots fronting thereon, and who may be unwilling, to make those streets for public use in any given reasonable time to be appointed by the common council.

And your petitioners further show that part of their plan aforesaid was to extend piers at right angles from the said permanent streets into the rivers at proper distance from each

other to be determined by the corporation, with suitable bridges, for the accommodation of sea vessels, and so constructed as to admit the currents at both ebb and flood in both rivers, to wash away all dirt and filth from the wharfs and thereby render the health of the inhabitants of the city more safe and secure; but doubts have also arisen whether your petitioners can compel the individual proprietors of the wharfs to sink and lay out those piers; or if they shall refuse, whether your petitioners will be authorized to sink and build those piers at the expense of the city and receive the wharfage, without incurring a breach of the conditions and covenants contained in their grants to individuals.

The petition thereupon invoked the aid of the Legislature to provide by appropriate legislation for the difficulties suggested.

The preamble in the Act substantially recited the contents of the petition and for the purpose of obviating the difficulty referred to, enacted, by section 1, in substance, that the city should have authority to lay out the streets and wharfs mentioned in the preamble and to extend the same along the sides of said rivers as the growth of the city should require.

Section 2 provided that said streets and wharfs should be made and completed according to the said plan by and at the expense of the proprietors of land adjoining in proportion to the breadth of their several lots on the river, by certain days to be appointed, and that the respective proprietors of such of said lots as may not adjoin said streets or wharfs, shall also fill up and level at their own expense the spaces lying between their said several lots and the said streets and wharfs, and shall upon so filling up and leveling the same be respectively entitled to and become the owners of the intermediate spaces of ground in fee simple.

Section 3 provided that the mayor, aldermen and commonalty should be authorized, in case of the neglect or refusal of the proprietors to level and fill up such places, to do the same for them and charge to and collect from such owners the cost of such filling.

Section 4 provided that the sums expended by the city should be assessed upon said owners and occupants and be a lien and incumbrance, superior to any other incumbrance, upon the houses and lots in respect to which said assessment shall have been made.

Section 5 provided that it should be lawful for the city authorities to direct piers to be sunk and completed, in front of such streets and wharves, and at such distances from each other, as they should think proper, at the expense of the proprietors of lots lying opposite to such piers; and if such proprietors should neglect or refuse to sink or make said piers by the time appointed, then it should be lawful for the mayor, aldermen and commonalty to sink and make said piers and bridges at their own expense, and to receive for their own use the wharfage accruing thereat. Section 6 preserved the validity of the clauses, covenants and conditions of previous grants made by the city to individuals; and section 7 enacted "that no building of any kind or description whatsoever (other than the said piers and bridges) shall at any time hereafter be erected upon the said streets or wharfs, or between them respectively

and the rivers to which they respectively shall front and adjoin."

These are all of the provisions of that Act which it is material to notice.

Subsequently, and prior to 1807, other Acts were passed to the same general effect as that of 1798 (sections 1, 3, 4, 5, 6, 7), viz.: chapter 129 of the Laws of 1801, and sections 1, 2, 3, 4, 5 of chapter 126 of the Laws of 1806. The Act of 1806, for the first time, so far as we have discovered, provided that in the case of piers ordered to be sunk by the corporation, if the adjoining owners should neglect or refuse to sink or build the same, the privilege of so doing might be granted by the city to other individuals.

Other Acts bearing upon this subject were subsequently passed by the Legislature, the most complete and comprehensive of which is undoubtedly that of chapter 86, called the Revised Act of 1813, and consisting principally of a re-enactment of the provisions of previous statutes. Sections 220 to 227 refer to the subject.

It is unnecessary, for the purposes of this discussion, to refer particularly to the provisions of this Act, or the other Acts referred to, as they all aim to preserve the pre-emptive rights of the littoral owners to grants of rights and privileges in land under water, which should thereafter be made by the city, and make the authority of the city to confer such rights upon others, depend upon the neglect and refusal of the riparian owners, after due notice, to comply with the terms lawfully prescribed by the city as the conditions of the grants.

The provision forbidding the erection of any structure or building between the wharves and the rivers, except piers and bridges, is carefully repealed in each successive statute.

It seems very clear, from the provisions referred to, that the authority given to the city to grant rights under water in the harbor to others than the littoral owners, on certain conditions, by necessary implication inhibits the granting of such rights to others, except upon compliance with the conditions annexed to the exercise of such authority.

Neither do we entertain any doubt as to the power of the authorities of New York to grant the privilege of constructing piers in front of the wharves and bulkheads thereafter made, to others than the owners of such structures, provided they comply with the conditions prescribed by the Act. All conveyances made after that Act by the city must be deemed to have been taken subject to its provisions, among which was the right in the city to construct such piers on conditions. It is therefore quite unnecessary to inquire what the common-law rights of littoral owners in waters adjoining their lands may be, as in this case those rights are carefully defined and protected by the statutes.

These statutes and many subsequently passed (1 Rev. Stat. 7th ed. 572-574), show a uniform policy on the part of the State to secure to the owners of lands on the harbor a pre-emptive right to the advantages and emoluments to be derived from the ownership and possession of lands having a water front, however varied the shore line of such harbor may be varied or changed by the needs of the city, or from other causes. In obedience to the requirements of

these provisions when the city, previous to 1806, determined to establish an extension line on the East River between Clinton and Montgomery Streets and to fill up the intervening space to high-water mark, it proposed to the littoral owners not only to grant the land under water for a street and wharf, but also the intervening land necessary to connect their existing possessions with the water fronts to be constructed by them.

Some question has been made over the quantity of land covered by the description in the deed from the city to Rutgers; but we are of the opinion that, reasonably interpreted, it gave to the grantee all of the land between low and high-water mark necessary to establish a street and wharf in the harbor and was not necessarily restricted by the distances mentioned therein. The rule that courses and distances in the description of a deed must yield to natural or artificial monuments if necessary to cover the lands plainly intended to be conveyed, is elementary and needs no citation to support it.

The terms of the grant expressly conveyed land lying between high and low-water mark extending from the grantee's land on the north to the harbor on the south. The plain purpose of the grant was, among other things, to enable the grantee to construct a wharf on the land granted accessible at all times from such harbor, and which should form the extreme southerly line of the city at that place. The deed provided that the wharf, pier or street to be built should be seventy feet wide on the south side of the granted lands, and should be contiguous to the harbor, and precluded by necessary implication the idea that any land was to be reserved by the city whose use could be made to interfere with the enjoyment of the wharf to be constructed by the grantee. Not only this, but it was the uniform expression of the statutes referred to that after the construction of the streets and wharves therein provided for, "that no building of any kind (other than the said piers and bridges) should at any time thereafter be erected between said streets or wharves, and the rivers to which they respectively shall adjoin."

The wharf and street in question were built by Henry Rutgers in pursuance of such grant and under the direction and supervision of the city authorities and presumably according to their instruction; and there is nothing in the description of the deed which restricted the location of the wharf, except that it should be on the southerly side of the grant, contiguous to the harbor, and connected with the street in such manner that the free and common passage of all persons thereon should be assured as upon other public streets of such city. Henry Rutgers and his heirs and devisees have now been in the possession of the wharf, as originally built, either personally or through their tenants, for upwards of half a century; and its ownership has never been questioned by the city or by anyone having the right to challenge the title acquired by them. It is too late, therefore, for anyone to dispute their title to the bulkhead and wharf, and least of all those who have occupied it as tenants under them.

It becomes material, therefore, to consider what rights the executors of Henry Rutgers

had in the premises in question at the time of the demise, and what property the lessees received and enjoyed under such lease. The title of the lessors and their grantees to the upland, and the fee of the street, is not questioned. They also had, as we have seen, the title to all lands lying between their original possession and the wharf, with such water rights as pertained to its ownership, together with a pre-emptive right to any further grant of privileges by the city in the lands under water, lying in front of such premises. As the grantees of a wharf from the city they acquired, not only the right to collect wharfage thereat, but also the right of unobstructed access thereto, over the waters of the harbor, as well as the pre-emptive right to acquire the ownership of all piers or bridges thereafter required by the city to be built in front of such premises. *Verplanck v. New York*, 2 Edw. Ch. 220.

These questions we conceive to have been decided in the case of *Langdon v. New York*, 98 N. Y. 129. That case determined, among other things, that "A grant of the right of wharfage, at a wharf adjoining land under water belonging to the grantor, carries with it, as a necessary incident and appurtenance, and as a part of the grant, a right of way or access to the wharf for vessels over such adjacent lands." And it was further said in the same case that "A grant of the right to build and forever maintain a wharf upon the land of the city, would upon the same principle carry with it the right to take the wharfage and have access to the wharf." It was also held that the plaintiff was entitled to maintain an action to recover damages from the city, for filling up and making land upon its own property in front of the plaintiff's wharf.

The principle involved was confirmed in the subsequent cases of *Williams v. New York*, 7 Cent. Rep. 801, 105 N. Y. 420, 7 N. Y. S. R. 529, and *Kingsland v. New York*, 110 N. Y. 569, 18 N. Y. S. R. 701, and would seem to be too well settled in this court to admit of further controversy.

The beneficial use and enjoyment of all the rights and privileges possessed by the heirs and devisees of Henry Rutgers, in the demised premises for the term provided for, passed to the lessees under the lease from his executors. They thereby acquired the right, not only to the use and enjoyment of the premises demised, and of all easements connected therewith, but also the right to make all such erections and improvements thereon and additions thereto, as should contribute to their profitable employment, which were not prohibited by the terms of the lease, and did not constitute waste. *Taylor, Landlord & Tenant*, § 178.

They could lawfully make new erections upon the lands demised or additions to those already there; they could extend and improve the wharf so as to increase its facilities, or build a pier attached thereto (provided they obtained consent of the city therefor), and occupy and enjoy its use during the term of their tenancy, and if it was a fixture for trade purposes, and did not constitute waste, could tear it down and remove it at any time before the expiration of their term, provided they surrendered the premises in as good condition as they were

when originally leased. *Johnson v. Brownson*, 7 Johns. 227; *Bradstreet v. Pratt*, 17 Wend. 44; *Livingston v. Reynolds*, 2 Hill, 157.

The covenants of quiet enjoyment in the lease precluded the lessors from entering upon the demised premises during the term for the purpose of making erections or alterations thereon which should impair or interfere with the full enjoyment thereof by the lessees, and they equally precluded them from disturbing or preventing the tenants from erecting any structures thereon which would conduce to their more profitable employment during the existence of the tenancy, provided such tenants should deem it desirable to build, and acquired authority from the city to do so. *Heermance v. Vernooy*, 6 Johns. 5; *Blake v. Jerome*, 14 Johns. 406; *Dixon v. Clow*, 24 Wend. 188; *Agate v. Lovenbein*, 57 N. Y. 604.

It would seem, therefore, that no act was done by the tenants during the term of the lease which gave the landlord a right of re-entry as for a forfeiture, or that constituted a breach of the lease giving a cause of action to the lessors. The tenant could lawfully adapt the premises to the purpose of securing the most profitable use of them not inconsistent with the terms of the lease, and the landlord had no right or power of interference therewith. *Austin v. Hudson River R. Co.* 25 N. Y. 334.

It cannot be questioned but that the erection of a pier thirty-five feet wide, occupying over a third of the wharf extending from it over the water for upwards of 300 feet, would constitute a very serious interference with the estate demised, if not occupied by the tenants, or but that, on the other hand, it would create an important extension of wharf rights, and a valuable addition thereto if possessed by those who had the right of using the wharf. The landlord had no right to build it, and was under no legal obligation to do so during the term of the tenancy; and the tenants did have that right, and could occupy it during their terms as the owners *pro hac vice* and the wharf adjacent thereto.

The general rule of law is that whatever is fixed by the tenant to the freehold becomes a part of it and is subjected to the same rights of property as the land (Taylor, Landlord & Tenant, § 525); but it is unnecessary, perhaps, to determine whether this pier, when erected and attached to the demised premises, became a fixture and was irremovable, or was simply a structure built for trade purposes and therefore movable during the term, inasmuch as it was upon the demised premises and was not so removed upon surrender, and therefore reverted to the landlord as part of the premises. The surrender of the leased premises by the assignors by operation of law vested the landlord with the title of any structures remaining thereon. *Agate v. Lovenbein*, 57 N. Y. 607.

The application of the rule expressed in the maxim, *Quicquid plantatur solo, solo cedit* (Wharton, Maxims, 78), to this pier if located upon the land demised, would seem to be unquestionable; and we can see no distinction between that case and one where it is immovably annexed to such land and occupies the place of an easement appurtenant thereto.

It is said in Wood's Landlord and Tenant § L. R. A.

(§ 179) that if the tenant "incloses land, whether adjacent to or in the vicinity of the demised premises, and whether the land be part of the waste or of the highway or belongs to the landlord or some third person, the presumption at the end of the term is that the inclosure is part of the holding and was made for the benefit of the landlord."

This rule was applied in the case of *Dempsey v. Kipp*, 61 N. Y. 470, to a private way procured by one Leddick, a tenant, for the benefit of a farm occupied by him as such tenant. It was said by Dwight, Commissioner, "As soon as Leddick acquired the right, it inured to the landlord's benefit. It is settled law that all that the tenant thus acquires from third persons appertains to the landlord. The rule is applied even to encroachments made by him upon the lands of others; *a fortiori* would it be applicable where the acquisition is made by consent or through contract with the owner of adjoining lands."

After referring to some English cases on the subject, he continues: "These cases establish the doctrine that a tenant, even from year to year, has a capacity to acquire a permanent interest in adjacent lands belonging to third persons for the use of the leased property, which shall inure to his own benefit while the tenancy continues and on its expiration shall appertain to his landlord. There appears to be no difference in principle whether the acquisition is made by prescription or by contract. The tenant's intent is the main subject of inquiry. In the case at bar the intent of both parties, as has already been shown, is plain."

Speaking of the rule that a tenant shall not dispute the title of his landlord to demised premises, Washburn on Real Property (p. 483) says: "Cases have arisen where the doctrine above stated has been applied to lands in possession of a tenant in favor of a landlord, although the same were not embraced in the terms of his lease."

We have no doubt but that the rule referred to, so far as it applies to this case, is founded upon correct principles, and when applied to property acquired by a tenant for the more profitable employment of the demised premises, physically connected therewith and essential to their enjoyment, is fully justified by the reason of the rule and the justice of the case.

We could not conceive of a case calling more strongly for the enforcement of the rule than the one under consideration. Here the inclosure was simply an extension of the water front originally demised, and cannot be used except in connection with the wharf and bulkhead to which it was attached. It cannot even be maintained separately except by the substantial destruction for commercial purposes of the demised property. The statute requires such piers to be attached to bulkheads, and they could not have been lawfully constructed but for this connection, and cannot be maintained as a pier without it. It is impossible that any interest in regard to its use could be entertained by anyone, except as an appurtenance to the property in the mainland; and the finding to a contrary effect was unwarranted by the evidence and the plain implication of the law authorizing the construction of the pier.

The opinion expressed in some of the cases

that the intent of the tenant in making an inclosure or acquisition must govern, was used in cases where the acquisition was made of lands lying outside the demised premises. It can have no application to an erection or inclosure made upon the demised premises, or on an appurtenance thereof. In such a case the intent is a question of law. Moreover, such intent, we think, is conclusively shown by the proceedings through which permission to build the pier was acquired.

In the consideration of this question we must look at the proposal of the lessees as well as the resolution of the mayor and common council accepting the same, as they together constitute the contract made between the parties. Under the Act the mayor and common council alone had authority to grant privileges to build piers in the harbor, and the previous permission of the street commission had no validity except as it was confirmed by the city authorities.

The right of Stevenson and Pearce to acquire permission to build the pier was based wholly upon the claim that they were "lessees, having the same rights and privileges as the owners of the soil, to the bulkhead between Clinton and Montgomery, adjoining the contemplated pier," and not upon any claim that the owners had lost their preemptive right by neglect or refusal to build; and the confirmation by the mayor and common council of the permission previously given by the street commissioner was made expressly subject to the rights of the owners of the fee. The tenants clearly attempted to clothe themselves with the statutory rights of their landlords, and recognized them by irresistible implication; and the city limited the right granted to them to that pertaining to their character as representatives of the littoral owners. Having obtained the right in such character, they would clearly be estopped from ascertaining any other right as against the party they assumed to represent.

It cannot, we think, be maintained that Stevenson and Pearce, at this time had any idea of obtaining any rights in the pier, except such as should belong to them as tenants. Their lease then had nearly forty years to run, and they were assured of the use of the pier for a long period without any increase in rent; and they might well suppose that its occupation for so long a period would be sufficient compensation for the cost of the structure. The meaning of the language used in the street commissioner's permission that it was to be built "at their expense and for their benefit," is abundantly satisfied by the right which they actually acquired to use it during the term of their tenancy; and the reservation of the rights of the landlord shows that they were not intended to have a more extended signification.

We therefore think the right to build the pier was acquired by the tenants after they had clothed themselves with the equities of their landlord, and was built as appurtenant to and for the more profitable employment of the demised premises, and could not be retained by them after the expiration of their term. We are therefore of the opinion that the defendant came clearly within the operation of the rule that tenants who have been put into possession of premises and permitted to occupy them by a lessor, are precluded from questioning his

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title in an action to recover possession of such premises or any part thereof. Washburn, Real Property, 482.

We are further of the opinion that the landlord acquired the right to this pier under the rule laid down in *Steers v. Brooklyn*, 101 N. Y. 57, 1 Cent. Rep. 798. If the effect of this pier separately maintained was, as it unquestionably is, to destroy the substantial and profitable use of plaintiff's wharf and bulkhead, its erection and retention by the tenants, after the expiration of the tenancy was a breach of the contract to surrender them in good condition. It was therefore wrongful, and became an accretion to such wharf, belonging to its owners.

It cannot, in justice, be maintained that a tenant can rightfully build a structure during his tenancy over an easement appurtenant to demised premises which should substantially destroy the easement and the use and value of the demised premises without being answerable therefor to his landlord. When such structures are wrongfully built as an appurtenance of a wharf or bulkhead over the water, the law treats them as an accretion to the land of the littoral owner and awards their ownership to such owners. *Ledyard v. Ten Eyck*, *supra*; *Mulry v. Norton*, 1 Cent. Rep. 748, 100 N. Y. 424.

It is further claimed by the defendant that it has acquired title to the pier by adverse possession under deed from Pearce and Jarvis. This deed was given to it simultaneously with the delivery of a conveyance by the same parties of the rights they possessed in the bulkhead and wharf under the lease from Rutgers' executors.

It is not explained why Jarvis, who held only under the lease, should have joined in this deed; but it appears therefrom that the defendant endeavored to protect its rights in the pier both under the lease and the deed.

We are of the opinion that an adverse possession could not be initiated under either of these conveyances; it evidently could not under the lease, and it is equally clear that the deed was impotent for such a purpose. The grantors in that deed had an interest in the pier which was to continue to the end of their term, then nearly thirty years distant, and this they had a right to convey even against the dissent of their lessors. The lessors could bring no action to recover possession of the pier or the water under it until the expiration of the term, for their lease had conferred this possession upon their lessees. There is no evidence in the case that the landlord ever had notice that the lessees, or their grantees or assigns, claimed any greater rights in the waters of the harbor than those acquired under their lease. The only pretense in the evidence of any such knowledge is that given by Jarvis that Crosby, one of Rutgers' executors, was about the pier frequently after it was built, and the inference therefrom that he must have known of its existence and use. Crosby, however, in execution of his powers under the will, conveyed this property to Beecher in trust in 1837 and wholly ceased to have any interest in them before the pier was built.

Beecher, the trustee, lived at Batavia when the pier was built and Denio, who succeeded

Beecher as trustee, resided at Utica—both at a distance of several hundred miles from the location of the pier. There is not the least evidence that either of the trustees, or any of the beneficiaries, had any knowledge of a claim to an adverse possession by anyone. Even if they had had such notice, it is not perceived what effect it could have upon their rights. It is quite certain that the present defendant occupied, and had the right to occupy, the pier under its lease from 1848 to its termination in 1877; and it is not pretended that it ever attempted to surrender such rights during the existence of the term, or committed any act which authorized a re-entry thereunder.

We are unable to find any steps taken by the original tenants, or their assignees, which can be made the foundation of a claim of adverse possession.

What was said by Judge Finch in the case of *Whiting v. Edmunds*, 94 N. Y. 814, contains a sufficient answer to the claim. He says: "The tenant cannot, by a disclaimer or by mere words denying the landlord's title and asserting one of his own, work a forfeiture of his tenancy, or set running an adverse possession. *DeLancey v. Ganong*, 9 N. Y. 1.

Where the relation of landlord and tenant has been once established, the possession of the latter, and that of his grantees and assignees, is the possession of the landlord and not hostile or adverse (*Jackson v. Davis*, 5 Cow. 129; *Sands v. Hughes*, 53 N. Y. 298); and this is true even where the grantee has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of a tenant, the latter denying any such relation. *Jackson v. Scissam*, 8 Johns. 499.

The possession of the tenant in subordination to the title of the landlord continues not only during the running of the term, but is presumed to be such and to remain unchanged until twenty years after the end of the term, and notwithstanding any claim by the tenant or his successors of a hostile title. Code, § 86; Code Civ. Proc. § 873.

This presumption may be rebutted; but to do so effectually and initiate an adverse holding, the tenant must surrender the possession to the landlord, or do something equivalent to that, and bring home to him knowledge of the adverse claim. And so it was said in the late case of *Bradt v. Church*, 110 N. Y. 543, 18 N. Y. S. R. 551. "That lease being perpetual, under well settled rules of law, everyone entering into possession of the demised premises is presumed to have entered under the lease; and that presumption can only be rebutted successfully by sufficient proof of an adverse possession at some time in hostility to the landlord's title. Where the relation of landlord and tenant is once established . . . it attaches to all who may succeed to the possession under the tenant, however remotely."

Some question has also been made as to the legal succession by the plaintiffs to the rights of the original lessors; but we are of the opinion that no material defect exists in the proof relating thereto.

*The judgments of the General and Special Terms should therefore be reversed and a new trial ordered, with costs to abide the event.*

All concur.

Motion for re-argument denied March 12, 1889.

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John ROBINSON, Admr. etc., *Appt.*

OCEAN STEAM NAVIGATION COMPANY, NY, Limited, *Respt.*

(....N. Y....)

1. **The appointment of a nonresident as an administrator in the State of New York does not authorize him to sue as a resident of the State under New York Code of Civil Procedure, § 1780.**
2. **No court in the State of New York has jurisdiction of an action by a nonresident against a foreign corporation on a cause of action which did not arise within the State.**
3. **The right of a nonresident to sue in the courts of a State is not one of the privileges and immunities granted to citizens of the several States by the Federal Constitution, art. 4, § 2.**

(January 29, 1889.)

**A**PPEAL by plaintiff, from an order of the General Term of the Superior Court of the City of New York, reversing an order of Special Term denying defendant's motion to vacate the summons and dismiss the complaint in an action to recover damages for negligence resulting in death. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Thomas P. Wickes and James Hillhouse* for appellant.

*Messrs. Everett P. Wheeler and Lawrence Godkin* for respondent.

**Earl, J.**, delivered the opinion of the court:

The plaintiff, as administrator of Jane Lingard Robinson, deceased, commenced this action in the New York Superior Court to recover damages against the defendant, a foreign corporation, for wrongfully and negligently causing the death of his intestate. In the complaint the death is alleged to have been caused upon the ocean within the territorial limits of the United Kingdom of Great Britain and Ireland by a collision between two of the defendant's vessels, upon one of which the deceased was a passenger.

This action is based upon the English Statute, called Lord Campbell's Act, passed in 1846, which has been substantially re-enacted in this State.

The defendant appeared in the action, interposed an answer to the complaint and noticed the cause for trial. Afterward it made a motion that the summons be vacated and the complaint dismissed, on the ground that the court did not have jurisdiction of the action. That motion was denied at the special term; and from the order there made the defendant appealed to the general term, where the order was reversed and the motion granted, and the plaintiff then appealed to this court.

It appeared upon the motion, and it is an undisputed fact, that the residence of the intestate at the time of her death was at Fall River, in the State of Massachusetts, and that the plaintiff was and is a resident of the same place, and that he was appointed administrator by the Surrogate of the County of New York. The claim of the defendant is that as the plaintiff was a nonresident and the defendant was a foreign corporation, and the cause of action did not arise within this State, the court

had no jurisdiction of the action under section 1780 of the Code.

The plaintiff contends that although he personally resided in the State of Massachusetts, within the meaning of the section referred to he was a resident of this State because he was here appointed administrator. But he was nevertheless personally a nonresident. Such a person may, under the statutes, be appointed an administrator, but he does not thereby become in any sense a resident of the State. *Wyoming Valley R. & Coal Co. v. Blatchford*, 78 U. S. 11 Wall. 173 [20 L. ed. 179]; *Re Page*, 107 N. Y. 266, 9 Cent. Rep. 723, 11 N. Y. S. R. 777.

The case of *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, is not an authority upon this point for the plaintiff, as in that case the defendant was a domestic corporation.

It is true that the plaintiff's cause of action is transitory, and that a plaintiff may bring a suit upon such a cause of action wherever he may be, provided he can find a court which has jurisdiction of the action and can obtain jurisdiction of the defendant. But a cause of action, even if transitory, must always arise somewhere; and this cause of action arose where the tort was committed which caused the death of the plaintiff's intestate. That this is a cause of action for a tort is too clear for reasonable dispute. It exists only by virtue of the statute referred to, and is based entirely upon the negligence and tortious conduct attributable to the defendant. We therefore have a case where the plaintiff is a nonresident, the defendant a foreign corporation, and the cause of action did not arise within this State; and therefore no court within this State has jurisdiction of the action.

Under the Revised Statutes, so far as we are able to discover, there was no provision for an action in the courts of this State by a nonresident against a foreign corporation, and the only provision for suits against foreign corporations was that found in 2 Revised Statutes, 459, section 15, where it is provided that suits brought in the supreme court by a resident of this State against any corporation created by or under the laws of any other State, government or country, for the recovery of any debt, claim or demand may be commenced by attachment. That provision remained until 1849, when by section 107 of the Laws of that year, it was amended so as to read as follows:

"Suits may be brought in the supreme court, in the Superior Court of the City of New York and in the Court of Common Pleas in and for the City and County of New York, against any corporation created by or under the laws of any other State, government or country, for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed or delivered within this State, or upon any cause of action arising therein. Such suits may be commenced by complaint and summons together with an attachment as provided by law, and such complaint and summons may be served as provided by sections 118 and 114 of the Code of Procedure."

Under the section as thus amended, any plaintiff could commence an action against a foreign corporation upon any cause of action arising within this State. In the same year section 427 was added to the Code of Procedure,

providing as follows: "An action against a corporation, created by or under the laws of any other State, government or country, may be brought in the supreme court, the Superior Court of the City of New York, or the Court of Common Pleas for the City and County of New York, in the following cases:

"*First.* By a resident of this State for any cause of action.

"*Second.* By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within the State."

This section did not assume to define all the cases in which actions could be brought against foreign corporations, and did not absolutely limit the power and jurisdiction of the courts mentioned. It specified the cases in which foreign corporations could compulsorily by service of process in the mode prescribed by law be subjected to the jurisdiction of the courts. It did not deprive the courts of any of this general jurisdiction.

The supreme court being a court of general jurisdiction, could, independently of any statute, entertain actions against foreign corporations. Such corporations could, by the common law, always be sued in this State by any plaintiff for any cause of action, provided jurisdiction could be obtained of their persons (*Morawetz, Corp.* § 977, and cases cited in note); and so it was held, construing this section of the Code, in *McCormick v. Pennsylvania Central Railroad Company*, 49 N. Y. 803.

There the action was brought by a nonresident plaintiff against a foreign corporation, for a cause of action which arose without the State; and it was held that the court could entertain the action because the defendant had appeared generally in the action and submitted itself to the jurisdiction of the court, the cause of action being one of a class coming within its jurisdiction. Thus the law remained until the Code of Civil Procedure was enacted, section 1780 of which provides as follows:

"An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation or by a nonresident in one of the following cases only:

"*First.* Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.

"*Second.* Where it is brought to recover real property situated within the State, or a chattel which is replevied within the State.

"*Third.* Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State."

Under this section a resident of this State or a domestic corporation can maintain an action against a foreign corporation for any cause of action, no matter where it arose. But an action by a nonresident plaintiff against a foreign corporation can be maintained only in the cases specified, and in no case for a cause of action which arose outside of the state limits. The jurisdiction of the courts is defined and limited



and absolutely confined to the cases specified; and the word "only" may have been and probably was inserted after the words, "following cases," to change the rule as announced in *McCormick v. Pennsylvania Central Railroad Company*.

The discrimination between resident and non-resident plaintiffs is probably based upon reasons of public policy, that our courts should not be vexed with litigations between non-resident parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to nonresident litigants when the cause of action arose or the subject matter of the litigation is situated within this State.

It is not sufficient that a nonresident plaintiff should by any service of process, or in any other way, obtain jurisdiction of a foreign corporation, but before the action can be maintained in any court of this State there must also be jurisdiction of the subject matter of the action. Jurisdiction of the action cannot be conferred upon the court by any consent or stipulation of the parties. The objection to the jurisdiction in such a case may be taken at any stage of the action, and the court may *ex mero motu*, at any time when its attention is called to the facts, refuse to proceed further and dismiss the action. *Cooley, Const. Lim.* 393; *Davidburgh v. Knickerbocker L. Ins. Co.* 90 N. Y. 526.

In the case cited, *Danforth, J.*, said: "There are no doubt many cases where the court having jurisdiction over the subject matter may proceed against a defendant who voluntarily submits to its decision; but where the State prescribed conditions under which a court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact."

It is claimed, however, that section 1780 of the Code, so far as it discriminates between resident and nonresident plaintiffs, is repugnant to section 2 of article 4 of the Federal Constitution, wherein it is provided that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." This section makes no discrimination between citizens, but between residents and nonresidents.

Without attempting to define the full scope of that constitutional provision, it is sufficient to say that it has no application to a case like this; and there are numerous decisions to that effect. *Adams v. Penn Bank*, 35 Hun, 393; *Frost v. Brisbin*, 19 Wend. 11; *Lemmon v. People*, 20 N. Y. 562; *Haney v. Marshall*, 9 Md. 194; *Campbell v. Morris*, 3 Harr. & McH. 535; *Chemung Canal Bank v. Lowery*, 93 U. S. 72 [23 L. ed. 806]; *McCready v. Va.* 94 U. S. 396 [24 L. ed. 249]; *Mo. v. Lewis*, 101 U. S. 22 [25 L. ed. 989].

A construction of the constitutional limitation which would apply it to such a case as this would strike down a large body of laws which have existed in all the States from the foundation of the Government, making some discrimination between residents and nonresidents in legal proceedings and other matters.

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*The order should, therefore, be affirmed, with costs.*

All concur.

William J. BRYAN, *Respt.*,

THE UNIVERSITY PUBLISHING COMPANY *et al.*, Impleaded, and Martha W. WILKINSON, *Appt.*

(.....N. Y.....)

1. An order for service of summons by publication should not be made by a court in New York against nonresident defendants, in an action by a judgment creditor to reach property in copyrights and royalties thereon which, for the purpose of defrauding creditors, have been assigned to one of the other defendants by the judgment debtor in another State, to which the debtor has gone, after execution had been issued on the judgment in the State of New York, where it was rendered. The property being intangible, the defendants nonresidents, and the transfer having been made out of the State, there is no jurisdiction over the subject of the action or its cause.

2. Where an order for publication of summons has been made in an action over the subject or cause of which the courts of the State have no jurisdiction, defendant is entitled to make a motion to set it aside, rather than submit to the hardship of coming in to defend the action.

(*Ruger, Ch. J., Earl and Finch, JJ., dissent.*)

(February 8, 1890.)

APPEAL by defendant, Martha W. Wilkin-son from an order of the General Term of the Supreme Court, Second Department, affirming an order of the Kings Special Term denying her motion to vacate an order for service of summons by publication. *Reversed.*

The facts fully appear in the opinion of the court and in the dissenting opinion.

*Mr. Payson Merrill* for appellant.

*Mr. Samuel R. Taylor* for respondent.

*Danforth, J.*, delivered the opinion of the court:

The action is by a judgment creditor of Mrs. Richardson, against her as debtor, and other defendants, one of whom is Mrs. Wilkinson; and the order of publication recites that the action relates to personal property within the State, in which the then defendants "have or claim the entire property or income, and that the relief demanded by the plaintiff consists partly in excluding the defendants from any lien upon or interest in it until the plaintiff's judgment is satisfied."

This statement may bring the case in terms, but not in spirit, within subdivision 5 of section 438, Code Civ. Proc.; but that is not necessary to consider, for neither the complaint nor the affidavits on which the order was founded, contain any warrant for such assumption, and the order was sustained against the motion to vacate it upon the sole ground that the defendant was a nonresident of the State.

The proceeding was a statutory one, and to give the judge jurisdiction to entertain it, some-

thing more than the nonresidence of the defendant must appear.

A summons is issued as the first step towards the commencement of an action, and this signifies in the Code (§ 3333) an ordinary prosecution by one party against another party for the enforcement or protection of a right, or the redress or prevention of a wrong. The service of the summons is the commencement of the action. It can be made, as of course, upon a defendant within the State. It can be served upon a nonresident within the State, or by publication, only by direction of a judge; but his order must be founded, not only upon an affidavit showing the nonresidence, but also upon a verified complaint, showing a sufficient cause of action against the defendant to be served. Code Civ. Proc. § 439.

Under the former Code (§ 135), it was enough to present the judge with an affidavit disclosing to him a cause of action against the defendant, and he was then authorized to make the order for publication in certain specified cases, and among others (1) "when the defendant is a foreign corporation and has property within the State, or the cause of action arose therein; (2) where the defendant is not a resident of the State, but has property therein, and the court has jurisdiction of the subject of the action."

These qualifying words are omitted in the Code of Civil Procedure, but that Act, as is above stated, requires the complaint to show "a sufficient cause of action." That condition stands in the place of the special cases enumerated in the former Code, and can require nothing less; for unless a cause of action arises within the State, or the defendant has property therein and the court has jurisdiction over the subject of the action, neither the person nor property of a defendant could be affected by any judgment the court might render. She could neither be punished for contempt in failing to obey its order, nor her estate be sold by reason of it. The jurisdiction of the court is limited to the boundaries of the State, and its process could not go beyond them.

The facts, therefore, constituting a valid claim against the defendant must be stated, and it must also appear that the case is one of which the court can take cognizance. Here nothing appears to be within its jurisdiction. So far as the appellant is concerned the subject of the action is in Massachusetts. She is alleged to be the assignee of certain copyrights, an intangible species of property, as the name implies—*Sterens v. Gladding*, 58 U. S. 17 How. 450 [15 L. ed. 156],—acquired by compliance with conditions imposed by statute (U. S. Rev. Stat. §§ 4956, 4962), to be performed at the office of the librarian of Congress, and consisting merely of the exclusive privilege of printing, publishing and selling books or other compositions, a privilege abiding with the person by whom it was originally secured, or her assignee. U. S. Rev. Stat. §§ 4952, 4955, 4971.

She resides in Massachusetts, and, for aught that appears, always has resided there. Nothing has taken place in this State, and no one is here to be affected by any judgment the courts of the State can make.

If the court directs the assignment to be canceled, how is its order to be made effective?—

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or appoints a receiver, what power will he possess over the defendant appellant?—or requires her to account for money received?—neither order could be enforced. Moreover, the complaint, while it shows the issuing of an execution against the debtor while a resident of this State, also shows that at some time thereafter, and before the issuing of the other execution alleged in the complaint, she left the State and became with her husband "resident of the State of Massachusetts, with the intent of defrauding and delaying the plaintiff in the collection of the said indebtedness," and still resides there. It then alleges the assignment of the copyright to Mrs. Wilkinson with intent to defraud the plaintiff, and the collection of royalties by her, and payment of them to Mrs. Richardson, with like intent.

The action is to reach the copyright and have an accounting for those royalties as the property of Mrs. Richardson, and is within the Code which gives to the creditor an action against his debtor and any other person to compel the discovery of anything in action, or other property belonging to the judgment debtor, or held in trust for him. Code Civ. Proc. § 1871.

As the transaction sought to be undone is illegal, the action is founded on a wrong by Mrs. Wilkinson in receiving the property for an unlawful purpose and to the plaintiff's injury; and for this she seeks a remedy. Her right as a creditor to that property is the right she desires to enforce.

It is plain that the right accrued, and therefore the cause of action arose, when and where the defendant was guilty of the wrong charged upon her; and that is when and where she stands as a shelter to the debtor and claims and exercises rights of ownership under an instrument executed and received in fraud of the rights of a creditor. If the allegation in the complaint is true, that is the position and that is the wrong practiced by the defendant. It is her duty to give up the property to be applied upon the debt, and the enforcement of that duty gives the cause of action. But these things did not happen in this State, nor are the interests or property here. The court can give no relief, and the impropriety of issuing an order which, if it leads to a judgment, "would operate on nothing in the State and be regarded by nobody out of it," becomes apparent. It offends every principle by which the jurisdiction of a court can be vindicated, and should not be allowed to stand.

*Clarke v. Borrel*, 21 Hun, 594, is cited by the respondent as opposed to these views. It seems to have no application. The action was for the recovery of damages for injuries to the person of a citizen, caused within this State by the negligence of the defendant. The court held that the cause of action arose in the State; that it had jurisdiction over it; that the defendant might, perhaps, appear, and thus jurisdiction of the person of the defendant be added to jurisdiction of the subject matter; and in the then condition of the proceedings, they regarded the motion as premature, and gave the plaintiff the benefit of the experiment. In the complaint before us no case is made giving jurisdiction to the courts of this State over the subject of the action or its cause.

and the defendant is entitled to make the motion rather than submit to the hardship of coming into them to defend the action.

*The orders of the General and Special Terms are therefore reversed, and the motion to vacate the order of publication granted, with costs in all courts, and \$10 costs of motion.*

**Andrews, Peckham and Gray, JJ.,** concur.

**Earl, J.,** dissenting:

Under the Code of Procedure service of a summons by publication could be made upon a nonresident defendant: "Where he is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action."

"Where the subject of the action is real or personal property in this State, and the defendant has or claims a lien or interest—actual or contingent—therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein."

"Where the action is for divorce, in the cases prescribed by law."

There was no provision of the Code expressly providing that the property of the defendant should in any case be attached as a condition precedent either to the granting of the order of publication or judgment by default after service of the summons by publication; and the practice was not uniform. It was held in some cases that a valid judgment upon a money demand could not be obtained unless property of the defendant had been attached, and that the judgment could then be enforced against the property attached and operate upon it only. Finally, in 1858, the practice was regulated by Rule 25 of the supreme court, which provided that "In actions for the recovery of money only, when the summons has been served by publication, under section 185 of the Code, no judgment shall be entered, unless the plaintiff at the time of making the application for judgment shall show by affidavit that an attachment has been issued in the action and levied upon property belonging to the defendant." The rule required the prerequisite of an attachment in actions for the recovery of money only, because an attachment could be issued only in such cases. Code Proc. § 227.

It did not require that the property should be attached at or before the order for publication was obtained, but it was complied with if property was attached at any time before application for judgment was made. As the Code prescribed that a summons could be served by publication against a nonresident defendant only in case he had property within the State, it was finally held that a valid judgment could be obtained against such a defendant for a money demand only in case an attachment was served on such property; and the statutes received final construction in the case of *McKinney v. Collins*, 88 N. Y. 216.

The Code of Civil Procedure introduced some change in the previous practice. It is provided in section 438 as follows:

"Section 438. An order directing the service of a summons upon a defendant, without the State, or by publication, may be made in either of the following cases:

"1. Where the defendant to be served is a

foreign corporation, or, being a natural person, is not a resident of the State; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the State.

"2. Where the defendant, being a resident of the State, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein, with like intent.

"3. Where the defendant, being an adult and a resident of the State, has been continuously without the United States more than six months next before the granting of the order, and has not made a designation of a person upon whom to serve a summons in his behalf as prescribed in section 480 of this Act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the State, after diligent effort.

"4. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.

"5. Where the complaint demands judgment, that the defendants be excluded from a vested or contingent interest in, or lien upon, specific real or personal property within the State; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.

"6. Where the defendant is a resident of the State, or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter 4 of this Act, before the expiration of the limitation applicable thereto as fixed in that chapter and the limitation would have expired within sixty days next preceding the application, if the time had not been extended by the attempt to commence the action.

"7. Where the action is against the stockholders of a corporation, or joint stock company, and is authorized by a law of the State, and the defendant is a stockholder thereof."

And section 439 provides that the order must be founded upon a verified complaint showing "a sufficient cause of action" against the defendant to be served, and proof by affidavit of the additional facts required by the previous section. Section 1217 was adopted in the place of what was previously substantially embodied in the rule of the supreme court, as follows: "A judgment shall not be rendered for a sum of money only upon an application made pursuant to the last section, except in an action specified in section 635 of this Act. Where the defendant is a nonresident, or a foreign corporation, and has not appeared, the plaintiff, upon the application for judgment in such an action, must produce and file the following papers:

"1. Proof by affidavit that a warrant of attachment granted in the action has been levied upon property of the defendant.

"2. A description of the property so attached, verified by affidavit; with a statement of the value thereof, according to the inventory.

"3. The undertaking mentioned in section 1216, if one has been required."

It is seen that the requirement that the non-resident defendant should have property within the State is omitted, and that fact is not essential to give jurisdiction to grant the order for publication. In an action to recover a money demand it may be granted although the defendant has no property within the State; but at some time before application for judgment can be successfully made, property of the nonresident defendant must be found within the State and attached, and then the judgment can be enforced only against the property so attached. Sec. 707.

I am inclined to think (although it is not now important to determine it) that it is the true construction of the various sections of the Code, that a valid judgment cannot be obtained against a nonresident served by publication, unless some of his property has been attached within the State before judgment, or the case is one mentioned in subdivisions 4, 5 or 7 of section 438. And this construction makes clear what is meant by the requirement in section 439, that there shall be a verified complaint showing "a sufficient cause of action;" that is, there must be a verified complaint showing a cause of action for a sum of money only as provided in section 635 of the Code, or showing a cause of action specified in subdivisions 4, 5 or 7, and unless the complaint shows such a cause of action, an order for publication of the summons is not warranted.

This is what is commonly called a creditor's action, brought against the University Publishing Company of New York, Charles B. Richardson, Charlotte H. Richardson and Martha W. Wilkinson. The complaint alleges the recovery of a judgment against Mrs. Richardson for about \$14,000, the issuing of an execution and the return thereof unsatisfied; that before the commencement of the action in which the judgment was obtained Mrs. Richardson and one Heath were engaged in the publishing business in the City of New York; that the stock in trade of the firm consisted of copyrights and the stereotype plates from which the copyrighted works were to be printed, and that they were the exclusive property of Mrs. Richardson; that the business was subsequently transferred to the University Publishing Company, and has since been conducted under that name; that subsequently to the commencement of that action Mrs. Richardson assigned and transferred to the defendant, Martha W. Wilkinson, the copyrights of several works specified for the nominal consideration of \$12,100, but without any real consideration, and solely with intent to defraud the plaintiff; and the stereotype plates from which the copyrighted works were printed were the property of Mrs. Richardson, although nominally transferred to the University Publishing Company with intent to defraud the plaintiff; that Mrs. Richardson was paid from \$8,000 to \$5,000 annually by the University Publishing Company, for royalties in the use of such stereotype and copyright plates by the company, the money being first paid to Mrs. Wilkinson and then by her turned over to Mrs. Richardson, for the use of the latter; that the University Publishing Company is a New York Corporation, engaged in business in the City of New York.

And the complaint demands judgment that

the assignment made by Mrs. Richardson to Mrs. Wilkinson and the assignment made by the University Publishing Company to Mrs. Wilkinson and the transfer to the University Publishing Company of the stereotype plates used in connection with the copyrights mentioned, be set aside and declared void; that an injunction be allowed restraining the defendants or either of them from disposing of or interfering with such copyrights and stereotype plates, and that a receiver be appointed to whom should be assigned all the property and estate of the defendant Mrs. Richardson, and who should be authorized to sell the same and satisfy the judgment of the plaintiff. The complaint is verified. In addition thereto, there was presented to the judge, upon the application for the order of publication, the affidavit of the plaintiff, setting forth substantially the same facts alleged in the complaint.

The order of publication was granted on the ground that the defendants, Martha W. Wilkinson, Charles B. Richardson and Charlotte H. Richardson, were nonresidents of the State; that the defendant Charlotte H. Richardson departed from this State with intent to defraud her creditor, the plaintiff, and the three defendants are proper parties "to this action which relates to personal property within this State, in which property the defendants, Martha W. Wilkinson, Charles B. Richardson and Charlotte H. Richardson, have or claim the entire property and income, and that the relief demanded by the plaintiff consists partly in excluding the said three defendants from any lien upon or interest in said property until the plaintiff's judgment against said Charlotte H. Richardson, amounting to more than \$17,000, shall be fully satisfied." The defendant, Mrs. Wilkinson, moved to set aside the order of publication on the ground that it was granted without jurisdiction.

It is clear that this complaint sets forth a sufficient cause of action within subdivision 5 of section 438 of the Code. It shows a valid cause of action to reach certain property transferred by a judgment debtor for the purpose of defrauding the plaintiff by hindering and delaying him in the collection of his judgment. It appears that some of that property at least is within this State. It is difficult to perceive what element of a sufficient cause of action is wanting. It cannot be doubted that if a proper service of a summons can be obtained upon the defendants, and the allegations of the complaint can be proved, a good cause of action will be established under subdivision 5, and that the court will be able to grant the relief demanded.

Whether the summons can be effectually served upon all the defendants, and thus a valid judgment be obtained against them, is another matter. That question may arise when application for judgment is made, or when any effort may be made in the future to enforce a judgment rendered in the action. But as the basis for an order of publication, everything appears in the complaint which is necessary to give the court jurisdiction. The plaintiff has the right to make an effort to bring the defendants into court by the service of his summons. It may be that they will appear, or that before judgment is obtained all the property will be brought

within this State; and there is no warrant in the law or in any rule of practice for depriving the plaintiff of these chances. Courts are not in the habit of refusing process to a suitor because he may not be able to make it effectual. It appears from the complaint that the entire business of the University Publishing Company is conducted for the benefit of Mrs. Wilkinson, and that she has a large and valuable interest therein, and she is a proper party to the action at least for the purpose of barring and cutting off any interest she may have in its property.

It is alleged in the affidavit used upon the application for the order of publication that some of the stereotype plates and all of the copyrights were possessed and controlled within the State of New York. It may be as matter of law that that is not true as to the copyrights. They are peculiar in their nature, intangible personal property or incorporeal rights, and have their *situs* either at the domicile of the owner or anywhere in the United States where they may be used.

It may be true, as stated by Judge Curtis, in *Stevens v. Gladding*, 58 U. S. 17 How. 450 [15 L. ed. 156], that "These incorporeal rights do not exist in any particular State or district; they are coextensive with the United States. There is nothing in any Act of Congress, or in the nature of the rights themselves to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts." But these copyrights are used in the City of New York. They do not appear to be used anywhere else. The books are printed and published in the City of New York.

The stereotype plates are tangible property and may be seized and sold under an execution and the property in the copyrights may be reached by a creditor's bill—*Stephens v. Cady*, 55 U. S. 14 How. 528 [14 L. ed. 528]—and it may be that the plaintiff can get some relief as to that property under the circumstances appearing in this case. Whether he can or not ought not to be determined upon a motion to set aside the order of publication. It should be left to be determined after he has obtained judgment, as when he seeks to enforce it against such property.

We are therefore of opinion that this motion was at least premature, and that it was properly denied.

The order should be affirmed, with costs.

**Ruger, Ch. J., and Finch, J., concur.**

**The REPUBLIC OF HONDURAS, Appt.,**

**v.**

**Marco Aurelio SOTO, Respnt.**

(....N. Y....)

**1. An independent foreign government is "a person residing without the State" within the meaning of New York Code of Civil Procedure, § 3268, requiring security for costs from such persons.**

**2. When a deposit of money, as security for costs, has once been made, the court has no authority, under New York Code of Civil Procedure, § 3276, to require any additional security.**

(January 22, 1890.)

3 L. R. A.

**APPEAL** by plaintiff, from an order of the General Term of the Supreme Court, First Department, affirming an order of the Special Term requiring plaintiff to furnish further security for costs. *Reversed.*

The question presented sufficiently appears in the opinion.

**Messrs. Phillip J. Joachinsen and Simon W. Rosendale** for appellant.

**Messrs. Emmet R. Olcott and William Q. Judge** for respondent.

**Ruger, Ch. J.**, delivered the opinion of the court:

Section 3268 of the Code of Civil Procedure provides that a defendant in an action brought in a court of record may require security for costs in cases among others where the plaintiff was, when the action was commenced, either: *first*, "a person residing without the State;" or *second*, "a foreign corporation." The plaintiff claims to be a foreign independent sovereign State.

It is urged by the plaintiff that it is neither a person nor foreign corporation within the meaning of the Code. It is not disputed that the plaintiff is an independent government recognized as such by the United States and capable of entering into contract and acquiring property, as well as competent, through the rule of comity, of bringing and maintaining actions in the courts of this country; but it is claimed that it does not come within the description of legal entities authorized to require security for costs. That it is within the spirit of the enactment, we think cannot be disputed, and we are also of the opinion that it is within its letter as well.

Vattel defines Nations or States to be "bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint effort of their combined strength." Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights. Law of Nations, 1; Wheaton, Internat. Law, chap. 1, §§ 1, 2; Bouvier, Institutes, title *Nation*.

That such a being constitutes a legal entity capable of acquiring and enjoying property and protecting itself from injuries thereto in the courts of foreign countries has long been recognized and established in the tribunals of civilized nations. *Republic of Mexico v. De Arangoz*, 5 Duer, 686; *Hul'et v. King of Spain*, 1 Dow. & Cl. 169; *Cherokee Nation v. Ga.* 30 U. S. 5 Pet. 52 [8 L. ed. 25].

There can, we think, be no doubt but under title 2, chapter 10, part 8, of the Revised Statutes, providing for security for costs in an action brought by any plaintiff, not residing within the jurisdiction of the court, that foreign States and Nations were required to give such security; and we do not think that the provisions of the Code were intended to change the law in that respect.

Section 3268 of the Code is stated to be a re-enactment of the previous statute; and it cannot, we think, have been intended thereby to defeat the right of a resident defendant to require security for costs as a protection from loss through

unfounded prosecutions by foreign states which had therefore been extended. No reason is seen for such a change and we do not think any was intended to be made.

The word "person" was, we think, used in its enlarged sense as comprising all legal entities except foreign corporations, which were authorized to bring actions in this State. In that sense it embraces moral persons having legal rights capable of entering into contracts and incurring obligations, as well as natural persons. The statute must be construed with reference to the objects it had in view, the evils intended to be remedied, and the benefits expected to be derived from it; and, as thus construed, we can see no reason why the plaintiff is not included within the description of persons intended to be subjected to the obligations of the statute.

A more difficult question, however, arises over the power of the court to require additional security where a deposit of money has once been made under an order by a nonresident plaintiff.

The right to require such security is purely a creation of the statute, and authority therefor must be found in the statute or it does not exist. Under the provisions of the Revised Statutes, hereinbefore referred to, no authority was conferred upon the court to require or permit a deposit of money; but the security authorized to be required was a bond in a penalty of not less than \$250, and no power to increase the amount of the original security was given. But by chapter 305, Laws of 1875, it was provided in case the bond given should be insufficient or the sureties thereon should die or become insolvent, the court might order an additional bond to be executed and filed by the plaintiff as security for costs already accrued and those expected to be thereafter incurred.

Section 3272 of the Code for the first time authorized a deposit of money in place of a bond. That section provides that when a case is made for security, the court must make an order requiring the plaintiff to deposit in court the sum of \$250, as security for costs, or, at his election, to give an undertaking and obtain an allowance of the same by the judge granting the order. Sections 3273, 3274 and 3275 provide the requisites of the undertaking; the mode of exception to sureties; their justification and the method of allowance of the bond by the judge or otherwise.

The only statutory authority for the requirement of additional security is contained in section 3276, which, so far as it is material, reads as follows: "At any time after the allowance of an undertaking, given pursuant to such an order, the court, or judge thereof, upon satisfactory proof, by affidavit, that the sum specified in the undertaking is insufficient, or that one or more of the sureties have died, or become insolvent, or that his or their circumstances have become so precarious that there is reason to apprehend that the undertaking is insufficient for the security of the defendant, must make an order requiring the plaintiff to give an additional undertaking. The last four sections apply to such an order, and to the undertaking given pursuant thereto."

3 L. R. A.

We are of the opinion that when a deposit of money has once been made, the court have no authority to require an undertaking; and whether the plaintiff shall give an undertaking in the first instance depends solely upon his election. If he then makes a deposit the court cannot afterwards require any further undertaking to be given. The statute is explicit and unambiguous, and there is no room or occasion for interpretation. *Re Middletown*, 82 N. Y. 196.

To require a plaintiff, under this statute, to file an undertaking after he has made a deposit would be an exercise of the power of legislation and not within the limits of judicial authority. The grounds upon which additional security may be required relate solely to the incidents of an undertaking, and not at all to those of a deposit. They are: *first*, that the amount of the undertaking should be insufficient; *second*, that the sureties have died or become insolvent; *third*, that their circumstances have become precarious.

All of these reasons, except the first, in their nature, apply exclusively to undertakings; and the first is, by the language of the statute, referable only to an undertaking. By the express language of the section, therefore, the power of the court to require additional security arises only after the allowance of an undertaking, and the authority to require further security is in imperative terms confined to an additional undertaking, and cannot be extended to the requirement of a further deposit without adding material language to the section. There is a manifest distinction between a deposit and an undertaking in respect to the causes which may impair the one and leave the other unaffected, and we are not able to say but that those differences controlled the Legislature in making the discrimination referred to.

The last clause in the section does not purport to enlarge the power of the court thereunder, but simply provides that the regulations of the previous four sections, so far as they are applicable, shall be applied to the order and undertaking authorized by section 3276.

The argument that the case is within the spirit of the provisions authorizing additional security to be required is without force when there is not only an absence of language providing for it, but the presence of language which by clear implication excludes it.

It was said in *People v. Woodruff*, 82 N. Y. 364: "It is always competent for the Legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of an Act, rather than to speculate upon what might have been the views of the Legislature in the emergency which may have arisen. It is wiser and safer to leave to the legislative department to supply a supposed or actual *casus omissus* than attempt to do it by judicial construction."

We are therefore of the opinion that *the orders of the General and Special Terms should be reversed, and the motion denied, with costs in both Courts.*

All concur.

Philip DEOBOLD, Exr. etc., *Resp't.*,  
Frederick OPPERMANN, Jr., et al., *Appts.*

(Two Cases.)

(.....N. Y.....)

1. **The sureties of an administratrix** who has obtained a decree discharging her and her sureties from their bond are not entitled to notice of a proceeding to vacate such decree for fraud. They are privies of the administratrix, and precluded from questioning any lawful order made by the surrogate in a proceeding wherein she is a party, if obtained without collusion between her and the next of kin or creditors of the estate.

2. **Sureties to whom money of an estate has been loaned by an administratrix** as a condition of their becoming sureties for her, to be retained until they are discharged from liability on the bond, are not relieved from such liability by repaying the money after examining a decree of the surrogate discharging her and them from their liability on the bond, when such decree is subsequently vacated on the ground of fraud.

(*Earl and Peckham, JJ., dissent.*)

(December 11, 1888.)

**APPEALS** by defendants, from judgments of the General Term of the Supreme Court, First Department, affirming judgments of the Special Term in favor of the plaintiff in two actions against the sureties on the bond of an administratrix. *Affirmed.*

The facts and questions presented are stated in the opinion.

*Mr. Ashbel P. Fitch* for appellants.

*Mr. Geo. F. Langbein*, for respondent.

The arrangement or agreement between the sureties and the administratrix for indemnity, as made in this case, was void as against public policy.

*Poultney v. Randall*, 9 Bosw. 284; *Wilder v.*

*Butterfield*, 50 How. Pr. 386; *Seaman v. Dur-yea*, 11 N. Y. 830; *Higgins v. Healy*, 15 Jones & S. 209.

The sureties were not innocent third parties.

Theobald, Principal and Surety, p. 1.

A surety taking security from his principal loses his privileges as surety and becomes a trustee for the creditor.

*Cushing v. Gore*, 15 Mass. 69; *Stewart v. Eden*, 2 Caines, 121; 14 Am. Law Rev. 889; *Jones v. Quinpiack Bank*, 29 Conn. 25; *Hill Trustees*, p. 266; *Dudley v. Hawley*, 40 Barb. 397; *Hoffman v. Carow*, 22 Wend. 285; *Ely v. Ehle*, 3 N. Y. 506; *Stanley v. Gaylord*, 1 Cush. 550; *Spraghts v. Hawley*, 39 N. Y. 441; *Hunter v. Hudson River Iron & Mach. Co.* 20 Barb. 493, 494; *Moore v. Paine*, 12 Wend. 128; *Clark v. Metropolitan Bank*, 8 Duer, 248; *Briggs v. Easterly*, 62 Barb. 51; *Cassard v. Hinman*, 6 Bosw. 8.

If the sureties had a right to have this estate in the manner in which they had it in their hands, it was their own negligence that they gave it back to the administratrix.

*Pringle v. Phillips*, 5 Sandf. 157; *Danforth v. Dart*, 4 Duer, 101.

The sureties were never discharged from liability.

*Von Gerhard v. Lighte*, 18 Abb. Pr. 101; *Watt v. Reilly*, 62 How. Pr. 351; *Andrade v. Cohen*, 32 Hun, 226; *Keiley v. Dusenbury*, 10 Jones & S. 238.

As the sureties were never in law discharged from liability it is absurd to claim they were entitled to notice of motion to set aside a fraudulent order discharging them, as to the making of which they were not parties, and which was not made on notice to them.

*Westervelt v. Smith*, 2 Duer, 456, 457; *Lee v. Clark*, 1 Hill, 56; *Annett v. Terry*, 35 N. Y. 260; *Thayer v. Clark*, 4 Abb. App. Dec. 391, 394; *Scotfield v. Churchill*, 72 N. Y. 566, 570.

Sureties are bound by the decree of the sur-

**NOTE.**—Judicial officer, power to dismiss proceeding.

A judicial officer is necessarily possessed of the power to dismiss a proceeding or to allow the same in his discretion to be discontinued; and surrogates' courts possess the incidental powers common to all courts or judicial officers. *Vreedenburgh v. Calf*, 9 Paige, 128; *Heermans v. Hill*, 4 Thomp. & C. 608; *Olmsted v. Long*, 4 Dem. 48, 17 Abb. N. C. 324. See *Pew v. Hastings*, 1 Barb. Ch. 454; *Skidmore v. Davies*, 10 Paige, 316; *Campbell v. Thatcher*, 54 Barb. 384; *Sipperly v. Baucus*, 24 N. Y. 46.

**Power of surrogate to vacate or set aside decree or order.**

The statute gives power to the surrogate to open, vacate, modify or set aside, or to enter as of a former time, a decree or order of its court, or to grant a new hearing for other newly discovered evidence, clerical error or other sufficient cause. *Olmsted v. Long*, 4 Dem. 48, 17 Abb. N. C. 324.

A surrogate possesses the authority to open or vacate a decree which has been procured through mistake, accident or fraud. *Bailey v. Hilton*, 14 Hun, 7. See *Campbell v. Logan*, 2 Bradf. 32; *Gibson v. Martin*, 8 Paige, 480.

If, through mistake or inadvertence, administration was committed to an infant, the surrogate should revoke the appointment. *Re Clement's App.* 25 N. J. Eq. 510.

A surrogate has power to allow a person who has proposed a will for probate to withdraw the same and discontinue the proceeding. *Heermans v. Hill*, 2 Hun, 409, 4 Thomp. & C. 608.

Where letters of administration have been irregularly issued to one having no interest in the estate, without citing the public administrator, they 2 L. R. A.

will be revoked. *Public Administrator v. Peters*, 1 Bradf. 104; *Barber v. Converse*, 1 Redf. 333.

**Sureties on official bond bound by final settlement of principal.**

The sureties on the official bond of an executor or administrator are, as a general rule, conclusively bound by a final settlement made by their principal with the probate court, and by a decree of such court, finding assets in his hands, because the effect of the terms of their bond is that they shall be so bound. *Stovall v. Banks*, 77 U. S. 10 Wall. 533 (19 L. ed. 1036); *Lucas v. Curry*, 2 Bailey, L. (S. C.) 463; *Hobbs v. Middleton*, 1 J. J. Marsh (Ky.) 176; *Boyd v. Caldwell*, 4 Rich. L. (S. C.) 117; *Taylor v. Hunt*, 34 Mo. 216; *Ordinary v. Kershaw*, 14 N. J. Eq. 527; *Cason v. Jerome*, 58 N. Y. 315; *contra*, *Hayes v. Seaver*, 7 Maine, 237. See *Lipscomb v. Postell*, 35 Miss. 476; *Brandt, Sur.* 636.

**Sureties concluded by decree against principal.**

When persons become sureties upon the bond of an administrator, they make themselves privy to the proceedings against their principal, and when he, without fraud or collusion, is concluded, they are concluded also. *Cason v. Jerome*, 58 N. Y. 315; *Gerould v. Wilson*, 81 N. Y. 583.

A surety who is fully indemnified is not discharged by the release of the principal. In such case the surety himself occupies the position of a principal. *Moore v. Paine*, 12 Wend. 123; *Brandt, Sur.* 175.

The decree is final as to the indebtedness of the estate, and the obligation of the executor to pay, and the sureties cannot go back of such judgment. *Thayer v. Clark*, 4 Abb. App. Dec. 391; 43 Barb. 243; *People v. Downing*, 5 Sandf. 139; *Baggett v. Boulger*, 2 Duer, 170; *Scotfield v. Churchill*, 72 N. Y. 570.



rogate in such a case, because by their contract they made themselves privy to the proceedings against their principal; and when the principal is concluded, the surety, in the absence of fraud or collusion, is concluded also.

*Douglas v. Howland*, 24 Wend. 35; *Jackson v. Griswold*, 4 Hill, 522; *Annett v. Terry*, 85 N. Y. 256; *Baggett v. Boulger*, 3 Duer, 160; *Gerould v. Wilson*, 81 N. Y. 588; *Western N. Y. L. Ins. Co. v. Clinton*, 66 N. Y. 331; *Louman v. Yates*, 87 N. Y. 604; *Gottberger v. Taylor*, 19 N. Y. 150; *Gordon v. McCarty*, 3 Whart. 407; *Coleman v. Bean*, 1 Abb. App. Dec. 394; *Lee v. Clark*, 1 Hill, 56.

**Ruger, Ch. J.**, delivered the opinion of the court:

This action was brought by the plaintiff as executor of the estate of his mother, Maria Deobold, to recover from the defendants as sureties upon the bond of Louisa Deobold, given upon her appointment as administratrix of the estate of her husband, Henry Deobold, a sum of money ordered by the surrogate to be paid to Maria Deobold as mother and next of kin to the intestate, but which the administratrix refused or neglected to pay. The trial court directed a verdict for the plaintiff, and the judgment entered thereon was affirmed upon appeal. The supreme court having granted leave to appeal to this court, the matter comes here for review. The record presents the following facts, the evidence being practically undisputed:

Prior to January 16, 1880, Henry Deobold, a resident of the City of New York, died possessed of personal property of about the value of \$3,800, and leaving him surviving his widow Louisa Deobold, his mother Maria Deobold, and brother Philip Deobold, next of kin. On that day the Surrogate of New York issued letters of administration upon the estate to the widow, Louisa Deobold, and the defendants became sureties upon her bond for the faithful performance of her duties as such. On December 9, 1883, upon a general accounting before the surrogate by the administratrix, he made a decree finally adjusting her accounts, and discharging the administratrix and her sureties from their bond. This decree purported to have been based upon a written waiver of notice of the settlement of the estate, signed by Maria and Philip Deobold, and a written assignment by them to the administratrix of all their right, title and interest in the estate of the deceased.

Proceedings were thereafter begun by Maria and Philip, in the surrogate's court, on January 9, 1888, to set aside the decree rendered on final accounting, upon the ground that it was fraudulently obtained, and that the assignment and waiver of citation were procured from them by the administratrix through fraud and misrepresentation. Such proceedings were thereupon had that the surrogate, on February 20, 1888, made an order vacating, and in all respects setting aside, the decree, and the defendants were immediately thereafter served with a copy of such order. Subsequently, upon a further accounting, the surrogate made an order directing the administratrix to pay to Maria Deobold the sum of \$200, and she refusing to pay the same, the surrogate made a fur-

ther order directing the prosecution of the defendant's bond for the recovery of the amount so ordered to be paid. This suit was brought in pursuance of the latter order.

It further appeared that, before consenting to act as sureties upon the bond of Louisa Deobold, the defendants required her to deposit with them the entire proceeds of the estate, to be retained until they were discharged from liability upon the bond, and an agreement to that effect was made between her and the defendants. No security was given to the administratrix for the repayment of these moneys by the defendants, and by the understanding of the parties they were to pay interest thereon, and were authorized to use them in their business as brewers. Under this arrangement the administratrix, at the time of the execution of the bond, deposited with the defendants the sum of \$3,800, the funds of the estate, which they employed in their business until January 16, 1888, when it was repaid by them, together with a loan of \$2,900, and interest, to Louisa Deobold. This payment was made by the defendants after an examination of the decree of the surrogate of December 9, 1883, discharging them from liability on the bond, and after an inspection of the papers upon which such decree was founded.

It did not appear that the defendants had actual notice of the proceedings previously instituted by Philip and Maria Deobold to set aside such decree for fraud, or that they were made parties thereto. It further appeared that, in actions instituted on behalf of Philip and Maria Deobold against the administratrix in the Court of Common Pleas of New York, judgments had been obtained by the plaintiffs, respectively, vacating and setting aside the assignments before referred to as fraudulent and void.

Two questions are presented by the appellants as grounds for the reversal of the judgment below, which may be briefly stated as follows: (1) that the surrogate could not reinstate the defendants in their liability as sureties upon their bond in proceedings to which they were not parties; and (2) that the agreement by which they were made the custodians of the funds of the estate was binding and lawful, and authorized them to retain them until after the discharge of such bond. As the corollary of the latter proposition, it is urged that, having the right to retain them, and having paid them out relying upon the assignment, and decree of the surrogate based thereon, the defendants were relieved from the obligation of repaying the same moneys in this action.

We are of the opinion that the claims of the defendants are not maintainable. No question is made but that the surrogate had ample power to set aside his decree for fraud, and require a further accounting by the administratrix as to the estate (section 1, chap. 359, Laws 1870); but the claim is that the sureties were not bound by the subsequent adjudications of the surrogate, for the reason that they did not have notice of the proceeding. This claim is clearly untenable. The decree discharging the administratrix and her sureties was, when made, assailable by any party thereby aggrieved either by motion to set it aside or by proceedings on appeal. In neither case was it necessary that the sureties should have notice of the

proceeding. The sureties are the privies of the administratrix, and are precluded from questioning any lawful order made by the surrogate in a proceeding wherein she is a party, if obtained without collusion between such administratrix and the next of kin or creditors of the estate. *Scofield v. Churchill*, 72 N. Y. 565; *Gerould v. Wilson*, 81 N. Y. 583.

Their bond contemplates that they shall remain sureties as long as the surrogate retains jurisdiction of the proceedings in administration of the estate, and has power to make valid orders therein affecting the property administered upon.

Of course, the sureties would not be bound by an order which the surrogate had no jurisdiction to make; but so long as his jurisdiction continues the liability of the sureties remains. The very language of the bond provides for orders made in proceedings *inter alios*, and for the liability of the sureties for a nonperformance by the administratrix of any decree or order made by the surrogate's court. The condition of the bond is that liability shall follow her infidelity to her trust, or disobedience of any lawful order or decree, whenever made in the proceedings. It was, we think, never heard of in practice that sureties on an administrator's bond should have notice of proceedings in the administration of an intestate's estate. It could not be claimed that these sureties were entitled to notice of an appeal from the surrogate's decree, or that if an appeal was taken from a decree in favor of an administrator, and the decree should be reversed, they would not still remain liable upon their bond. Such bonds are similar to those given in civil actions upon appeals and otherwise, and have always been held to abide the result of the action.

The real question, therefore, is as to the legality of the arrangement made with the defendants in respect to the custody and use of the funds of the estate during the pendency of proceedings in administration, and the effect of the repayment of such moneys by the defendants to the administratrix under the circumstances disclosed in the case.

We are of the opinion that any employment of trust funds for the individual benefit of a trustee is forbidden by the rules of equity, and constitutes a *devastavit* authorizing the removal of the trustee, and the reclamation of such funds from anyone receiving them with knowledge of their character. The employment and use of such moneys by executors, administrators and other trustees, during the continuance of the trust, has been from the earliest times the subject of frequent consideration by the courts, and their decisions have displayed a uniform tendency towards that mode of use which should afford the greatest security to the fund. Their employment by the trustees in trade, or as loans to persons engaged in such business, or in the prosecution of mercantile, commercial and manufacturing enterprises or speculative adventures, has been uniformly condemned as illegal, and as constituting a *devastavit* of the estate. *Wilmerding v. McKesson*, 108 N. Y. 336, 4 Cent. Rep. 526; *King v. Talbot*, 40 N. Y. 90; *Fellows v. Longyor*, 91 N. Y. 324; *Wetmore v. Porter*, 92 N. Y. 76.

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So, too, it is the uniform doctrine of the cases that trust funds so invested by the trustees in the hands of third persons, having knowledge of their trust character, still remain impressed with the obligation of the trust in the hands of the holder, and are subject to be reclaimed by suit in the name of their trustees, or in that of the beneficiaries of the trust, and restored to the trust fund. *Wilmerding v. McKesson*, *supra*; *Wetmore v. Porter*, *supra*; *Rogers v. Squires*, 93 N. Y. 50; *Clark v. Hougham*, 2 Barn. & C. 149; 2 Perry, Trusts, §§ 826-832; 2 Wms. Exrs. 801; *Field v. Schieffelin*, 7 Johns. Ch. 150.

Neither can the transferee of such fund protect himself from an action brought by the trustee to reclaim them, by showing that such trustee was a legatee under the will as next of kin to an intestate, and thus entitled to an interest in the fund. 2 Perry, Trusts, § 811.

Such interest can become a legal right in any part of such fund only after administration has been had and the decree of the court has provided for division and distribution according to the rules regulating such proceedings. We conceive it to be beyond the power of an executor or administrator to bind the estate they represent to any use of its funds, by contract with third persons having knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust, and in furtherance of its objects. The bond in question was executed for the sole purpose of securing the persons interested in the property the administratrix was about to receive, from any loss which they might sustain through her misconduct or dishonesty; and the defendants were well aware of the character of the transaction. The defendants thereby contracted to become sureties for the faithful performance by her of her duties as such administratrix, and the beneficiaries of the estate thereupon became, under the theory of the law, entitled, not only to the security afforded by the bond, but also to that of the funds of the estate remaining in the hands of the administratrix. If this transaction is sanctioned, one of the securities that the law provides to such persons is entirely destroyed, and the funds of the estate are merged in the personal responsibility of the sureties alone, subject to the hazard and casualties which frequently attend persons engaged in trade.

Estates in the hands of administrators are always supposed to be under the immediate control of the surrogate's court, and subject from day to day to such orders as it may make in relation thereto. It would be contrary to the policy of the law to allow an administrator, at the outset of his administration, by contract, to place the funds of the estate beyond the reach of the court, and irreclaimable until after all the duties of administration have been performed by the administrator. It would certainly be no excuse to an administrator, for disobedience to an order of the surrogate as to the disposition of any portion of the estate, to allege that it was impossible for him to obey because he had placed its funds out of his possession. Neither would it be any defense to a third person, in an action by anyone having authority to recover possession of such

funds, to plead that he held them by virtue of a contract with a former trustee, entered into with him as such trustee.

We think this proposition was decided in *Poultney v. Randall*, 9 Bosw. 286. There the general guardian of an infant sued the defendant for moneys collected by such defendant, belonging to the estate of the infant, under a power of attorney from the guardian. The defense set up was that he held the money by virtue of a contract with the guardian to so hold it as security for his obligation upon the guardian's bond, and that the guardian was insolvent. The court held that the facts pleaded constituted no defense, and that the contract was void upon considerations of public policy, and a fraud upon the statute requiring security for the due performance by the guardian of his duties as such. We can see no material distinction between that case and the case at bar, and approve of the reasons therein alleged for the decision. The case of *Wilder v. Butterfield*, 50 How. Pr. 885, is to a similar effect.

But it is claimed that the surrender, after the decree canceling the administratrix's bond, of the funds of the estate held by the defendants to the administratrix, operates as a defense to this action. The principle upon which the appellants make this point is not very clearly presented in their points, and we are unable to see the exact theory upon which it is based. They do not claim that the plaintiff is estopped from alleging the invalidity of the assignment, or of the decree upon the faith of which the payment was made. They claim, however, that "Of two innocent parties that one must suffer who puts it in the power of the third person to do the act which caused the injury." This contention is probably based upon the familiar maxim that "When one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one, if either, whose act has enabled such fraud to be committed." 8 Abb. N. Y. Dig. "Maxims," §4, and volume 4, "Maxims," 892. This maxim has been applied and illustrated in numerous cases in this State, among which are the following: *Spraghts v. Hawley*, 39 N. Y. 441; *Moor v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Grinnold v. Haven*, 25 N. Y. 595; *Exchange Bank v. Monteath*, 26 N. Y. 505; *Sandford v. Handy*, 23 Wend. 268; *Root v. French*, 13 Wend. 572; *Voorhis v. Olmstead*, 66 N. Y. 116.

These cases generally relate to the authority of agents whose right to deal with the property of their principals was in dispute, and the maxim has been applied by reason of various peculiar circumstances which were deemed sufficient to preclude the principal from availing himself of the agent's want of actual authority; but the general principle involved has been applied in many cases where a loss has followed from the negligence of one party which enabled a fraud to be committed upon another.

We are of the opinion that the maxim has no application to the case in hand, for the reason that no actionable fraud has been shown to have been committed upon the defendants in this transaction, nor has any loss accrued to them in consequence of the surrender of the money referred to. It is probably true that the defendants would not have surrendered to

the administratrix the funds of the estate in their possession, or have repaid to her the debt which they owed her, except for the decree produced for their inspection; but it is also very clear that they had no right to retain such funds by virtue of their contract with the administratrix, and there was no intention to commit a fraud upon them by the administratrix in obtaining possession of property to which she was legally entitled. She was entitled to the repayment of her loan as a matter of course, for she held a promissory note therefor payable on demand, and no possible defense could be made against its collection. Neither, as we have seen, could they have resisted a claim made by her or others for the reclamation of the money of the estate. They have done nothing, therefore, in consequence of the decree, except what they were under legal obligation to do, and have therefore suffered no legal loss or injury from the transaction.

The surrender of the property in question would not even have furnished a good consideration for a promise made by the administratrix. *Vanderbilt v. Schreyer*, 91 N. Y. 892.

It is of the very essence of an action of fraud or deceit that the same should be accompanied by damage, and neither *damnum absque injuria* nor *injuria absque damno* by itself establishes a good cause of action. *Hutchins v. Hutchins*, 7 Hill, 104; *Michigan v. Phenix Bank*, 33 N. Y. 9.

Neither can a party claim to have been defrauded who has been induced by artifices to do that which the law would have otherwise compelled him to perform. *Thompson v. Menck*, 41 N. Y. [2 Keyes] 82; *Story v. Conger*, 38 N. Y. 673; *Randall v. Hazelton*, 12 Allen, 412.

The defendants may possibly lose the money which they pay in satisfaction of their bond; but this will result from their contract, and the confidence reposed by them in their principal, and not at all from the surrender of the property held by them. It is not probable, however, that they will lose anything, as, for all that appears, their principal is perfectly responsible, and liable to indemnify them for any sums they may be obliged to pay on her account. It affirmatively appears that in January, 1883, she not only had in her possession all the funds of the estate, but also the additional sum of upwards of \$3,000, the result of her own savings during the preceding two or three years, and being an amount largely exceeding the liability of the defendants on their bond.

The main question in the case really seems to be, Who shall pursue the administratrix for the moneys of the estate improperly retained by her? We think it is the duty of the defendants, as the object of their bond was to relieve the next of kin from the necessity of resorting to the personal liability of a dishonest, negligent or absconding administrator. We are further of the opinion that the defendants are precluded from the benefit of the principle contained in the maxim by reason of the obligations of their bond. They are the privies of their principal, and the guarantors of her fidelity in the administration of her trust.

The decree under which the defendants claim discharge from liability was procured by

a fraud practiced upon the surrogate through the presentation of papers fraudulently obtained and used by her. It was against the perpetration of such frauds that the defendants' bond was intended to protect the beneficiaries of the estate. The defendants had covenanted that the administratrix should faithfully execute the trust reposed in her, and obey all lawful decrees and orders of the surrogate's court. When she obtained, through fraud, the order of the surrogate awarding the moneys of the estate to her, and canceling her bond, she violated the obligations of her trust, and the defendants became liable for the damages flowing from such breach of duty.

That the defendants were deceived by the administratrix constituted no protection to them, for they had guaranteed that she should deceive nobody in the administration of her trust. The liability of the sureties is coextensive with that of the administratrix, and embraces the performance of every duty she is called upon to perform in the course of administration. It is quite absurd to say that the very fact which creates a cause of action against the sureties should also operate as a defense to them. They cannot stand as innocent parties in relation to an act which they have covenanted to the plaintiff, and all others interested, should never be performed, and they have sustained no legal loss when subjected to a liability which they agreed to assume in the event which is now alleged as the cause of their misfortune. We are therefore of the opinion that the judgments below should be affirmed, with costs.

The decision in action No. 2, between the same parties, is necessarily controlled by the determination in action No. 1, and the judgment in that case must therefore also be affirmed, with costs.

All concur, except Earl and Peckham, JJ., dissenting.

Cornelia A. BEVERIDGE, as Executrix, etc.,  
Appt.,  
v.

NEW YORK ELEVATED R. CO. *et al.*,  
Resp'ts.

(.....N. Y. ....)

1. A judgment declaring a tripartite agreement between three corporations to be void as to one of them, rendered in an action by that one against the other two, is not *res judicata* upon any question arising between one of the defendant corporations and the stockholders of the other, or as to the attitude of one of the defendant corporations towards its own stockholders.
  2. The power conferred by the New York Act of 1839 upon a railroad corporation to contract with another for the use of their respective roads in such manner as the contract may prescribe involves the power to make a lease for a term of years.
  3. A guaranty by one corporation, on a lease of the road of another, of an annual dividend of 10 per cent on the capital stock of the lessor company creates no privity between the lessee company and the stockholders of the other; and a statement printed on the certificates of stock to
- 2 L. R. A.

the effect that such dividend is guaranteed, purporting only to be a statement of a fact having reference to an agreement between the companies, which statement is not signed by the lessee company, does not constitute any contract with the stockholders.

4. An agreement by the directors of a corporation, made in good faith, and with apparent reasons to reduce the amount of moneys payable under a lease of their corporation, is not in excess of their power or voidable at the instance of the stockholders, especially where nearly nine tenths of them have acquiesced, and given practical effect to the agreement.
5. Where a tripartite agreement between three corporations has been held invalid as to one of them, an action to sever the contractual relations is within the honest discretion of the directors of the other companies.

(January 15, 1899.)

**A**PPEAL by plaintiff, from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings Special Term, in favor of defendants in an action to compel the transfer of certain stock and the payment of certain dividends, and to set aside certain instruments. *Affirmed.*

The material facts are fully set out in the opinion.

**Mr. William H. Arnoux**, for appellant:

The contract was in effect a disposition of all the property of the New York Company, and was void.

*Abbot v. Am. Hard Rubber Co.* 33 Barb. 562; *Black v. Del. & R. Canal Co.* 24 N. J. Eq. 455; *Copeland v. Citizens Gas-Light Co.* 61 Barb. 60.

Such a contract was *ultra vires*, and needed the ratification of the stockholders to give it any validity.

*Omaha Hotel Co. v. Wade*, 97 U. S. 13 (24 L. ed. 917); *Zabriskie v. Hakensack & N. Y. R. Co.* 18 N. J. Eq. 183; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 46; *Erwin v. Oregon R. & Nav. Co.* 23 Blatchf. 517, 525; *Hays v. Ottawa, O. & F. R. V. R. Co.* 61 Ill. 422; *Chicago Gas Light & C. Co. v. People's Gas Light & C. Co.* 11 West. Rep. 63, 121 Ill. 580; *Clearwater v. Meredith*, 68 U. S. 1 Wall. 25 (17 L. ed. 604); *Nugent v. Putnam Co.* 8 Biss. 105; *S. C.* 86 U. S. 19 Wall. 241 (22 L. ed. 83); *McMahan v. Morrison*, 16 Ind. 172; *Mowrey v. Indianapolis & C. R. Co.* 4 Biss. 78; *Green's Brice, Ultra Vires*, 2d ed. 632, 633; *Beman v. Rufford*, 1 Sim. N. S. 550, 20 L. J. Ch. 587; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* 4 De G. M. & G. 115, 22 L. J. Ch. 682.

The contract was made by the Metropolitan in the interest and for the benefit of the persons who, upon the faith of it, would be induced to take and pay for its stock and become shareholders. In such cases the contract inures to the benefit of the real parties in interest who are certainly not the directors, not the corporation, as an artificial person, but the holders of the stock who have invested with a view to dividends, and whose rights the directors are supposed to care for.

*Metropolitan Elevated R. Co. v. Manhattan R. Co.* 14 Abb. N. C. 182; *Lawrence v. Fox*, 20 N. Y. 268; *Hand v. Kennedy*, 88 N. Y. 149; *Burr v. Beers*, 24 N. Y. 178; *Thorpe v. Kookuk Coal Co.* 48 N. Y. 258; *Campbell v. Smith*, 71 N. Y. 26; *Boardman v. Lake Shore & M. S. R.*

*Co. 84 N. Y. 157; Prouty v. Lake Shore & M. S. R. Co. 85 N. Y. 272; Clark v. Lake Shore & M. S. R. Co. 94 N. Y. 217; March v. Eastern R. Co. 43 N. H. 515.*

There can be such a condition of things as will justify a court of equity in compelling directors to declare a dividend contrary to their judgment.

*Beers v. Bridgeport Spring Co. 42 Conn. 17; Scott v. Eagle Fire Co. 7 Paige, 198; Brown v. Buffalo, N. Y. & E. R. Co. 27 Hun, 842.*

Whenever money which ought to have been divided among the stockholders has been withheld, and whenever there is a clear abuse of power on the part of the corporate management, and a refusal to declare a dividend that ought to be declared, a court of equity will, at the instance of any shareholder, compel the proper authorities to declare and pay the dividend.

*Stevens v. South Devon R. Co. 9 Hare, 313; Brown v. Buffalo, N. Y. & E. R. Co. 27 Hun, 842; Robinson v. Smith, 8 Paige, 222; Scott v. Eagle Fire Co. 7 Paige, 198; State v. Bank of La. 6 La. 745; Pratt v. Pratt, 88 Conn. 446; Beers v. Bridgeport Spring Co. 42 Conn. 17.*

*Messrs Luke A. Lockwood and E. B. & C. P. Cowles*, also for appellant:

The Manhattan Company agreed to make the annual payment of \$650,000 as a dividend on the capital stock of the New York Company, and for such purpose the New York Company agreed to receive the sum.

Dividends are the property of the stockholders.

*Taylor, Private Corporations, § 568; Le Roy v. Globe Ins. Co. 2 Edw. Ch. 657; Kans v. Bloodgood, 7 Johns. Ch. 90; Re Le Blanc, 14 Hun, 8, affirmed in 75 N. Y. 598. See Boardman v. Lake Shore & M. S. R. Co. 84 N. Y. 157; Van Dyck v. McQuade, 86 N. Y. 88.*

An agreement made by one corporation to pay dividends on the capital stock of another corporation when ratified by the stockholders of that corporation, is a contract made for the benefit of the individual stockholders, the performance of which may be enforced by them.

*See Vrooman v. Turner, 69 N. Y. 280; Hand v. Kennedy, 83 N. Y. 149; Little v. Banks, 85 N. Y. 253; Todd v. Weber, 95 N. Y. 181.*

Where a statement is made for the purpose of inducing a person to act upon the faith of the representations, and such person does rely upon the representations, the party making the statement is estopped from denying the truth or effect of the same.

*See Pickard v. Sears, 6 Ad. & El. 469; Welland Canal Co. v. Hathaway, 8 Wend. 480; Dezell v. Odell, 3 Hill, 215; Plumb v. Cattaraugus Co. Mut. Ins. Co. 18 N. Y. 392; Brown v. Bowen, 80 N. Y. 519; Blair v. Wait, 69 N. Y. 113.*

*Messrs. Julien T. Davies and Charles A. Gardiner*, for respondents:

The contract of guaranty, stamped upon the certificates of stock of the New York Company, was a contract between the Manhattan and the New York Companies solely, to which the stockholders were not parties or privies, and upon which the plaintiff can have no right of action against either the Manhattan Company or the New York Company.

*See Harkness v. Manhattan R. Co. 22 Jones & S. 174; People v. Metropolitan Elevated R. Co. 2 L. R. A.*

*26 Hun, 82; Flagg v. Manhattan R. Co. 10 Fed. Rep. 413.*

The plaintiff can maintain no action against the New York Company for dividends on his stock, because he has no contract for dividends with said company.

*Williams v. Western U. Teleg. Co. 98 N. Y. 162; Luling v. Atlantic Mut. Ins. Co. 45 Barb. 510; Karnes v. Rochester & G. V. R. Co. 4 Abb. Pr. N. S. 107; Barry v. Merchants Exchange Co. 1 Sandf. Ch. 280; Ely v. Sprague, 1 Clarke, Ch. 351; 2 Waterman, Corp. 149 and note 1.*

As matter of law, the will of a majority of stockholders governs in all acts and proceedings within the limits of the Act of incorporation. Everyone who becomes a stockholder assents beforehand to all measures that shall be sanctioned by a majority; each stockholder tacitly agrees to subject his individual will to the will of the body.

*East Tenn. & V. R. Co. v. Gammon, 5 Sneed, 587; Dufres v. Old Colony & F. R. R. Co. 5 Allen, 230; Bill v. Western U. Teleg. Co. 16 Fed. Rep. 19. See also Wallace v. Long Island R. Co. 12 Hun, 463; Faulds v. Yates, 57 Ill. 416; Dudley v. Kentucky High School, 9 Bush, 578; St. Mary's Church Case, 7 Serg. & R. 517; Kean v. Johnson, 9 N. J. Eq. 401; People v. Albany & S. R. Co. 55 Barb. 344.*

Chapter 213 of the Laws of 1889 has been repeatedly held to give authority for the leasing of the property of one railroad corporation to another.

*Fisher v. New York Cent. & H. R. R. Co. 46 N. Y. 644; Woodruff v. Erie R. Co. 93 N. Y. 609; Flagg v. Manhattan R. Co. supra.*

**Gray, J.**, delivered the opinion of the court:

The plaintiff's testator, in March, 1882, was the owner and holder of a certificate for 100 shares of the capital stock of the defendant the New York Elevated Railroad Company, on the margin of which were engraved the following words: "The Manhattan Railway Company, for value received, has agreed to pay to the New York Elevated Railway Company an amount equal to 10 per cent per annum on the capital stock of the latter company—that is, on \$6,500,000—payable quarterly, commencing January 1, 1880." There was no signature to this marginal writing.

The certificate of stock was issued in the name of S. T. Russell & Co., and the plaintiff's testator acquired its possession under an assignment, in blank as to names, etc., printed in the usual form upon its back, and signed by S. T. Russell & Co. Testator, in July, 1884, commenced this action, and he seeks therein to obtain a judgment—*first*, that the New York Elevated Railway Company be compelled to transfer the stock on its books, and to issue in its place to him a new certificate, upon which should be the same words as were upon the margin of the old certificate; *second*, that the Manhattan Railway Company be compelled to pay to the said New York Company an amount equal to 10 per cent per annum on the capital stock of the latter company from July 1, 1881, to July 1, 1884; and *third*, that out of such payment the New York Company be compelled to pay him \$3,250, "being thirteen dividends, of \$250 each, for the several quarters commencing

July 1, 1881, to and including the quarter ending July 1, 1884, together with the interest on the several quarters."

In order to better understand the nature of this claim, and the grounds upon which are based our conclusions with respect to it, some review of the principal facts and corporate transactions of these two companies, as they appear from the record before us, is necessary.

Though the legal questions presented are grave, and of considerable importance as to the parties defendant, they are within a comparatively narrow compass. In May, 1879, the defendants, the New York and the Manhattan Railway Companies united with the Metropolitan Elevated Railway Company in the execution of a tripartite agreement, by the terms of which the New York and Metropolitan Companies were to lease their railways and appurtenant properties and franchises to the Manhattan Company for a term of 999 years.

There was reserved in that agreement, as to each of the lessor companies, the obligation of discharging certain liabilities incurred by, or possibly accruing to, them, and of meeting all claims, in action or otherwise, existing against them on January 31, 1879. On its part, the lessee company assumed certain liabilities of the lessors, agreed to pay an equal amount of first mortgage bonds of each company, and to do various other things expressed therein, or in the annexed form of lease; but with its other provisions we are not particularly concerned.

In accordance with this agreement the New York Company executed the lease, in a form described in the tripartite agreement, to the Manhattan Company, in May, 1879. By its provisions the Manhattan Company agreed to pay a fixed sum of \$10,000 a year, semi-annually, and by the following article "Guaranteed to the New York Company an annual dividend of 10 per cent on the capital stock of the New York Company, to the amount of \$6,500,000; that is to say, the Manhattan Company will each and every year during the term hereby granted, beginning with the first day of October, 1879, pay to the New York Company \$650,000, free from all taxes, in equal quarter yearly payments of \$162,500 each; and the Manhattan Company will, from time to time, execute, in proper form, a guaranty to the above effect, printed or engraved upon the certificates of stock of the New York Company; and, as such stock certificates are surrendered for cancellation and reissue, will, from time to time, upon request of the holder, renew such guaranty upon all reissued certificates." By a subsequent article that company further agreed, "in addition to the rental hereinbefore provided," to pay the taxes, etc., which might be imposed on the lessor company.

A similar lease was executed by the Metropolitan Company of its railroad and appurtenant property to the Manhattan Company.

In July, 1881, the Manhattan Company made default in the payments called for by the leases, and the Attorney-General of the State instituted an action in the name of the People to obtain a decree for the dissolution of the corporation, on the ground of its insolvency, among others; and other actions were brought, prior to that date, by bondholders of the lessor companies for certain equitable relief, which also were

based on such insolvency. The net earnings from the operation of the leased roads had not amounted to what had been expected, as the result of their being placed under one management, and, in addition to that fact, the taxes, which were assessed upon the properties appear to have been larger in amount than anticipated; and the result was that the Manhattan Company was unable to fulfill its engagements.

The court, in the People's action, appointed two receivers for the Manhattan Company, who continued in possession for several months. Meanwhile contests were waged for the possession of the leased properties, and for the establishment of claims against them in behalf of the lessee, and negotiations were set on foot for the settlement of these difficulties. In October, 1881, these negotiations resulted in agreements made for the three companies by their boards of directors, by which the leases were modified in certain respects, but the principal features of which were a reduction in the payments required of the lessee company on the capital stock of the lessors from 10 to 6 per cent, and in making the payments to the New York Company preferred over that due to the Metropolitan Company. Thereafter an order of the court was obtained in the People's suit, directing the restoration by the receivers to the Manhattan Company of the properties in their possession.

In November of the same year the boards of directors of the three companies made an agreement for the transfer or merger of the capital stock of the lessor companies into that of their lessee. Under its provisions the stock issued in exchange for the stock of the New York Company was to be called "first preferred stock," and became entitled, from net earnings, to the payment quarterly of dividends at the annual rate of 6 per cent before any other class of stockholders—that is, of the other companies—should receive any dividends. The Metropolitan stockholders were to receive second preferred stock of the Manhattan Company, which should be entitled to similar dividends, but only after the payment of full dividends on the New York Company's stock; and whereas the dividends were cumulative on the first preferred stock, for the second preferred stockholders they were not.

The exchanged shares were to be held by the Manhattan Company uncanceled, as a muniment of title to itself and to the exchanging stockholders. Except as expressed in this merger agreement, the previous agreements and the leases were confirmed. Soon after the capital stock of the Manhattan Company was increased from \$13,000,000 to \$26,000,000 in due form of law.

At the annual meeting of stockholders of the New York Company in January, 1882, on the question of their approval of these October and November agreements, a vote of 25,904 shares was cast in favor and of 787 shares in opposition. The amount of capital stock of the New York Company was 65,000 shares. In January, 1882, a majority of that stock had been converted into the first preferred stock of the Manhattan Company; and by May 6, 1884, before this plaintiff's testator's demand and the commencement of this action, 58,011 out of the 65,000 shares had been so converted. On January 31, 1882, the Manhattan directors by reso-

lution elected to become *ex officio* directors of the New York Company.

Holders of the Metropolitan Company's shares whose interests were only in that company, or were greater than in the other companies, were not so well satisfied with the October agreements; and in December, 1882, a month after the election of a board of directors composed of persons other than in the previous board, a suit was instituted in the Common Pleas of New York by the Metropolitan Company as plaintiff against the Manhattan and the New York Companies as defendants, to set aside the agreements. A decision was had in May, 1884, declaring those agreements to be null and void as to all the parties thereto. The opinion upon which this decision was entered was rendered by Judge Van Brunt, and is a most able and exhaustive review of the law relative to the government of corporations, their powers and the duties of directors to stockholders. The effect claimed for his decision by this plaintiff is that as between these companies it is *res judicata*, and restored the contract in the lease of 1879 with the same obligation as though it had never been modified or changed by subsequent agreements. That cannot be so, and a consideration of the issues presented and tried will dispose of any such claim, and may as well be made at this point.

The Metropolitan Company alleged as grounds for its action the lack of power in its directors to modify the tripartite agreement and lease without the consent of its stockholders; the fact that three of its directors were at the time of making the October agreements also directors of the Manhattan Company; that the personal interests of several of its directors were opposed to the interests of the company; and that its directors were actuated by fraudulent motives. These allegations were met by the denials of the defendants in their answers. As affirmative defenses, they set up the October agreements as having been made in good faith, and the making of the merger agreement of November, 1881.

The issues thus presented for trial and judgment were, as between the Metropolitan Company on the one hand, hostile to the agreements, and the Manhattan and New York Companies on the other hand uniting in asserting the good faith and validity of all that had been agreed to and done between the companies, and insisting upon the indissoluble nature of the corporate relations which resulted from the making of the October and November agreements. What was decided was that the October agreements were voidable at the election of the Metropolitan Company, on the ground that its directors had no power to make them without the consent of the stockholders; and that, even if they had such power, the presence of directors in the Metropolitan board who were also directors in the Manhattan Company at the time of the adoption of the October agreements gave either company the right in equity to repudiate those contracts, although they may have been perfectly valid at law. The judgment in that action was that all the parties thereto were relieved from the October agreements.

I do not deny that the legal effect of the judgment in the action referred to was to destroy the contractual relation which had been

formed between the companies. Inasmuch as the agreements were tripartite in their nature, a decree relieving one of the parties from their obligations would of necessity, by destroying their mutuality, annul the whole contract. But that decree was not *res judicata* upon any question arising between the stockholders of the New York Company and the Manhattan Company, or as to what was the attitude of the New York Company towards its corporators under the agreements of October and of November, nor affected the acts done under them.

The plea of *res judicata* is not available to parties in an action unless the judgment set up was rendered upon issues between them. There must have been a controversy between the parties the questions in which were or might, within the issues formed, have been competently adjudged. But in the action of the Metropolitan Company, referred to, there was no litigation between the New York and Manhattan Companies, defendants thereto; nor was there any dispute between them, or any variance in matters relied upon as defenses to the maintenance of the action.

The only effect which could be given to the judgment in that action was that, for special reasons applicable to the Metropolitan Company, the October agreements, which its directors had entered into as a corporate act, were avoided as to that company.

After the decision in that action, the directors of the New York Company, who were and had been since January, 1882, the same as those of the Manhattan Company, took action which resulted in a surrender by the Manhattan Company to the New York Company of all the property which had been leased to it in 1879, and a retransfer of the exchanged capital stock. The New York Company thus repossessed itself of and operated its railway and properties. This step was a not unnatural consequence of the judgment in the Metropolitan Company's action annulling the previous agreements between the companies, and seems to have been approved of by the vote of a majority of the New York Company's stockholders at the meeting held on May 6, 1884.

On August 1, 1884, agreements were entered into for a new lease of the New York Company's property to the Manhattan Company, and also for the merger and consolidation of all three companies; but I fail to see how, for the disposition of this case, it is at all necessary for us to consider the detailed steps which led to their making, or the legality or effect of their consummation. The learned trial judge, in refusing to pass upon various requests to find with respect to the evidence as to the negotiations and acts of the directors after the surrender of the leased property in May, 1884, and as to what was done by stockholders and directors on August 1, 1884, towards the new lease and the consolidation of the companies, placed his refusal on the ground of their immateriality, and I think he committed no error in so doing.

This suit was commenced in July, 1884, upon a demand made on May 22, 1884; and the claim of the plaintiff does not seem to involve any other examination of this rather voluminous record than such as to see whether he, as



a holder of the New York Company's stock, has been injured in any legal rights and is entitled to equitable relief for their enforcement or protection. His counsel insists, in that behalf, that the agreement in the lease of 1879 with respect to the guaranty by the lessee company to make payments to the lessor company at the rate of 10 per cent annually, and which we have cited in full, inured to the benefit of the stockholders in the lessor company, so as to warrant the interposition of a court of equity in his favor, compelling a performance of the agreement in its fullest import. He says that the consent of the testator's assignor was essential to the validity of the lease of the New York Company in 1879, and by that fact, and by his relation as a stockholder, he thus came into privity with the contract.

As a matter of fact, conceded in the case, the lease of 1879 received the assent of the New York Company's stockholders; but we do not think the concurrence of stockholders to be an essential condition to the validity of a lease by a railroad corporation of its road to another railroad corporation. The Act of 1839 has more than once been construed to authorize such a lease. The power therein conferred upon a railroad corporation to contract with another for the use of their respective roads in such manner as the contract may prescribe, involves the power to make a lease for a term of years. *Woodruff v. Erie R. Co.* 98 N. Y. 616.

In the case cited, *Ruger, Ch. J.*, delivering the opinion of the court, cites several cases in this court as authorities, and shows, by reference to several subsequent Acts of the Legislature, that no subsequent legislation has impaired the powers conferred by that Act, but that subsequent legislative enactments recognize the validity of leases made under its provisions.

In *People v. O'Brien*, 111 N. Y. 1 (lately decided by us), it was held that the Act of 1839 continues in force and unaffected with respect to its general grant of power to railroad corporations to make traffic contracts with each other for the use of their respective roads. The power conferred by this law is to be exercised as any other power of a corporation is where the mode of exercise is not prescribed by the charter or general laws applicable thereto.

All powers directly conferred by statute, or impliedly granted, of necessity must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. The expression of the corporate will, and the performance of corporate functions, in the management of a corporation, may originate with its directors, where the law or the by-laws have not expressly restricted their authority, and made their action to rest for its validity upon the concurrence of the stockholders by previous action or subsequent ratification. Within the chartered authority they have the fullest power to regulate the concerns of a corporation according to their best judgment, and contracts which the corporation could legitimately make come within the scope of the ordinary powers of corporate management. *Leslie v. Lorillard*, 110 N. Y. 536 [1 L. R. A. 456].

The duties of directors are of the most real 2 L. R. A.

sponsible kind, and it is in the purview of the law that they should be held to a full accountability for their acts to the stockholders, towards whom they occupy the relation of trustees, with all that that term implies in power and responsibility. In the management of the affairs of the corporation they are dependent solely upon their own knowledge of its business, and their own judgment as to what its interests require. The error in the supposition that, in the case of a railroad corporation, a lease of the railroad property requires for its validity the authorization of stockholders, has its source in the idea that such an act involves an organic change, which either the law inhibits, or, if it permits, vests the power to make only in the corporators, either by express enactment or by necessary or natural implication.

If such a contract as the lease by a railroad corporation to another of its railway was not within the powers expressly conferred by general laws, by which, as by the charter, the corporate powers are measured, it would be *ultra vires*, and could not be done at all. But as the Act of 1839 authorizes the making of such a contract, and the law does not regulate the manner of making it, or impose restrictions with respect to it, we think it must logically follow that the power to make it is, like all other general powers of management, lodged in the directors. They must exercise all the powers of a corporation, subject to the general law and to the by-laws of the company; and where they act in good faith, and without fraud or collusion, their action is conclusive upon the corporation. As agents of the corporation, we must find the extent of their powers by an examination of the laws under which it was created and exists. Those laws, in defining the powers of the corporation define the scope of the directors' powers to act for it.

*Judge Comstock in Hoyt v. Thomson*, 19 N. Y. 216, said: "The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds towards his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former

... But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer nor can they revoke those powers. They are derivative only in the sense of being received from the State in the Act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers," etc.

It is difficult to find a solid foundation for the argument which denies to the directors the power of making a contract which the law expressly permits the corporation to make without the authorization of the stockholders. If it is deemed to be too extensive a power to be vested in the directors, and dangerous to the rights of stockholders in the possibilities of fraud, it is for the Legislature to interfere and prescribe regulations for its exercise. What we hold here is that a contract for the leasing of one railroad to another is within the original powers of a board of directors to make; because it is a power conferred upon the corporation by the Legislature, which lodges primarily in

its directors, to be exercised when, according to their best judgment, the needs or interests of the corporation require it. What business a corporation can do within its chartered limits, and in or about that business, by statutory authority, its directors hold a delegated power from the Legislature to do for it. The fact that in this case the assent of the stockholders was secured to the lease does not affect the question. It is a very proper and reasonable precaution to take, in view of its being an important disposition of property, and one which I should think would naturally be taken.

It follows from what we have said that the plaintiff's theory of the privity and relations of his assignor to the lease of 1879, and of beneficial rights accruing thereby to and enforceable by him, is untenable.

Regarding, then, the lease itself, and the so called guaranty which is contained among its provisions, I find therein no contract made with individual stockholders, but only one made with the New York Company, which stipulates for the payment of a sum of money equal to 10 per cent upon the capital stock of that company. There is no contract to pay 10 per cent dividends to individual stockholders upon their holdings, nor any contract that the New York Company will pay it out in the shape of 10 per cent dividends to its stockholders. Payments under that contract are to and for the lessor corporation, and go into its treasury, as would any other moneys or revenues derived from or produced by corporate property.

The statement upon the certificate of stock, which the plaintiff attaches such importance to, of itself, certainly, is no contract by the Manhattan Company, for it is not even signed. On its face it only purports to be a statement of a fact, having reference to an agreement made with the New York Company. Undoubtedly the effect of this statement may have been to give an enhanced value to the shares of stock of that company in the market, not because the purchaser was buying securities on which were guaranteed to be paid to the holder 10 per cent dividends, but because it conveyed information, to those proposing to invest, that a fund had been provided for, by agreement, out of which dividends might be paid. The knowledge was communicated as to the amount of rental moneys or revenues which the company was in receipt of, and which were available for the declaration and payment of dividends. Such a statement would tend to give confidence to investors and marked value to the securities.

The certificate of stock in *Boardman v. Lake Shore & M. S. Railway Company*, 84 N. Y. 157, read that the stock was entitled to dividends at the rate of 10 per cent per annum, and at the top of the certificate were the words, "Guaranteed Ten Per Cent Stock." The interpretation given was that the dividends were not only preferred, but, being guaranteed, were to be paid before any dividends were divided upon the common stock. In that case resort to the evidence of the resolutions and proceedings of the company was deemed competent to show the real character of the corporate transactions underlying the issue of the stock, and which the certificate of stock to some degree evi-

denced. Miller, J., in his opinion in that case, has cited a number of authorities warranting such resort in cases relating to the power to create preferred or guaranteed stock.

In the stock certificate in *Barr v. New York Railroad Company*, 96 N. Y. 444, the obligation of the Erie Railway Company ran to the "holders" thereof. In the present case nothing in the language of the certificates imports any agreement with its holder for the payment of any dividends whatever; and, if we resort to the evidence of the corporate proceedings, we find none giving him a right to dividends in the future, or creating an obligation enforceable by him for the payment of dividends upon his stock.

Judge Ingraham, in his able opinion in *Harkness v. Manhattan R. Company*, 54 N. Y. Super. Ct. 174 [22 Jones & S.], a case involving a similar question, analyzes the agreement in the lease in question. He held that it gave no cause of action against the Manhattan Company to recover the amount to be paid to the New York Company, and among other things, said: "The agreement is to pay a certain sum of money to the corporation, the New York Company. The sum is fixed at 10 per cent of the outstanding stock of the New York Company. Nothing was to be paid to the individual stockholders, nor did the Manhattan Company in any way agree that the stockholders of the New York Company should receive the money it agreed to pay to the New York Company, or that such money should be used for the purpose of a dividend on the stock of the New York Company. . . . As soon as the money was paid to the New York Company, it became the property of the corporation, liable for its debts, and the stockholders had no claim to it until by some act of the corporation it had been appropriated to them. There was no agreement of the New York Company that the money to be received should be paid to its stockholders, and there was therefore no obligation on the part of the New York Company to its stockholders which the Manhattan Company undertook to discharge." This sums up the whole matter clearly and well, and amplification seems to be needless.

In *Flagg v. Manhattan Railroad Company*, 20 Blatchf. 142, 10 Fed. Rep. 413, *Justice* Blatchford held, similarly, that the guaranty here was not to the stockholders severally, but to the corporation.

Within the principles of adjudged cases in this court, where the plaintiff seeks to base his right to maintain his action against a third party upon a contract made between that party and another, it must be one made or intended for his benefit. Such a beneficial intent must be clearly found in the agreement. *Wheat v. Rice*, 97 N. Y. 296; *Vrooman v. Turner*, 69 N. Y. 280; *Barlow v. Myers*, 64 N. Y. 43; *Lawrence v. Fox*, 20 N. Y. 268.

The present case does not fall within the principle of the decision of *Schemerhorn v. Vanderheyden*, 1 Johns. 139, that, "Where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise."

That decision was based on the case in the King's Bench of *Dutton v. Poole*, 2 Lev. 210, and of subsequent English cases following its

authority. But in all of the cases which I have examined, where the action was sustained, the facts showed that the promise clearly was for the third person's benefit, and made with that distinct intention.

If this agreement in the lease for the payment to the New York Company annually of a sum equal to 10 per cent on its capital stock is not one which gave the plaintiff any right of action against the Manhattan Company, he is equally without any right to maintain an action upon it against his own company for the payment of dividends. A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made or a dividend declared. *Jones v. Terre Haute & R. R. Co.* 57 N. Y. 196; *Boardman v. Lake Shore & M. S. R. Co.* *supra*.

He acquires no right or title to the accumulated gains from the revenues of the corporation which entitles him to sue for his aliquot share of dividends. Until divided by the directors or trustees of the corporation, all of its property is held in joint ownership by the corporators, and no several right is possessed by the individual stockholder until after a dividend is declared.

The declaration of a dividend from a surplus or the division of profits is within the discretionary powers of the directors or trustees, which will not be controlled by the courts. *Wiltama v. Western U. Teleg. Co.* 98 N. Y. 162.

Nor does any obligation exist here on the part of the New York Company to pay a dividend which plaintiff can enforce performance of in equity. The moneys which were payable by the Manhattan Company became the property and assets of the New York Company, and were within the control and administration of the directors, for the needs and in the interests of the corporate body.

The next step brings us, then, to the agreements of October, 1881, by which the leases were modified, in the principal feature of the reduction of the payments agreed to be made, from 10 to 6 per cent. About this action of the directors little need be added, in view of the previous discussion of the extent of their powers. We hold that it was quite competent for them to make those agreements without any concurrent action or ratification by the stockholders. No fraud is found or proven against them in taking this action, and it seems not an unreasonable or an improper exercise of business discretion, in view of the embarrassments in which the insolvency of the Manhattan Company had involved itself and its lessors. To have, in good faith and with apparent reasons, agreed to reduce the amount of moneys payable under the lease of their corporation, was not an act in excess of the power of the directors, or one voidable at the instance of the stockholders. It was as much within their province and authority, and as much a part of the ordinary business of the corporation, as would be the reduction of the interest secured in a bond to the corporation, or the rent reserved in a lease of some building, or any other act lying in the exercise of business judgment.

The question of the exercise of such a power of management must be left to the honest and fair business discretion of the board of directors; and the only inquiry by the stockholders

could be as to whether there was any fraud by which assets were wrongfully diverted. They must be presumed to act for the best interests of the corporation, and to give to the management and disposition of its property their best judgment. But when subsequently the agreement of November, 1881, for the merger or transfer of the capital stock of the lessor companies into that of the lessee, was, as to the New York Company, given practical effect by the exchange of upwards of 58,000 shares out of a total of 85,000 shares, that fact, under any aspect of the case, expressed the decided acquiescence of nearly nine tenths of the corporators in what had been done. While the action of other shareholders may not, in the merging of their stock, affect any legal rights of the non-merging shareholders, it may not improperly be referred to in the endeavor to discover the sentiments of the general body of corporators as to corporate action taken by their directors. The appeal to equity, when the acts complained of are within the powers of directors, and apparently uninfluenced by corrupt motives or personal interests adverse to those of stockholders, ought at least to be justified by some showing that these acts were improper within the belief of a fair proportion of the body of stockholders.

Coming, then, to the condition of affairs which followed upon the decision of *Judge Van Brunt* being known, we do not find in it any origin for this action by the plaintiff. In May, 1884, the stockholders of the New York and Manhattan Companies approved agreements for the surrender to the New York Company by the Manhattan Company of the leased property, and for the retransfer of the stock exchanged for the stock of the New York Company. Although *Judge Van Brunt's* decision was rendered upon the complaint of the Metropolitan Company, and avoided the October agreements as to that company, it so affected the contractual relations of all the companies as to seem to make some action necessary. It had no such effect upon the New York Company's stockholders as to avoid those agreements; but no action had been, nor, in our opinion, could have been, taken by the company, or its stockholders, to annul the October agreements.

The stockholders could not be heard to say that they acquired any rights under that judgment, with respect to the past. It is sufficient that such action was deemed necessary as was had in May, 1884, for the severance of the contractual relations established by the lease, and it was a matter, we think, which was also within the exercise of an honest discretion by the directors. Although not legally requisite, their action was approved by the great majority of the votes cast on May 6, 1884, by the holders of the New York Company's stock. I do not see, however, that much discussion upon the action taken in May, 1884, is called for under the view taken of the plaintiff's rights in this opinion. The gravamen of his complaint is that the contract in the lease of 1879 injured to his benefit, and could not be discharged or modified by agreement between the companies, and is one which he can enforce, and that when he commenced his suit that contract was in full force, and the New York Company is entitled to recover from the Manhattan Company the

10 per cent payable under its provisions since July, 1881. I have undertaken to show how he is in error in the propositions on which he claims to maintain his action. When he commenced his action in July, 1884, his company had competently resumed the possession of its railroad properties. It had then no claims against the Manhattan Company for any differences between the payments guaranteed to it in the lease of 1879 and those provided to be made by the October agreements. As to the New York Company, in our opinion, those agreements were valid and binding when made, and

being acted upon and acquiesced in subsequently, the stockholders are without any legal or equitable cause of complaint. The plaintiff has altogether failed to show any ground for the interference of the courts. He bought the stock with full knowledge of what had taken place; and this fact, in connection with an absence of legal grounds for the maintenance of an action, deprives his appeal of all merits.

*The judgment appealed from should be affirmed, with costs.*

All concur; **Ruger, Ch. J.**, in the result.

## INDIANA SUPREME COURT.

Peter KUNTZ, *App't.*

v.

Mahlon SUMPTION.

(....Ind....)

1. The denial of due process of law resulting from the provisions of the Indiana Statute \*which assumes to confer authority upon the county board of equalization to increase the valuation of property of an individual taxpayer listed by him for taxation, by a decision which is final, without giving him an opportunity to be heard, renders such provisions unconstitutional.
2. Where individual rights are concerned, and the matter is one upon which a party is entitled to be heard, a proceeding conclusively and finally disposing of individual property

\*Ind. Rev. Stat. § 6399.

**NOTE.**—*Protection of individual rights; common-law principles incorporated in constitutional law.*

No man's property can be taken from him without his consent, express or implied, except by due course of law. *Blackman v. Lehman*, 68 Ala. 647; 2 Desty, Taxn. 749.

The Bills of Rights in the American Constitutions are conservatory instruments rather than reformatory, and assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation. *Weimer v. Bunbury*, 80 Mich. 201; *Cooley Taxn.* 49.

The Fourteenth Amendment does not employ the phrase "due process of law" in any new sense but as employed in the State Constitution. *Munn v. Ill.* 94 U. S. 118 (24 L. ed. 77); 2 Desty, Taxn. 750.

It simply requires that a person should be brought into court and have an opportunity to prove any fact for his protection. *People v. Essex Co.* 70 N. Y. 220.

The fact that the value of railroad property is to be ascertained by a state board, each being equally charged to ascertain the actual value of the property assessed, does not violate the Fourteenth Amendment to the Federal Constitution. *San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 12; *Cooley, Taxn.* 50.

### *Due process of law, as regulated by state law.*

What is due process of law in the State is regulated by the law of the State. *Walker v. Sauvinet*, 92 U. S. 90 (23 L. ed. 678).

The Legislature of a State performs its whole duty under the Constitution of the United States, in providing for "due process of law," when it enacts a law for the government of its courts while exercising the respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. *Arrowsmith v. Harmoning*, 118 U. S. 194 (30 L. ed. 243).

"Every independent government is at liberty to prescribe its own methods of judicial process, and declare by what means parties shall be brought before its tribunals." *Mackay v. Gordon*, 34 N. J. L.

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rights will be void, unless founded upon a law providing for notice of some kind. It is not enough that some notice or information may be given, but the law must provide for notice.

(January 22, 1889.)

**A**PPEAL from a judgment of the Circuit Court of Randolph County (Monks, J.), sustaining a demurrer to a complaint. *Reversed.*

The question presented is stated in the opinion.

*Messrs. Gray & Gray* and *David Turpfil* for appellant.

*Messrs. Thompson, Marsh & Thompson* and *The Attorney-General* for appellee.

286; *Mutual L. Ins. Co. v. Pinner*, 8 Cent. Rep. 649, 43 N. J. Eq. 62.

The method by which a defendant shall be notified of a suit instituted against him, so that the court may acquire jurisdiction over him, whether the notice shall be actual or constructive, is a subject over which the law-making power of each government has supreme control. *Hess v. Cole*, 23 N. J. L. 113; *Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 231; *Mutual L. Ins. Co. v. Pinner*, 8 Cent. Rep. 649, 43 N. J. Eq. 62.

### *Due process of law defined.*

The term "due process of law" means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. *Penoyer v. Neff*, 95 U. S. 714 (24 L. ed. 565); *Kennard v. La.* 92 U. S. 480 (23 L. ed. 478); *Hazar v. Reclamation District*, 111 U. S. 701 (28 L. ed. 569).

It means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. *Bartlett v. Wilson*, 4 New Eng. Rep. 119, 59 Vt. 23; *Cooley, Const. Lim.* 356; *Berthoff v. O'Reilly*, 74 N. Y. 509, 18 Am. Law Reg. N. S. 119; *Ex parte Ah Fook*, 49 Cal. 402.

It means law in its regular course of administration through courts of justice (*Baker v. Kelley*, 11 Minn. 480; *Rowan v. State*, 30 Wis. 129; *Newcomb v. Smith*, 1 Chand. 71; *State v. Becht*, 23 Minn. 413) — the law of the land (*Re Meador*, 1 Abb. (U. S. 631; *Murray v. Hoboken L. & I. Co.* 50 U. S. 18 How. 272 (15 L. ed. 372); *Janes v. Reynolds*, 2 Tex. 251; 2 Desty, Taxn. 749) — and generally implies and includes parties, judge, regular allegations and a trial according to some settled course of judicial proceedings. *Murray v. Hoboken L. & I. Co.* 50 U. S. 18 How. 272 (15 L. ed. 372); *Huber v. Reilly*, 53 Pa. 112; *Rees v. Watertown*, 80 U. S. 19 Wall. 122 (22 L. ed. 76); *Westervelt v. Gregg*, 32 N. Y. 302.

The term, when applied to judicial procedure, means a course of legal procedure according to those rules and principles established by our jurisprudence for the protection and enforcement of

*Elliott, Ch. J.*, delivered the opinion of the court:

The Board of Equalization of Randolph County entered an order reading thus: "On motion, the board increased the assessment of Peter Kuntz on personal property \$20,000." Prior to the meeting of the board Kuntz had listed his property for taxation. He was subpoenaed before the board, and testified as a witness, but did so under protest.

We have given to the principal question in this case much and careful study, and we are compelled to hold that the statutory provisions concerning the authority of the county board of equalization to increase the valuation of the property of an individual taxpayer listed by him for taxation are unconstitutional. We limit our decision to this point, and mark the limit as distinctly and definitely as we can. We do not affirm that the provisions of the statute conferring authority upon the county board to change the general levy are invalid, nor do we affirm that they are invalid in so far as they confer authority to make orders affecting the taxpayers generally. We do, however, affirm that they are invalid in so far as they assume to confer authority upon the board to conclusively change the valuation placed upon property by an individual taxpayer, or to add property to his list. We are satisfied that the statute is in conflict with the Constitution, for the reason that it assumes to confer authority upon the board to add to a citizen's taxes without giving him an opportunity to be heard, and thus denies him due process of law.

Our judgment is that after a citizen has listed

his property no change in the list can be compulsorily made by an officer or tribunal whose decision is final, until, by due process of law, he has had an opportunity to vindicate the correctness of his list, or resist an attempt to increase the valuation. The presumption is that men obey the law and act in good faith, and under this long settled rule it must be held that, until the contrary is shown, the taxpayer is entitled to have his list accepted as correct and just. The contrary cannot be legally and conclusively shown, unless he has an opportunity to be heard, and this opportunity he cannot have unless notice is given him before a conclusive decision is made. The statute does not provide for notice to taxpayers whose taxes it is proposed to increase; and this infirmity destroys it in so far as it affects such citizens. It is not enough that in fact the taxpayer does have some notice or information, for the law must provide for notice, or else no legal notice can be given. A man may be subpoenaed as a witness in an action pending against him, but unless he is summoned or notified as a party under some law authorizing a summons or a notice the proceedings are utterly void. A man may be served with a written notice that a petition for a ditch is pending, but, if there is no law authorizing notice, it will be unavailing. A notice not authorized by law is in legal contemplation no notice. We do not assert that the proceedings would be void where there is some notice, although not given in strict conformity to law; for we know that a defective notice, assumed to be given under a statute, will be sufficient to uphold jurisdiction as against a

private rights. *Pennoyer v. Neff*, 95 U. S. 714 (24 L. ed. 555).

There must be a competent tribunal, and the party affected must be brought within the jurisdiction. *Id.*

*Does not necessarily require judicial proceedings.*

The phrase "due process of law" does not in all cases necessarily require judicial proceedings. *McMillen v. Anderson*, 95 U. S. 37 (24 L. ed. 335). See *Pearson v. Yewdall*, 95 U. S. 294 (24 L. ed. 436); *Murray v. Hoboken L. & I. Co.* 59 U. S. 18 How. 272 (15 L. ed. 872); *Davidson v. N. O.* 96 U. S. 97 (24 L. ed. 618); *Hoke v. Henderson*, 4 Dev. 15; *Taylor v. Porter*, 4 Hill, 143; *Vanzant v. Waddell*, 2 Yerg. 280; *State Bank v. Cooper*, Id. 599; *Jones v. Perry*, 10 Yerg. 56; 2 Desty, *Taxn.* 749.

Due process of law does not require judicial proceedings in enforcing a tax. *McMillen v. Anderson*, 95 U. S. 37 (24 L. ed. 335); *Cooley*, *Taxn.* 51.

It does not require a plenary suit and trial by jury in all cases where property and personal rights are involved; it is in all cases that kind of procedure which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the court. *Ex parte Wall*, 107 U. S. 265 (27 L. ed. 553).

Although differing from proceedings in courts of justice, the general system of procedure for the levy and collection of taxes is, within the meaning of the Constitution, due process of law. *Kelly v. Pittsburgh*, 104 U. S. 78 (23 L. ed. 658).

It is not necessary a process according to the course of the common law, but process according to the course of proceedings applicable to the subject matter, and conformable to those general rules that affect all persons alike. *Bartlett v. Wilson*, 4 New Eng. Rep. 119, 59 Vt. 23; *Cooley*, *Const. Lim.* 356.

Any legal process founded on necessity, consecrated by time, and approved and acquiesced in by universal consent, is an exception to the right of trial by jury, and is embraced in the term "law of the land," and summary proceedings in the collection of taxes are so held to be. *State v. Allen*, 2 McCord, L. 60. See *Harris v. Wood*, 6 T. B. Mon. 643; *New Orleans v. Cannon*, 10 La. Ann. 764; 2 L. R. A.

*Willard v. Wetherbee*, 4 N. H. 113; *McCarroll v. Weeks*, 5 Hayw. (Tenn.) 245.

So a warrant for the collection of taxes, authorizing the sale of property thereon, is due process of law. *Springer v. U. S.* 102 U. S. 586 (23 L. ed. 253).

Or a summary seizure of lands for nonpayment may be authorized by state laws, and this is not a violation of the provision as to due process of law. *Kelly v. Pittsburgh*, 104 U. S. 78 (23 L. ed. 658); *Railroad Tax Cases*, 13 Fed. Rep. 722.

The statute authorizing a tax collector to sell for the nonpayment of a tax any chattels in possession of the taxpayer in default is not unconstitutional, even where the goods are owned by another person. *Hersee v. Porter*, 1 Cent. Rep. 753, 100 N. Y. 403.

A party is not deprived of his property without due process of law by the enforced collection of taxes, merely because they, in individual cases, work hardships or impose unequal burdens. *Kelly v. Pittsburgh*, 104 U. S. 78 (23 L. ed. 658).

*Application to tax proceedings.*

Where life and liberty or the title and possession of property are involved, due process of law requires that there be a regular course of judicial proceedings, and that the party to be affected shall have notice and an opportunity to be heard; but where the taking of property is in the enforcement of a tax, whether notice to him is necessary depends upon the character of the tax and the manner in which its amount is determinable. *Hagar v. Reclamation District*, 111 U. S. 701 (23 L. ed. 569).

"Due process of law," as applied to the levy and collection of taxes, does not imply or require the right to such notice and hearing as are considered essential to the validity of the proceedings and judgments of judicial tribunals. *Cincinnati, N. O. & T. P. R. Co. v. Ky.* 115 U. S. 321 (23 L. ed. 414); *McMillen v. Anderson*, 95 U. S. 37 (24 L. ed. 335); *Lent v. Tiltson*, 72 Cal. 404.

*Revenue laws in harmony with Fourteenth Amendment.*

The constitutional provision as to due process of law has no application to the levy of taxes by state officers, contrary to an invalid provision of a stat-

collateral attack. *Montgomery v. Wasem*, 13 West. Rep. 800, 15 N. E. Rep. 796; *Hume v. Conduitt*, 76 Ind. 598.

But there must be an assumption of the right to give notice, and there must be some law authorizing this assumption. At all events, there must be color of right, and without a law authorizing notice there can be none. We approve, as fully as language can do, the doctrine of former decisions, that the Legislature has ample authority to prescribe what the notice shall be. *Johnson v. Lewis*, 115 Ind. 490, 15 West. Rep. 455; *Gartin v. Dausseman*, 14 West. Rep. 813, 114 Ind. 429, 16 N. E. Rep. 826; *Carr v. State*, 1 West. Rep. 592, 103 Ind. 548; *Hobbs v. Tipton County*, 1 West. Rep. 539, 103 Ind. 575.

We affirm, too, that whether the notice is by publication or by personal service, it will sustain jurisdiction, provided there is back of it some law providing for notice. While affirming these various propositions, we also affirm that, where individual property rights are affected, there must be provision for notice made by law before there can be a final and conclusive adjudication. Only the law can prescribe the form of the notice, and the law must provide for it. Where, therefore, individual rights are concerned, and the matter is one upon which a party is entitled to be heard, a proceeding conclusively and finally disposing of individual property rights will be void, unless founded upon a law providing for notice of some kind. Where the matter to be decided is one of pure discretion, and the tribunal decides

upon its own judgment, unaided by evidence, then notice is not essential. *State v. Johnson*, 3 West. Rep. 692, 105 Ind. 463; *Fries v. Brier*, 9 West. Rep. 260, 111 Ind. 65; *Trimble v. McGee*, 11 West. Rep. 682, 112 Ind. 307; *Weaver v. Templin*, 12 West. Rep. 274, 113 Ind. 298, 14 N. E. Rep. 600.

But in adding to property listed by the taxpayer, or in increasing the valuation put upon listed property by him, a board of equalization does not exercise arbitrary power or unrestricted discretion. On the contrary, it must be guided by the law and the facts, and has no right to add to the list of the taxpayer property he does not own, nor has it authority to increase the valuation of property without giving the taxpayer legal notice—thus affording him an opportunity to adduce evidence or furnish information. It is a serious matter to charge a person with fraudulently or falsely listing his property; and to add to his list, or to increase the valuation of property, imposes upon him a burden, for it deprives him of property in the form of money. That notice is required in all cases where individual property rights are involved, and the matter is not one of pure discretion, has been again and again decided by our own and other courts. *Strosser v. Fort Wayne*, 100 Ind. 448; *Troyer v. Dyar*, 102 Ind. 396; *Jackson v. State*, 1 West. Rep. 269, 103 Ind. 250; *Johnson v. Lewis*, 15 West. Rep. 455, 115 Ind. 490; *Wells County v. Gruver*, 15 West. Rep. 130, 115 Ind. 225, 17 N. E. Rep. 290, and cases cited.

That the notice must be authorized by law is

not attempting to exempt it. *Little Rock & F. S. R. Co. v. Worthen*, 119 U. S. 97 (30 L. ed. 588).

The revenue laws of a State may be in harmony with the Fourteenth Amendment, though they do not provide for giving a party an opportunity to be present when the tax is assessed against him, and to be then heard, if they give him the right to be heard afterwards in a suit to enjoin the collection, in which both the validity of the tax, and the amount of it, may be contested (*McMillen v. Anderson*, 95 U. S. 37 (24 L. ed. 335); *Hagar v. Reclamation District*, 111 U. S. 701 (28 L. ed. 599); *Pearson v. Yewdall*, 95 U. S. 294 (24 L. ed. 436); *Cooley, Taxn. 51*); even though he be required, as in other injunction cases, to give security in advance. *McMillen v. Anderson*, 95 U. S. 37 (24 L. ed. 335); *Desty, Taxn. 732*.

#### **Tax proceedings in harmony with constitutional law.**

Whenever a tax or burden is imposed upon property for the public use, and provision is made for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding with regard to the property, as is appropriate to the nature of the case, the judgment cannot be said to deprive the owner of his property without due process of law. *State Board of Assessors v. Cent. R. Co.*, 4 Cent. Rep. 433, 48 N. J. L. 146; *Davidson v. N. O. 96 U. S. 97* (24 L. ed. 619); *Cincinnati, N. O. & T. P. R. Co. v. Ky.*, 115 U. S. 321 (29 L. ed. 414); *McMillen v. Anderson*, 95 U. S. 37 (24 L. ed. 335); *Hagar v. Reclamation District*, 111 U. S. 701 (28 L. ed. 599).

The Revenue Laws of a State may be in harmony with the Fourteenth Amendment, although they do not provide that a person shall have an opportunity to be present when a tax is assessed against him, or that the tax shall be collected by suit. *McMillen v. Anderson*, 95 U. S. 37 (24 L. ed. 335); *Desty, Taxn. 750*.

Opportunity to be heard, accorded by the statute to persons who feel themselves aggrieved, is sufficient to constitute due process of law. *Lent v. Tilton*, 72 Cal. 404.

A law imposing tax or assessment for public improvement and leaving the amount to be raised to be determined by commissioners, without a hearing to parties interested to oppose, but giving a

hearing as to apportionment, is not unconstitutional. *Spencer v. Merchant*, 1 Cent. Rep. 741, 100 N. Y. 535.

#### **Right to notice and a hearing.**

It is a fundamental principle that before a person can be deprived of a right, even by judicial suit, he must have notice, and reasonable opportunity to be heard in defense of his rights. *Shove v. Manitowoc*, 37 Wis. 5.

Notice or means of knowledge is an essential element in every proceeding which affects rights of persons or property. *Philadelphia v. Miller*, 49 Pa. 448.

The rule is of universal application, and is founded on the plainest principles of justice. *Harwood v. North Brookfield*, 130 Mass. 561.

This constitutional provision may apply to the assessment of taxes for the support of Government. *Lehman v. Robinson*, 59 Ala. 244; *Darling v. Gunn*, 50 Ill. 424.

If a party is illegally deprived of opportunity for a hearing in opposition to the assessment, the defect is jurisdictional, and cannot be cured. *Marsh v. Chesnut*, 14 Ill. 223; *Billings v. Detten*, 15 Ill. 218.

The Legislature cannot confer power on a board to proceed without notice, since this would infringe that provision of the Constitution which declares that no man shall be deprived of his property without due process of law. *State v. Lindell Hotel Co.*, 9 Mo. App. 455; *South Platte Land Co. v. Buffalo Co.*, 7 Neb. 253; *1 Desty, Taxn. 568*.

A law imposing an assessment for a local improvement without notice to, and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, has the effect to deprive him of his property without "due process of law," and is unconstitutional. *Stuart v. Palmer*, 74 N. Y. 183; *Bennett v. Buffalo*, 17 N. Y. 383.

A statute creating a state board of equalization, vesting power in such board to increase the valuation of property of a railroad company beyond the valuation as apportioned by the county auditors of the several counties, is unconstitutional so far as it fails to provide for a hearing of the property owner. *Baltimore & O. & C. R. Co. v. Seneca Co. Treasurer (Ohio)*, 1 West. Rep. 94.

affirmed by many cases. The rule is thus stated in one case: "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them a right to a hearing, and an opportunity to be heard." *Stuart v. Palmer*, 74 N. Y. 188.

Judge Cooley, in speaking of the correction of tax lists, says: "It is a fundamental rule that in judicial or quasi judicial proceedings, affecting the rights of the citizen, he shall have notice, and be given an opportunity to be heard, before any judgment, decree, order or demand shall be given and established against him. Tax proceedings are not in the strict sense judicial, but they are quasi judicial; and, as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken." Cooley, *Taxn.* 2d ed. 363.

An author who has recently written on the subject concludes his discussion by saying: "There is really but one logical and consistent position in the matter, and that is that a statute that does not provide for notice is invalid." Lewis, *Em. Dom.* § 968.

A very thorough discussion of the question will be found in *Johnson v. Joliet & C. Railroad Company*, 23 Ill. 202.

We need not, however, look beyond our own reports, for our own decisions declare that the statute itself must provide for notice. *Campbell v. Dwiggins*, 83 Ind. 473; *Jackson v. State*, 1 West. Rep. 340, 104 Ind. 516; *Fries v. Brier*, 9 West. Rep. 260, 111 Ind. 65; *Johnson v. Lewis*, *supra*.

We said in *Jackson v. State*, *supra*, that "The notice must assume to be such as the law requires, but, in order to repel a collateral attack, it need not be a valid notice;" and in *Garvin v. Dauseman*, *supra*, we said:

"It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice, at some stage in the proceeding."

The ultimate conclusion which we reach is that where a conclusive decision is authorized the statute itself must provide for notice, and secure it to the taxpayer, not as matter of favor, but as a matter of right.

We agree with the appellee's counsel that the board of equalization is not a judicial tribunal, in the strict sense of the term; but, while this is true, it is also true that it possesses functions of a judicial nature. *Wilkins v. State*, 13 West. Rep. 354, 113 Ind. 514.

Judicial powers are, as we said in the case cited, lodged in the courts; and where the Constitution distributes the judicial power, it can only be exercised by the tribunal named by the Constitution, and constituted as the Constitution provides. *Greenough v. Greenough*, 11 Pa. 489; *Chandler v. Nash*, 5 Mich. 409; *Alexander v. Bennett*, 60 N. Y. 204; *Van Slyke v. Trempealeau County F. Mut. F. Ins. Co.* 89 Wis. 890, 896, 20 Am. Rep. 50; *Gibson v. Emerson*, 7 Ark. 172; *Gregory v. State*, 94 Ind. 384; *Shoultz v. McPheeters*, 79 Ind. 873.

But while we hold that the authority of the board of equalization is not judicial, yet we also

hold that it is in its nature so far judicial as to require notice to one whose individual rights are directly affected. We are inclined to concur with appellee's counsel that the judgment of the board is conclusive; but to that proposition we add that it is only so where there is jurisdiction, and that notice to one whose list is to be added to or whose valuation is to be increased is essential to give jurisdiction. *Clinton School-Dist's App.* 56 Pa. 815; *Osborn v. Danvers*, 6 Pick. 98; *Hughes v. Klein*, 80 Pa. 227; *Macklot v. Davenport*, 17 Iowa, 379; *Deane v. Todd*, 22 Mo. 90; *McIntyre v. White Creek*, 48 Wis. 620.

The fact that the judgment is conclusive supplies a strong reason for holding that the taxpayer should have an opportunity to be heard, and that he should be heard before his list or his valuation is set aside or changed. The power to hear and determine, where there is a question admitting of controversy, and the entire matter is not one of absolute and arbitrary discretion, implies that, in reason and justice, the law should, by making provision for notice, give the parties an opportunity to be heard; for otherwise it cannot be justly said that there is due process of law.

Thus far we have proceeded upon the assumption that the statute does not provide for notice to the individual taxpayer whose list is to receive additions, or whose valuation is to be increased; and if this assumption cannot be made good, our reasoning is invalid. It is, however, not difficult to prove the validity of our assumption. The statute itself supplies the requisite proof. It does provide notice sufficient for two classes of judgments, but for no others. It provides for notice sufficient as to all general changes in the levy, and sufficient as to all who have complaints to make; and over these matters jurisdiction arises when the notice is given as the statute directs. But there is no provision for notice to the individual taxpayer whose list is to be added to or whose valuation is to be increased. Its provisions on the subject of notice are these: "Two weeks' previous notice of the time, place and purpose of such meeting shall be given by the county auditor in some newspaper of general circulation, printed and published in the county; or if no newspaper be published in the county, then by posting up notices in three public places in each township in the county." Sec. 6397, Rev. Stat. 1881.

This notice, it is obvious, cannot require every taxpayer in the county to be in attendance at the meeting of the board to see that no additions are made to his list. As additions to his list affect him as an individual, he is entitled to notice as an individual. He is not within the scope of the statute, since he is not bound to assume that there will be any change in the verified list given by him to the assessor. His rights are distinct from those of the public, and from the rights of those persons who have complaints to make. Those who believe themselves wronged by having property listed to them that they do not own, or who believe that their property has been overvalued, are actors; they move, they take the initiatory step, and they must come before the board under the notice prescribed by the statute. But with the taxpayer whose assessment is to be in-



creased it is otherwise. He is not the actor; he does not take the initiatory step; but, on the contrary, he is passive and inactive until brought before the board by notice. He is not under any legal obligation to move until notice comes to him. Indeed, he cannot move if he is content with his list and assessment, for there is nothing for him to do.

The taxpayer who has a complaint to make occupies a position very similar to that of the plaintiff in an ordinary action, while the person whose taxes are to be increased is in a position very like that of a defendant. We must hold that a taxpayer is entitled to notice, or else we must hold that he is bound, at his peril, to keep vigilant watch of the proceedings, lest property he does not own be assessed to him, or the valuation of his listed property be increased. In the absence of notice to him as an individual, he is not bound to exercise any such vigilance. *Claybaugh v. Baltimore & O. R. Co.* 6 West. Rep. 575, 108 Ind. 262; *Munson v. Blake*, 101 Ind. 78.

It would be almost as unjust to compel such a taxpayer to be constantly on the watch during the meetings of the board as to compel a defendant who has failed to pay a note, violated a covenant, or committed a trespass to watch the dockets of the court during term time. The notice does no more than inform the public that the board will be in session at a

designated time and place, and no one is bound to act upon the notice further than to present complaints or resist general changes in the levy. Certainly no one is bound to know that a complaint will be preferred against him affecting his individual rights. If one taxpayer is bound to keep watch during the session of the board, so are all; and the result, would be that the meetings of the board would be thronged with taxpayers, or else their rights be at the mercy of the board.

The organic law to which all statutes must yield does not intend that such a thing shall ever occur, for it requires notice to each person whose individual property rights may become the subject of investigation and final adjudication. This is a fundamental principle, ruling all the departments of government. A decision of a judicial nature, conclusively deciding upon individual property rights of a citizen, and imposing a burden upon him, can only be given in a proceeding of which, before a final and conclusive judgment is reached, the citizen has notice; for without such notice there cannot be due process of law. A decision not final, but subject to review, may not necessarily require notice; but a final decision must be based on a notice provided for by law.

*Judgment reversed, with instructions to overrule the demurrer to the complaint.*

## UNITED STATES CIRCUIT COURT, DISTRICT OF SOUTH CAROLINA.

Isabella LEE, by Her Next Friend,

v.

Richard W. SIMPSON.

(....Fed. Rep.....)

**1. Equity jurisdiction.** A fund was given to a trustee for the separate use of a married woman for her life, with power of appointment in her by will, in default thereof to her child in fee. It was used by her husband, who was substituted as trustee, in purchasing real estate, he adding his own money, taking title to himself as trustee to these uses. The wife died. Her child died in her lifetime, leaving Isabella, an infant, her heir at law. The trustee afterwards died, leaving the property to A, in trust to convey it to the State of South Carolina. To a bill filed in behalf of Isabella, alleging default in the exercise of the power, and claiming the property from A, with an account of the rents and profits, A demurred, on the ground that she had a plain, adequate and complete remedy at law. Demurrer overruled.

**2. In this case the use was not executed** upon the death of the married woman if she failed to exercise the power of appointment; but the legal estate remained in the trustee, and his devisee, a volunteer, took it and the property bound by the trust.

**3. Injunction.** The devise to A was upon trust to convey the property to the State of South Carolina upon certain conditions, ignoring the claim of complainant. The devisee, after this bill was filed and subpoena served, addressed a letter to the General Assembly of South Carolina asking

its acceptance of the property, and of the conditions annexed to it. The General Assembly at once put an Act on its passage for this purpose. *Held*, that the right of complainant to assert her claims in this court was imperilled, and an interlocutory injunction was issued.

**4. When a defendant pendente lite** in a Circuit Court of the United States seeks to convey the land, the subject of controversy, to a State, he will be restrained by injunction.

(December 18, 1888.)

**ON** motion in equity for a preliminary injunction restraining defendant from parting with certain property. Heard on bill, answer, affidavits and exhibits. *Injunction granted.*

The opinion states the facts.

*Messrs. Le Roy F. Youmans and James P. Carey*, for complainant:

A court of equity has jurisdiction to prevent as well as remove a cloud upon title.

1 High, Inj. §§ 872, 881; *Pettit v. Shepherd*, 28 Am. Dec. 441.

Thomas G. Clemson was trustee for his wife and complainant under the will of Floride Calhoun, and the legal title to the property in dispute is now in the devisee of his will, the defendant, and no action of ejectment could be brought against him.

*Finlay v. King*, 28 U. S. 8 Pet. 346 (7 L. ed. 701).

Persons coming into possession of trust property with notice of the trust, are themselves trustees.

*Mechanics Bank v. Seton*, 26 U. S. 1 Pet. 399 (7 L. ed. 152).

\*Head notes by the Court.

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Where the danger threatened is such that it cannot be easily remedied, in case of refusal of relief, injunction will be granted.

1 High, Inj. 11; *U. S. v. Duluth*, 1 Dill 469.

*Messrs. Wells & Orr and Smythe & Lee*, for defendant:

This is not a case of equitable jurisdiction, because:

1. Being a bill simply to enforce legal title to land, the action should be at law.

*Ellis v. Davis*, 109 U. S. 493 (27 L. ed. 1008); *Russell v. Gregg*, 113 U. S. 554 (28 L. ed. 994); *Front v. Spilley*, 121 U. S. 557 (30 L. ed. 1012); *Wilson v. Hyatt*, 4 S. C. 369.

2. Alleging the defendant to be in possession the law presumes him to be rightfully so, until the contrary is proved.

*Northern Pac. R. Co. v. Paine*, 119 U. S. 561 (80 L. ed. 513).

3. Proceedings to remove a cloud on title can only be brought by one in possession of the property. *Idem*.

4. If an injunction is necessary to preserve the *status quo* then the proceeding in equity for that purpose must be ancillary to a pending legal action.

*Erhardt v. Boaro*, 113 U. S. 539 (28 L. ed. 1117); Kerr, Inj. 197-201.

5. If plaintiff seeks an account of the acts and doings of a dead man, his executor or administrator must be a party. There is no such representative of T. G. Clemson a party.

Story, Eq. Pl. §§ 170, 171.

Complainant has not sued defendant as executor, and cannot avail herself of his acts as such.

*Leggott v. Gr. Nor. R. R.* 1 Law Rep. 602; *Conklin v. Egerton*, 21 Wend. 436; *Punt v. McKuen*, 4 Conn. 549; *Colt v. Colt*, 111 U. S. 566 (28 L. ed. 520).

Where a State voluntarily goes into court it is bound by the same rules as between individuals.

*State v. Pac. Guano Co.* 22 S. C. 50; *Clark v. Farnard*, 108 U. S. 436 (27 L. ed. 780).

If the State accepts title to this property, *pendente lite*, from a party to the case, it voluntarily becomes a party and is bound by all the proceedings.

*Tilken v. Cofield*, 98 U. S. 168 (23 L. ed. 859); *Walden v. Bodley*, 50 U. S. 9 How. 34 (13 L. ed. 36); *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; Story, Eq. Pl. § 194.

**Simonton, J.**, delivered the following opinion:

This is a motion for a preliminary injunction. It comes up on bill, answer, affidavits, with exhibits. From these it appears that Mrs. Floride Calhoun, the grandmother of the mother of the complainant, left in force a last will and testament. That in clauses of this will she gave to Edward Noble, as trustee, a fund then invested in the bond of her son, Andrew P. Calhoun, secured by a mortgage of Fort Hill Plantation, in Oconee County, and certain slaves. The purpose of the trust was that the fund be held for the sole and separate use of Mrs. Anna M. Clemson, for her natural life, with a power of appointment thereof by a last will and testament, as she pleases; and, in default of such appointment, to her daughter, of whom the complainant is the only child. That

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proceedings were taken in the lifetime of Mrs. Calhoun to foreclose this mortgage. These proceedings were not consummated until after her death. At the sale for foreclosure the plantation of Fort Hill was purchased by Thomas G. Clemson, who had in the mean time been substituted as trustee in lieu of Noble; and a conveyance thereof was made to him as such trustee under the last will and testament of Mrs. Floride Calhoun.

Complainant alleges that the purchase money was paid by a receipt for Mrs. Clemson's share in the bond. Defendant avers that this share was supplemented by moneys of Mr. Clemson to the extent of some \$8,000. Mrs. Clemson died in 1875, some years after this conveyance, leaving, it is said, a last will and testament. Complainant charges that she did not execute the power of appointment, by reason whereof the property devolves on her. Thomas G. Clemson, so being in possession as trustee of his wife, remained in possession of Fort Hill after her death, continuously until his own death, in 1888.

In his answer the defendant avers that Clemson left a last will and testament, with a codicil, wherein he was named as executor, and whereby the Fort Hill property was devised to him upon certain trusts. In the exhibit is his letter to the General Assembly, and copy of this document, wherein it appears that he was the devisee in fee of this Fort Hill Plantation, and that the trust was to execute a conveyance thereof to the State of South Carolina, upon the acceptance of the gift thereof on certain conditions by the said State.

On the 4th of December, 1888, the defendant sent in to the General Assembly of South Carolina, then in session, his said letter, accompanied by a copy of the said will, and in it asked the acceptance of this property thus given, on behalf of the State. This bill was filed on November 26, 1888, and subpoena was served on defendant on November 28, 1888. The motion is for a preliminary injunction, based on this letter of the defendant and the action of the General Assembly thereupon. One House has passed the bill accepting the gift, and the bill is now on the calendar of the other House, awaiting early consideration. The General Assembly proposes to adjourn at a not distant day.

As we have seen, the defendant has answered. But in his answer he makes defenses properly made by demurrer, and craves the same benefit thereof as if he had formally demurred. We must therefore consider them with the other grounds of defense in the answer, and not pass on the bill alone. The demurrer is to the jurisdiction—that the complainant has a plain, adequate and complete remedy at law. While it is true that in deciding upon motions for preliminary injunctions the courts must provide for the preservation of property or rights *in statu quo* without expressing, and, indeed, without having the means of forming, an opinion as to such rights (1 High, Inj. § 5; *Great Western R. Co. v. Birmingham & O. Junction R. Co.* 22 Eng. Ch. 602), yet, when the jurisdiction of the court is challenged, that question must be met and decided.

The position taken by the defendant is this: complainant alleges that she is the owner in fee

of this plantation—Fort Hill—under the will of Mrs. Calhoun. The defendant claims the fee under the will of Clemson. It is simply a question of title, cognizable by a court of law. In such an action a judgment can be had for the rents and profits. There is no occasion and no room for the peculiar jurisdiction of equity. The will of Mrs. Calhoun impressed with a trust the fund afterwards invested in Fort Hill. Of this trust Clemson became the trustee, and so remained, certainly up to the death of his wife. After her death he continued in possession. Did his relation to the property change at the death of his wife?

The complainant charges that he held the property in trust for his wife for life, with a power of appointment in her at her pleasure by will, and, in default thereof, to the limitations of Mrs. Calhoun's will; and that there was a default in the exercise of the power; that thus the legal estate remained in him, subject to these limitations. There is nothing before the court going to show that Clemson ever disavowed this trust, or that he gave any notice of his holding in his own or in any adverse right. If there was, it could not avail as against complainant, then and now an infant. Nor is there any place here for an executed use, devolving the legal title on the complainant. The property, Fort Hill, was purchased by Clemson at the master's sale. In paying the purchase money, as defendant claims, a part of it only was paid by the money provided under Mrs. Calhoun's will. The remainder was supplemented by himself out of his own funds. The conveyance to him was as trustee for Mrs. Clemson under the last will and testament and codicil of Mrs. Calhoun. This was confirmed by the court. The legal title was thus fixed in him, and could not pass out of him but by his deed or will. He made no such deed in his lifetime. By his will he devised the property to the defendant, a volunteer, and so charged with all the equities with which his testator held it.

The legal title being thus in Clemson, no suit at law could have been maintained against him for possession during his life. Nor can such suit be maintained at law against the defendant, his devisee of the legal estate. Whatever may be the final conclusion of the court on this point, the above reasons are sufficient to prevent the dismissal of this bill, or the refusal of this motion on the ground of a want of jurisdiction.

Do the circumstances of the case warrant a preliminary injunction? The defendant, as we have seen, was served with subpoena in this cause on November 28, 1888. The bill gave him notice of the claim of complainant, and her prayer for an injunction against him. On the 4th of December, 1888, he addressed his letter to the General Assembly of the State of South Carolina. This, with the document accompanying it, informed the General Assembly that he was the devisee in fee for the Fort Hill Plantation, and that he had the right to convey it to the State of South Carolina upon compliance by the State with certain conditions therein stated. Thereupon he requested the General Assembly to accept the property thus "donated for and in behalf of the State." Upon receipt of this letter, both Houses, as has 2 L. R. A.

been stated, took action, and that promptly bills were introduced into both Houses accepting the gift. In each bill in each House is this section as section 1:

"Section 1. That the State of South Carolina hereby expressly declares that it accepts the devise and bequest of Thomas G. Clemson, subject to the terms and conditions set forth in his last will and testament, and that the treasurer of the State be, and is hereby, authorized and empowered to receive and securely hold the said property, both real and personal, and to execute all necessary papers and receipts therefor so soon as the said executor shall convey and transfer the said devise and bequest to the State, as aforesaid."

This bill has passed one House. It is under consideration, with every prospect of its passage, in the other. It may very soon—in a day or two—become a law. If it does become a law, the property will be taken out of the jurisdiction of this court. No process can make the State of South Carolina a party to this suit. It can have no jurisdiction over the State in a civil action, except with her consent. So far as plaintiff's right to recover this plantation is concerned, if she has such a right, it will be irretrievably lost if the legal title be conveyed to the State. It is idle to say that the State will recognize and accede to the decision of this court if it establish any rights in complainant. Courts of justice enforce their decrees by mandates whose sanction is the court. No decree or mandate can be entered or issued, obedience to which depends upon the will or courtesy of the party against whom it may be made.

Without deciding, so as to commit the court, any question of right or property made in the papers submitted, and solely with the purpose of preserving the *status quo*, this motion will be granted. There is a principle which governs nearly all judges on applications for preliminary injunctions, governing me. When the danger or injury threatened is of a character which cannot be easily remedied if the injunction be refused, and there is no doubt that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. *U. S. v. Duluth*, 1 Dill. 469 (*Mr. Justice Miller*).

The complainant has brought her action against the defendant, not as executor, but in his personal character. He is devisee of the Fort Hill Plantation as well as executor. As such devisee he takes the legal estate, charged with the equities, but not with the defaults, of his testator. If there be any account for the rents and profits received by Clemson in his lifetime, for such default R. W. Simpson, executor, *qua* executor, is liable; not R. W. Simpson, devisee. He takes the property, if he takes it, with notice of the trust, responsible only for his own enjoyment of the rents and profits. For the same reason, the defendant not being a party as executor, these proceedings cannot affect him so far as personalty in his hands to be administered as executor is concerned. The injunction, therefore, must be confined to the Fort Hill Plantation.

This cause came to be heard on motion for a preliminary injunction upon the bill, answer, affidavits and exhibits. After hearing the

same and argument thereon, and upon due consideration thereof, *it is ordered, adjudged and decreed that a writ of injunction do issue to the defendant, Richard W. Simpson, enjoining and restraining him from executing and delivering any deed or deeds of conveyance of, or parting with the possession of, the Fort Hill Plantation,*

as described in the pleadings of this case, to any person or persons, or to or for any uses, intents, and purposes whatsoever, especially to the State of South Carolina, or to any person or persons whomsoever in behalf of the said State. This order and writ to remain in force until the further order of this court.

## MAINE SUPREME JUDICIAL COURT.

Thomas GILPATRICK *et al.*

v.

Daniel GLIDDEN *et al.*

(....Maine....)

**The parol agreement of a wife,** in consideration of her husband's leaving her his property by will absolutely, to transfer the remainder, after she was done with it, to his heirs, may, after her death, leaving it unperformed, be enforced against her representatives notwithstanding the Statute of Frauds.

(December 27, 1888.)

ON defendants' appeal. *Decree affirmed.*

This was a bill in equity brought in the Supreme Judicial Court of Kennebec County by the heirs of Thomas Gilpatrick against the heirs and personal representative of Sarah Gilpatrick, wife of said Thomas, to carry into effect a parol agreement made by said Sarah before her decease.

The facts sufficiently appear in the opinion.

*Messrs. Spear & Clason and Loring* for appellants.

*Messrs. Baker, Baker & Cornish* for appellees.

*Virgin, J.*, delivered the opinion of the court:

The plaintiffs are the nephews and niece and next of kin of the late Orrin Gilpatrick, and the defendants are the administrator and next

of kin of the widow of Orrin, neither of whom left any children.

The plaintiffs seek to establish their title to the proceeds of certain real and personal estate, on the ground that Orrin, having expressed to his wife his intention of leaving all his property to his heirs (plaintiffs) was induced by her to sell and will it to her, in form absolute, in sole consequence of his reliance upon her assurance that she would use it during her natural life only, and seasonably transfer the remainder to his own heirs; that she did not fulfill her agreement, but died intestate; whereupon the property descended to her heirs, instead of his; and that by reason of the promises it became vested in her in trust, to enforce which trust is the object of this bill.

The presiding Justice, who saw and heard all of the witnesses testify, found the facts in favor of the plaintiffs, which findings we should be slow to reverse, unless clearly satisfied that it was erroneous. *Young v. Witham*, 75 Maine, 536.

But after a very careful examination of the stenographer's report of the direct and uncontradicted testimony of the Gilpatrick's lifelong trusted friend, and his wife and daughter, in whose family Mrs. G. lived during four years of her widowhood; of their family physician of many years; their business adviser, scrivener, and executor of Mr. G's will, and the writer at her dictation of what Mrs. G. called a "certification;" of the neighbor who purchased the hay during the last ten years of Mr. G's life,

**NOTE.—Equity will prevent obtaining estate by fraud.**

The court of equity will interfere to prevent the obtaining of an estate by fraud, notwithstanding the Statute of Frauds. *Podmore v. Gunning*, 7 Sim. 644. See also *Sellack v. Harris*, 5 Vin. Abr. 521; *Chamberlaine v. Chamberlaine*, *Freem.* Ch. 52; *Devenish v. Baines*, *Prec. in Ch.* 3; *Thynn v. Thynn*, 1 Vern. 296; *Oldham v. Litchfield*, 2 Vern. 506; *Drakeford v. Wilks*, 3 Atk. 539; *Walker v. Walker*, 2 Atk. 98; *Reech v. Kennegal*, 1 Ves. Sr. 123, *Amb.* 67; *Muckleston v. Brown*, 6 Ves. Jr. 52; *Strickland v. Aldridge*, 9 Ves. Jr. 516; *Chamberlain v. Agar*, 2 Ves. & B. 259; *Segrave v. Kirwan*, 1 Beat. 157; *Dixon v. Olmuis*, 1 Cox, Ch. 414; *Bulkley v. Wilford*, 8 Bligh, N. R. 111; *Chester v. Urwick*, 23 Beav. 407; *Middleton v. Middleton*, 1 Jac. & W. 94, 96; *Church v. Ruland*, 64 Pa. 432; *Hoge v. Hoge*, 1 Watts, 163, 213; *Dowd v. Tucker*, 41 Conn. 197; *Williams v. Vreeland*, 29 N. J. Eq. 417; 2 Pom. Eq. Jur. § 1054.

There must be some active or passive fraud in procuring the disposition. *Hoge v. Hoge*, 1 Watts, 163; *Lantry v. Lantry*, 51 Ill. 438; *McCormick v. Grogan*, L. R. 4 H. L. 97; *Podmore v. Gunning*, 7 Sim. 644.

Under an alleged contract by intestate that he would leave all his property, real and personal, to the legatees of his wife, a court of equity will not decree specific performance where there was no writing, no part performance to take the case out of the statute, and the contract was not so fair and just that it should be enforced by specific performance. *Myers v. Cronk*, 45 Hun, 401. 10 N. Y. S. R. 127.

2 L. R. A.

**Devise or bequest may be impressed with a trust.**

Although an entire will cannot be set aside on account of fraud, yet a particular devise or bequest may be impressed with a trust in favor of a third person for whom the testator's beneficial intentions have been fraudulently intercepted and prevented by the actual devisee or legatee. *McCormick v. Grogan*, L. R. 4 H. L. 82, 91, 97, per Lord Westbury; *Dutton v. Pool*, 1 Ventr. 318; *Thynn v. Thynn*, 1 Vern. 296; *Oldham v. Litchfield*, 2 Vern. 506; *Freem.* Ch. 284; *Devenish v. Baines*, *Prec. in Ch.* 3; *Chamberlaine v. Chamberlaine*, *Freem.* Ch. 34; *Reech v. Kennegal*, *Amb.* 67; *Barrow v. Greenough*, 3 Ves. Jr. 152; *Mestaer v. Gillespie*, 11 Ves. Jr. 621, 633; *Chamberlain v. Agar*, 2 Ves. & B. 259, 262; *Chester v. Urwick*, 23 Beav. 407; *Dimes v. Steinberg*, 2 Sm. & Giff. 75; *Morgan v. Annis*, 3 De G. & Sm. 461; *Hindson v. Weatherill*, 1 Sm. & Giff. 604, 5 De G. M. & G. 301; *Podmore v. Gunning*, 7 Sim. 644, 660; *Russell v. Jackson*, 10 Hare, 204, 213; *Hoge v. Hoge*, 1 Watts, 163, 213; *Jones v. McKee*, 3 Pa. 496, 6 Pa. 425, 428; *Irwin v. Irwin*, 34 Pa. 525; *Church v. Ruland*, 64 Pa. 432, 442; *Gaither v. Gaither*, 3 Md. Ch. 158; *Jenkins v. Eldredge*, 3 Story, 181; 2 Pom. Eq. Jur. § 919.

In avoidance of a fraud a parol trust may be engraved upon an instrument which purports to be absolute on its face notwithstanding the prohibition of the statute. *Barrell v. Hanrick*, 45 Ala. 60; *De Laurencel v. De Boom*, 48 Cal. 581.

A nod of assent to the wishes of the testator was held sufficient to establish a trust in favor of the son. *Jones v. McKee*, 3 Pa. 496.

Whenever a person procures a devise or bequest

and of her thereafter—all disinterested witnesses—whose testimony of Mr. G's frequent expressions to his wife, for months before his decease, of his desire and intention that his property should go to his own heirs; of her final agreement to transfer the remainder thereof "after she was done with it," provided he would give it to her absolutely; of her frequent and freely expressed admissions of such agreement, and of her own construction of it as evidenced by her own acts in executing all the stipulations thereof, except the final transfer of the remainder of the property to his heirs, and putting even that in writing signed by her; and of the peculiar instructions of Mr. G. as to the phraseology of the will—not to use the word "give"—we are fully satisfied that the Justice's finding of facts was correct, and that the following, among other facts, are clearly established:

That Orrin Gilpatrick died in February, 1875, possessed of a farm which came down to him from his paternal grandfather, and of other property, all of the value of more than \$9,000, and which he desired to go to his heirs; that his widow died in 1888, leaving property which she had owned in her own right, consisting chiefly of money invested in town securities, amounting to some \$5,000; that they left no children, but a widow of a deceased son; that they always kept their individual property separate; that for several months before his decease they had frequently discussed the mode of the disposition of his property, and, as she had so much in her own right, he frequently expressed to her his intention of giving his to his own heirs; that, a short time before his death, she finally induced him to give some of the personal property, and will the remainder of his estate to her in form absolute, upon her assurance that she would only use it, if necessary, during her natural life, pay their daughter-in-law \$500, reconvey certain real estate, the legal title of which he held, to one Glidden, erect a monument in and keep in repair their private cemetery, and finally reasonably transfer all that remained to his heirs; that if she had not given her husband such assurance, and

if he had not confidently relied upon her performance of it, he would not have executed the will, nor given her the personal property; that she promptly performed all of the terms of her agreement, except the final transfer of the remainder, which she purposely omitted to do, although she had expended but a comparatively small portion of the property during her life.

Nor do we entertain any doubt of the soundness of the law on which the decree appealed from was based, viz.: a constructive trust impressed upon the property, and the donee and devisee converted into a trustee *in invitum*, although not so denominated in the paper title, and although the statute expressly provides: "There can be no trust concerning lands . . . unless created or declared by some writing signed by the party or his attorney." Rev. Stat. chap. 73, § 11.

Fraud is infinite in its varieties and forms; and while, as Lord Hardwicke said: "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the court should be found out" (*Lawley v. Hooper*, 3 Atk. 278), still rules have been established governing certain classes of cases involving the element of fraud—such as that the fraudulent suppression of a cause of action or of a will is a good answer to the Statute of Limitations (*Duke's App.* 80 Maine, 50, 5 New Eng. Rep. 848); that married women and infants shall not take advantage of rules made for their protection to perpetrate fraud (1 Perry, Trusts, § 170); and that the Statute of Frauds shall not be allowed to bar a decree for the specific performance of an oral agreement for the sale and conveyance of land, when there has been such a part performance by the party seeking as equity recognizes. *Pulsifer v. Waterman*, 78 Maine, 233; *Woodbury v. Gardner*, 77 Maine, 68.

And, while the precise question involved in the case at Bar has never before arisen in this State, the cases last cited are analogous thereto in principle; and the universally recognized ground on which the decisions rest is that to permit the Statute of Frauds to be used as a bar to the compulsory performance of such an

to be made directly to himself—through false assurances, or promises that he will apply the devise or bequest to the benefit of the third person who is the real object, and after the testator's death he refuses to comply with his former assurances or promises, equity will enforce the obligation by impressing a trust upon the property in favor of one who has been defrauded of the testator's intended gift. 2 Pom. Eq. Jur. § 1054.

Where the wife died intestate, and the plaintiffs, who were natural children of her deceased husband, filed a bill against the heir and next of kin, and also the heir and administrator of the wife, it was held that if the alleged promise of the wife to her husband to give the whole property at her death to plaintiffs had been proved, a trust would have been created. *Towles v. Burton*, Rich. Eq. Cas. 146, 24 Am. Dec. 415.

*Specific performance of verbal contract may be enforced.*

Specific performance of a verbal contract will be enforced where the contract is admitted by the answer of the defendant, and the benefit of the Statute of Frauds is not claimed in words equivalent to the statute. *Battell v. Matot*, 2 New Eng. Rep. 496, 58 Vt. 271.

A promise by a devisee to pay an annuity, or the promise of the executor to pay a legacy, should be enforced, notwithstanding the Statute of Frauds. *Oldham v. Litchfield*, 2 Vern. 506; *Mestaer v. Gillespie*, 11 Ves. Jr. 621; *Chamberlain v. Agar*, 2 Ves. & 2 L. R. A.

*B. 256; Reech v. Kennigate*, Amb. 67; *Thynn v. Thynn*, 1 Vern. 206.

A parol agreement by devisee to convey may be enforced as a trust. *Barrell v. Hanrick*, 42 Ala. 60.

It may be enforced by compelling him to carry the trust into effect through a conveyance to the one who is beneficially interested. It is not necessary that the assurances or promises should be in writing; they may be entirely verbal. 2 Pom. Eq. Jur. § 1054.

If a testator devises an estate to a son, who promises his father, in consideration of such devise, to pay a certain sum to another son, equity will enforce the promise. *Strickland v. Aldridge*, 9 Ves. Jr. 516; 2 Pom. Eq. Jur. § 919.

A parol promise by a husband and wife, to whom the testator devised the residue of his estate, to make an allowance to the plaintiff, was enforced as a trust. *Norris v. Frazer*, L. R. 15 Eq. 318; *McCormick v. Grogan*, L. R. 4 H. L. 82.

A promise made by a legatee to the testator for the purpose of preventing a change in the will, that he would give a certain bond, bequeathed to him, to another, was enforced. *Drakeford v. Wilks*, 3 Atk. 539.

A promise by a testator's wife and residuary legatee to surrender a certain note, was enforced as a trust in *Richardson v. Adams*, 10 Yerg. 273.

A promise made by a devisee to pay certain legacies in order to prevent an alteration of the testator's will, was proved and was enforced as a trust. *Chamberlaine v. Chamberlaine*, 2 Freem. Ch. 34.

agreement, thus partly performed, would practically authorize a statute, enacted for the purpose of preventing a fraud, to become the veriest instrument for perpetrating or protecting a fraud.

So, for like reason, when one obtains the legal title to real or personal estate, either by will or otherwise, under circumstances which render it unconscionable for him to retain it for his own benefit while in fact another is entitled to it, or to some interest in it, equity secures to the latter his right, not by disregarding the former's legal title, but by imposing on him the duty of holding and using his title for the real beneficiary.

Applying the principle to the facts in the case: Mr. G. was persuaded by his wife to change his intention of leaving his property to his own heirs, and to give it to her, by reason of her express promise to give the remainder to his heirs, which she omitted to do. His will was regularly probated, and the legal title passed thereby to her. His heirs claim that remainder, because her conduct operated as a fraud upon her husband, as well as upon them, and that by reason thereof she held the property impressed with a trust, and was made a trustee. Equity does not interfere with the will. That remains unchallenged. Nor does it assume to set aside the Statute of Frauds, which the defendants invoke. But, on account of her conduct in procuring the legal title to herself, equity does declare that she cannot conscientiously hold it or its proceeds for her own exclusive benefit, and imposes on her conscience the obligation to hold all she did not use during her life for the benefit of her husband's heirs (plaintiffs) as the equitable owners thereof, and the additional obligation of perfecting their ownership by will or otherwise. But, as she has deceased, equity can reach the personal, or the proceeds of both real and personal, estate in the hands of her personal representatives, and any of the real estate in the hands of any subsequent holder who is not a *bona fide* purchaser thereof without notice, holding it relieved of the trust. Pom. Eq. Jur. §§ 481, 1053.

We do not mean, however, that it is essential to the upholding of such a trust that a devisee should have been an active agent in procuring the devise to be made in his favor; for the great current of English authority during the last two centuries, as well as that of this country, holds that, if either before or after the making of the will, the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect, and the latter, by any words or acts calculated to, and which he knows do in fact, cause the testator to believe that the devisee fully assents thereto, and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement, equity will decree a trust, and convert the devisee into a trustee, whether, when he gave his assent, he intended a fraud or not—the final refusal having the effect of consummating the fraud.

As this is the first case of this kind that has ever arisen in this State, and we have the English and American cases before us, we mention some of them:

2 J. R. A.

Thus, as early as 1678, where a father, being about to change his will lest there might not be assets enough besides the lands settled on his son to pay certain legacies to his daughter, was assured by the son that he would pay them in case of deficiency of assets if the will were not changed, the son was held to his promise—the chancellor remarking that it was the constant practice of the court to make such decrees on such promises. *Chamberlaine v. Chamberlaine*, Freem. Ch. 84, 2 Eq. Cas. Abr. 48.

So in 1684, where her son promised the executrix that if she would obtain a new will naming him as executor, he would hold it in trust for her, which she did, the Lord Keeper decreed the trust, notwithstanding the Statute of Frauds. *Thynn v. Thynn*, 1 Vern. 296.

So in 1689, where a copy-holder, intending to leave the greater part of his estate to his godson, was persuaded by his wife, on her promise to carry out his intentions, to give the whole to her, the courts, notwithstanding the statute, enforced the trust. *Deenish v. Baines*, Freec. in Ch. 8.

In *Oldham v. Litchfield*, 2 Vern. 506, 2 Eq. Cas. Abr. 44 (1705), lands were charged with an annuity, on proof that the testator was prevented from changing them in his will by a promise of payment by the devisee.

Again in 1747 a testatrix, having given a bond for £360 to the plaintiff, afterwards, by a new will, gave it to another on the latter's promise to give it, at her own decease, to the plaintiff, and the performance of the promise was decreed against her representatives, against the interposition of the Statute of Frauds. *Lord Chancellor Hardwicke* said:

"I know no case where the court has not decreed it, whether such an undertaking was before the will has been made or after . . . This is not setting up anything in opposition to the will, but taking care that what has been undertaken shall have its effect. A will being ambulatory, if the testatrix has a conversation with a legatee, and the legatee promises that, in consideration of the testatrix's disposition in favor of her, she will do an act in favor of a third person, and the testatrix lets the will stand, it is very proper the person who undertook to do the act should perform; because I must take it, if she had not so promised, the testatrix would have altered her will." *Drakeford v. Wilks*, 3 Atk. 589.

The next year a residuary legatee, who satisfied the testator that he need not change his will in order to give a nephew £100, for he himself would pay it, was held trustee, and a trust imposed on the residue of the assets. *Lord Chancellor Hardwicke* said:

"The court will not suffer the statute to protect fraud, so as that anyone should run away with a benefit not intended . . . There is a breach of promise, but attended also with fraud upon the testator as well as the plaintiff, by representing as if there was no occasion to alter the will." *Roech v. Kennegal*, 1 Ves. Sr. 124, 1 Amb. 87, 1 Wils. 227.

So in 1796, instead of changing his will with the avowed intention of increasing the annuity to his wife, the testator told his residuary legatee he would "leave it to his generosity to pay it as he promised," and a trust was imposed on

the residue of the assets. The Master of the Rolls said:

"The word *generosity* can be construed to take away the effect of a solemn desire of the testator, coupled with the promise of the defendant. The defendant had no intention of fraud at that time, for he desired the testator to make a new will. Leaving it to his generosity is leaving it to his honor and conscience . . .

The question is whether, by reposing that trust in the defendant, the testator was not prevented from making a new will. The defendant ought to have told him that, if he did not put it in his will, he would not do it. Instead of that he promised to do it, upon which the testator refuses to make a new will." *Barrow v. Greenough*, 8 Ves. Jr. 152.

In 1804 Lord Eldon said: "If a father devises to his youngest son, who promises that, if the estate is devised to him, he will pay £10,000 to the eldest son, this court would compel the former to discover whether that passed in parol; and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000." *Strickland v. Aldridge*, 9 Ves. Jr. 516.

And the like result is brought about by the silent assent of the devisee to a like proposal of the testator. *Byrn v. Godfrey*, 4 Ves. Jr. 6, 10; *Paine v. Hall*, 18 Ves. Jr. 475.

In 1836 natural children of the testator alleged, in substance, in their bill, that the testator's wife promised, in consideration of his giving to her the whole estate, to leave it to them at her decease, upon the faith of which he did it. Shadwell, *V. C.*, said:

"My opinion is that, if it were perfectly clear that that state of circumstances took place which the plaintiffs allege, they would be entitled to the relief they ask." *Podmore v. Gunning*, 7 Sim. 644, 654.

In 1852 a residuary estate was devised, with an oral intimation by the testator to the devisee that he had confidence that he would carry out the testator's intentions, which the devisee well knew and assented to, and the devisee was held a trustee. Lord Justice Turner, *V. C.*, in discussing the question of the devisee's undertaking, said:

"The true test of the answer to the question is this: Would the testator have left his property to the defendants if the defendants had stated, in answer to that question, that they would not carry out the disposition which the testator intended to effect through the medium of the trust? . . . No one can doubt that if these defendants had stated that they would not carry out the intentions of this testator, this disposition in their favor would not have been found in this will." *Russell v. Jackson*, 10 Hare, 204, 211.

In the often cited case of *Wallgrave v. Tebbs*, 2 Kay & J. 321, the joint devisees of real estate denied that they ever knew anything of the testator's intentions till after his decease, but an unsigned letter written by him expressed his confidence in their application of the devised property in accordance with his desires. Wood, *V. C.* (then Lord Hatherly), upheld the trust, saying:

"Where a person knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own

benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust; and in such a case the court will not allow the devisee to set up the Statute of Frauds, or, rather, the Statute of Wills, by which the Statute of Frauds is now in this respect superseded; and for this reason the devisee, by his conduct, has induced the testator to leave him the property, and, as Lord Justice Turner says in *Russell v. Jackson*, 10 Hare, 204, no one can doubt that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute; but for the same end, namely: prevention of fraud, it ingrafts the trust on the devise . . . In order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it."

In 1867, in *Jones v. Badley*, L. R. 8 Eq. 685, 652, Lord Romilly, *M. R.*, quoted the foregoing extract entire, and declared the law to be therein very "accurately and very comprehensively stated." On the appeal, in 1868, Lord Cairns quoted the same extract, and pronounced it "the clear and felicitous exposition of the law." *Jones v. Badley*, L. R. 8 Ch. 302.

And in 1878, in *Roubootham v. Dunnett*, L. R. 8 Ch. Div. 430, 436, Mallins, *V. C.*, made the same quotation, and pronounced the law "correctly laid down," but dismissed the bill for want of proof.

In 1869, in *McCormick v. Grogan*, L. R. 4 H. L. 82, where, under the peculiar circumstances of the case, no trust was decreed, some of the language of Lord Westbury in the fore part of his opinion, where he says the court "must see that personal fraud, a *malus animus*, is proved," etc., has sometimes been urged by defendants as requiring more than the authorities already cited; but when it is considered in connection with the facts before him, and with his own illustrations in the same opinion, that erroneous view vanishes. After discussing the *rationale* of the principle of dealing with the Statute of Frauds and of Wills, he said:

"If an individual on his death-bed, or at any other time, is persuaded by his heir at law or his next of kin to abstain from making a will; or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the donee to carry into effect; and the donee assents to it, either expressly or by any mode of action which the donee knows must give to the testator the impression and belief that he fully assents to the request—then undoubtedly, the heir at law in the one case, and the donee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud."

Such, in 1873, was the view of Sir James Bacon, *V. C.*, in *Norris v. Fraser*, L. R. 15 Eq. 818, 820, where a husband and wife were devisees of the bulk of the property of a testa-



tor, who expressed a desire that an annuity of £800 should be provided for a third person, which the wife testified she promised, and the husband assented to. The Vice-Chancellor said:

"Mr. Swanston has read particularly from Lord Westbury's judgment in *McCormick v. Grogan*, the conditions as to what the court has to see proved before it admits any such claim, and he says it must be proved that there was direct personal fraud. . . . If the statement made by Mrs. Frazer (one of the devisees) be true, then a more direct, a more distinct, personal fraud could not be committed than for Mrs. F. to refuse to perform that promise which she made to the testator upon his death-bed."

To the same general purport are *Riordan v. Banon*, 10 Ir. Eq. Rep. 469, and *Re Fleetwood*, L. R. 15 Ch. Div. 594, 608 (decided in 1880). In the latter case, Hall, V. C., after reviewing numerous cases, said:

"The testator, at least when his purpose is communicated to, and accepted by, the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise."

Once more in the English Courts, in 1884, in *Re Boyes*, L. R. 26 Ch. Div. 531, 535, in speaking of this class of cases, Kay, J., said:

"In these cases the court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that, if it had not been for such promise, the testator would not have made or would have revoked the gift," citing cases *supra*.

This general doctrine, so long and so thoroughly established in England, has been adopted in several of the States, and fully recognized in others.

Thus, in 1803, a father was induced to make no will, and let his Maryland property descend to his eldest son, on the latter's promise to convey the same to his younger brother, provided, as was expected, he himself succeeded to certain property in Scotland, which he did subsequently inherit; and the court enforced the promise. *Browne v. Browne*, 1 Har. & J. 430.

In *Owings' Case*, 1 Bland, 370, 17 Am. Dec. 311, 317, 338, after stating the English doctrine of enforcing oral promises of devisees, Bland, Chancellor, said: If in such cases the person beneficially interested "could not have the promise enforced, his loss would be altogether irretrievable. The heir or person making it would be suffered to frustrate the intention of the deceased—to practice a fraud with perfect impunity; and the Statute of Frauds, if it were allowed to apply, would be made to operate for the protection, instead of the prevention, of fraud."

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In Pennsylvania, in 1882, the testator's brother was made his residuary devisee on his promise to apply the property for the benefit of the testator's illegitimate son, and a trust was decreed. Gibson, Ch. J., said:

"Equity turns the fraudulent procurer of the legal title into a trustee to get at him. . . . A mere refusal to perform the trust is, undoubtedly, not enough. . . . It seems to be requisite that there should appear to have been an agency, active or passive, on the part of the devisee, in procuring the devise;" and, after citing several of the English cases, said: "If the testator was induced by the promise of his brother, much more if by his suggestion, to believe that a devise to him was the most prudent plan of securing the estate to his illegitimate son, it cannot be said that a breach of confidence thus reposed in him was intended to be protected by the statute." *Hoge v. Hoge*, 1 Watts, 163, 215, 216. To the same purport are *Jones v. McKee*, 3 Pa. 496, 6 Pa. 425; and *Church v. Ruland*, 64 Pa. 432; *Schultz's App.* 80 Pa. 396.

The English rules have also been adopted and enforced or fully recognized in the following cases: *Williams v. Fitch*, 18 N. Y. 546; *O'Hara v. Dudley*, 95 N. Y. 408, a full discussion of the whole subject; *Dowd v. Tucker*, 41 Conn. 197; *Vreeland v. Williams*, 32 N. J. Eq. 734; *Glass v. Hulbert*, 102 Mass. 34, 39, 40; *Campbell v. Brown*, 129 Mass. 28, 26; *Olliffe v. Welle*, 130 Mass. 221, 224.

The plaintiffs are the nephews and niece of Orrin Gilpatrick—children of his two deceased sisters; Thomas Gilpatrick being the only child of one of the sisters, and the other plaintiffs children of the other. If the property should go to them according to the Law of Descent, Thomas would be entitled to one half "by right of representation," and the other half to the other plaintiffs equally. Rev. Stat. chap. 75, § 1.

Mr. G. invariably spoke of its going to his heirs generally. Mrs. G.'s certificate expressed her desire that "it should be equally divided between his heirs;" which, having been written soon after her husband's decease, may be considered as probably expressing the real understanding between her and her husband. Such a division would also seem equitable.

We are of opinion, therefore, that the bill be sustained, and that the plaintiffs have judgment against the goods and estate of Sarah Gilpatrick in the hands of the administrator on her estate, for the sum of \$9,508.06, less the sums paid to Zubra Gilpatrick, the amount paid for erecting the monument and caring for the cemetery, and the commissions paid to the executor—which amount, if not agreed upon by the parties, is to be ascertained by a master. *Decree accordingly*.

Peters, Ch. J., and Walton, Danforth, Emery and Haskell, JJ., concurred.

## VIRGINIA SUPREME COURT OF APPEALS.

PHENIX INSURANCE CO. of New York  
*et al.*, Appts.,  
 v.

FIRST NATIONAL BANK of Harrison-  
 burg *et al.*

(.... Va....)

**An insurer, on payment of insurance cover-**  
 ing only part of a mortgage debt, cannot take  
 by subrogation from a mortgagee any part of  
 his claim until the mortgage debt is paid, both  
 principal and interest, in full.

(February 14, 1889.)

**A** PPEAL by plaintiffs, from a decree of the  
 A Rockingham County Circuit Court in favor  
 of defendants in an action brought to obtain  
 possession of certain bonds. *Affirmed.*

The facts are fully stated in the opinion.

*Mr. Ed. S. Conrad* for appellants.

*Mr. George E. Sipe* for appellees.

**Richardson, J.**, delivered the opinion of  
 the court:

This is an appeal from a decree of the Cir-  
 cuit Court of Rockingham County, rendered  
 June 30, 1887, in the chancery cause therein  
 pending in which the Phenix Insurance Com-  
 pany of New York, the Fire Association of  
 Philadelphia, and the Hope Insurance Compa-  
 ny of New Orleans were complainants, and  
 the First National Bank of Harrisonburg, Vir-  
 ginia, was defendant.

A corporation, styled the New Rawley  
 Springs Company, issued its bonds to the  
 amount of \$30,000, dated July 12, 1879, with  
 coupons for semi-annual interest, and executed  
 a trust deed to secure payment thereof. These  
 bonds, to the amount of \$7,187, were, on  
 the 10th of August, 1885, owned by the defend-  
 ant bank; and that day the bank obtained from  
 the Phenix Insurance Company a policy of in-  
 surance against loss by fire to the amount of  
 \$1,000 for the term of one year, in part of the  
 buildings and furniture embraced in the trust  
 deed.

The policy was issued in the name of the  
 Springs Company, though the bank paid the  
 premium, the loss, if any, being payable to  
 the bank as its interest might appear. On the  
 7th of June, 1886, the items of property covered  
 by the policy were destroyed by fire, the loss  
 aggregating \$700, which was paid and the pol-  
 icy surrendered. The bank also took out addi-  
 tional policies in the Virginia Fire & Marine  
 Insurance Company for \$2,750, in the Hope  
 Insurance Company of New Orleans for \$1,500,  
 and in the Fire Association of Philadelphia  
 for \$1,750, making a total insurance of \$7,000  
 to protect the bonds.

The losses under the several policies were:  
 Phenix \$700, Fire Association \$1,375, Hope  
 \$1,050, and Va. F. & M. \$2,375, aggregating  
 \$5,500. When the Phenix Insurance Compa-  
 ny paid the bank the amount of the loss under  
 its policy it demanded of the bank \$700 of said  
 bonds, claiming that it stood in the relation of  
 surety, and that, having paid \$700 of the debt  
 of the Springs Company represented by the  
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bonds, it had become entitled, on the principle  
 of subrogation, to bonds to that amount. This  
 claim being denied by the bank, the Phenix  
 Ins. Company filed its bill for relief. The bank  
 demurred to and answered the bill, denying the  
 complainant's demand. Then the Fire Associ-  
 ation and the Hope Ins. Company, by leave of  
 the court, filed their petition to the same effect.  
 These two companies had not paid the losses  
 under their policies, declining to do so until  
 the bonds they claimed were turned over to  
 them.

In vacation, on the 30th of June, 1887, the  
 court decreed that the complainants were not  
 entitled to demand and take of the bank the  
 bonds or any of them, until the bank had re-  
 ceived the full amount of the principal and in-  
 terest of its debt, but that the insurance com-  
 panies which have or shall have paid the bank  
 the amount of adjusted loss due from them  
 respectively were entitled in equitable propor-  
 tions to such surplus of the dividends applica-  
 ble to said bonds owned by the bank as may  
 arise upon the foreclosure of the trust deed  
 and remain after the payment of principal and  
 interest of said bonds to the bank, and that the  
 prayer of the complainants be denied, and that  
 the right of the bank to hold and collect the  
 bonds was firm and stable. From this decree the  
 Phenix Insurance Company and the other com-  
 plainants appealed to this court.

We have had no hesitancy in coming to the  
 conclusion that the decree complained of is with-  
 out error, either on principle or authority.  
 The case involves only one single question:  
 Does an insurer, who has paid a loss to a mort-  
 gagee that covers only a part of the mortgage  
 debt, acquire, as against the mortgagee, a right  
 to demand and take from the mortgagee the  
 evidences of the debt secured to the amount of  
 the loss paid by the insurer, whether the mort-  
 gagee be able or not to obtain satisfaction of  
 his debt from the remaining evidences of the  
 debt? Or, in other words, must not the cred-  
 itor's debt be paid *in full* before the insurer  
 can take from him by subrogation any part of  
 that debt?

The doctrine which is applicable to this case,  
 and which squarely meets this question, is  
 clearly laid down by *Mr. Justice Strong*, in  
 pronouncing the opinion of the Supreme Court  
 of the United States in *Carpenter v. Providence*  
*Washington Insurance Company*, 41 U. S. 16  
 Pet. 501 [10 L. ed. 1044] where the learned  
 judge says:

"No doubt can exist that the mortgagor and  
 the mortgagee may each separately insure his  
 own distinct interest in the property. But there  
 is this important distinction between the cases:  
 that where the mortgagee insures solely on his  
 own account it is but an insurance on his debt,  
 and if his debt is afterwards paid or extin-  
 guished the policy ceases from that time to  
 have any operation, and, even if the premises  
 insured are subsequently destroyed by fire, he  
 has no right to recover for the loss, for he sus-  
 tains no damage thereby; neither can the mort-  
 gagor take advantage of the policy, for he has  
 no interest whatever therein. On the other  
 hand, if the premises are destroyed by fire be-

fore any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances."

And in *Royal Insurance Company v. Stinson*, 108 U. S. 25 [28 L. ed. 478], Mr. Justice Bradley concludes the opinion with the remark: "After a loss has occurred, and the insurance has been paid sufficient to discharge the debt, the insurer may be subrogated to the rights of the creditor against the debtor."

In a note to *King v. State Mut. F. Ins. Co.* [7 Cush. 1] 54 Am. Dec. 696, the learned annotator says: "The doctrine of the principle case, that the insurer is not entitled to demand

subrogation under a policy which does not expressly provide for it, is the established law in Massachusetts . . . and that doctrine seems to be adopted in May on Insurance, § 456; Wood on Fire Insurance, 782, and in later editions of Mr. Phillips' work. 2 Phill. Ins. § 1712.

But it must be admitted that the decided preponderance of authority is against this doctrine, and in favor of the insurer's right of subrogation and assignment in such cases upon paying the loss, and if necessary the balance due on the mortgage"—citing *Flanders*, Ins. 400; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495 [10 L. ed. 1044], and numerous other authorities.

The authorities demonstrate the correctness of the decree appealed from, and we are, therefore, of opinion that the same must be affirmed.

*Decree affirmed.*

## WEST VIRGINIA SUPREME COURT OF APPEALS.

Jennie H. KERR, *Appt.*,

Ann LUNSFORD *et al.*

(.....W. Va.....)

**\*1. Upon an issue devisavit vel non, the proponents of the will have the affirmative of the issue, and the right to open and conclude the argument.**

\*Head notes by the COURT.

### NOTE.—Trial of issue of *devisavit vel non*.

In an issue *devisavit vel non*, no question is raised as to whether or not the testator is crazy; the precise question for determination is whether or not his mind and memory were sufficiently sound to enable him to know and to understand the business in which he was engaged, at the time when he executed the will. *Shaver v. McCarthy*, 1 Cent. Rep. 142, 110 Pa. 339.

The burden of proof of testamentary capacity is supposed to rest on the person propounding the will. See *Wigram*, *Willis*, 15.

On the issue of sanity *vel non*, the usual method is to examine medical experts on hypothetical cases submitted to them, based on the testimony. *Boardman v. Woodman*, 47 N. H. 134; *Rowell v. Lowell*, 11 Gray, 420; *Kempsey v. McGinnis*, 21 Mich. 123; *McNaghten's Case*, 10 Clark & F. 200; *State v. Powell*, 7 N. J. L. 249; *Millard v. Brown*, 35 N. Y. 297; *U. S. v. McGlue*, 1 Curt. C. C. 1; *Dexter v. Hall*, 82 U. S. 15 Wall. 9 [21 L. ed. 73]; *Melendy v. Spaulding*, 54 Vt. 517; *Wetherbee v. Wetherbee*, 33 Vt. 454; *Butler v. St. Louis L. Ins. Co.* 45 Iowa, 63; *State v. Klingner*, 46 Mo. 224; *Tingley v. Cowgill*, 43 Mo. 291; *Griggs v. State*, 59 Ga. 738; *Wright v. Hardy*, 22 Wis. 348; *Pidcock v. Potter*, 68 Pa. 342; *Stuart v. State*, 1 Baxt. 180; *People v. Thurston*, 2 Park. Cr. Cas. 49; *Tefft v. Wilcox*, 6 Kan. 48; *State v. Medlicott*, 9 Kan. 257; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667; *Pannell v. Com.* 86 Pa. 290; *Lawson*, Exp. Ev. 144.

The question in cases of this kind is, Were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will? *Trish v. Newell*, 62 Ill. 205; *Am. Bible Society v. Price*, 8 West. Rep. 73, 115 Ill. 623.

### Competency of attesting witnesses.

The attesting witnesses are competent to prove a want of testamentary capacity. *Whitenaack v. Stryker*, 2 N. J. Eq. 11.

A devise to a witness to a will formerly avoided the will unless it had three witnesses. By the present English Law, which has been adopted in most of the United States, the will is now valid, but the 3 L. R. A.

**\*2. Trial. Evidence.** In the trial of an issue *devisavit vel non*, it is not improper for the proponents to offer the will, and the evidence of its due execution, and the competency of the testator at the time it was executed, and thus having made a *prima facie* case, to rest—and after the contestants have offered their evidence against the validity of the will, to permit the proponents to offer other evidence to sustain the will, as well as evidence in rebuttal.

legacy is void. According to the old rule, if the legacy was adeemed, the witness was restored to competency in England, but not in America. *Windham v. Chetwynd*, 1 Burr. 414; *Hawes v. Humphrey*, 9 Pick. 850; *Cornwell v. Iaham*, 1 Day, 35, 41.

### Expert testimony; opinion on hypothetical case.

In questions of science, skill and trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts but are permitted to give their opinions in evidence. 1 Greenl. Ev. § 440; *Yardley v. Cuthbertson*, 1 Cent. Rep. 652, 108 Pa. 395.

Their opinions are confined to their judgment on the facts proved. *Id.*

Where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, nothing more is required than a scientific opinion. *Id.*; *Sills v. Brown*, 9 Car. & P. 601.

The expert, in giving his opinion on a hypothetical case, must not be called upon to pass upon disputed facts. *Page v. State*, 61 Ala. 18; *Fairchild v. Bascom*, 35 Vt. 399; *Lawson*, Expert Ev. 151.

A medical man who is present at the trial, and has heard all the testimony, may be properly asked: "Upon the hypothesis that the testimony given by the witnesses in this case is all true, what would be your opinion of the party's sanity?" *Negroes v. Townshend*, 9 Md. 145.

His opinion is not conclusive, but is to be weighed by the jury like all other evidence. *Tatum v. Mohr*, 21 Ark. 355; *Chandler v. Barrett*, 21 La. Ann. 58; *State v. Bailey*, 4 La. Ann. 376. But see *Wood v. Barker*, 22 Am. L. Reg. 323; *Lawson*, Expert Ev. 151.

The jury are not bound by the opinions of medical experts. They are to consider all the evidence, and if they believe T. sane, to find in favor of the will, though four out of the five physicians examined in the case give their opinions that T. was insane. *Watson v. Anderson*, 13 Ala. 208; *Lawson*, Expert Ev. 153.

### Opinions of witnesses not experts.

As a general rule persons not medical men can-

3. **Evidence.** Upon the trial of such an issue, a general question, put to a witness, "Was there anyone who influenced the testator?"—is improper.

4. **One who would inherit a part of the testator's property but for the will, under chapter 180 of the Code, § 23, is incompetent to speak of the testator's capacity to make the will.**

5. **When a medical expert is asked to give his professional opinion to a jury, not upon matters within his own knowledge, but upon a hypothetical case founded upon the testimony of witnesses previously examined in the case, the questions to him must be so shaped as to give him no occasion to mentally draw his conclusion from the whole evidence, or a part thereof, and from these conclusions, so drawn, express his opinion, or to decide as to the weight of evidence, or the credibility of witnesses; and his answers must be such as not to involve any such conclusion, so drawn, or any opinion of the expert as to the weight of the evidence, or the credibility of witnesses.**

6. **The opinion of medical experts, founded on testimony already in the case, can only be given on a hypothetical case; and the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion.**

7. **In putting hypothetical questions to expert witnesses, counsel may assume the facts in accordance with their theory of them; it is not essential that he states the facts as they exist, but the hypothesis should be based on a state of facts which the evidence in the cause tends to prove.**

8. **Appeal; harmless error.** Where, on the trial of an issue *deviseavit vel non*, a medical expert was permitted to answer two improper hypothet-

ical questions, which he did, fully covering the whole case, and the court refused to permit him to answer two proper hypothetical questions which embraced no more than the two he was permitted to answer, the party who was thus deprived of having his proper hypothetical questions answered was not, and could not have been, prejudiced by the error; and for such error the appellate court would not reverse the decree and set aside the verdict.

9. **Evidence of capacity.** Where, in the trial of an issue *deviseavit vel non*, the contestants, on the question of the testator's capacity, offered a witness who testified that about three months before the execution of the will the testator had sold a property for \$10,000, and it was sold very cheaply; the proponents offered the purchaser of the property, who testified he had paid full value for it; the contestants then offered a witness who had occupied the property as lessee, and testified he knew its value, and asked the witness, "What is the property worth?"—the proponents objected, objection was sustained, and contestants excepted, —held, that, if error, it was not a reversible error. *Johnson, P., dissenting.*

10. **The record of an inquisition de lunatico inquirendo is admissible on the trial of an issue *deviseavit vel non*; but where the court refused to permit to be read, on such an issue, such portion of the order of adjudication as instructed the committee appointed as to the scope of his duties, —held, no error.**

11. **Stenographer's notes.** Where, on the trial of such an issue, a witness for contestants had testified that the testator, in giving his evidence in a certain action in ejectment was incoherent, and on cross examination said he had the stenog-

not give their opinions as to the existence, nature or extent of disease in anyone. *Lush v. McDaniel*, 13 Ired. L. 485.

Quite early, however, an exception to this rule was recognized, which permitted the subscribing witnesses to a will to be called upon for their opinions as to the sanity or insanity of the testator in the courts of all the States, except those of Massachusetts, Maine, New Hampshire and Texas. See *Lawson, Expert Ev.* 477; *Buckminster v. Porry*, 4 Mass. 563; *Needham v. Ide*, 5 Pick. 510; *Com. v. Wilson*, 1 Gray, 387.

The opinions of witnesses, when they state facts within their personal knowledge as the ground of their opinions, are competent evidence, and are entitled to the consideration of the jury. *Dickinson v. Dickinson*, 61 Pa. 404; *Shaver v. McCarthy*, 1 Cent. Rep. 143, 110 Pa. 339; *DeWitt v. Early*, 17 N. Y. 340, 9 N. Y. 371.

It is competent to admit in evidence the opinions of witnesses who were not experts, touching the testator's sanity, first stating their observations on which their opinions were based. *Roe v. Taylor*, 45 Ill. 486; *Upstone v. People*, 109 Ill. 175; *Am. Bible Society v. Price*, 3 West. Rep. 74, 115 Ill. 623; *Lawson, Expert Ev.* 476.

One who was not a physician, but who, as sheriff, had watched C's actions for some length of time, was permitted to give his opinion as to his sanity. *Clark v. State*, 12 Ohio, 490; *Clary v. Clary*, 2 Ired. L. 78.

A brother and other witnesses were asked to give their opinion, from their observation of one's appearance and conduct, of his sanity. *Hardy v. Merrill*, 56 N. H. 227.

On a commission de *lunatico inquirendo*, acquaintances (not experts) were properly allowed to express their opinion as to the soundness of mind of the alleged lunatic. *Re Vanauken*, 10 N. J. Eq. 192.

In Pennsylvania it has always been the rule that after a nonprofessional witness has stated the facts upon which his opinion is founded, he is permitted to state his opinion as to the sanity or insanity of the testator. *Forbes v. Caruthers*, 3 Yeates, 527; *Yardley v. Cuthbertson*, 1 Cent. Rep. 652, 106 Pa. 305.

In Texas it is held that evidence of this character is inadmissible. *Gehrke v. State*, 13 Tex. 508; *Lawson, Expert Ev.* 486.

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The jury may act against the greater number of opinions, and in favor of the fewer; for the opinion of one expert may be of greater value to the jury than the opposite opinions of several. *Getchell v. Hill*, 21 Minn. 464.

**Duty of court to determine sufficiency of evidence.**

It is the duty of the court to determine the sufficiency of the evidence, and it is error, if the point is made, to submit the question of testamentary capacity to a jury, unless it be sufficient. *Cuffman v. Long*, 82 Pa. 72; *Shaver v. McCarthy*, 1 Cent. Rep. 143, 110 Pa. 339.

The rule is, on questions of this kind, that the finding of the jury is conclusive unless clearly against the weight of the evidence (*Brownfield v. Brownfield*, 43 Ill. 147; *Meeker v. Meeker*, 75 Ill. 286; *Carpenter v. Calvert*, 83 Ill. 62; and in this respect they are put upon the same footing with cases at law. *Long v. Long*, 107 Ill. 210; *Am. Bible Society v. Price*, 3 West. Rep. 74, 115 Ill. 623.

**What not evidence of mental incapacity.**

Testamentary capacity may exist even where neither the mind nor the memory is as good as at a former period. *Bice v. Hall*, 9 West. Rep. 759, 120 Ill. 597.

Failure of memory is not sufficient incapacity, unless it goes to the extent of such a loss of memory as to deprive the testator of the ability to call up to the mind the immediate members of his family and property. *Lamb v. Lamb*, 2 West. Rep. 700, 105 Ind. 458.

An instruction that if the testatrix, at the time of executing the will, had a diseased brain, or her mind was so unsound as not to remember the names of her relations, and to judge soundly of the act she was about to do, or to know or understand the business she had in view, then she did not have capacity to make a will, was held to assert an incorrect rule as to testamentary capacity. *Kramer v. Weinert*, 81 Ala. 414.

Extreme physical disability is not mental incapacity. *Stoutenburgh v. Hopkins*, 11 Cent. Rep. 232, 43 N. J. Eq. 577.

**Proof of testamentary capacity.**

Testamentary capacity is proved by evidence that the testator knew what he was doing, even though

rapher's notes of his evidence in the action, but that the stenographer was not sworn, but the witness said the notes were substantially correct, and on motion the proponents, to contradict the witness, were permitted to read the notes to the jury.—*Held*, no error.

12. **On the trial of such issue, a will executed in 1879**, about two years before the will in issue, at which former date it is shown the testator was competent, is admissible on the question of his capacity at the time the will in issue was executed.
13. **Evidence of business transactions** by the testator, both before and after the execution of the will, indicating his mental condition, are admissible on the question of his capacity at the time the will was executed.
14. **The opinions of witnesses not experts** are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them; but if the reasons and facts upon which they are founded are frivolous, the opinions of such witnesses are worth little or nothing.
15. **The evidence of witnesses who were present** at the execution of the will is entitled to peculiar weight, and especially is this the case with attesting witnesses.
16. **It requires less capacity to make a will** than it does to make a deed.
17. **Old age** is not of itself sufficient evidence of incapacity to make a will.
18. **The time to be looked to** by the jury, in determining the capacity of a testator to make a will, is the time when the will was executed.
19. **It is not necessary that a person should possess the highest qualities of mind** in order to make a will, nor that he should have the same strength of mind he may formerly have had; the mind may be in some degree debilitated, the memory may be enfeebled, the understanding may be weak, the character may be eccentric, and he may even want capacity to transact many of the ordinary business affairs of life; it is sufficient if he have mind enough to understand the nature of the business in which he is engaged, to recol-

lect the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them.

20. **In order to make a valid will it is not necessary** that the testator should name all his children in it, or give each of them a portion of his estate. If he was mentally capable of understanding the disposition which he was making of his property, and acted freely, it is immaterial to whom he gives his property—whether all to one, or some, of his children, or to strangers. If he has a disposing mind and memory, he has a right to do as he pleases with his property.
21. **Although the testator may, perhaps, have been influenced** by feelings of resentment or dislike to one or more of his children, and by feelings of affection and attachment towards others, and though these feelings may have influenced him to give his whole estate to the one part, and little or nothing to the others, this is not sufficient to make the will invalid.
22. **If the provisions of the will were induced** by the extreme kindness and attention to the testator on the part of the principal devisees, that will not constitute undue influence which will invalidate the will.
23. **It is improper to single out one witness**, although he was the family physician, and instruct the jury that his evidence is entitled to great weight.
24. **Where an instruction has already been substantially given**, the court is not bound to repeat it.
25. **Assumption of facts.** Where an instruction refers to a disease by a technical name, is confused in its parts, and assumes facts as proved, it is properly refused.
26. **It is not necessary for proponents to prove** that the testator actually recollected all his property, the objects of his bounty, etc.; it is sufficient if he was, at the time, mentally capable of doing so.
27. **An instruction was properly refused** that assumed that the evidence raised in the minds of the jury a doubt of the testator's capacity.
28. **An instruction should not be given un-**

his general business capacity was impaired. *Converse v. Converse*, 21 Vt. 188; *Kinne v. Kinne*, 9 Conn. 102; *Stewart v. Lisenard*, 26 Wend. 255.

An understanding of the nature of business about which the testator was engaged, of the kind and value of the property devised, and of the persons who were the natural objects of his bounty, and of the manner in which he wished to dispose of his property—all these are evidences of testamentary capacity. *Roe v. Taylor*, 45 Ill. 490; *Am. Bible Society v. Price*, 3 West. Rep. 73, 115 Ill. 623.

The statements of one in the last stages of consumption, expressing an expectation of recovery, are not proof of delirium, in connection with question of testamentary capacity. *Ayres v. Ayres*, 11 Cent. Rep. 220, 43 N. J. Eq. 565.

**Incapacity must exist at time of execution of instrument.**

If, at the making of the will, testator was sound in mind, it is immaterial that he was unsound before or after. *Pennypacker v. Pennypacker* (Pa.) 7 Cent. Rep. 532.

One who is aged and infirm and is afflicted with softening of the brain, but has occasional lucid intervals when his mind is clear, may be competent, during one or more of such lucid intervals, to make a will. *Will of Silverthorn*, 68 Wis. 372.

In an action to set aside a will, evidence that the disease by which the testator was afflicted was so severe at times as to require the frequent use of sedatives and narcotics, yet on the morning of the execution of the will he was free from pain and from the effects of the drug administered during the preceding night, and of sound mind and memory, and apparently understood the nature of the act he was about to perform, it is sufficient to show 2 L. R. A.

testamentary capacity. *Epling v. Hutton*, 11 West. Rep. 572, 121 Ill. 555.

**What derangement of mind incapacitates.**

The derangement is that want of capacity which prevents a person from reasoning correctly, and from understanding the relation of cause and effect in ordinary business affairs. *Carpenter v. Calvert*, 83 Ill. 62; *Brown v. Riggins*, 94 Ill. 583; *Meeker v. Meeker*, 75 Ill. 286; *Am. Bible Society v. Price*, 3 West. Rep. 73, 115 Ill. 623.

If incapable of appreciating the effect of any disposition made by him of it, and of understanding to whom he intends to bequeath it, he is without the requisite testamentary capacity. *Leech v. Leech*, 21 Pa. 67; *Shaver v. McCarthy*, 1 Cent. Rep. 142, 110 Pa. 339; *Elkinton v. Brick*, 1 L. R. A. 161.

**Intoxication does not necessarily incapacitate.**

Partial intoxication does not work a complete disqualification to will. *Lowe v. Williamson*, 2 N. J. Eq. 85. See *Elkinton v. Brick*, 1 L. R. A. 161, note; *Wigram, Wills*, 15.

If testator understands in detail all that he is about, and chooses with understanding and reason between one disposition and another, it is sufficient for the making of a will. *Daniel v. Daniel*, 39 Pa. 191; *Tawney v. Long*, 76 Pa. 106; *Shaver v. McCarthy*, 1 Cent. Rep. 142, 110 Pa. 339.

**Existence of delusions not conclusive of incapacity.**

There may be insanity without the general business capacity of the individual being affected thereby. *Searle v. Galbraith*, 73 Ill. 272; *Am. Bible Society v. Price*, 3 West. Rep. 73, 115 Ill. 623.

The existence of delusion on one subject is not inconsistent with sufficient soundness of mind on

less relevant, and it is not relevant unless there was evidence tending to prove the facts on which the instruction is based.

29. **Submitting to the jury**, under the statute, "particular questions of fact," is within the discretion of the trial court. This is a revisable discretion.
30. **The questions must be of such a character** that the answers thereto, if contrary to the general verdict, would control the same and be conclusive of the issue.
31. **Under the statute, the court did not err** in refusing to submit to the jury the following questions: "(1) Was the late Lewis Lunsford, in August, 1880, suffering from a disease known as senile dementia? (2) If so, is that disease curable? (3) Had that disease so far progressed in August, 1882, as to render him (Lewis Lunsford) imbecile and incapable of transacting business? (4) Does a person suffering from such disease have any lucid intervals?"
32. **When a final decree is pronounced** in favor of a will on the verdict of a jury rendered on an issue *devsant vel non*, the functions of the suit are exhausted, and the bill should be dismissed. In such suit the construction of the will cannot be involved.
33. **Newspaper comment.** The court will not set aside a verdict merely because a newspaper, during the trial, made improper reference to the trial and the case.

(December 8, 1888.)

**APPEAL** by plaintiff from a judgment of the Ohio County Circuit Court in favor of defendants in a bill in equity for the construction of a will. *Affirmed.*

The questions raised fully appear from the opinion.

*Messrs. Robert White, W. W. Arnett and F. A. Riddle* for appellant.

*Messrs. W. B. Hubbard and H. M. Russell* for appellees.

**Johnson, P.**, delivered the opinion of the court:

another (*Bitner v. Bitner*, 65 Pa. 347; *O'Neil v. Evan*, 1 Am. L. J. 522); and mere feebleness of intellect is insufficient to avoid a will. *Daniel v. Daniel*, 39 Pa. 191.

It does not follow that a man has insane delusions or is void of testamentary capacity because he is prejudiced against some of his children without reason. *Schneider v. Manning*, 10 West. Rep. 133, 121 Ill. 376.

**Unequal distribution of property not conclusive evidence.**

The party must be capable of acting rationally in the ordinary affairs of life, so that he may comprehend what disposition he may wish to make of his property and be able to select the subjects of his bounty. *Meeker v. Meeker*, 75 Ill. 260; *Rutherford v. Morris*, 77 Ill. 327; *Freeman v. Easley*, 5 West. Rep. 102, 117 Ill. 317.

Inequality in the distribution of property is not conclusive evidence of unsoundness of mind or of undue influence; it may be considered as a mere circumstance, when in proof, as tending to establish undue influence or unsoundness of mind, but it is not of itself alone conclusive and sufficient for that purpose. *Salisbury v. Aldrich*, 5 West. Rep. 608, 118 Ill. 190.

A will will not be set aside for incompetency and undue influence, where the proof shows grounds for unequal distribution of property, and the testatrix, although addicted to the use of morphine, was of good understanding when not under its influence. *Frost v. Wheeler*, 10 Cent. Rep. 880, 43 N. J. Eq. 573. But gross inequality in the disposition of the instrument, where no reason for it is suggested, may require an explanation on the part of those who

**Lewis Lunsford**, of Ohio County, on the 27th day of April, 1881, made his last will and testament, in which he gave to his wife, Ann, during her natural life, the house in, and grounds on, which he resided, and directed his executors to set apart from his estates and invest, in such manner as they might deem best, \$10,000, and to pay to his wife the dividends, interests and profits accruing therefrom, during her life, and gave her, during life, the household and kitchen furniture, and gave her, absolutely the provisions on hand at the time of his death, and, if enough was on hand for the purpose, grain sufficient for herself and family for one year. These bequests were in lieu of dower.

By the second clause of his will he directs his executors to divide the residue of his estate, including the portions given to his wife, after the life estate had terminated, into six shares—one for the children of his deceased daughter, Elizabeth, and one share each for his five living daughters, Sarah L., widow of R. C. Holliday, Margaret M. Lunsford, Julia A. Lunsford, Amanda V., widow of James R. Foster, deceased, Jennie H., wife of William Kerr—"The six shares to be as nearly as practicable equal to each other, taking into account the respective amounts to be added and charged thereto, as hereinafter specified. I have advanced \$4,262 to said Elizabeth in her lifetime, and \$800 to her children since her death, on which \$800 interest is to be computed from February 25, 1881, to the time of my death, and the said \$4,262, \$800, and the interest aforesaid, are to be added to this share, to make it equal to each of the other shares with the proper additions thereto. I have also advanced to the said Sarah L. Holliday \$2,500; to Margaret M. Lunsford \$1,500; to Julia A. Lunsford \$1,500; and to Amanda V. Foster \$3,500; and their shares, including these advancements as part thereof, are to be made respectively equal. I have also advanced \$1,500 to Jennie H. Kerr, and her husband is indebted to me in the sum of \$3,900, upon which interest is to be

support the will, to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind. *Gay v. Gillilan*, 10 West. Rep. 308, 92 Mo. 250.

*Undue influence to avoid will.*

Undue influence, to make a will void, must destroy the free agency of the testator. *Trost v. Dingler*, 10 Cent. Rep. 592, 118 Pa. 250, 20 W. N. C. 408.

The influence, to render a will void, must be intentionally exercised specifically to secure the testament in question. *Herster v. Herster*, 9 Cent. Rep. 306, 116 Pa. 612, 20 W. N. C. 154.

Undue influence is not made out where a testatrix, weak physically, exhibited strength of mind in resisting the importunities of her husband, in making a natural will, and transacting other business. *Stoutenburgh v. Hopkins*, 11 Cent. Rep. 232, 43 N. J. Eq. 577.

Influence gained by kind offices to an aged parent is not undue. *Brick v. Brick*, 9 Cent. Rep. 321, 43 N. J. Eq. 167.

Solicitations, however importunate, cannot of themselves constitute undue influence. *Trost v. Dingler*, *supra*.

Where the testator is infirm and the will executed in the article of death, the preparation of the will by the principal legatee is conclusive evidence against its validity. *Waddington v. Buzby*, 9 Cent. Rep. 130, 43 N. J. Eq. 154.

It can excite no remark that the testator, in his extremity, should trust his nephew, who had been his confidential adviser when in health, to write his will. *Ewing v. Hutton*, 11 West. Rep. 572, 121 Ill. 533.

computed to the time of my death, and this \$1,500, \$3,900, and the interest aforesaid, are to be added to her share to make it equal; but the debt and interest due, as aforesaid, by the said William Kerr, shall be thereby discharged and released.

He empowered his executors, for the purpose of making the division, to sell and convey his property. By the third clause he releases his son, Thomas, from any debts he owed him, but declined to make any bequest to him, stating as his reason that he had given to him and paid on his account more than his share in the estate. The testator was about eighty years of age when the will was made.

In September, 1884, Jennie H. Kerr brought her suit in chancery to set aside said will. The bill alleges that at the date of said will—the 27th day of April, 1881—and long prior thereto, and continuing down to the date of his death, in 1883, the testator was not of sound mind and disposing memory; that “He was wholly incapacitated by reason of his advanced age, the failure, exhaustion and weakness of his mental faculties, and the decrepitude of his physical system, to make, execute and acknowledge any valid instrument of writing whatever.” It charges that said will was procured by Amanda V. Foster and other members of the testator’s family. The bill alleges that if said will be permitted to stand, the plaintiff will suffer great wrong and injustice as one of the heirs of the said Lewis Lunsford, and prays that the said will be set aside, etc. The defendants, in their answer, deny the charge of incompetency and undue influence.

On the 10th day of January, 1885, the court ordered an issue “to be tried at the bar of this court by a jury, to try whether the paper writing dated April 27, 1881—a copy of which is exhibited, ‘A’—is the true last will and testament of Lewis Lunsford.” On the 21st day of May, 1885, the jury was sworn to try the issue, and on the 29th day of the same month rendered their verdict:

“We, the jury, find that the paper writing dated the 27th April, 1881 . . . is the true last will and testament of Lewis Lunsford.”

The proponents were given the affirmative of the issue, and accorded the right to open and conclude. The contestants moved to set aside the verdict and grant them a new trial, on the ground that the verdict was contrary to the law and the evidence, because of wrong instructions to the jury, and the admission of improper evidence, and the rejection of proper evidence, and because of a comment made, during the trial, in the *Wheeling Daily Intelligencer*, a newspaper published in the City of Wheeling, which last ground was supported by an affidavit. The court overruled the motion and refused to grant a new trial, and decreed “that the paper writing dated the 27th of April, 1881, mentioned in the bill and proceedings in this cause, be and the same is hereby established as, and declared to be, the last will and testament of Lewis Lunsford, deceased.”

The contestants filed a bill of exceptions as to a number of rulings during the trial, and to the refusal of the court to set aside the verdict and grant a new trial.

The first exception was that the affirmative

of the issue was given to the proponents, and also the right to open and conclude the argument. Upon an issue *debetur vel non*, the proponents of the will have the affirmative of the issue, and the right to open and conclude the argument. *Coalter v. Bryan*, 1 Gratt. 18; *McMechen v. McMechen*, 17 W. Va. 688; *Nicholas v. Kershner*, 20 W. Va. 259.

The proponents, to maintain the issue on their part, introduced the will of Lewis Lunsford, deceased, dated the 27th day of April, 1881, also the two subscribing witnesses to the will, B. S. Allison and W. H. Hearne. These two witnesses testified to the execution of the will, and to the mental capacity of the testator, and the proponents then rested. The contestants then offered many witnesses, who gave evidence tending to show that at the date of the execution of the will the testator was wholly incompetent to make a will. This testimony had taken a very wide range—from several years before the execution of the will to several years after, and to his death, in 1883—and showed that more than a year after the will was executed, on motion and petition of one of the contestants, the estate of the testator was put into the hands of a committee.

When the contestants rested, the proponents against the protests of the contestants, on the ground that the proponents had rested their case in chief, were permitted to introduce Daniel Lamb, who wrote the will, and a number of other witnesses, who gave their opinions of the sanity of the testator, both before, at the time, and after the execution of the will, based on the acts, conduct, language and transactions of the testator. It is here insisted that this was error; that after the proponents had rested in chief, they could not introduce any evidence except that which was strictly in rebuttal of the evidence offered by the contestants.

In *Bowyer v. Knapp*, 15 W. Va. 295, it was said: “It is alleged as error that the court permitted the depositions of Newman, Kincaid, Flanagan, Richards and Conaway to be read in evidence, because, as is claimed, they were not rebutting evidence. This is an objection to the mere order of the testimony. The bill of exceptions shows that, after the introduction of three witnesses, the defendants ‘closed for the present,’ and then, after a number of witnesses had been introduced by the plaintiff, principally on the question of the competency of the plaintiff to transact business, the defendants were permitted to introduce the witness Kincaid and others on the same subject. Whether a plaintiff shall be permitted to introduce further evidence after the defendant’s evidence is introduced is a matter within the discretion of the court trying the cause; and its exercise will rarely, if ever, be controlled by an appellate court”—citing, as the only authority, *Brooks v. Wilcox*, 11 Gratt. 411. This principle is sustained elsewhere. *Hoffman v. Harrington*, 44 Mich. 188; *Hess v. Wilcox*, 58 Iowa, 380; *Hagerty v. White*, 69 Wis. 317; *Campbell v. Moore*, 8 Wis. 678; *Harden v. Hays*, 14 Pa. 91; *Smith v. Smith*, 8 Ired. L. 29.

The general rule undoubtedly is that, in the trial of law issues, the party on whom rests the burden of proof should introduce in the first instance all his evidence in chief, and then, after the defendant has introduced all his evi-



dence in chief, he should be confined to rebuttal evidence. *Rez v. Smith*, 2 Starkie, 208; *Rez v. Hilditch*, 5 Car. & P. 209; *Hathaway v. Hemingway*, 20 Conn. 191; *Clinton v. McKennis*, 5 Strobb. L. 36; *Yankee Jim's Union Water Co. v. Orary*, 25 Cal. 504; *Kohler v. Wells*, 28 Cal. 606; *Holbrook v. McBride*, 4 Gray, 215.

This rule should be followed as far as practicable by the trial court; but the rule is not an inflexible one, the order of the evidence being in the discretion of the court—a discretion with which the appellate court will not interfere unless it clearly appears that injustice was done by the manner in which the trial court exercised its discretion. But inasmuch as in issues *devisavit vel non* the burden of proving the sanity of the testator is on the proponent of the will; and the issue being “whether the paper writing is the last will and testament of the testator,” and that the will may be assailed on any and all the grounds that would show it invalid, it would not promote justice to apply the rule applicable to ordinary law issues.

How are the proponents to know what kind of testimony, and how much, the contestants have to prove their general charges of want of capacity and undue influence? What particular objections and evidence may be offered to sustain such general charges can only be known as the evidence is developed. As was said by White, J., in delivering the opinion of the court in *Kunyan v. Price*, 15 Ohio St. 6: “To require those affirming the will either to finally rest their case on the order of probate, or otherwise, in anticipation of attacks that may or may not in fact be made; to introduce all the evidence they may have sustaining the will, on every ground on which it may be competent for the adverse parties to attack it—would not, in our opinion, promote either the convenience of those charged with the trial, or the justice of the case, but would tend to contrary results.”

In the *Ohio Case*, it appeared that the proponents offered in evidence the will and probate, which, under the Statute of Ohio, makes a *prima facie* case for the proponents, and then rested. After the contestants had introduced their evidence, the proponents offered general evidence to sustain the will. To the introduction of such evidence the contestants objected, but the court overruled the objection, and admitted the evidence. The ruling was affirmed. The same course was approved in *Forney v. Ferrell*, 4 W. Va. 729.

In the trial of an issue *devisavit vel non*, it is the proper course to pursue for the proponents to offer the will, and the evidence of its due execution, and the competency of the testator at the time it was executed, and then, having made a *prima facie* case, to rest; and, after the contestants have offered their evidence against the validity of the will, to permit the proponents to offer other evidence to sustain the will, as well as evidence in rebuttal of the evidence of the contestants. The court did not err in overruling the objection to the evidence offered by the proponents.

Did the court err in admitting or rejecting evidence? The witness McFarland was asked the question: “At the time of your visit at the house, and of Mr. Lunsford and lady’s visit to your place of business, was there anyone

who influenced him to any extent?” Objection was made by proponents, and sustained by the court. This ruling was clearly right. The witness had no right to tell the jury that influence was exerted on the testator. He could tell what he saw, and the jury would be left to infer whether any influence had been exerted, and whether it were undue influence—one of the questions in issue.

Thomas Lunsford, one of the children and heirs of the testator, was asked his opinion of the mental condition of the testator. The court properly refused to permit the question to be answered, as, under our statute, he was incompetent to speak on the subject. *Ander-son v. Cranmer*, 11 W. Va. 562.

Did the court err in refusing to allow the medical experts to answer the hypothetical questions propounded? Several were allowed to be answered, against the objection of the proponents, and to the ruling of the court they excepted. The following question was asked Dr. James E. Reeves:

“Doctor, assuming that a person seventy-seven years of age, in the month of August, 1880, was sick for a period of two or three weeks, and that during such sickness it was found that such person believed himself to be in a location different from that in which he was, and whose mind, in the month of August, 1882, was impaired almost to its fullest extent—what would be your diagnosis, as an expert, of such person’s malady or condition, and what would be your opinion as an expert of his mental capacity on April 27, 1881?”

The doctor answered: “Evidently the illness or sickness in 1880, at which time there was delusion, as shown by his belief that he was elsewhere than at the place he was then resting, and that in 1882 there was complete destruction of the mind, the clear inference would be that the sickness in 1880 may very reasonably be related as cause to the effects which were so plainly apparent in 1882; and while there is evidently a gap in the question, which would not enable an expert to arrive at an exact conclusion, or aid him in creating the case in his own mind, there is nothing that would substitute the opinion that the patient was the subject of senile dementia. Now, in further answer to the question when the fact of senile dementia is found to exist, that means nothing more or less than mental incapacity, not in the performance of any one, but of all acts. In a word, when that disease is developed—and when I say developed I mean that its progression has gone so far as to be recognized by friends and associates—I might just as reasonably say that a man could run without two legs as to say that a man suffering from senile dementia is capable of the transaction of business.”

Dr. Reeves was also asked: “Suppose a man of the age of seventy-seven, in the month of August, 1880, and who during the month of May, 1880, had lost a favorite son by death, and who, in the years 1875 and 1876, had been a capable and active man, and whose memory in the month of June, 1880, was discovered to be considerably impaired, and who was in the habit of relating past events to the same person day after day, without seeming to know he had related them at all, and who, in

the month of August was sick with an illness of two or three weeks' duration, and who, in that month, was found to have believed himself to be in a locality different from that in which he was, and who, in the month of January, 1880, had sold a piece of valuable real estate at a price which Col. Thomas O'Brine considered, to say the least, was very cheap, and who, in August, 1882, was found to have suffered a mental deterioration almost to its fullest extent—what would be your diagnosis of such a case, and what would be your opinion of the mental capacity of such a person on the 27th day of April, 1881?

The doctor answered: "That question fills the gap I mentioned when I was on the floor before. It completes the description which leads me irresistibly to the conclusion that the case was one of senile dementia, and I have only to repeat what I said before—that when the fact is established to me, it would be just as absurd to think of a man running with one leg as to say he was capable of transacting business."

Q. "Well, with reference to the capacity of such a person on the 27th of April, 1881, what would you say, doctor?"

The answer was: "Remembering the rise and termination of the case as presented in the question, there could be no other reasonable conclusion than at that date he was incapable," etc.

The following question was asked of the same witness, against the objection of the proponents, and answered: "Doctor, suppose that an active and capable man in the years 1875 and 1876, who, in the month of May, 1880, was of the age of seventy-seven, or thereabouts, and who in that month sustained the loss of a favorite and dutiful son, and who was found in the month of June, 1880, to have sustained a considerable impairment of memory, and who, in that month, was in the habit of relating events and circumstances connected with the past, and of repeating the same things to the same person, without recollecting that he had before stated them, and who, in the month of August, 1880, had suffered from an illness of two or three weeks' duration, and who, during such illness, had conceived himself to be in a locality different from that in which he was, and who, in the month of January, 1881, had disposed of valuable real estate, at a price which, in the opinion of Col. Thomas O'Brine, was very cheap, to say the least, and who, in the month of August, 1882, was found to have suffered an impairment of mind almost to its fullest extent—what would you say of the capability of such a person, under such circumstances, of comprehending the nature and extent of his estate, whether large or small, the subjects of his bounty, and the manner in which his estate should be divided among them, on the 27th day of April, 1881?"

A. "That question, I take it, is substantially the question I answered before; and I repeat that, the diagnosis having been made, it was a case of senile dementia; that there can be no judgment without memory, and that both these qualities of mind are necessary in order to transact business with a will power. I unhesitatingly say that such a subject would be incapable, at the period named, of transacting business with judgment and justice."

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In *McMeehan v. McMeehan*, 17 W. Va. 668, it was held that, when a medical expert is asked to give his professional opinion to a jury, not upon matters within his own knowledge, but upon a hypothetical case, founded upon the testimony of witnesses previously examined in the case, the questions to him must be so shaped as to give him no occasion to mentally draw his conclusions from the whole evidence or a part thereof, and from these conclusions so drawn express his opinion, or to decide as to the weight of evidence or the credibility of witnesses; and his answers must be such as not to involve any such conclusion so drawn, or any opinion of the expert as to the weight of the evidence or the credibility of the witnesses. The opinion of medical experts, founded on testimony already in the case, can only be given on a hypothetical case, and the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion.

In addition to the principles announced in that case, it is now held that, in putting hypothetical questions to expert witnesses, counsel may assume the facts in accordance with his theory of them. It is not essential that he state the facts as they exist, but the hypothesis should be based on a state of facts which the evidence in the cause tends to prove. *Conoley v. People*, 83 N. Y. 464.

In that case *Folger, Ch. J.*, in delivering the opinion of the court, said: "The claim is that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes—assumes—something for the time being. Each side, in an issue of fact, has its theory of what is the true state of facts, and assumes that it can prove it to be so to the satisfaction of the jury, and, so assuming, shapes hypothetical questions to experts accordingly; and such is the correct practice. *Brickson v. Smith*, 2 Abb. App. Dec. 64; *People v. Lake*, 12 N. Y. 358; *Seymour v. Fellows*, 77 N. Y. 178; *Guiterman v. Liverpool, N. Y. & P. Steam-Ship Co.* 83 N. Y. 858."

The first of the questions put to Dr. Reeves, which the court permitted to be answered, is unobjectionable under the rules above laid down. But both the others are objectionable and improper, because they leave the witness to weigh the credibility of Col. Thomas O'Brine. The two questions put to Dr. Smith are open to the same objection. The first question put to Dr. Reeves, which the court permitted to be answered, is not as full and complete as some refused. Nearly all the questions put to Dr. Reeves are open to the same objection in one form or the other. The two following hypothetical questions were put to Dr. Reeves:

"Assuming that a man seventy-seven years of age, in the month of August, 1880, who had, in the month of May, 1880, suffered the loss of a faithful and dutiful son, and who was found in the month of August to be suffering from an illness of two or three weeks' duration, and

who, during such illness in the month of August, 1880, was found to be under delusion, especially as to locality, and who was found to be afflicted with a mental disorder—although slightly, yet certainly and unmistakably, affecting his mind—and who, in the month of August, 1882, was pronounced to have suffered an almost complete loss of mental power, and who, at that time, was incapable of transacting business affairs—what would be your diagnosis of such a person, as an expert, and what would be your opinion of his mental capacity on the 27th day of April, 1881?”

“Doctor, assuming the case of a man seventy-seven years of age in February, 1880, and who was found in the month of August, 1880, to be sick and under the care of his family physician, and, during the sickness occurring in August of that year, the patient supposed himself to be in a place distant from where he actually was, and who was found, during that sickness, to be afflicted with a mental disorder, although slightly, and who was found in the month of August, 1882, to have sustained an almost total loss of mental power—what would be your diagnosis of such a person's condition, as an expert, and what would be your opinion, as an expert, of his mental capacity on the 27th day of April, 1881?”

These questions are proper under the rules we have laid down, and ought to have been answered; but as questions were permitted to be answered which were, at the least, as favorable to the contestants as these, although they were not proper questions, as we have seen, yet, as they were answered, and the contestants had the benefit of them, they were not prejudiced because the foregoing questions were not permitted to be answered. Dr. Reeves was so positive in his answer to the hypothetical questions put to him, and his answer covering the whole ground, it was impossible that the jury was confused or misled by the refusal to permit the two proper questions to be answered.

It was claimed by contestants that one evidence of the incompetency of the testator was that he sold the Market Street house very cheap—much too cheap for a business man in possession of all his faculties; and the contestants asked Dr. Caddel, who was lessee of the property, and who testified he knew the value of it, “What was the value of that property?” Proponents objected, the objection was sustained, and the contestants excepted. Mr. Rinehart had testified that he had purchased the property from the testator at \$10,000, and that the price paid was, he thought, full value for it.

The witness was then asked: “Did you ever offer Mr. Rinehart a sum of money for that property?”—which question was objected to, and objection sustained. Then the witness was asked: “Did you ever offer him \$14,000 for it?” Objected to, sustained, and contestants excepted. Then Rinehart was recalled for further cross examination, and said he had an offer for the property from Mr. Zook, a member of Dr. Caddel's firm. The offer was \$10,000. It was not \$14,000. Did not tell him he would not sell for \$14,000, and that it was worth \$18,000. The question was then asked Dr. Caddel, what Rinehart stated the property was worth.

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I do not think the court erred in refusing to permit the witness to state what Rinehart said the property was worth; but I cannot see upon what principle in the law of evidence Caddel could not, as well as any other witness, state what the property was worth. It was shown that in January, 1881, the testator sold his property some three months before the will was executed. It was contended by the contestants that it was sold very cheaply, and that this was an evidence of the incapacity of the testator at the time to transact business. Rinehart, for proponents, had testified that he thought the price he paid was its full value; if so, then the transaction would afford no evidence of weak intellect on the part of the testator. The evidence of Caddel, offered to prove the value of the said property, was competent and relevant testimony, and the court erred in refusing to admit it. But is this error sufficient to reverse the decree, and to set aside the verdict of the jury?

This court said in *State v. Kinney*, 26 W. Va. 143, that “To authorize the reversal of a judgment for admitting irrelevant evidence, not only must the evidence be irrelevant, but it must be of such a nature that its admission may have prejudiced the prisoner. If he may have been so prejudiced, even though it be doubtful whether in fact he was so or not, that is sufficient ground for reversing the judgment. *Southern Mut. Ins. Co. v. Treor*, 29 Gratt. 255; *Payne v. Com.* 81 Gratt. 855.”

The converse of this proposition is equally true—that, to authorize the reversal of a judgment for refusing to admit relevant testimony, not only must the evidence be relevant, but it must be of such a nature that its rejection may have prejudiced the party offering it. If he may have been so prejudiced, even though it be doubtful whether in fact he was or not, that is sufficient ground for reversing the judgment. We cannot here say that the rejection of this evidence could not have prejudiced the contestants. We do not know how close a case it was in the minds of the jury. It might have been so nicely balanced that it would have taken very little to turn the scale. This looks like a small matter on which to reverse the decree in the cause of the magnitude of this; but to lay down proper, correct and uniform rules for the guidance of the citizen is of much more importance than the speedy termination of the suit, or saving costs to the parties.

It is strange, in such a record, involving such a variety of rulings, that it should have to be reversed on such a ruling; but it cannot be helped, and for this error alone the decree will have to be reversed, the verdict set aside, and a new trial granted. This is my opinion, but my brothers do not think that this error, if one, is sufficient to reverse the decree, because it was on a collateral fact on which there was already sufficient evidence to prevent the jury from being misled because the testimony was refused.

The contestants offered in evidence an order made by the Circuit Court of Ohio County on the 4th day of October, 1882, adjudicating the said Lewis Lunsford to be insane, and appointing a committee for him, and the petition and notice for said appointment; but the court refused to admit any of the papers except the notice, and

so much of the order as adjudicated that said Lunsford was insane, and appointing a committee for him. The contestants excepted.

There appears to be no petition for such appointment in the record other than the notice signed by Amanda V. Foster, by her attorney. There is a petition of the "committee" filed, which asked the court to instruct him as to his duties under said appointment. This, of course, was irrelevant, and not proper evidence. The only reason for complaint is that the court refused to permit the whole of the order to go in evidence. The remaining part of said order relates to the duties of the "committee" with reference to the estate of the said Lunsford, called forth by the said petition of the committee, and in answer thereto. At this time the contestants did not ask that the whole record of the inquisition should go to the jury. Some time before that the contestants identified an affidavit made by W. J. Bates, Jr., and also what purported to be a committee bond, reciting that Amanda V. Foster had been appointed committee for Lewis Lunsford, by the Clerk of the County Court of Ohio County—to which objection was made and sustained, and contestants excepted. They offered, then, no order adjudicating the party insane, and of course the court did not err in refusing to permit said papers to go in evidence. What was properly the record of the inquisition *de lunatico inquirendo* was proper evidence. *Rogers v. Walker*, 6 Pa. 871; *Hutchinson v. Sandt*, 4 Rawle, 284; *Rippy v. Gant*, 4 Ired. Eq. 448; *Yauger v. Skinner*, 14 N. J. Eq. 889; *Redden v. Baker*, 86 Ind. 191; *Wheeler v. State*, 84 Ohio St. 394; *Field v. Lucas*, 21 Ga. 447; *Hart v. Deamer*, 6 Wend. 497; *Willis v. Willis*, 12 Pa. 159.

The last part of the order relating to the duties of the "committee" is properly no part of the inquisition, and the court did not err in refusing to permit it to be read in evidence.

It is insisted that the court erred in permitting stenographer's notes to be read to the jury. Alfred Caldwell was called as a witness for contestants, and said he was counsel in the case of *Goshorn v. Carter*, tried at the April Term, 1881, of the Circuit Court of Ohio County. He testified that the testator was sworn as a witness in that trial; that, when he was on the stand, on some subjects he was pretty clear, but in some respects was incoherent. "He was an old man, and his testimony did not agree very well with his previous conversation with me; that made me have him summoned as a witness. He would wander off in answering some of the questions."

On cross examination, witness said: "I have the stenographer's report of the testimony in that case and will produce it. In this testimony Mr. Lunsford appears, and it shows he was called for the plaintiff and examined by myself. This is a report of all his testimony given on that trial, and is substantially accurate. Captain Mathews, who made this report, was the official stenographer of the court, but not sworn as such, I learn." Thereupon counsel for proponents offered to read said testimony of Lewis Lunsford to the jury, to which contestants objected, and the objection was overruled, the testimony read, and contestants excepted. This, certainly, would not be proper

evidence in chief. *Nisner v. Darling*, 44 Mich. 498; *People v. Stigh*, 48 Mich. 54; *Lipscomb v. Lyon*, 19 Neb. 511.

The notes are not of that character properly authenticated to make them admissible as substantive, independent testimony; but they were offered to contradict the evidence of Caldwell, who had sworn that they were substantially correct. Caldwell had characterized the evidence as wandering and incoherent, and as evidence tending to contradict him they were admissible.

It is also alleged as error that the court admitted to be read in evidence a will that the testator had executed in 1879. It is not questioned in the case that the testator was fully competent to execute a will in 1879. This will was clearly admissible, on the question of capacity to execute the will in question, because it is similar in its provisions, and tends to show a steady and fixed purpose as to the manner in which the testator intended to dispose of his property. The same may be said of another draft of a will not executed, which was proved to have been dictated by the testator. It was also objected that certain questions were asked of the committee as to the dates at which the testator acquired a certificate of deposit and certain stock, which questions were answered by the witness, after looking at the indorsements on the papers themselves. The testimony on the question of capacity was admissible, as tending to show business transactions, at the respective dates, by the testator.

In January, 1882, the testator had bought a suit of clothes of R. L. Prall; the cutter took his measure, and had certain conversation with him; acted as other customers; left strict orders about how he wanted the pockets made. Witness was asked the question: "From what took place at the time the clothes were ordered, the conversation you had with Mr. Lunsford, and what took place at the time—what is your opinion as to his mental condition then?" Objections by contestants; overruled, and exception. The witness answered: "I didn't see anything the matter with the gentleman at all, whatever, in any way."

The rule in our State is: "The opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them; but if the reasons and facts upon which they are founded are frivolous, the opinions of such witnesses are worth but little or nothing."

The evidence is admissible, and it is for the court or jury, under the circumstances, to give the opinions such weight as they think they should receive. For the same reason the court did not err in admitting the testimony of Joseph F. Paull. A number of other exceptions were saved as to rulings on the admission or rejection of evidence; but we have noticed all argued by the learned counsel in their elaborate brief, and have examined the record closely, and we think no errors in this regard were committed in said rulings.

It is insisted that the court erroneously instructed the jury for the proponents. The instructions so given, at the instance of proponents, were as follows:

"(1) The evidence of witnesses who were present at the execution of the will is entitled

to peculiar weight; and especially is this the case with attesting witnesses.

"(2) It requires less capacity to make a will than it does to make a deed.

"(3) Old age is not of itself sufficient evidence of incapacity to make a will.

"(4) The time to be looked to by the jury, in determining the competency of the testator to make a will, is the time when the will was executed.

"(5) It is not necessary that a person should possess the highest qualities of mind in order to make a will, nor that he should have the same strength of mind which he may formerly have had. The mind may be in some degree debilitated, the memory may be enfeebled, the understanding may be weak, the character may be eccentric, and he may even want capacity to transact many of the ordinary business affairs of life; but it is sufficient if he understand the nature of the business in which he is engaged, has a recollection of the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them.

"(6) In order to make a valid will, it is not necessary that the testator should name all his children in it, or give all of them a portion of his estate. If he was mentally capable of understanding the disposition which he was making of his property, and acted freely, it was immaterial to whom he gives his property—whether all to one, or some, of his children, or to strangers. If he has a disposing mind and memory, he has a right to do as he pleases with his property.

"(7) Although the testator may, perhaps, have been influenced by feelings of resentment or dislike to one or more of his children, and by feelings of affection and attachment towards others, and though those feelings may have influenced him to give his whole estate to the one part, and little or nothing to the others, this is not sufficient to make the will invalid.

"(8) If the provisions of the will were induced by the extreme kindness and attention to the testator on the part of the principal devisees, that will not constitute undue influence which will invalidate the will."

These instructions propounded the law correctly, and have been expressly approved by this court in *Jarrett v. Jarrett*, 11 W. Va. 584, and *Nicholas v. Kershner*, 20 W. Va. 251, except the fifth one, which, to be accurate, instead of using the language, "If he understand the nature of the business in which he is engaged," etc., should read: "It is sufficient if he possess mind enough to understand," etc. It would be hard to prove that a testator, of whose competency there was no question, recollected all his property, etc.—that is, made no mistake.

The court, at the instance of the contestants, gave the following instructions, to which there were no objections by the proponents:

"The opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant the opinion that the testator was capable of understanding the nature of his business in which he was engaged when he made his will, recollected his property he meant to dispose of thereby, as well as the objects of

his bounty, and the manner in which it is to be distributed among them.

"That, before the jury can find a verdict in favor of the proponents, they must believe from the evidence that Lewis Lunsford, on the 27th day of April, 1881, had the active power of mind and memory sufficient to collect and retain the elements of the business in which he was engaged when making his said will, for a sufficient time to perceive their obvious relations to each other.

"That unless the jury believe from the evidence that the testator acted freely and of his own will, and understood the nature of the business in which he was engaged in making his will, and had a recollection of the property thereby disposed of, as well, too, of the objects of his bounty, and understood the manner of the distribution of his property by the will, they must find a verdict in favor of the contestants.

"The court instructs the jury that the evidence of physicians, especially those who attended the testator and were with him during the time it is charged he was of unsound mind, is entitled to great weight.

"The court instructs the jury that the condition of the testator's mind, both before and after the execution of the purported will, is proper to be considered in determining what was his mental condition at the time the purported will was executed."

The following instructions were asked by contestants, objected to, and refused, and contestants excepted. We will dispose of them *seriatim*:

"The court instructs the jury that, in considering the testimony, the evidence of Dr. W. J. Bates, Jr., the physician who attended the testator and was his family physician, is entitled to great weight. This instruction was properly refused. It was in effect asking the court to tell the jury that Dr. Bates' evidence was entitled to great weight. The court had already, at the instance of the contestants, instructed the jury correctly—and it was as far in that line as it was proper to go—"that the evidence of physicians, especially those who attended the testator and were with him during the time it is charged he was of unsound mind, is entitled to great weight."

The second refused instruction had before been substantially given. The fourth asked the court to instruct the jury "that it is proper to consider the condition of the mind and memory of the testator, both before and after the date of the will in question, in determining the question of the testator's capacity to make said will." This instruction had already been substantially given, and the court is not bound to repeat its instruction.

The next refused instruction was: "The court instructs the jury that the opinion of witnesses not experts are entitled to little or no regard, if the facts on which such opinions are professed to be founded do not warrant the opinion that an old man, in whom the disease of senile dementia was developed, several months before the date of the will, to the degree that his family physician noticed it, was, at the date of said will, not so afflicted by said disease but that he was able to understand the nature of the business in which he was engaged in mak-

ing his will, to recollect his property, and the subjects of his bounty, and the manner of its distribution by the will among such subjects."

The instruction was properly refused, because of at least three fatal objections: *first*, it is confused; *second*, it refers to a disease by a technical name that the jury is not supposed to understand; and *third*, it assumes a number of facts to have been proved to the jury.

The next instruction is: "The court instructs the jury that the law presumes that the testator, Lewis Lunsford, was not capable of making a will, and the burden is on the proponents to show, by competent testimony, that at the date of his will, the said Lewis Lunsford understood the nature of the business in which he was engaged, recollected his property disposed of thereby, the objects of his bounty, the number of them, the advancements he claims thereby to have made to them, and the manner in which he wished to distribute his property."

This instruction, in the terms in which it was asked, was properly refused, because it would be sufficient "if he possessed mind enough to understand," etc. It is not necessary for the proponents to prove that a testator actually understood and recollected all these things; if he was mentally capable of doing so, it is sufficient.

The next instruction is: "The court instructs the jury that if they believe, from the evidence, that the said Lewis Lunsford was affected with a mental disorder known as 'senile dementia,' during the month of August, 1880, then they should consider the nature, progress, effect and termination of such disorder—as shown by the testimony—as bearing upon the mental capacity of Lewis Lunsford on the 27th of April, 1881, to make, execute and acknowledge the alleged will as his free and voluntary act."

This instruction was properly refused, because it proposes to place the jury in the place of medical experts to trace the progress of a disease of which they are supposed to know nothing, and because the instruction assumes that the testimony "shows the nature, progress, effect and termination of senile dementia."

The court was also asked to instruct the jury "that, whilst it may be true that an enfeebled old man, whose mind has to some degree become debilitated and memory enfeebled and understanding weakened, may sometimes have sufficient capacity to make a will, yet if the jury believes, from the evidence in this case, that the testator was, several months previous to the date of his will, afflicted with a disease which then materially affected his mind and memory, and which progressed in its effects upon the mind to the date of the will, and continued to progress for sixteen months afterwards, when, because thereof, the testator was mentally unable to transact business, then they should weigh the testimony tending to show mental capacity with great care, and be satisfied that it was sufficient to overcome the doubts of the testator's capacity, existing both by reason of said disease, as well as by reason of the presumption of incapacity which the law fixes."

The court properly refused to give this instruction.

2 L. R. A.

It must always be remembered that the time to be looked to for the testator's capacity is the time when the will was executed. The evidence might be so clear to the minds of the jury, that at that time the testator was competent, as to leave no doubt whatever in their minds, even though they might believe from the evidence that previous to the execution of the will the testator was afflicted with a disease which materially affected his mind and memory, and which progressed in its effects upon his mind to the date of the will, and for sixteen months afterwards, when, because of said disease, the testator was mentally incapacitated to transact business; yet the instruction assumes that this evidence raised a doubt in the minds of the jury that he was competent when the will was executed.

The court was also asked to instruct the jury "that they must take into consideration all the evidence tending to show that the said Lewis Lunsford was induced to make the alleged will in controversy by the direction, suggestion or persuasion of any other person or persons; and if the jury believe, from the evidence, that any undue influence was used to induce the said Lewis Lunsford to make the will in question, they will take into consideration the person or persons exercising such undue influence, if they believe, from the evidence, that any such was exercised, together with the relation of the person or persons alleged to have exercised any undue influence."

This instruction was properly refused. To authorize an instruction it must be relevant. There must be some evidence tending to prove the facts upon which the instruction is based. Here is no evidence tending to prove undue or other influence exerted by anyone on the testator to induce him to make the will in question.

The last instruction asked by contestants, and refused, singles out the family physician, and asks that the jury be instructed that his evidence is entitled to great weight. For reasons already stated, the instruction was properly refused. We have thus gone over every instruction asked, given and refused, and it is quite evident some would have been proper with slight modifications; but the court was not bound to modify them.

It was assigned as error that the court declined to submit the following questions to the jury, to be answered by it: "(1) Was the late Lewis Lunsford, in August, 1880, suffering from a disease known as 'senile dementia'? (2) If so, is that disease curable? (3) Had the disease so far progressed in August, 1883, as to render him (Lewis Lunsford) imbecile, and incapable of transacting business? (4) Does a person suffering from such disease have any lucid intervals?"

Section 5 of chapter 181 of the Code provides that, "Upon the trial of any issue or issues to a jury, whether under this section or not, the court may, on motion of any party, direct the jury, in addition to rendering a general verdict, to render separate verdicts upon any one or more of the issues, or to find in writing upon particular questions of fact, to be stated in writing. The action of the court upon such motion shall be subject to review as in other cases. Where any such separate verdict or special finding shall be inconsistent with the

general verdict, the former shall control the latter, and the court shall give judgment accordingly."

This is the first time the court has been called upon to construe this statute. A number of western States have similar statutes which have received construction. None of them are precisely like ours. *Atchison etc. R. Co. v. Campbell*, 16 Kan. 200; *Dubois v. Campau*, 28 Mich. 304; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Dickerson v. Dickerson*, 50 Mich. 87; *Ederhardt v. Sanger*, 51 Wis. 73.

In *Dubois v. Campau*, 28 Mich. 304, Campbell, J., speaking for the court, said: "The questions to be separately submitted to the jury are required to be 'particular questions of fact' (2 Comp. Laws, § 6026), and these, as we have held, should be such as to involve legal consequences. *Crane v. Reeder*, 25 Mich. 308.

"We think such a question as that which was put here could not be fairly called a particular question of fact, and it is difficult to imagine any answer that could have any controlling force in reaching a conclusion."

The action was ejectment, and the question the court declined to put to the jury was: "By what acts did Joseph Campau claim to hold possession adversely to the plaintiffs?"

In *Tobacco Company v. Jenison*, Cooley, J., for the court, said: "All the questions which remain unanswered might also have been excluded, for none of them were conclusive." We have no doubt the submitting to the jury, under the statute, of "particular questions of fact" is within the discretion of the trial court, which discretion is reviewable.

The questions must be of such a character that the answers thereto, if contrary to the general verdict, would control the same, and be conclusive of the issue. That this is true is apparent from the language of the statute. It declares: "Where any such . . . special finding shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

Now, let us see, according to these principles, what would have been the effect had there been a general verdict in favor of the will, and the jury had, at the same time, answered the first question, "Was the late Lewis Lunsford, in August, 1880, suffering from a disease known as senile dementia?"—"Yes;" and to the second question, "Is that disease curable?"—"No;" and to the third, "Had the disease so far progressed, in August, 1882, as to render him (Lewis Lunsford) imbecile and incapable of transacting business?"—"Yes;" and to the fourth question, "Does a person suffering from such disease have any lucid intervals?"—"No."

If these questions had been submitted, and the answers found as indicated, could such special findings have controlled the general verdict in favor of the will, and have required the court, on the special findings, to enter a decree against the will? It is very clear what was the object of the contestants' counsel in asking these questions to be submitted. Their theory is that if the testator, in August, 1880, had senile dementia, and that disease was incurable, and it had so far progressed that in two years thereafter the testator was imbecile and incapable of transacting any business, and that a

person suffering from such disease has no lucid intervals, then it must inevitably follow that on the 27th day of April, 1881—the date of the will—the testator was incompetent to make it. The main issues were: Was Lewis Lunsford, the testator, at the date of the will, mentally competent to make it? and did he act freely?

It will not do to say that because an old man is suffering from senile dementia from August, 1880, until August, 1882, at which time he was incompetent, therefore twenty months before the latter date, on the 27th of April, 1881, he was, as a legal consequence, incompetent to make a will, even though the disease be incurable and there are no lucid intervals. The question still is, What was his mental condition at the time the will was made? At that time did he have mind sufficient to authorize him to execute a valid will?

Dr. Edwards, in his deposition in behalf of the contestants, says: "All old men who begin to go down hill begin to have senile dementia to a limited extent. Of course some retain their intellect longer than others."

It would be sad, indeed, if all old men suffering from the disease of senile dementia were, because of this fact, to have their wills set aside—their wishes disregarded—even though a jury might think them competent testators. It was not proper to submit the questions, or either of them; and the court did not err in refusing to submit them.

The court did not err in refusing to set aside the verdict and grant a new trial, on the ground that the verdict was contrary to the law and the evidence, or because of misdirection by the court. The evidence was conflicting, and on well established principles it could not be set aside as against evidence.

The motion for a new trial was also based upon an affidavit that the *Wheeling Intelligencer*, a daily newspaper published in the City of Wheeling, had the following paragraph published therein during the trial: "*The Lunsford Will Case* still drags its slow length along. It will probably occupy the entire remainder of this week. The general public opinion is that the jury will sustain the will, or disagree. Among the witnesses examined yesterday were Rev. Dr. Cunningham, Attorney-General Caldwell, Hon. Daniel Lamb, and John O. Pendleton." "And affiant further says that said daily newspaper has a large circulation in and through said city, and is very generally read by the people of said city, as he believes."

Here is no evidence that any member of the jury read said paragraph; and if they had, that would not be sufficient to set aside the verdict. If the fact was as therein stated as to the "public opinion" on the case, the members of the jury, who are not required to be, and were not, kept together, could have heard the matter talked of without themselves being culpable. If verdicts could be set aside on such grounds, suits would be interminable. The court did not err in refusing to set aside the verdict on this ground.

It is insisted that the court erred in not giving a construction of said will, as such construction was asked in the bill. This matter in the bill may be regarded as mere surplusage, as it could not be joined in a bill for an issue *der-savit vel non*. When a final decree is pro-



nounced in favor of a will, on the verdict of a jury rendered on an issue *deviasit vel non*, the functions of the suit are exhausted, and the bill should be dismissed. In such suit the construction of the will cannot be involved. *Coalter v. Bryan*, 1 Gratt. 18; *Dower v. Church*, 21 W. Va. 23; *Couch v. Eastham*, 27 W. Va. 796.

The decree is affirmed.

Green, Snyder and Woods, JJ., concurred.

PITTSBURG, WHEELING & KENTUCKY R. CO., *Def't. in Err.*

v.

BENWOOD IRON WORKS *et al.*, *Plffs. in Err.*

(.....W. Va.....)

1. **Public use.** Whether the use for which property is sought to be taken under the exercise of eminent domain is public or private is a judicial question, subject to review by the appellate court.
2. **Evidence** that all who wish to avail themselves of the proposed switch, branch road or lateral work can do so, is not sufficient to show that the use of the work will be for the benefit of the public.
3. **The property of railroad corporations,** so far as concerns the ownership thereof, and the profit or gain to be made from their use, is to all intents and purposes private property, although applied to a use in which the public have an interest.
4. **Property for private purposes.** As far as the public is concerned, when what railroad corporations need is for "public use," they have

\*Head notes by JOHNSON, P.

NOTE.—*Eminent domain; power of.*

The power to take private property for public use belongs to every independent government as an incident to its sovereignty. *U. S. v. Jones*, 109 U. S. 513 (27 L. ed. 1016).

Legislation in the exercise of eminent domain is not limited if the purpose be a public one and just compensation be paid or tendered for the property taken. *Secombe v. Milwaukee & St. P. R. Co.* 90 U. S. 23 Wall. 108 (23 L. ed. 67).

The control of the right rests with the Legislature, and the public necessity for its exercise is exclusively for its ascertainment. *Rees' App.* (Pa.) 11 Cent. Rep. 143; *Savannah v. Hancock*, 3 West. Rep. 248, 91 Mo. 54; *Chicago & E. L. R. Co. v. Wiltz*, 4 West. Rep. 121, 116 Ill. 448.

To entitle to the exercise of the right there must be a real public necessity for it. *Detroit v. Daly* (Mich.) 18 West. Rep. 151.

*Exercise of right through agents.*

The Sovereign, in exercising the right of eminent domain, must employ agents or servants. *Mineral Range R. Co. v. Detroit & L. S. Copper Co.* 25 Fed. Rep. 515; *Mills, Em. Dom.* 178.

By the Act of incorporation the railroad company becomes the agency of the State, under certain restrictions, to take such lands as it may deem necessary for its road. *Alexandria & F. R. Co. v. Alexandria & W. R. Co.* 76 Va. 780.

The exercise of the power cannot extend beyond such acts as are necessary and usual in its proper exercise, as conferred. *Selfert v. Brooklyn*, 2 Cent. Rep. 125, 101 N. Y. 128.

*Power to exercise right may be delegated.*

This power may be delegated to individuals and their associates (*Crittenden v. Wilson*, 5 Cow. 165; *Re Kerr*, 42 Barb. 119; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45; *Tide-Water Canal Co. v. Archer*, 9 Gill & J. 479; *Smeaton v. Martin*, 57 Wis. 304; *Philadelphia & G. F. Pass. R. Co's App.* 102 Pa. 123; *Young v. Buckingham*, 5 Ohio, 435; *Mills, Em. Dom.* 178); to corporations, both municipal and private, 3 L. R. A.

the right to invoke the exercise of eminent domain; but, in so far as that which concerns them as to their private interests, their profits and gains are concerned, they stand as individuals, or merely as private corporations, in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain.

5. **Switch.** Where a railroad corporation sought to condemn land, over which to build a switch, branch road or lateral work, to reach a private manufactory, a steel mill, for the purpose of transporting freight to and from said steel mill over petitioner's road—*held*: the use to which the land was to be subjected was a private, not a "public, use."

(December 15, 1883.)

**ERROR** to the Marshall County Circuit Court, to review a judgment for plaintiff in condemnation proceedings. *Reversed.*

The facts are fully stated in the opinion.

*Messrs. Caldwell & Caldwell*, for the Benwood Iron Works, plaintiff in error:

It must appear that the railroad is one which the general public may not only use, but which the general public has use for; which not only the small part of the public which has business with the private corporation has use for, but the general public.

2 Kent, Com. p. 340; *Citizens Sav. & Loan Asso. v. Topeka*, 87 U. S. 20 Wall. 612, 653 (22 L. ed. 461); *Cole v. La Grange*, 118 U. S. 1 (28 L. ed. 896); *Valley City Salt Co. v. Brown*, 7 W. Va. 196; *Varner v. Martin*, 21 W. Va. 555, 566.

If the legislative enactment that property might be condemned for branch railroads and lateral works could be construed to mean that land might be condemned for such switches as

and to corporations of another State. *Hyde Park v. Oak Woods Cemetery A. so.* 6 West. Rep. 738, 119 Ill. 141; *North Mo. R. Co. v. Gott*, 25 Mo. 540; *Boston Waterpower Co. v. Boston & W. R. Corp.* 23 Pick. 260; *Buffalo & N. Y. C. R. Co. v. Brainard*, 9 N. Y. 100; *Mineral Range R. Co. v. Detroit & L. S. Copper Co.* 25 Fed. Rep. 515; *Moody v. Jacksonville, T. & K. W. R. Co.* 20 Fla. 567; *Re Townsend*, 39 N. Y. 171; *Morris Canal & Bkg. Co. v. Townsend*, 24 Barb. 653; *New York & E. R. Co. v. Young*, 33 Pa. 175.

The right may be delegated to foreign corporations, not by reason of interstate comity, but when it is not expressly restricted to domestic corporations. *Abbott v. N. Y. & N. E. R. Co.* 5 New Eng. Rep. 527, 145 Mass. 450; *Dodge v. Council Bluffs*, 57 Iowa, 560.

Corporations organized for the purpose of carrying freight only may exercise the power of eminent domain. *State, De Camp, v. Hibernia U. R. Co.* 47 N. J. L. 43.

*The use must be public.*

The use to the public must concern the community but not necessarily every person in the community, nor should every individual have an equal interest; that some persons will be benefited above others does not deprive the improvement of its public character. *McQuillen v. Hatton*, 48 Ohio St. 202.

The Legislature determines the sufficiency of the number of people to be benefited in order to constitute the use a public one. *Aldridge v. Tusculumbia, C. & D. R. Co.* 2 Stew. & P. 199.

The agents who accomplish the objects do not determine the public character of the use, but the fact that the public may use and that the improvement may be useful to the public. *Willyard v. Hamilton*, 7 Ohio, pt. II, 111.

Enlargement of grounds for greater facilities in handling traffic is for a public use. *Re Staten Island R. T. R. Co.* 4 Cent. Rep. 514, 108 N. Y. 251.

Waterworks for a particular town are for the public use. *Wayland v. Middlesex Co.* 4 Gray, 500.

Drains and ditches for reclamation of overflowed

these in the case at Bar, then such legislative enactment is unconstitutional and void.

*Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 56; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627 (7 L. ed. 542); *Cole v. La Grange*, 118 U. S. 8 (28 L. ed. 898).

*Messrs. Ewing, Melvin & Riley* for the City of Benwood.

*Mr. W. P. Hubbard*, for defendant in error:

The law does not contemplate that when the petitioner is brought within the provisions of the statute, the right of condemnation can be defeated by simply showing, in the opinions of witnesses who have no interest in or connection with the objects of the proceeding, that the land sought to be condemned is not necessary for the purpose stated.

*Smith v. Chicago & W. I. R. Co.* 105 Ill. 512, 519.

It is not necessary to prove in a particular case the necessity of occupying the particular land sought.

*El River & E. R. Co. v. Field*, 67 Cal. 429.

"The company was organized under a valid charter and is shown to have done corporate acts under it. That was sufficient to establish a *prima facie* right to take the property in question for the purposes set forth in the petition."

*Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 601.

A railroad constructed by a duly authorized corporation is a public road; and a compliance with the statute creating a corporation for the purpose is a legislative declaration of the public necessity for the road.

*Powers v. Hazelton & L. R. Co.* 33 Ohio St. 486. See also *W. Va. Transp. Co. v. Volcanic Oil & Coal Co.* 5 W. Va. 882.

The extent of the probable use by the public is not material.

*Lewis v. Washington*, 5 Gratt. 265. See *Varner v. Martin*, 21 W. Va. 564, 565; *Re New York, L. & W. R. Co.* 99 N. Y. 13, 24; *Bonaparte v. Camden & A. R. Co.* Baldw. C. C. 205; *National Docks R. Co. v. Central R. Co.* 82 N. J. Eq. 765; *Dietrich v. Murdock*, 42 Mo. 284; *Clarke v. Blackmar*, 47 N. Y. 150; *Chicago Dock & Canal Co. v. Garrity*, 1 West. Rep. 670, 115 Ill. 166, 167; *Truesdale v. Peoria Grape Sugar Co.* 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60.

Whether the motive of the corporators is private convenience, and whether the actual use is likely to be general, are of no more importance than are the like considerations in the laying out of what are called private roads. It is the right which characterizes the enterprise, and that is public.

*National Docks R. Co. v. Central R. Co.* 82 N. J. Eq. 765. See also *New Central Coal Co. v. George's Creek Coal & Iron Co.* 87 Md. 562.

*Johnson, P.*, delivered the opinion of the court:

This is a condemnation proceeding. The plaintiff is a domestic corporation, incorporated by chapter 54 of the Acts of the Extra Session of the Legislature of 1863, and its name then was The Pan Handle Railroad Company, and was incorporated "for the purpose of constructing a railroad from Holliday's Cove Railroad, in Brooke County, to the Town of Wellsburg, and thence to the City of Wheeling."

By the second section it was declared that said company should "be subject to all the provisions, and entitled to all the benefits, now conferred by law upon internal improvement companies . . . and especially to the provisions

lands, when the public welfare will be subserved, are for public use. *Jenal v. Green Island Draining Co.* 12 Neb. 163; *Kinnie v. Bare* (Mich.) 13 West. Rep. 549; *Winslow v. Winslow*, 95 N. C. 24.

The transportation and supply of natural gas is for a public use. *Johnston v. People's Natural Gas Co.* (Pa.) 5 Cent. Rep. 564.

Public parks are for public use. *Olcott v. Fond du Lac Co.* 83 U. S. 16 Wall. 678 (21 L. ed. 382); *Chicago Dock & Canal Co. v. Garrity*, 1 West. Rep. 675, 115 Ill. 166; *Re Niagara Falls & W. R. Co.* 11 Cent. Rep. 275, 108 N. Y. 375; *Re First Street* (Mich.) 9 West. Rep. 579.

The use of land for a cemetery is for a public use. *Evergreen Cemetery Asso. v. Beecher*, 2 New Eng. Rep. 308, 53 Conn. 551.

[Private property cannot be taken for a private use.

As between individuals, no necessity, however great, can compel or require a man to part with one inch of his estate. *Bangor & P. R. Co. v. McComb*, 60 Maine, 290; *Underwood v. Bailey*, 59 N. H. 489; *Mills*, Em. Dom. 110.

Nor has the Legislature the right to take the property of one individual or corporation and give it to another, even if compensation is provided. *Hepburn's Case*, 3 Bland, 95; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507 (12 L. ed. 535); *Bangor & P. R. Co. v. McComb*, 60 Maine, 290. For an exception to this general statement, see *Mills*, Em. Dom. § 9; *Underwood v. Bailey*, 59 N. H. 489; *Foster v. Stafford Nat. Bank*, 67 Vt. 128; *Re Eureka Basin W. & Mfg. Co.* 96 N. Y. 42; *Varner v. Martin*, 21 W. Va. 534; *Macon v. Harris*, 73 Ga. 428; *Anderson v. Baker*, 98 Ind. 587; *Cole v. LaGrange*, 113 U. S. 1 (28 L. ed. 896).

The fact that the structures to be built on the land sought to be condemned will incidentally benefit the public, will not suffice to bring the case within the operation of the right so long as the structures are to remain under private ownership and control and the public have no voice in their management. *Re Eureka Basin W. & Mfg. Co.* 96 N. Y. 42; *Mills*, Em. Dom. 97, 109.

2 L. R. A.

*Criterion to judge character of use.*

The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or by permission, and not to whom the tax or toll for supporting them is paid. *Bonaparte v. Camden & A. R. Co.* Baldw. 235; *Rogers v. Bradshaw*, 20 Johns. 735; *Re Mount Washington Road Co.* 35 N. H. 134; *State v. Maine*, 27 Conn. 641; *Wood v. Truckee Turnpike Co.* 24 Cal. 474.

The Constitution is satisfied if the use is public and the public may have the privilege of using the same. *Concord R. Co. v. Greely*, 17 N. H. 47; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 5; *Brown v. Beatty*, 34 Miss. 227; *State, De Camp, v. Hibernia U. R. Co.* 47 N. J. L. 43.

It is sufficient if it affords advantage or benefit to the community. *Olmstead v. Camp*, 33 Conn. 532; *McQuillen v. Hatton*, 42 Ohio St. 242; *Mills*, Em. Dom. 98.

The question whether the contemplated use be really public is a judicial question. *Denver R. L. & Coal Co. v. Union Pac. R. Co.* 34 Fed. Rep. 386.

*Railroads are for public use.*

A railroad, though constructed and owned by a private corporation, is for public use; and the right of eminent domain of the State may be exerted to facilitate its construction, and taxes may be imposed by the State in furtherance of that use (*Olcott v. Fond du Lac Co.* 83 U. S. 16 Wall. 678 (21 L. ed. 382); *Rogers v. Burlington*, 70 U. S. 3 Wall. 654 (18 L. ed. 79); *Pine Grove v. Talcott*, 86 U. S. 19 Wall. 666 (22 L. ed. 227); *Secombe v. Milwaukee & St. P. R. Co.* 90 U. S. 23 Wall. 108 (23 L. ed. 67); they are in fact public highways. *Louisville, C. & C. R. Co. v. Chappell, Rice*, L. 383.

Railroads are compelled by law to transport over their lines, at reasonable times, and at prices frequently limited by law, all such passengers and freight, not of a dangerous character, as shall be offered for transportation; and this constitutes the use a public one. *Buffalo & N. Y. C. R. Co. v. Brinard*, 9 N. Y. 100; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45; *Raleigh & G. R. Co. v. Davis*, 2 Dev.

of chapters 56, 57 and 61 of the Code of Virginia."

By chapter 77 of the Acts of 1869 it was authorized "to extend its road from the City of Wheeling in the direction of the Kentucky state line, through such sections of the State contiguous to the Ohio River as said company may deem most desirable." By chapter 52 of the Acts of 1871, the corporation name was changed to the "Pittsburg, Wheeling & Kentucky Railroad Company."

By section 5 of chapter 61 of the Code of 1860 it is provided that "The president and directors of any company incorporated to construct a railroad or other work of internal improvement may cause to be made, in connection therewith, branch railroads, or lateral works, not exceeding two miles in length; and, under a resolution adopted in general meeting by two thirds of all the votes of all the stockholders, may cause to be made branch railroads or lateral works, not exceeding ten miles in length."

Section 69 of chapter 54 of the Code of West Virginia, 1887, provides that "Any railroad company organized under this chapter may build and construct lateral and branch roads or tramways, and of any gauge whatever, not exceeding fifty miles in length."

By section 67 of the same chapter it is provided "That all existing railroad corporations within this State shall respectively have and possess all the powers and privileges, and be subject to all the duties and liabilities and provisions, contained in this chapter."

On the 29th day of October, 1886, the plaintiff tendered its petition to the Circuit Court of Marshall County, alleging that it had constructed its railroad to Benwood, in Marshall County. That "recently, and since the construction of said railroad, a corporation known

and called the 'Wheeling Steel Works Company' has erected a steel plant or works in the said City of Benwood, in said county, which plant lies next east of the Benwood Iron Works. Said steel company produces large quantities of steel, and consumes large amounts of material; and your petitioner's said road is now unable to transport any of said steel or material, by reason of its having no track reaching to or into said steel works. In order to reach said steel works, by a track or switch leading from its said main track, your petitioner avers it is necessary to take certain lands hereinafter fully described. Said switch or track is to be constructed for the purpose of transporting freights to and from said steel works over your petitioner's said railroad."

The description of the first lot sought to be taken is as follows: "Beginning at a point in the southern line of a street parallel to, and 276½ feet distant northerly from, the Benwood Nail Factory—said point being 125 feet westwardly from the west line of Second Street, in said City of Benwood; running thence in a southerly direction, on a curved line to the left, having a radius of 350 ½ feet, parallel to, and eight feet distant eastwardly from, the center line of the side track leading from the main track of the Pittsburg, Wheeling & Kentucky Railroad into the Wheeling Steel Works, a distance of three feet; thence, on a reversed curved line to the right, having a radius of 368 ½ feet, still parallel and eight feet distant eastwardly from said side track, a distance of 233½ feet, to the said west line of Second Street; thence, by said line of said street, south, twenty degrees and forty-two minutes west, twenty-eight feet, to a line parallel to, and sixty feet distant northwesterly from, said Benwood Nail Factory; thence, by said line, north, sixty-nine degrees and eighteen minutes west, thirty-four

& R. L. 451; *Swan v. Williams*, 2 Mich. 427; *Tracy v. Elizabethtown, L. & B. S. R. Co.* 80 Ky. 239; *Moody v. Jacksonville, T. & K. W. R. Co.* 20 Fla. 597.

Ways which the public may use are sustained as constitutional. *Sherman v. Buick*, 33 Cal. 241; *Warren v. Bunnell*, 11 Vt. 603; *Re Kilbuck Private Road*, 77 Pa. 39; *Sadler v. Langham*, 34 Ala. 311; *Shaver v. Starrett*, 4 Ohio St. 494; *Mills, Em. Dom.* 98.

The taking of private property to construct a railroad is for a public necessity. *Secombe v. Milwaukee & St. P. R. Co.* 90 U. S. 33 Wall. 106 (23 L. ed. 67).

The circumstance that the railroad company uses its own cars exclusively is not material. *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 9; *Swan v. Williams*, 2 Mich. 427.

It does not signify that profit will accrue to private individuals, or that tolls are charged (*Concord R. Co. v. Greely*, 17 N. H. 47; *Galveston Wharf Co. v. Galveston*, 68 Tex. 14); or that the tolls are collected for its own exclusive use. *Swan v. Williams*, 2 Mich. 427; *Bonaparte v. Camden & A. R. Co.* Baldw. 205; *Mills, Em. Dom.* 100.

#### Use of streets in cities and towns.

Lands devoted to one public use under the power of eminent domain, cannot be taken for another use, without special authority. *Baltimore & O. & C. R. Co. v. North*, 1 West. Rep. 469, 103 Ind. 486; *Indianapolis & C. Gravel Road Co. v. State*, 2 West. Rep. 631, 105 Ind. 87; *Glasgow v. St. Louis*, 4 West. Rep. 575, 87 Mo. 678; in *Dis. Op. Julia Bldg. Assn. v. Bell Teleph. Co.* 5 West. Rep. 365, 89 Mo. 258.

A city cannot confer a right to the use of its streets upon a railroad company without compensating the owners of the fee for the additional burden imposed on the land (*Olney v. Wharf*, 2 West. Rep. 841, 115 Ill. 519); otherwise if the fee of the street is in the city. *Id.*

A municipal corporation takes the title to streets 2 L. R. A.

dedicated to it by the owner, in trust. It cannot, nor can the State, appropriate the street to the laying of a railroad track. *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 273 (19 L. ed. 74).

A city cannot, by virtue merely of the right to lay out, open and alter, repair and amend streets, grant the right to an association, for a term of years, to construct a railway in one of its streets for private gain. *People's Pass. R. Co. v. Memphis City R. Co.* 77 U. S. 10 Wall. 38 (19 L. ed. 844).

In Iowa, although no permanent obstruction, like a depot building, can be erected on the streets of a town, they may be occupied by railway tracks without the consent of an adjacent proprietor, and without compensation. *Barney v. Keokuk*, 34 U. S. 324 (24 L. ed. 224).

The Baltimore & Potomac Railroad Company, being a corporation of Maryland authorized by Act of Congress to extend its road into the District of Columbia, has no power to use the streets of Washington, except such as are expressly designated by Congress for that purpose. *Edmonds v. Baltimore & P. R. Co.* 114 U. S. 453 (29 L. ed. 216).

#### Title to property taken for public use.

The ownership of the property taken may be vested in a private corporation; but upon no other ground than that the purpose is public can the exercise of the power of eminent domain in behalf of such corporations be supported. *Varner v. Martin*, 21 W. Va. 534; *Pine Grove v. Talcott*, 86 U. S. 19 Wall. 666 (23 L. ed. 227); *Secombe v. Milwaukee & St. P. R. Co.* 90 U. S. 33 Wall. 106 (23 L. ed. 67); *Weir v. St. Paul, S. & T. F. R. Co.* 18 Minn. 155; *Concord R. Co. v. Greely*, 17 N. H. 47; *Brown v. Beatty*, 34 Miss. 227; *Swan v. Williams*, 2 Mich. 427; *Stewart v. Polk Co.* 30 Iowa, 9.

When the title acquired may be freed from the use, it cannot be obtained by the exercise of the right of eminent domain. *Oregon R. & Nav. Co. v. Oregon Real Estate Co.* 10 Oregon. 444.

feet; thence, on a curved line to the left, having a radius of  $326 \frac{1}{2}$  feet, parallel to, and thirty-two feet distant westwardly from, the said side track, a distance of  $224 \frac{1}{2}$  feet; thence, on a reversed curved line to the right, having a radius of  $390 \frac{1}{2}$  feet, a distance of fifty-two and two-tenths feet to the southern line of the first-mentioned street; thence, by said line of said street, south, sixty-nine degrees and eighteen minutes east, sixty-two and one half feet, to the place of beginning—containing an area of twenty-four one hundredths of an acre, more or less." The second parcel is also described in like manner, and contains an area of  $\frac{1}{100}$  of an acre. A plat is exhibited with the petition, which shows the exact location of the land sought to be taken, and is made a part of the petition.

The petition shows that the whole of the first parcel of land is owned by the Benwood Iron Works, a corporation under the laws of West Virginia, and engaged in the manufacture of iron and nails; that there are no liens on said parcels of real estate, and no buildings or other improvements thereon, and lying open and unused; that it is unable to agree with said Benwood Iron Works in relation to the price of said parcel of land, the said company refusing to sell it for any price; and that said parcel of land is necessary for the construction of petitioner's said track.

The petitioner avers that the second parcel of land is partially claimed by different persons. The north sixty feet is claimed by Mrs. Hannah McMechen, H. B. McMechen, and Eliza McMechen Mayes, as the devisees in fee of the late Hiram McMechen, while at the same time the Benwood Iron Works claims to be the owner thereof in fee, and the City of Benwood claims that it constitutes a part of one of the public streets of the city; that the remainder of said parcel of land is claimed in fee by the Benwood Iron Works. Notice was served on the parties, and the petitioner prayed the court to appoint commissioners to ascertain what will be a just compensation to the parties owning said parcels of land sought to be taken, etc.

The plat shows that to go to said steel works two streets of the City of Benwood would have to be crossed, and that it would diagonally cut the vacant lot, and passing along Second Street, and partly on the land of the Benwood Iron Works, and between the iron works, terminate at the steel works. When the petition was presented the City of Benwood appeared and objected to the filing of the petition; but the court overruled the objection, and permitted the same to be filed. On the 7th of April, 1887, on demurrer to said petition, the court held "that the use set forth in the petition to which the track of the railroad is to be put, for which the lands are sought to be condemned, are not public uses, and the prayer of the petitioner should be denied." Whereupon the petitioner asked leave to amend its petition, to which the Benwood Iron Works and the City of Benwood objected, but the objections were overruled, and the leave was granted. On the 29th day of June, 1887, the petitioner tendered its amended petition in pursuance of the leave granted by the court.

The City of Benwood and the Benwood Iron

Works filed their objections in writing to the filing of said amended petition, and the City of Benwood filed its demurrer in writing to said petition, and said objections and demurrer were argued, and taken under consideration by the court, and the court overruled the objections and the demurrer, and permitted the petition to be filed, and notice was ordered to be given the defendants who had not appeared. The description of the property in the amended petition, and the lines of the side track, are substantially the same as set out in the original petition, and is accompanied with the same plat. The only material difference in the two petitions is the declaration of the purpose for which said side track, called in the amended petition a "branch railroad and lateral work," is to be used.

In the amended petition it is alleged "that the railroad so constructed is now owned by your petitioner, and is used and operated for the transportation of passengers and freight, under and in accordance with the laws of the State of West Virginia, and for all the public uses imposed upon railroads by such laws. Your petitioner now desires and intends, in accordance with law, and in the exercise of the further authority conferred upon it by its charter and the laws of this State, to build and construct a branch railroad and lateral work, not exceeding two miles in length, from a point on its main line, in the City of Benwood, and some distance north of the nail factory of the Benwood Iron Works, to a point opposite and west of the southern end of the steel mill of the Wheeling Steel Works, also in the City of Benwood. The branch railroad and lateral work so to be constructed by your petitioner is to be a public highway, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law, and is to be for public use."

The City of Benwood answered, to which answer the petitioner objected, and denied the right of the petitioner to condemn its street, or a part thereof, to build a switch to the works of a private corporation. It then sets out the streets that would be invaded, and shows what inconvenience would result to the city; that Second Street is now partially obstructed by a railroad track constructed to the Wheeling Steel Works from the track of the Ohio River Railroad, over which road the petitioner has the right to pass, and does pass to and take and unload freight at the Wheeling Steel Works; that the further obstruction of the street, as proposed, would render it valueless and impassable as a public highway for the city, which is necessary and indispensable.

The objections of the Benwood Iron Works to the filing of the amended petitions are, in substance, that it is insufficient in law, and does not show that the lands sought to be taken are to be condemned for a public use, within the meaning of the Constitution of this State; because the uses for which the said lands are sought to be taken, as stated in the original petition, did not constitute a public use, and the amended petition only sets forth in more general language the uses for which the lands are sought to be taken, and does not use any language which is inconsistent with the proposed railroad being used sole-

ly for the uses set out in the original petition; the amended petition, including its exhibits, is inconsistent with itself, etc.

The Benwood Iron Works filed its answer, to which the petitioner objected. The answer alleges that it was applied to a short time before July, 1886, by C. D. Hubbard, president of the petitioner, to ascertain on what terms it would sell to the railroad company the right of way through its grounds; that the matter was laid before the board of directors of the Benwood Iron Works, and the board refused to sell at any price, because it had been for a long time, and was, reserving said ground, for the purpose of erecting thereon a blast furnace. It avers that the Wheeling Steel Works induced the petitioner to ask to have the lands condemned; that since the filing of the original petition the Wheeling Steel Works has bought from the Benwood Iron Works the ground south of the main works, on which to stand and shift cars laden with freight consigned to or by that corporation; that the petition, though nominally that of the railroad company, is really that of the steel works; that the purpose is revealed in the original petition as follows: "Said switch or track is to be constructed for the purpose of transporting freights to and from the said steel works;" that this is not a purpose useful to the public, but to the steel works; that it is still true, as stated in the original petition, that the Wheeling Steel Works has erected a steel plant or works in the City of Benwood, which lies next east of the Benwood Iron Works, while petitioner's main track lies west of the said Benwood Iron Works; said steel company produces large quantities of steel, and consumes large amounts of material; and said switch or track is to be constructed for the purpose of transporting freights to and from said steel works over petitioner's road. It denies that the switch, track, railroad and lateral work mentioned in the amended petition is to be a public highway, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law, and that it is for public use, etc.

On the 18th day of November, 1887, the parties came, etc.; "And the court, having maturely considered the answers heretofore tendered by the Benwood Iron Works and the City of Benwood to the amended petition herein, and having also considered the objections heretofore made by said answers, and argued by counsel; and the court, being of opinion that nothing alleged in said answers constitutes a bar to the appointment of commissioners, to ascertain a proper compensation for the land sought to be taken, except so much of the answer of the Benwood Iron Works as denies that the branch or lateral work mentioned in the amended petition is to be a public highway, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law, and that it is to be for public use, and also so much as avers that the said amended petition, though nominally that of the railroad company, is really that of the Wheeling Steel Works Company—doth overrule the objection to these parts of the answer of the Benwood Iron Works, and doth sustain all the other objections of the

petitioner; and the petitioner now replying generally to the averments of the answer of the Benwood Iron Works as to which the petitioner's objections were overruled, and issue being joined upon the matters alleged in the petition and so much of the answer as remains, it is ordered that testimony on that issue be taken by deposition," etc.

On the 11th day of February, 1888, the matter came on to be further heard "upon the issue joined on so much of the answer of the Benwood Iron Works as denies," etc., stating it; upon the depositions of the witnesses C. D. Hubbard, J. M. Bellville, Alonzo Loring and A. N. Wilson, with the exhibits therewith, and upon the original entries in the minute book of the board of directors of the Benwood Iron Works, copies whereof were filed with the depositions, etc.; and upon the Acts of the Legislature, to wit: the Act of incorporation, passed July 15, 1868, the Act of March 1, 1869, permitting the extension of the road, and the Act of February 16, 1871, changing the name of the corporation to what it now is; upon consideration of which the court found for the petitioner on the issues joined; and thereupon it was considered by the court that proper notice had been given, and that the said petitioner has lawful right in this proceeding to take, for the purposes stated in the amended petition, the several parcels of land in its said amended petition mentioned and described, and for such purposes to acquire title to said parcels upon just compensation; to which ruling and judgment of the court the defendant the Benwood Iron Works excepted, and tenders its bill of exceptions thereto, and asked that the same might be signed and sealed by the court, and made a part of the record therein, which was accordingly done. The court then proceeded to appoint the commissioners. To this order the Benwood Iron Works obtained a writ of error and *superseas*.

The main question to be decided is, Was the use for which the lands sought to be condemned were to be put, a public use? If not, then, of course, the lands could not be legally condemned, under the law of eminent domain. If the use were public, then it matters not if the Benwood Iron Works had for twenty years reserved its lot for the purpose of building a blast furnace thereon. It could be taken for public use, and the loss to it could be compensated in damages.

The question here is not one of compensation, but it is whether the petitioner had a right to take the property. It, of course, has no right to take private property for private use, but it has the right to take private property for public use on paying a just compensation therefor. The right to take, which depends upon whether it is to be taken for public or private use, is a judicial question, and the decision of the circuit court on that question is subject to review. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 812.

There were issues made in the case, and evidence taken thereon. One of these issues—whether the Wheeling Steel Works was not in fact the real party asking for the condemnation—was properly decided in the negative. I am unable to perceive the necessity of the issue as to whether the use to which the property

was to be devoted was public, as it seems to me that question might have been decided from the face of the petition, and the exhibits filed therewith.

Another issue was whether the road or switch was to be a public highway, and free to all persons for the transportation of their persons and property thereon. The evidence on this subject is short, and I will give the substance of it: The Wheeling Steel Works is a corporation whose stock is owned, and which was built, by three other corporations, to wit: the defendant the Benwood Iron Works, the Wheeling Iron & Nail Company, and the Belmont Nail Company. These three companies each furnished three directors to control the Wheeling Steel Works, as its board of directors. The steel works had had some trouble in making its shipments, but it is not shown that it induced the petitioner to institute condemnation proceedings.

C. D. Hubbard, who is the president of the petitioner, and interested in the Wheeling Iron & Nail Company, in his deposition was asked, after reading to him the purpose for which the condemnation was sought, as it appears in the original petition, "Are not these averments of the original petitioner true, and is not the purpose for which the switch or track is proposed to be constructed correctly set forth in the original petition?" He answered: "I think they are substantially true; we have no track of our own, and are subject to the courtesy of two different railroads to get there, and to pass over part of the Ohio River Railroad and part of the Baltimore & Ohio Railroad, and are liable at any time to be shut out by either railroad—that is, the Ohio River or the B. & O."

Q. How much of the Ohio River Road did you have to run over after leaving the southern end of the Pittsburg, Wheeling & Kentucky Railroad before your cars would strike the Wheeling Steel Works' track after it crossed the B. & O. Road?

A. I cannot say how much of the main line of the Ohio River R. R. we have to pass over, but sufficient to enable us to get on to the switch by which the Ohio River Road connects with the Baltimore & Ohio Railroad in order to make connection with the track of the Wheeling Steel Works.

Q. When you were asked whether the averments in the original petitions were true, and whether the purposes for which the switch or track proposed to be constructed over the ground the P., W. & Ky. R. R. seeks to condemn in these proceedings were correctly set forth, you said: "I think they are substantially true." I ask you to read question 29, now handed you, and state in what respect those averments are not literally true, as applied to the amended petition in these proceedings.

A. I would like to see the original petition.

It was handed to him, and he answered: "My answer referred mainly to the location of the track; and the closing part of the question, which sets forth the purposes of the track, escaped my attention. The purposes are largely to secure the business of the steel works. They would be open for the use of any other parties having anything to ship over it, and in that respect my answer was not entirely correct."

Q. What other parties can you suggest would

have use for shipping anything over the track laid on the ground now sought to be condemned, except those desiring to transport freight to and from the Wheeling Steel Works?

A. It could be used by any of the citizens of Benwood—the Benwood Iron Works, as the track would run between their two nail factories, and we have on the P., W. & Ky. Railroad no other track or siding at Benwood, on which to deliver or receive freight from the citizens of Benwood or others wanting to ship.

Q. Would your company have sought to condemn this ground, except for the purpose of transporting freights to and from the steel works?

A. I think not; it is just in this way: If the steel works hadn't been there, we should not have thought of building this road to it; just as the main line of the road would not have been built to Wheeling if there had been no Wheeling—the road being built in both cases to secure business.

Q. When you said that your road "is liable at any time to be shut out from either railroad," didn't you mean to be shut out from access to the Wheeling Steel Works?

A. Yes sir.

On cross examination this question was asked the witness: "Is this averment in the amended petition true: 'The branch railroad and lateral work to be constructed by your petitioner is to be a public highway, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law, and is to be for public use?'"

A. That is my understanding.

Being asked on the redirect, "Are the switches you have spoken of as fully a mile above Benwood, and close to Boggs' Run, within the corporation limits of the Town of Benwood?"

A. I think not.

Q. What complaints, if any, have you ever known of from the citizens of Benwood, about there being no convenient place to deliver freight on your road consigned to that town?

A. No special complaints have come to my knowledge.

J. M. Belleville, the agent of the Pittsburg, Wheeling & Kentucky Railroad at Wheeling, after testifying, on cross examination, as to the difficulty of his road getting freights to and from the Wheeling Steel Works, in answer to the question, "Of what use would your company's proposed lateral road be to the general business of the Town of Benwood?"—said: "It would enable the citizens there to load and unload cars of freight consigned to or coming from them."

Q. What reason is there to suppose it would be of use in that way?

A. We have several times had carload shipments to and from parties in Benwood other than the Wheeling Steel Works, and the Benwood Iron Works, and they could use such a track for that purpose. Our business in Benwood outside of the iron business has increased very much, and the citizens there are demanding better facilities.

Q. What facilities have you now for handling carload shipments in the general commercial business of Benwood?

A. We have none, except a siding on ground

belonging to the Benwood Iron Works, and cars for other parties can only be handled on that track, through courtesy.

Q. What effect has the want of such facilities had upon the business of your company in Benwood?

A. I think it has directed business to the B. & O. Road which we would otherwise have secured.

On the redirect:

Q. On Exhibit A, now shown you, is not the Benwood Iron Works' track you have spoken of indicated by the words, "Siding used by Benwood Iron Works" and by red lines?

A. Yes sir.

Q. Could not a track which would accommodate the carload trade with Benwood be put on the northerly side of that used by the Benwood Iron Works?

A. We could not put in any such siding, for the reason that we have no property at that point available.

Q. Suppose you had the property condemned, how would it be then?

A. I suppose it would be practicable. I am not enough of an engineer to say positively.

Q. Isn't it level ground there?

A. The ground is level from a point about sixty feet east of our present main track, and running eastwardly from that.

Alonzo Loring has been secretary of the Benwood Iron Works for over twenty-three years, and in his deposition says the Pittsburg, Wheeling & Kentucky Railroad Company have not to his knowledge had a freight agent at Benwood. The business of the Benwood Iron Works with that company is done in the Wheeling office.

Now, what does this evidence amount to? I think, after all has been said, it amounts to this, and nothing more: that the lands sought to be condemned, and the purpose for which they are to be used, if condemned, is to run a track or tracks over to connect with the steel works; said switch, branch road, or lateral work is to be constructed for the purpose of transporting freights to and from said steel works over petitioner's road. If this is a public use, then the lands should be taken; but, if not, they should not be taken for such purpose. It is insisted by counsel for defendants in error that such use is public, and he cites, to sustain the position, *Clarke v. Blackmar*, 47 N. Y. 150; *Dietrich v. Murdock*, 42 Mo. 284; *Lower v. Chicago, B. & Q. R. Co.* 59 Iowa, 563; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 186, 1 West. Rep. 670; *Trustvale v. Peoria Grapes Sugar Co.* 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60; *Hays v. Risher*, 32 Pa. 109; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 785; *New Central Coal Co. v. George's Creek Coal & Iron Co.* 37 Md. 562.

In *Clarke v. Blackmar* the court said: "The counsel for the appellant insists that the common council had no power to authorize the streets of the city to be crossed by a railroad track for the benefit of private property or its owners. Be that as it may, it is not this case. The case shows that a very considerable business as common carriers, for a great number of persons, is carried on over this road, both by the Grand Trunk and New York Central. . . . The track is not private, but must be re-

garded as a branch track of the New York Central and Grand Trunk; and the fact that the elevator, in the transaction of its extensive business, is greatly benefited, or that its owners contributed largely to the expense of laying the tracks, does not show it to be private." There is nothing in this case to show that the use was a merely private one.

In *Dietrich v. Murdock*, 42 Mo. 284, it was held that "Where the Legislature in the exercise of its discretion delegated to a railroad company the right of eminent domain, the courts ought not to interfere, except in those cases where it is manifest that private interests alone are to be promoted, and private rights violated, to the extent of taking the property of one individual, and transferring it to another. If by the terms of its charter it was made a public corporation for the use and benefit of that particular section of the State where it was located, and was obliged to furnish the means of transportation, both for passengers and freight commensurate with its wants, it must be assumed that the grant of authority to the company to condemn the land necessary for its roadbed was a rightful exercise of legislative discretion."

In *Lower v. Chicago Railroad Company* it appeared that the company proposed to build a lateral line fifteen miles long. There seemed to be no doubt in this case, and no question, that the use for which the land was sought to be condemned was a public use.

In *Chicago Dock & Canal Company v. Garrity*, 115 Ill. 186, 1 West. Rep. 670, bills were filed to enjoin the laying of railway tracks in Illinois Street, in the City of Chicago. Answers were filed, and the cause was referred to a master to take and report the evidence. The master reported the evidence, and the court enjoined the defendants as prayed. Appeals were prosecuted from these decrees to the Appellate Court for the First District, where they were affirmed. On appeal to the supreme court the decree was reversed. The court held that railroad tracks laid on the streets of a city, connected with existing railroads and extending to public ware houses, malt houses or manufacturing establishments, or to public wharves and landings, are in their nature public, and for the public good; and all railroad companies are required by law to permit such connections to be made with their tracks. Mr. Justice Scholfeld, in delivering the opinion of the court, said:

"It is not claimed that the use of the streets can be permanently granted for private purposes; and we recognize as unquestionable law that the use of the streets, whether for vehicles drawn by animals, for those riding upon animals, for footmen, or for the passage of railway cars, must be for the public; and that no corporation or individual can acquire an exclusive right to their use, or the use of any part of them, for private purposes. But we have held that there may be a grant to private individuals of the right to lay tracks in the streets connecting with public railway tracks previously laid, and extending to the manufacturing establishments of those laying the tracks; but in such cases the tracks so laid become in legal contemplation, to all intents and effects, tracks of the railway with which they are connected, and open to the public use, and



subject to the public control, in all respects as other railway tracks open to public use. We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite to, or within convenient contiguity of, a private manufacturing establishment, as materially affecting them, and giving a private character to their use. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are, they are tracks for public use. It may be in such cases that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturing establishment; yet if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question. *Truesdale v. Peoria Grapes Sugar Co.* 101 Ill. 561; *Mills v. Parlin*, 106 Ill. 60."

It is true, as stated in the brief of counsel for defendant in error, that "In Pennsylvania the Acts known as 'Lateral Railroad Acts,' which authorize the owners of mills and coal mines to condemn land necessary for the construction of lateral railroads from their mills or mines to a railroad or other line of public transportation, have always been held constitutional in Pennsylvania. This ruling was originally put by *Chief Justice Gibson* on the ground that the Constitution of Pennsylvania did not expressly forbid the taking of private property for private use."

*Gibson, Ch. J.*, in the first case that arose on the subject (*Harvey v. Thomas*, 10 Watts, 68), said:

"The most material point in the cause is that which involves the constitutionality of the statute on which the defendant's right is founded, but it is one about which little need be said. If there is an appearance of solidity in any part of the argument, it is that the Legislature have not power to authorize an application of another's property to a private purpose, even on compensation made, because there is no express constitutional affirmance of such a power. But who can point out an express constitutional disaffirmance of it? The clause by which it is declared that no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation made, is a disabling, not an enabling, one; and the right would have existed in full force with out it. Whether the power was only partially restrained for a reason similar to that which induced an ancient lawgiver to annex no penalty to parricide, or whether it was thought there would be no temptation to the act of taking the property of an individual for another's use, it seems clear that there is nothing in the Constitution to prevent it, and the practice of the Legislature has been in accordance with the principle of which the application of another's ground to the purpose of a private way is a pregnant proof. It is true that the title of the owner is not divested by it, but, in the language of the Constitution, the ground is nevertheless 'applied' to private use. It is also true that it has usually, perhaps always, been so applied on compensa-

tion made; but this has been done from a sense of justice, and not of constitutional obligation. But, as in the case of the statute for compromising the dispute with the Connecticut claimants, under which the property of one man was taken from him and given to another for the sake of peace, the end to be attained by this lateral railroad law, is the public prosperity. Pennsylvania has an incalculable interest in her coal mines, nor will it be alleged that the incorporation of railroad companies for the development of her resources in this or any other particular would not be a measure of public utility, and it surely will not be imagined that a privilege constitutionally given to an artificial person would be less constitutionally given to a natural one."

In that case it appears that on the 5th day of May, 1832, an Act of Assembly was passed authorizing the location and construction of lateral railroads connecting with the public improvements, and prescribing the mode of obtaining the same. In pursuance thereof the defendant, Freeman Thomas, petitioned the court of common pleas for the appointment of viewers to ascertain the amount of damage Jameson Harvey would sustain by reason of the railroad which he proposed to make through his land. He made the road, and the supreme court said he had a right to do so, although he thereby took private property for private use.

In *Hays v. Risher*, 32 Pa. 169, it was held that the Lateral Railroad Acts are constitutional. In that case Risher located a railroad, twenty feet wide from his "lands, mill, coal mines," etc., "lying within three miles of the Monongahela River, over the intervening lands of James H. Hays, to the Monongahela slack-water navigation." On writ of error, Woodward, J., for the court, said:

"The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for private use, and there was no occasion for *Judge Gibson's* remark in *Harvey v. Thomas*, 10 Watts, 68, that the Constitution does not forbid such taking. The private property is taken for public use—for clear and definite objects of a public nature, which are of sufficient importance to attract the sanction of the sovereign. That an individual expects to gain thereby and has private motives for risking the whole of the necessary investment, and acquires peculiar rights in the work, detracts not a whit from the public aspects of it . . . It was found, as her public improvements penetrated the interior, that many productive mines and manufactories situated near them were still separated by the land of an un-neighborly owner, which must be crossed or tonnage be lost to the public improvements. To compel such owners to admit a right of passage was not to take away from them a fair participation in the public improvements, and to compensate the owner for the land occupied was to do all they had a right to claim. They hold their land, as every man does, subject to the call of the government." *Harvey v. Lloyd*, 8 Pa. 331; *Shoenberger v. Mulhollan*, 8 Pa. 184.

In the case cited from 32 N. J. Eq. 765, *Dixon, J.*, said: "But it is insisted by the complainants that the road which the National Docks Railway Company intends to construct will be a private and not a public one; and to

establish this they adduce the purposes of the incorporators. But I think these purposes are foreign to the inquiry. The character of the road in this respect is dependent, not on the designs of its projectors, but on the terms of the law which governs it. Said Judge Baldwin, in *Bonaparte v. Camden Railroad Company*, Baldw. 205: "A road or canal constructed by the public or a corporation is a public highway for the public benefit, if the public have a right of passage thereon by paying a reasonable, stipulated, uniform toll." Tested by this criterion, and it is the true one, there can be no doubt that every railroad built by a corporation organized under our general law becomes *ipso facto* a public road."

In *New Central Coal Company v. George's Creek Coal & Iron Company*, 37 Md. 562, it appeared that, by the Act governing the case, it was declared that the three persons named therein, and such other persons as might be associated with them in the manner therein provided, should be and were thereby incorporated and made a body politic by the name and style, etc.; "And the said company shall have all the privileges and rights necessary for carrying on the mining of coal and ores, and the manufacture of iron and fire brick, and for transporting to market the produce of their mines, land and manufactories, and shall have power to lease or purchase lands, mines and furnaces with their appurtenances, and to hold all such property, personal, real and mixed, as they may require for the purposes aforesaid," etc.; and it was by statute also invested "with all and singular the rights, profits, powers, authorities, immunities and advantages for the surveying, locating and constructing a railroad with the necessary appurtenances, from their mines or works, to connect with any convenient point or points, with other existing railroads in Allegany County, or with the Chesapeake & Ohio Canal at Cumberland," in the same manner as has been given and delegated to the Baltimore & Ohio Railroad Company, which includes the full and ample power of condemnation for right of way. By the same section it is made the duty of the company to "carry all persons and property at the same rates of tolls and prices of transportation as the Baltimore & Ohio Railroad Company are or shall be by law allowed to charge and receive." On appeal, Alvey, J., for the court, said:

"Without the facility of transportation from the mines by railroads, there would be little or no inducement to the investment of capital, and but small progress could be made in developing the vast mineral wealth of the State, in which the public at large are interested. To furnish the requisite facilities for the construction of railroads for the successful operation of the mines is therefore in some sense a public necessity, and, that being so, the use of the ways for such roads may well be said to be public, and therefore the right of condemnation exists; that the right should be placed in the hands and under the control of a private corporation, detracts nothing from the public nature of the use."

In *Gete's Appeal* (Supreme Court of Pennsylvania), 3 Am. & Eng. R. Cas. 186, it was held that the grant to construct a railroad car-

ries with it, by necessary implication, the right to construct all works and appendages usual in the convenient operation of a railroad; that sidings are among such works. It was further held that the Philadelphia & Reading Railroad Company, by virtue of the General Railroad Law, is authorized to construct sidings leading to manufacturing or mining establishments held by private owners, and for this purpose may take, by virtue of the delegated power of eminent domain in it reposed, the interjacent lands belonging to other parties; that the right of running sidings to such private establishments, and of taking the necessary lands for the purpose, is clearly within the constitutional power of the Legislature to confer, because the public interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the State, and promoting the general wealth and prosperity of the community. Trunkay, J., dissented.

In *Reeves v. Wood County Treasurer*, 8 Ohio St. 383, it was held that "The Act of May 1, 1854, 'authorizing the trustees of townships to establish watercourses,' etc., and the Amendment Act of April 14, 1857, are in contravention of the nineteenth section of the Bill of Rights, inasmuch as they authorize an appropriation of private property without reference to the public welfare."

It has been held in New York that the use of lands for rural cemetery associations is private, not public; and that the provision of the New York Statute authorizing the taking of lands for purposes of such associations, by proceedings *in invitum*, is unconstitutional, and void, reversing the same case in 5 Hun. 483; *Re Deansville Cemetery Assn.* 66 N. Y. 569.

In *Gilmer v. Lime Point*, 18 Cal. 229, "public use" is defined to be "a use which concerns the whole community, as distinguished from a particular individual." But it is not necessary that each and every individual member of society should have the same degree of interest in this use, or be personally or directly affected by it, in order to make it public. If the use for which the property is taken be to satisfy a great public want, or public exigency, it is a public use in the meaning of the Constitution.

This court has said that to authorize the exercise of the right of eminent domain, the use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to another or to a corporation, to be used by such other or by such corporation as its private property, uncontrolled by law as to its use. Such supposed indirect advantage to the community is not, in contemplation of law, a public use. This use of the property, which in such case the public must have, must be a substantially beneficial use, which is obviously needful for the public to have, and which it could not do without, except by suffering great loss or inconvenience. *Varner v. Martin*, 21 W. Va. 534.

Section 44, chap. 63, Code 1868, authorized anyone owning timber or mineral land, and who deserves a subterranean or surface right of way by railroad or otherwise, under or through or over the land of another, for the purpose of mining for minerals, or conveying such timber or minerals to market, etc., to apply to the circuit court for condemnation proceedings. By the forty-fifth section, the report of the commissioner should not be confirmed, "unless from such report, and the evidence in the case, the court was of the opinion that the purpose for which the property was to be taken was of public utility," etc. Under this chapter the Valley Salt Company filed its application to have condemned a subterranean right of way for a railroad under the lands of Major Brown and others. The circuit court condemned the way, and the defendants obtained a writ of error. The judgment was reversed and the proceedings dismissed. Judge Paull, for the court, after reviewing the evidence, said:

"No sufficient public use is therefore made to appear to justify an interference with the rights of private property. To secure the possession and enjoyment of private property is one of the chief ends of all free governments, and hence the limitation found in our National and State Constitutions to secure this object; and the safeguard thus provided in the supreme law, may not be lightly or recklessly invaded." *Valley City Salt Co. v. Brown*, 7 W. Va. 191.

In the case *Re Niagara Falls Railroad Company*, 108 N. Y. 875, 11 Cent. Rep. 272, the Court of Appeals of New York held that a railroad which does not connect with a highway, which can only be reached by passing over state or private lands, which can have no habitations along, or any freight traffic over, the road, whose sole business is to convey sightseers along the Niagara River, and the season of whose operations is confined to four months in the year, is not such a railroad corporation as is contemplated by the General Railroad Act of 1850, and there is no such public use as to justify the exercise of eminent domain in its behalf. In its opinion the court quotes with approbation Cooley on Constitutional Limitations, 609:

"That can only be considered such (public use) when the Government is supplying its own needs, or is furnishing facilities for its citizens in regard to these matters of public necessity which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful and needful for the public to provide."

The court further says: "The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one, so as to justify condemnation proceedings."

In *Denver Coal Company v. Union Pacific Railroad Company*, 84 Fed. Rep. 886, 33 Am. & Eng. R. Cas. 104, note (decided March 26, 1888), it was held that "The Constitution of Colorado, art. 15, § 4, declaring all railroads to be public 2 L. R. A.

highways, does not prevent the raising of the question as to the character of a railroad in a proceeding by it to condemn land, article 2, § 15, providing that, 'Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.' The inquiry is not as to what the company was organized for, or whether it will be a private or public corporation, but what the road will be, the structure itself, if any such thing will be made.

The court further said: "It may be that this provision of the Constitution was inserted with a view to remove the presumption which is here referred to, or perhaps to allay all doubts which might arise at any time in respect to the question; but it is certainly true that this provision of the Constitution is only a declaration of the law as it stood at the time the Constitution was made." Hallett, J., refers in his opinion to a case I have not seen decided in his court (*McPhee v. Union Pac. R. Co.* not reported), in which it was held that a tract which the company proposed to lay down in a town was only a private road for serving certain warehouses, not of a public character, which would enable them to proceed in opposition to the demands of certain property holders in the neighborhood.

In *Chicago Railroad Company v. Wilts*, 4 West. Rep. 121, 116 Ill. 449 (decided by the Supreme Court of Illinois in 1886), it was held that where the track for which the appellant sought to condemn appellee's land was a branch road, intended for the private use of handling the freight of certain brick works, the condemnation of the property for such a use is unauthorized by law, and the proceedings should have been dismissed as soon as such purpose became apparent. Shope, J., for the court said:

"It is evident from the evidence in this case that the sole use and purpose of the proposed track was to reach the brick works, situated between a half and three quarters of a mile from appellant's railroad, and thereby create a feeder to its main line, and add to the volume of its freights. There is no pretense that there was any necessity for any increased facilities in the locality of the proposed track, except for the purpose of saving the hauling of brick from these brick works, and the increased traffic brought to appellant's main line by the building of this spur. True, the superintendent says this track could be used to store cars upon; but it is in the country, and there is no pretense that there is or will be any necessity for this, or that it will be convenient to store cars at this point, or that the track was intended for such use. Besides, the track is shown to be designed for use by running cars over it each day. Indeed, so patent is it from the record that the proposed track was a spur road, intended for the use indicated, that the only statement by appellant's counsel, in his brief, of the use for which appellee's land was to be appropriated, is as follows: 'The appellee being the owner of some land located between the railroad and the brick works, appellant filed his petition to condemn a strip thirty feet in width, across his land, in order to build a railroad track from its main

track to the brick works, as described' . . . If this was a side track, and was in some way necessary to, or aided in the convenient and successful operation of, appellant's railroad, the fact that it serves the private use mentioned would not, as said by the court in *South Chicago Railroad Company v. Dix*, 109 Ill. 237, make it any the less necessary as a side track; but there is no such pretense here, and the right to condemn appellee's land depends upon the right of appellant to build an independent branch road from its main line to the brick works, for the purpose of creating a feeder to its main line of road, or, as put by counsel, to move this vast volume of freight. In no just sense can this proposed line be said to be connected with or necessary to the building, operating, or running of appellant's railroad."

In *Getz's Appeal*, *supra*, Trunkey, J., in a vigorous dissenting opinion, said (8 Am. & Eng. R. Cas. 195): "No one denies that a railroad company may lay as many sidings and turnouts as are fairly requisite to accommodate its business, nor that the company is intrusted with the location of its road and branches, keeping within the limits of its charter. Locating its road between certain points, or locating a branch to a certain point for accommodation of the public, is altogether different from locating a branch or siding merely to accommodate a private person, natural or artificial, for private gain. Here is a naked fact of running a siding, as it is called, across the plaintiffs' lot, against their will, for private gain, to a rolling mill. This siding is not for public use. Its terminus is on private property. If the defendant may lawfully construct it, it may arbitrarily run its sidings to every private place it chooses, doing irreparable mischief to owners of property who are in the way. In Reading, the plaintiffs' dwelling and business are destroyed today in laying a siding to an iron mill; to-morrow another citizen may be ruined by a siding to an ice house; another, by one to a tannery; and so on indefinitely. Other companies have like powers as this defendant. In Philadelphia, dwellings may be demolished in running sidings to sugar refineries, shoe factories, shops and sales rooms, and other private places, at the arbitrary discretion of the several boards of directors. Outside of the cities, no man's farm will be secure from a siding to any stone quarry or other private place whose owner may be favored by the judgment of a board of directors. I am not convinced that it was the Legislature's intent to grant such rights, and do not believe they have been granted. But if within the words of the statutes or charters, it seems to me a gross violation of the citizen's right that his property should be violently taken for private use."

Thus we see the progress that has been made in Pennsylvania in favor of the extraordinary rights claimed by corporations and persons against the private right of the citizen. First the legislative grant was justified in *Harvey v. Thomas*, *supra*, on the ground that the Constitution did not forbid it; and since, on the ground that the use was public, although it is difficult to see where the general public could be interested. It would seem that the public would be quite as much interested in the issue of bonds to aid manufacturing companies; yet it is un-

formly held that a statute which authorizes a town to issue its bonds in aid of the manufacturing enterprises of individuals is void because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profits of others, and not for a public use, in the proper sense of that term. *Citizens Sav. & Loan Assn. v. Topeka*, 87 U. S. 20 Wall. 656 [22 L. ed. 455]; *Cole v. La Grange*, 118 U. S. 1 [28 L. ed. 806]; *Ohio Valley Iron-Works v. Moundsville*, 11 W. Va. 1.

The property of railroad corporations, in so far as concerns the ownership thereof, and the profit or gain to be made from their use, is to all intents and purposes private property, although applied to a use in which the public have an interest. *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 97 Ill. 506.

As far as the public is concerned, when what they need is for "public use," they have a right to invoke the exercise of eminent domain; but in so far as that which concerns them as to their private interests, their profits and gains, is concerned, they stand as individuals, or as merely private corporations, in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain.

Stripped of all the disguises thrown around the case of the petitioner, it is shown that its object is to condemn the land of the defendants for the purpose of enabling it to lay a siding, switch, branch road or lateral work from the main track to the Wheeling Steel Works, a few hundred feet distant, for the purpose, as stated in the original petition, "of transporting freights to and from said steel works over the petitioner's said railroad." This clearly was for the private accommodation of both the railroad and steel works, and to make the private business of both more profitable. This was not for a public, but was for a private, use; and the taking of the property, under these circumstances, would be the taking of private property for private use, which is clearly prohibited.

The learned counsel for defendant in error in his brief says: "No deadlier blow could be aimed at the industries of the State than that which this defendant asks the court to deal."

It seems to us, if railroad corporations were permitted, *ad libitum*, to do what this defendant in error asks to be done, "no deadlier blow could be dealt the private rights of the citizen." If the doctrine claimed by defendant in error should prevail, then corporations might go to any private place they chose, to rolling mills, ice houses, tanneries, sugar refineries, brick yards, grocery stores, etc., and in the country, to stone quarries, coal mines, stock farms, etc., and, if any private citizen dared to stand in the way, violently wrest his property from him for their mere private gain. In such a state of affairs the so called protection by the Constitution to the rights of private property, by the arbitrary ruling of the courts, would be rendered nugatory and void. The mere declaration in a petition that the property is to be appropriated to public use does not make it so; and evidence that the public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was private gain, and it was appar-

ent that the general public had no interest in it. We would do nothing to hinder the development of the State, nor to cripple railroad companies in assisting such development, but at the same time we must protect the property rights of the citizens. All that to which the corporations are entitled under a proper con-

struction of the law they will receive; but they must not, for their own gain and profit, be permitted to take private property for private use. *The judgment of the Circuit Court is reversed, and the petition dismissed.*

*Green, Snyder and Woods, JJ., concurred.*

## VIRGINIA SUPREME COURT OF APPEALS.

C. L. McCOULL, Jr., *Plff. in Err.*,

City of MANCHESTER.

(....Va.....)

1. A municipal corporation cannot abrogate or dispense with the duties and liabilities imposed upon it by its charter for the safety of the public in respect to the care of streets, by means of an ordinance.
2. A city ordinance permitting a person engaged in building, etc., to deposit materials upon the street for one half of its width is no defense to an action against the city for negligence in permitting obstructions to remain in the street without any light at night or other signal to give warning of them, in consequence of which a traveler sustained injuries.

(December 18, 1868.)

**ERROR**, brought by the plaintiff below, to review a judgment of the Corporation Court of the City of Manchester in favor of defendant below in an action for damages for injuries sustained by reason of an obstructed highway. *Reversed.*

The facts and questions raised are fully stated in the opinion.

*Mr. W. E. Meredith*, with *Messrs. Meredith & Cocke*, for plaintiff in error.

*Mr. W. I. Clopton* for defendant in error.

**Fauntleroy, J.**, delivered the opinion of the court:

The petition of C. L. McCoull, Jr., complains of a final judgment of the Corporation Court of the City of Manchester rendered in the case of C. L. McCoull, Jr., plaintiff, against the City of Manchester, defendant, on the 7th day of May, 1868.

It appears from the record that about 1 o'clock A. M. on the night of November 2, 1865, the plaintiff (said McCoull) was prudently riding his horse, in company with others, along the principal street of the City of Manchester, when his horse struck a large pile of sand in the roadway, fell, broke its neck, and badly bruised the said McCoull. It was so dark at the time that his friends and companions—who, hearing his exclamation when the disaster occurred, came to his assistance—were in danger of riding over him, and had to strike several matches before they could discover him.

**NOTE.**—*Permitting use of streets for building purposes.*

A municipal corporation may lawfully permit its streets to be temporarily used for building purposes. Such a corporation is not an insurer of the safety of its streets. *Warsaw v. Dunlap*, 9 West. Rep. 361, 118 Ind. 574.

2 L. R. A.

Neither the street lamp was lighted, nor was there any light or barrier or other danger signal before the pile of sand, which was thirty feet long, from thirteen to nineteen feet from the right-hand curbstone, and from three to four feet deep.

The plaintiff instituted this action of trespass on the case in the said Corporation Court of the City of Manchester, and filed his declaration, setting forth the aforementioned facts, reciting and charging the duty and legal obligation of the City of Manchester, under its charter, to keep in good and proper condition its public highways and streets, for the use and travel of persons driving and riding along and upon the same; and "*Whereas*, On a certain night, to wit: the night of the second day of November, 1865, there was, and had been for a long time previous thereto, in and partly across a certain street of said city called 'Hull Street,' at or near the south corner of Fourth Street, a pile of sand of a certain size, to wit: running from the sidewalk towards the middle of Hull Street nineteen feet, running north and south thirty-two feet, with a depth in the middle of about four feet, and which was a partial obstruction to driving or riding in or along the roadway of said street; and whereas, it was, and had been for a long time previous to the happening of the injuries hereinafter mentioned, the duty of the defendant [city] to have removed the said pile of sand, yet the said defendant, well knowing the premises, although in duty bound as aforesaid to keep said highway in safe condition and repair for the use of persons driving or riding upon and using the same, on a certain night, to wit: the night of the day and year aforesaid, did not remove the said pile of sand, but negligently and wrongfully allowed the same to remain in said Hull Street as aforesaid, whereby the plaintiff, then and there carefully riding a horse, unintentionally and unknowingly rode a certain horse, to wit: a bay mare, into and upon the said pile of sand, thereby causing the said mare to break or dislocate her neck, and thereby killing the said mare, and thereby injuring and straining the shoulder of said plaintiff, which so remained a long time, and thereby rendering the said plaintiff partially insensible—to wit: on the night of the second day of November, 1865—to the damage of the said plaintiff of \$500," etc.

To this declaration there was no demurrer or objection of any kind. The defendant pleaded "Not guilty," joined issue upon it, and put itself upon the country; whereupon a special jury was obtained to try the case, which, after hearing the evidence and instruction given by the court, rendered a verdict for the defendant; upon which verdict the court rendered its judgment.

ment, after overruling the motion of the plaintiff to set the verdict aside, and grant to him a new trial, on the ground that the verdict was contrary to the law and the evidence—to which action of the court the plaintiff excepted, as well as to the refusal of the court to give the instructions asked for by the plaintiff, and to the giving by the court of the instruction asked for by the defendant. The court certified the facts proved, as already set forth.

A witness (Cox) who was one of the company riding with the plaintiff at the time of the accident, testified on the trial that but for the exclamation of the plaintiff when his horse fell, and he, fearing that he would be trampled under the horse's feet in the darkness, called out, he, too (Cox), would have ridden into the sand pile, as his horse's hoofs were on the edge when he was warned.

Another witness, J. D. Mathews, who lived in Manchester, testified that on the night next after the accident, when there was the same absence of light, two wheels of his buggy struck the said sand pile, overturning the buggy, and throwing himself and his sister out.

Captain Lipescomb, a witness for the defense, testified that he was Chief of Police of the City of Manchester, and *ex officio* city engineer; that he knew of the pile of sand being in Hull Street a week or ten days before the killing of the plaintiff's horse, but did not think it necessary to report it, or take any extra precautions with regard to it; that the street lamp diagonally opposite the pile of sand had been lighted before the second of November until 12 o'clock at night, the city's regulations only requiring them to burn until that hour, but after the accident of plaintiff, and that of Mr. Mathews, he, of his own volition, had kept the lamp burning all night, until the completion of the work on Mr. Jones' house.

The plaintiff introduced on his part the Charter and Ordinances of the City of Manchester, particularly the seventh section of the Act of March 20, 1874, in reference to streets and alleys, which gives the City of Manchester power "to close or extend, widen or narrow, lay out, graduate, curb and pave, and otherwise improve, streets, sidewalks and public alleys in the city, and have them kept in good order, and properly lighted," etc.

The defendant introduced on its part the following ordinance of the City of Manchester, chap. 28, § 7: "A person engaged, or about to be engaged, in building, repairing, excavating or making any improvements on a house or lot on which materials are to be used, or from which they are to be removed, may deposit such materials in that part of the street or public alley opposite his premises, or so much of the carriage way as does not exceed one half of the width thereof, so that the use of the gutter be not thereby obstructed. The council may, on being satisfied of the necessity therefor, grant a special permit in writing, authorizing more of the street to be used than hereinbefore mentioned, or authorizing the deposit to commence earlier or continue longer than is hereinafter provided. But, except by such permission, the deposit shall not be made, in case of small repairs, more than one day, nor, in other cases, more than three days, before the work is commenced; and the remains shall be

cleanly removed, in a case of small repairs, by the end of the first day, and, in other cases, by the end of the third day, next after that on which the work is finished," etc.

It was further proven that the pile of sand was a part of the building material used in the construction of Mr. Jones' house, either by himself or his contractors, and that Mr. Jones owned the lot opposite the pile of sand, and abutting on the said Hull Street, at the point where said pile of sand was placed, and that the said Jones was at the time engaged in building a brick house on said lot, and that said sand was necessary for and used for the construction of said house, and that said pile of sand did not occupy more than half the width of the carriage way of the said street, and did not obstruct the use of the gutter of said street. It was further proven that the width of the carriage way of said street was forty feet, and of each sidewalk sixteen feet.

Upon this state of facts, as proven by the evidence adduced to the jury, the plaintiff asked the court to instruct the jury as follows: "That it is the duty of a municipal corporation to keep its streets free from obstructions, and that the passage of an ordinance does not relieve the city of liability for injuries resulting from the negligence of the city in failing to light said street so as to warn travelers of existing danger in the use of said way. A traveler is not required to walk his horse, but has a right to travel at such a rate as a man of ordinary prudence usually travels. In order to hold the city liable, it must have had notice, which is either express or implied. If the obstruction is on a frequented street of a town, and has been there ten days or two weeks, the jury may imply that the city had notice of the obstruction. If the jury believe from the evidence that one of the city officers, who is chief of police, had notice before the accident of the obstruction, that is express notice to the corporation. Even if there is an ordinance of the city allowing a builder to put sand in the street, yet if the jury believe from the evidence that it was necessary in such case to safe traveling that there should have been a city lamp lit at the corner of Fourth and Hull Streets to warn travelers of this existing danger, they are instructed that the failure of the city to have such light at the time plaintiff passed by is negligence. The court further charges the jury that the city was responsible and liable in damages to any individual who suffers any special damage, caused by the streets being left in an impassable condition, where, by ordinary prudence and caution, he could not foresee and avoid the injury occasioning him damage. When public streets in this city are left in an impassable or dangerous condition to the traveling public, and no means or precautions are taken to warn the public of the danger, or to prevent them from running upon it, unless the person sustaining the injury has notice of the danger and suffers in consequence of his own negligence, and from the want of ordinary caution and prudence, the city is liable for the damage sustained."

But the court refused to grant the aforesaid instructions, or any one of them; and, upon the motion of the defendant, in lieu thereof, instructed the jury "that if they believe from

the evidence that, in accordance with the following ordinance of the City of Manchester—seventh section of chapter 28, Revised Ordinances of the City: 'A person engaged, or about to be engaged, in building, repairing, excavating, or making any improvements on a house or lot on which materials are to be used, or from which they are to be removed, may deposit such materials in that part of the street or public alley opposite his premises, or so much of the carriage way as does not exceed one half of the width thereof, so that the use of the gutter be not thereby obstructed. The council may, on being satisfied of the necessity therefor, grant a special permit, in writing, authorizing more of the street to be used,' etc.—that the pile of sand in the declaration complained of, as the obstruction which caused the injury to the plaintiff in the declaration claimed, was placed in Hull Street by one A. C. Jones, or his contractors, and that he, the said Jones, was then and there engaged in building a house on his lot which abutted on the street at the point at which the injury occurred, and that the said sand was necessary and used for said building as building material, and that the said pile of sand did not occupy more than one half of the roadway, nor obstruct its street so that travelers could not pass, then the City of Manchester is not responsible for the injury, and the jury must find for the defendant."

There is no demurrer to the declaration in the record, and it states a case clearly within the rule laid down by this court in *Jones v. Old Dominion Cotton Mills*, 82 Va. 148, 10 Va. L. J. 474, in which Richardson, J., delivering the opinion of the court, says the declaration states "a cause of action so that it could be understood by the party who is to answer it, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment."

"It certainly does state and distinctly set forth when, where, in what manner, and under what circumstances—giving ample details—the plaintiff was injured by the default, negligence and improper conduct of the defendant's servant. This is all that seems necessary to fulfill the office of a declaration." *Baltimore & O. R. Co. v. Whittington*, 80 Gratt. 810.

The declaration in the case under review states the time when the accident occurred, and the manner and circumstances of its occurrence, and alleges that the defendant city negligently and wrongfully allowed the pile of sand to remain in the street. It says nothing about how, or by whom, or under what authority, it was put there; but charges that it was negligently and wrongfully permitted by the city to remain there. The proof was that it was allowed by the city, with the full knowledge of its chief of police, without lights

in the street lamps, and without barriers, or any kind of danger signals; and that by this default and negligence of the defendant city the plaintiff was injured, without fault or negligence on his part, by the falling and killing of his horse under him, and his own serious hurt, caused by a pile of sand thirty feet long, fifteen or more feet wide, and four feet deep, occupying one half of the main street, without lights, barriers, danger signals or anything to warn the traveling public, in a dark night, of the obstruction in the highway.

Upon the facts charged in the declaration, and certified by the court to have been proved in the cause, the instructions which were asked for by the plaintiff, and refused by the court, correctly expounded the law as to the legal duty of municipal corporations to keep their streets in a safe condition for the use of the public, and their liability in damages at the suit of an individual who sustains injury by reason of their neglect so to do, and the Corporation Court of the City of Manchester erred in refusing to give them to the jury. See *Noble v. Richmond*, 81 Gratt. 271; *Sawyer v. Corse*, 17 Gratt. 280; *Richmond v. Courtney*, 82 Gratt. 798; *Orme v. Richmond*, 79 Va. 86; *Gordon v. Richmond*, 2 S. E. Rep. 727.

The instruction which was asked for by the defendant city, and given by the court, is wholly erroneous. The defendant city pleaded its own ordinance, allowing building materials to be put in the streets, and setting forth that the pile of sand which had caused the injury was being used at the time by the contractor for building purposes; and the court instructed the jury that the existence of the ordinance was a complete and absolute defense to the city itself, and relieved it from all amenability to the law, which requires it to be its duty to keep its streets and highways in safe condition for the use of the public, and, where necessary (as in this case) to have a light or barrier, or other signal, to warn travelers of the temporary and necessary danger in the street.

The duties and liabilities imposed by its charter for the safety of the public cannot be abrogated or dispensed with by an ordinance of the city council; and reason and public policy supplement the law in holding the city responsible for the neglect or omission of due diligence in the discharge of their charter duties. The corporation court erred in overruling the motion to set the verdict of the jury aside, and to grant a new trial; and the judgment complained of is wholly erroneous, and must be reversed and annulled, the said verdict be set aside, and the case will be remanded to the Corporation Court of the City of Manchester for a new trial, with direction to give the instructions in the record asked for by the plaintiff, if the evidence shall be the same.

*Reversed.*



## KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE R. CO.,  
App't.,  
v.

Lou E. BALLARD.

[(.... Ky. ....)]

1. A woman carried by a railroad train beyond her station at which the railroad employes refused to put her off, and to whom they "were insulting either in words, tone or manner," may be allowed to recover punitive damages.
2. A judgment for \$3,005 damages in favor of a woman who was carried past her station on a railroad train, in consequence of which she was obliged to walk between one and two miles, carrying a large bundle and valise, and by the exertion and excitement thereby caused, was made sick for several days, and who was treated in an insulting manner by the railroad employes, will not be set aside as excessive, where substantially the same amount has been given on a former trial.

(January 22, 1889.)

**A**PPPEAL by defendant, from a judgment of the Marion County Circuit Court (W. E. Russell, J.), in favor of plaintiff in an action brought to recover damages for injuries resulting to her by being carried beyond a station to which she had purchased a ticket and being compelled to walk back. *Affirmed.*

The facts are fully stated in the opinion.

*Messrs. H. W. Bruce, William Lindsay and W. J. Lise* for appellant.

*Messrs. Rives & Spalding* for appellee.

**Bennett, J.**, delivered the opinion of the court:

The appellee, a young lady, was in February, 1882, teaching school at Loretto, Marion County, Ky. Her father lived between half a mile and a mile from a flag station on the appellant's road known as "Harper's Ferry." The appellee on Saturday evenings usually went to her father's home, and returned again on Monday morning to her school. She made her trips to and from Harper's Ferry station on the appellant's passenger train. Her father was in the habit of meeting her at Harper's Ferry, and taking her from that place to his home on horseback. She, Saturday evening, February 18, 1882, purchased a passenger ticket, which entitled her to travel on the appellant's train from Loretto to Harper's Ferry. She boarded the train at Loretto to make her trip to the latter place. She carried with her a bundle of considerable size, and a valise. The conductor, Sweeny, was in the habit of running said train on Saturday evenings, and had said train in charge that evening, and took up the appellee's ticket before the train reached Harper's Ferry.

The appellee swears that the train did not blow its whistle for Harper's Ferry, nor did it stop at that place. In this she is corroborated by several persons who were passengers on the train. Also her father says that he was on his way to Harper's Ferry for the purpose of taking the appellee home, but, as the train passed

the station without stopping, he concluded that the appellee was not on it, and he returned to his home without going to the station. The appellee says that she discovered that the train had passed the station; that she then called to the conductor, who was at the far end of the car, engaged in conversation with some one, several times before she got his attention; that he then came to her, and asked her at what place she wished to get off. She said at Harper's Ferry, to which point she had purchased her ticket. He said that the train had passed Harper's Ferry, and that he could not go back to it; but he would take her on to the next station. She declined to be taken on to the next station; but claimed that she should be put off at Harper's Ferry. He said if she would not go on she would have to get off the train and walk back. She said she could do so, but she would make him pay for it. He waived his hand towards the door as if to say go, and she went, carrying her bundle and valise, and he following to the door, and standing on the platform without offering to assist her; that she had to get off the train without any assistance whatever, that a brakeman was at hand, but offered her no assistance, but seemed to be enjoying the situation; that as she got on the ground from the coach steps, the lowest step being some three or four feet from the ground, the brakeman being right by her, grinned at her with a broad grin; that the conductor's tone of voice and manner towards her were insulting; that she got off the train about a mile from Harper's Ferry, and she had to walk back to it, and from thence home, carrying her bundle and valise; that from the place that she got off of the train to Harper's Ferry there was no pathway. The route was rough, muddy and uninhabited; that from the walk and excitement she was made sick—not, however, in bed all the time—for four days.

On the other hand the conductor swears that, owing to some casualty over which he had no control, the train was not stopped at the platform, but it was stopped within sixty or seventy yards after passing it; that he waited to see if anyone would get up as if to get off, but no one did. Then he called out, "All out for Harper's Ferry," and no one getting up as if to get off, he went on. He denied *in toto* the conduct attributed to him by the appellee. He says that she was put off not exceeding four or five hundred yards from Harper's Ferry. The brakeman sustains the conductor. He also says that he was not rude to the appellee but helped her off the train. The testimony of others is to the same purport. The father of the appellee swears that on the next morning the appellee showed him the place that she got off the train, and he stepped the distance to Harper's Ferry, and it was 1,975 yards.

It is manifest that the jury believed the appellee's entire story; therefore they awarded to her \$3,005 in damages. Theretofore there had been a trial of the case upon substantially the same evidence as was introduced on the trial of this case, which resulted in a verdict of \$3,000 for the appellee, which this court set aside on

account of an error in one instruction, which was as follows:

"If the jury believe from the evidence that the defendant's agents or employés, or any of them in charge of the defendant's train, carried the plaintiff beyond the station for which she had purchased a ticket, and refused to put her off at her station, and were indecorous or insulting, either in words, tone or manner, they should find for the plaintiff, and award her damages in their discretion, not exceeding \$5,000."

This court disapproved said instruction, upon the ground that it was improper to authorize the jury to find for the appellee on account of the indecorous conduct of the appellant's employés alone; but the remaining portion of the instruction was approved.

Instruction No. 1 in this case uses the language, "were insulting, either in words, tone or manner." The appellant objects to this instruction on account of the use of the word "tone." We cannot see the force of the objection as applied to a female passenger. The jury were told that if the appellant's employés "were insulting in tone" they should award damages; that is, if their voices were so accented, inflected or modulated as to express intentional insult, then the jury should find for the appellee. It was in the foregoing sense that the word "tone" was used, in which sense the word would be commonly understood by men of ordinary intelligence.

The appellant also objects to the latter part of the instruction, which reads: "They should find for the plaintiff, and award damages in their discretion, not exceeding in all \$5,000," etc. This part of the instruction is objected to because it authorizes punitive damages. It does authorize punitive damages, and the trial judge doubtless intended that it should authorize punitive damages. We think that, as an instruction on punitive damages, it was properly drawn. The remaining instructions given by the court draw a correct distinction between compensatory and punitive damages. Also the composition of compensatory damages was correctly defined in one of said instructions. Indeed, instruction No. 1 having correctly submitted the question of punitive damages to the jury, and one of the other instructions having correctly submitted the question of compensatory damages to the jury, it was unnecessary to give the remaining instructions.

The refusal to give instructions B, C and D, at the instance of the appellant, was not an error, because the jury were already fully and correctly instructed. This court held, when the case was here before, that the evidence in reference to the conduct of the brakeman was competent. See 3 S. W. 530. The jury having returned two verdicts for substantially the same amount, we will not reverse on account of its excessiveness.

*The judgment is affirmed.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

### SMETHURST

#### PROPRIETORS OF INDEPENDENT CONGREGATIONAL CHURCH.

(...Mass....)

**1. Where the wall of a building is on the line of the highway, and a portion of the roof projects over the highway, an injury resulting therefrom by the fall of snow is incidental to its construction and use; and an allegation that such injury is caused by negligence in the construction or management of the building is none the less true because the encroachment on the highway is wrongful.**

**2. The fall of ice and snow from a building upon a horse, causing him to start, whereby the driver, who was engaged in unloading, was thrown from the wagon and injured, is the direct, proximate cause of the injury, although the ice and snow did not hit the driver.**

**3. One who violates a duty owed to others, or commits a tortious or wrongfully negligent act, concur and it cannot be determined which contributed most largely, or whether without their concurrence the accident would have happened, a recovery cannot be had. Marble v. Worcester, 4 Gray, 306.**

#### NOTE.—Negligence defined.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The duty is dictated and measured by the exigencies of the occasion. *Baltimore & P. R. Co. v. Jones*, 95 U. S. 429 (24 L. ed. 506).

It is the duty of the owner of a building under his own control and in his own occupation, as between himself and the public, to keep it in such safe condition that travelers on the highway shall not suffer injury. *Gray v. Boston Gas Light Co.* 114 Mass. 149; *Kbron v. Brook*, 4 New Eng. Rep. 423, 144 Mass. 516; *Baltimore & O. R. Co. v. Rose*, 3 Cent. Rep. 724, 65 Md. 423.

When there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and as proximate to it. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 489 (24 L. ed. 256).

An intervening cause cannot affect the liability of a negligent party. *Harriman v. Pittsburgh etc. R. Co.* 9 West. Rep. 446, 447, 45 Ohio St. 11; *Gilliland v. Chicago & A. R. Co.* 2 West. Rep. 139, 19 Mo. App. 411.

#### Concurrent causes of injury.

The general rule is that where two or more causes

concur and it cannot be determined which contributed most largely, or whether without their concurrence the accident would have happened, a recovery cannot be had. *Marble v. Worcester*, 4 Gray, 306.

The original or wrongful or negligent act will not be regarded as the proximate cause where any new agency, not within the reasonable contemplation of the original wrongdoer, has intervened to bring about the injury. *Seale v. Gulf etc. R. Co.* 65 Tex. 274.

*The negligence must be the proximate cause of the injury.*

Negligence is not actionable unless it is the proximate cause of the injury complained of. *Mathiason v. Mayer*, 7 West. Rep. 740, 90 Mo. 585; *Pittsburgh, C. & St. L. R. Co. v. Conn.* 1 West. Rep. 904, 104 Ind. 64.

Whether as a cause of action or as a defense, it must be the proximate cause of the injury complained of; and when contributory negligence is set up as a defense, it is an admission of negligence on the part of the defendant himself. *Carter v. Chambers*, 79 Ala. 223.

The immediate and not the remote cause is to be considered. *W. Mahanoy Twp. v. Watson*, 3 Cent. Rep. 545, 118 Pa. 344, 19 W. N. C. 441.

Where a horse was frightened by a moving street

is liable not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to and in fact do result from his act.

4. **The rights of a traveler** are not lost by one who stops his wagon in a reasonable manner in the highway, for the purpose of unloading goods.
5. **The exclusion of a question** to a witness cannot be considered on appeal, unless the bill of exceptions shows what the answer would have been, or what it was offered to prove by him if he were allowed to answer.

(January 3, 1880.)

**ON** defendants' exceptions. *Overruled.*

Action for tort, for injuries received by plaintiff through his horse starting on being struck by snow falling from defendants' building while plaintiff was unloading his wagon in the street.

The case was tried in the Superior Court for Essex County, before Thompson, J., and a jury, and resulted in a verdict and judgment for plaintiff.

The questions presented and the facts connected therewith are stated in the opinion.

**Mr. W. H. Gove** for defendants.

**Mr. S. A. Fuller** for plaintiff.

**Devens, J.** delivered the opinion of the court:

It is the contention of the defendants that, as the declaration alleges negligence on the part of the defendants the plaintiff can maintain it only by showing a want of ordinary care in the construction or management of the building.

Where parties in the management of their own estate so use it that injury in the ordinary course of things may fairly be expected to result to others in the enjoyment of their own estates, or in the exercise of their own lawful rights, as such use is wrongful, if injury does thus result, it may properly be said to have occurred by their negligence. The instructions as given on this point were in the language used by this court in *Shipley v. Fifty Associates*, 106 Mass. 194.

car and runs away, and the driver is injured by a collision with a dangerous obstruction in the street, the obstruction is the proximate cause. *Campbell v. Stillwater*, 32 Minn. 308.

Where one walking on the street slipped on account of ice, and, falling, struck her head on a projecting cellar door, the alleged negligence in maintaining such door did not contribute to the injury. *Hunter v. Wanamaker* (Pa.), 2 Cent. Rep. 70.

Where a horse took fright at a hole in a culvert, and by the conduct of the horse the driver was thrown from the wagon into the ditch, the hole must be considered as the remote cause, its connection with the accident being casual and not causal. *Spaulding v. Winslow*, 74 Maine, 533; *O'Brien v. McGlinchy*, 68 Maine, 557.

So if the horse by fright becomes unmanageable and causes an upset, the horse should be regarded as the proximate cause. *Perkins v. Fayette*, 68 Maine 112; *Page v. Bucksport*, 64 Maine, 53; *Moulton v. Sanford*, 61 Maine, 127; *Titus v. Northbridge*, 97 Mass. 263; *Wright v. Templeton*, 132 Mass. 49; *Nichols v. Brunswick*, 3 Cliff. 81; *Kennedy v. N. Y.* 73 N. Y. 365; *Hey v. Phila.* 61 Pa. 50.

*Proximate cause; how determined.*

In determining what is proximity of cause, the true rule is that the injury must be the natural and probable consequence of the negligence. *W. Mahanoy Twp. v. Watson*, 8 Cent. Rep. 543, 116 Pa. 344, 19 2 L. R. A.

They deny to defendants the right to erect and maintain a building, even if of no unusual construction, so near the street that ice or snow will so fall from it in the ordinary course of things as to endanger travelers who are passing in the highway, or using the same rightfully for the purposes of travel.

*Shipley v. Fifty Associates*, like the case at Bar, was an action brought for negligence on the part of the defendants, in the use of their property. It is there said that the defendant "had no right so to construct his building that it would inevitably, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed."

The defendants urge that as in that case the building of the defendant did not encroach upon the highway, while in the case at Bar it is shown to have done so (the eaves projecting about two feet beyond the wall of the building and into the street), the injury to plaintiff did not result from their carelessness or negligence, but from the encroachment over the highway; and thus, even if defendants would be liable for a nuisance or in trespass, they are not in this action.

The wall of defendants' building was on the line of the highway, but the portion of the roof projecting over the highway was a part of the roof, as the building was constructed and maintained; and if injury resulted therefrom, it was incidental to the construction and use by defendants of their property. Nor was such use the less properly described as careless and negligent because it was also distinctly wrongful.

The second instruction requested by the defendants was a general statement taken from *McDonald v. Snelling*, 14 Allen, 290, the accuracy of which we have no occasion to question. If that given by the presiding judge instead of it was correct, adapted to the case, and all that the case required, the defendants can have no ground of objection because the words asked by them were not used.

The instruction as given was: "The striking of the horse by the snow, if it caused him to

*W. N. C. 441; Southside Pass. R. Co. v. Trich*, 10 Cent. Rep. 367, 117 Pa. 390, 20 W. N. C. 324.

It must be shown that such a direct relation between the act and the injury exists as it might have been anticipated would probably ensue, and such nearness in connection as to be the primary cause. *Gilliland v. Chicago & A. R. Co.* 3 West. Rep. 139, 19 Mo. App. 411.

If negligence be the proximate cause of the injury, it is of no consequence whether it be omission or commission. *Harriman v. Pittsburgh etc. R. Co.* 9 West. Rep. 444, 45 Ohio St. 11.

*Proximity of cause of injury a question for the jury.*

The question as to whether a given act of negligence was the proximate cause of the injury complained of, where the character of the facts is such that different conclusions may be drawn from them, is a question for the jury. *Weick v. Lander*, 75 Ill. 98; *Hill v. Winsor*, 118 Mass. 251; *Savage v. Chicago, M. & St. P. R. Co.* 31 Minn. 419; *Johnson v. Chicago, M. & St. P. R. Co.* Id. 57; *Lake v. Milliken*, 63 Maine, 240; *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 38; *Dunn v. Cass Ave. etc. R. Co.* 3 West. Rep. 424, 21 Mo. App. 188; *W. Mahanoy Twp. v. Watson*, *supra*. Yet it has been repeatedly held that where there are no disputed facts the court must determine it. *W. Mahanoy Twp. v. Watson*, 3 Cent. Rep. 243, 113 Pa. 574.

start, would be a direct proximate cause of the injury, although the ice and snow may not have hit the plaintiff." This instruction assumes that the fall of ice or snow upon the horse was found to have been due to the negligence of the defendants, as upon all parts of the case not especially made the subject of exception full and appropriate instructions were given.

It is well settled in this Commonwealth that one who violates a duty owed to others, or who commits a tortious or wrongfully negligent act, is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to, and in fact do, result from his act. *McDonald v. Snelling*, *supra*; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277; *Derry v. Flitner*, 118 Mass. 181; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64.

That a horse struck by falling ice or snow would start, and would thus be liable to injure a person standing near or upon the wagon, and who was engaged in loading or unloading, is so entirely according to the natural and usual sequence of events that it cannot have been necessary to submit the question whether one occurrence might probably be expected to follow the other.

The defendants further contend that the plaintiff was not using the street as a traveler, and therefore had not the rights which a traveler or an adjoining proprietor might have to be protected from the effects of a fall of snow. The plaintiff at the time of the accident was engaged in unloading, from his team, goods which were to be deposited in the basement of defendants' building. The exact position of plaintiff's team was in dispute.

The presiding judge declined to instruct the jury that plaintiff was not a traveler, and instructed the jury that the plaintiff had the right to use the way for the transportation of goods in a proper manner, not unreasonably obstructing or interfering with others, adding:

"He has a right to stop in the road for the purpose of getting out or getting in, or of unloading a team in a reasonable manner; and what is a reasonable manner is a question for the jury to pass upon, under all the circumstances of the case."

Under this instruction the jury must have found that he was unloading his team in a reasonable and proper manner when the accident occurred. A traveler lawfully using the way has the same rights to enjoy such use undisturbed as if he were the owner in fee simple. *Shipley v. Fifty Associates*, 101 Mass. 251.

In order to be a traveler, it is not necessary that one should be constantly moving, if he is a pedestrian, or that the vehicle he drives, or that in which he is conveying goods, if he is using one, shall be continuously in motion. It would certainly be impossible to use the highways conveniently for the ordinary purposes of business or social life, with teams or lighter carriages, if occasional stops were not permitted to enable those using them to load and unload teams, to receive and deliver goods, to enter shops and stores, and to make brief calls of business, or even of a social character. During

these stops, if reasonable in duration, one should not lose his rights as a traveler, and the protection thus afforded to his person or property. *O' Linda v. Lothrop*, 21 Pick. 292; *Judd v. Fargo*, 107 Mass. 264.

In regard to the exclusion of the question to the witness Pinnock, it is sufficient to say that it does not appear by the bill of exceptions what his answer would have been, or what the defendant offered to prove by him if he were allowed to answer. It has been often decided in such cases that the bill of exceptions must contain enough to show that the excepting party has been actually injured. *Warren v. Spencer Water Co.* 8 New Eng. Rep. 502, 148 Mass. 155-164.

*Exceptions overruled.*

D. W. STARRATT *et al.*  
v.

James F. MULLEN.

(...Mass....)

1. If one furnishes goods upon an executed consideration he cannot maintain an action to recover for their price although the original agreement was void under the Statute of Frauds.
2. The defenses of payment in advance need not be pleaded and proved as payment, but may be raised by the general issue.
3. Although proof of delivery of goods to a person in compliance with his request makes out a *prima facie* case of liability to pay for them, yet this is only a probability; and if it is shaken, the seller must show that language or circumstances import an assumption of liability by him to pay money.

(February 28, 1889.)

ON plaintiffs' exceptions. *Overruled.*

This was an action on contract, on an account annexed, for clothes made, sold and delivered, work done and money lent. The defendant admitted that all of the items sued for, except two items, were furnished and delivered by the plaintiffs to him, but contended, and offered evidence tending to show, that he lent to the plaintiffs \$4,000, for which the plaintiffs gave him their promissory notes, nothing being said in said notes about interest, running on an average of four months, and that when he lent the money to the plaintiffs the plaintiffs orally agreed that for the use of said money they would pay the defendant the sum of \$20 per week and furnish him with his clothes.

The plaintiffs asked the court (Lathrop, J.) to rule that the agreement would be void, not being in writing, and also that the defendant having relied upon this agreement the burden of proof was upon him to prove it; which rulings the court refused to give, and ruled that the burden of proof was upon the plaintiffs to show that the money sued for was lent, and the goods sued for were sold by the plaintiffs to the defendant; to which refusals to rule and ruling the plaintiffs excepted. The jury found for the defendant, and plaintiffs alleged exceptions.

*Messrs. John M. Way and E. M. Bigelow* for plaintiffs.

*Messrs. Thomas J. Gargan and Charles H. Sprague* for defendant.

Holmes, J., delivered the opinion of the court:

Whether the agreement set up by the defendant could have been enforced or not, the plaintiffs were at liberty to perform it if they saw fit; and if they furnished the clothes in pursuance of it, they could not recover in this action. *Martin v. Mandell*, 125 Mass. 563.

The contract is not relied on as an executory or binding undertaking, but simply to show that the plaintiffs delivered the clothes upon an executed consideration; in which case, as in that of a gift, they did not deliver them for pay to be received thereafter.

The ruling as to the burden of proof was correct. *Phipps v. Mahon*, 141 Mass. 471, 2 New Eng. Rep. 81.

We shall not repeat the reasoning of that decision, with which we remain satisfied. But as it was questioned at the Bar, we shall add a few words to what was said then. Undoubtedly many matters which, if true, would show that the plaintiff never had a cause of action, or even that he never had a valid contract, must be pleaded and proved by the defendant; for instance, infancy, coverture or, probably, illegality; where the lines should be drawn, might differ, conceivably, in different jurisdictions. But in the narrowest view of what constitutes the plaintiff's case, if he declares on a special contract, he must prove its terms as alleged; and on the same principle, if he declares on the common counts, he must prove that the goods or services were furnished for a reward to be paid thereafter in money. "The plaintiff is bound to prove such a sale and delivery as will raise a debt payable on request." Parke, B., in *Cousins v. Paddon*, 2 Crompt. M. & R. 547; S. C. 5 Tyrwh. 535, 543.

Hence it was settled in England that even under the Hilary Rules, if the defense was that the goods, although delivered to the defendant at his request, were delivered as a gift, or under a contract to pay in beer, or upon a consideration previously executed by the defendant, the proper course was to plead the general issue; and that a special plea would be bad upon special demurrer. *Jones v. Manney*, 1 Mees. & W. 383; *Grounell v. Lamb*, 1 Mees. & W. 352; *Morgan v. Pebrer*, 3 Bing. N. C. 457, 466, 467; *Wilson v. Story*, 4 Jur. 463; *Collingbourne v. Mantell*, 5 Mees. & W. 289; *Gardner v. Alexander*, 8 Dowl. 146. See *Martin v. Mandell*, *supra*. So as to special contracts. *Brind v. Dale*, 2 Mees. & W. 775; *Kemble v. Mills*, 1 Man & Gr. 757, 770; *Nash v. Breese*, 13 L. J. N. E. Exch. 805.

The cases cited answer the argument that payment in advance would have to be pleaded and proved as payment. Payment in advance would mean that the goods were furnished upon an executed consideration in pursuance of an antecedent duty, and that there never was a debt due for them for a single instant. It has been held in England that even where the transaction was a cash sale, and the payment was made at the same moment that the goods were furnished, the proper plea in debt after the Hilary Rules was *nunquam indbitatus*. *Dusey v. Barnett*, 9 Mees. & W. 812; *Wood v. Blotcher*, 4 Week. Rep. 536; S. C. 27 L. T. 126; *Dicken v. Neale*, 1 Mees. & W. 556, 559. See 2 L. R. A.

*Com. v. Devlin*, 141 Mass. 423, 431, 2 New Eng. Rep. 101.

We do not refer to the foregoing cases as deciding the question of burden of proof; but the reasoning on which they proceed, coupled with the rule that the burden of proof never shifts, leads inevitably to the result reached in *Phipps v. Mahon*.

Proof of delivery of clothes by a tailor to the defendant at his request makes out a *prima facie* case, no doubt, because in the ordinary course of events a suit of clothes is followed by a bill. But this is only a probability, and if the probability is shaken, it is for the plaintiff to show that the language or the circumstances imported an assumption of liability by the defendant to pay money.

*Exceptions overruled.*

William O. DELANO, Admr.,

v.

Emma O. BRUERTON *et al.*

(.....Mass.....)

A grandchild whose father is dead and who has been adopted by his paternal grandfather under Public Statutes, chap. 149, cannot, if his grandfather dies intestate, inherit shares of his personality in a double capacity, as adopted son and as representative of his deceased father, but will take only one portion and that as adopted son.

(March 1, 1889.)

ON report. *Decree below reversed.*

This was an appeal from a decree of the probate court upon a petition by the administrator of the estate of the late Ivory G. Curtis for an order of distribution, by which decree a double share of an intestate estate was ordered to be distributed to a grandchild of the deceased, he being the only child of a deceased son and having also been adopted by the intestate and his wife after the decease of said son. Heard in the supreme judicial court before Field, J., and reserved for the full court.

The provisions of the statutes under which the claim was made, and necessary facts, appear in the opinion.

Messrs. Augustus Russ and D. A. Dorr for appellants.

Messrs. G. L. Huntress and Homer Albers for the administrator.

Morton, Ch. J., delivered the opinion of the court:

Ivory G. Curtis died intestate leaving as his heirs at law and distributees five daughters, and a grandson, Henry Curtis, the only child of a deceased son, Henry G. Curtis. In 1879, after the death of his son, Henry G. Curtis, the intestate, adopted his grandson, Henry Curtis, under the Statutes of 1876, chap. 218, re-enacted in Public Statutes, chap. 149.

The question in this case is as to the distribution of his personal estate. One third goes to his widow. Of the remaining two thirds it is claimed, on behalf of Henry Curtis, that he is entitled to one seventh part as an adopted

son and also one seventh part by right of representation of his father.

The statute provides that after the decree of adoption all the rights, duties, responsibilities and other legal consequences of the natural relation of child and parent, except as regards succession to property, shall exist between the child and the adopting parent, and shall, except as regards marriage, incest or cohabitation, terminate between the adopted person and his natural parents and kindred.

By the seventh section it is provided that "As to the succession to property a person adopted in accordance with the provisions of this chapter shall take the same share of property which the adopting parent could have devised by will that he would have taken if born to such parent in lawful wedlock; and he shall stand, in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if so born to him." Pub. Stat. chap. 148, §§ 6, 7.

The intent of the statute was to put an adopted child, for all legal purposes, with certain carefully defined exceptions, in the place of a natural child, and to give him the same rights. If the statute had stopped here it would seem clear that Henry Curtis would, in regard to the succession to the property of his adopted parent, stand as a son; and that his rights of succession as a grandson would be merged in his greater rights as a son.

But the statute contains a further provision at the close of the seventh section, that "No person shall, by being adopted, lose his right to inherit from his natural parents or kindred." Probably the Legislature contemplated, what is in fact true, that most of the children adopted would be infants incapable of protecting their rights and of appreciating the effect of the transaction; and it was just to provide that they should not, without their intelligent consent, be deprived of the right to inherit the property of their natural parents or kindred. As applied to most cases the provision is plain and in harmony with the other parts of the statute, and there is no difficulty in carrying into effect every part of it.

But when applied to the case before us, if it is to receive the construction claimed by the guardian of Henry Curtis, it becomes inconsistent with the main provisions of the statute. The same person cannot, as to the legal descendants of his adopting parent, stand in the same position as his son, and at the same time claim to inherit a portion of his property as his grandson.

It is to be continually borne in mind that we are not dealing with the question whether Henry Curtis can inherit as a son from his adopted parent, and at the same time inherit directly from his father. If his father left property he would have the right to inherit it. But the sole question is as to the right to inherit the property of his grandfather and adopting father in a double capacity—as his son and as his grandson. He claims the right to inherit under the first part of the section as his son, and under the last clause because he is included among "his kindred."

When the Legislature provided that no person should by being adopted lose his right to inherit from his natural parents or kindred, we 2 L. R. A.

do not think it understood or intended that "kindred" should include the adopting parent. It intended to save the right of inheritance from other parties, having already provided as to the right of inheritance from the adopting parent.

To bring this provision, when applied to a case like this, into harmony with the other parts of the statute and within its general spirit and scope, we are of opinion that it should be held to apply to the inheritance of the property of some third person, and not of property of the adopting parent.

There is no need of a saving provision to prevent injury to the adopted child in any case which is likely to happen of the adoption of a descendant, because the adopted child would almost invariably take more as an adopted son than he could by right of representation, or inheritance through his parents. We think the only exception is the one supposed by the counsel for the guardian, which is that a man who has had four children adopts his great grandson who by the intermarriage of cousins is the only issue of two of the children of the adopting parent. In that case he would take more as a great grandson by right of representation of his parents than he would as an adopted child of the intestate. But the case is so extremely unlikely to occur that it cannot have much weight in the interpretation of the statute.

We are therefore of opinion that Henry Curtis is entitled to take as an adopted son one sixth of the two thirds part of the estate which is to be distributed, and no more.

*Decree reversed.*

MANUFACTURERS NATIONAL BANK  
of Boston

v.

CONTINENTAL BANK of St. Louis, and  
Trustees.

(....Mass.....)

Where a national bank contracts to collect drafts and checks for another bank, under

*NOTE.—Bank collections; usages and customs.*

The deposit in one bank, of a bill to be collected in another, is a common usage; and the duty of the bank receiving such bill is precisely the same whoever may be the owner; and if unwilling to undertake the collection, the duty ought to be declined. *Bank of Washington v. Triplett*, 28 U. S. 1 Pet. 25 (7 L. ed. 37).

Proof of custom of banks to transmit checks drawn on other banks to those banks for collection will not justify a bank in sending a certified check for collection to the bank bound to pay such check. *Drovers Nat. Bank v. Anglo-American Packing & P. Co.* 4 West. Rep. 148, 117 Ill. 100.

*Collecting bank as agent of payee or holder.*

When an obligation is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment. *Ward v. Smith*, 74 U. S. 7 Wall. 447 (19 L. ed. 207); *Phila. Nat. Bank v. Dowd*, ante, 480 and note.

The bank is agent of the holder, and not of the drawer; and, consequently, it may so act as to discharge the drawer, without becoming liable to its principal. *Bank of Washington v. Triplett*, 28 U. S. 1 Pet. 25 (7 L. ed. 37).

But a bank is not the agent of the payee for the collection of bonds not deposited with it, although payable there. *Ward v. Smith*, 74 U. S. 7 Wall. 447 (19 L. ed. 207).

A collecting bank is the agent of the holder of

which contract it has the right to mingle the proceeds of collections with its own funds and make itself debtor for the amount, its insolvency will terminate such right and the proceeds of a check properly indorsed as for collection and sent by it to a third bank to be collected, which is not accomplished until after such insolvency, are the property of the principal bank and may be recovered by it in a suit against such third bank.

(February 23, 1899.)

**ON plaintiff's exceptions. Sustained.**

This was an action of contract to recover of the principal defendant, the Continental Bank of St. Louis, the amount collected by it on a check drawn by J. G. Brandt for \$1,900.66 on the German American Bank of St. Louis, Mo., payable to the order of Hathaway, Soule & Harrington and by them indorsed to plaintiff. The check had been sent by plaintiff to the Fidelity National Bank of Cincinnati, Ohio, for collection, and by it forwarded to defendant and collected by it. Defendant made no claim on its own behalf, to the funds, but

the note, and in no sense the agent of the maker. *Dodge v. Freedmans Sav. & Trust Co.* 98 U. S. 379 (23 L. ed. 320).

#### *Liable for its negligence in collecting.*

If a bank fail to demand payment of a bill held for collection, it makes the bill its own, and becomes liable for the amount. *Bank of Washington v. Triplett*, 26 U. S. 1 Pet. 25 (7 L. ed. 37); *Bird v. La. State Bank*, 93 U. S. 96 (23 L. ed. 518).

Where a bank to which a draft was sent for collection, located about three miles from the bank at which it was payable, received it on May 27, and mailed it to the latter bank, which received it on May 28, and suspended on May 29, it is guilty of negligence in not promptly presenting it; but the drawer, notified by the bank of its nonpayment, and paying the sum under protest, cannot subsequently recover such payment back. *Harvey v. Girard Nat. Bank*, 11 Cent. Rep. 675, 119 Pa. 212, 21 W. N. C. 523.

A bank holding a check for collection has no right, unless specially authorized to do so, to accept anything in lieu of money. *Pittsburgh Fifth Nat. Bank v. Ashworth*, 23 W. N. C. 33.

#### *Rights and liabilities as collecting agent.*

A collecting bank ordinarily becomes the owner of money collected by it for its correspondent, and consequently a debtor for the amount collected, under obligation to pay on demand, not the identical money received, but a sum equal in legal value. *Planters Bank v. Union Bank*, 38 U. S. 16 Wall. 433 (21 L. ed. 473).

Where the drawer of a check upon one bank in favor of another delivers the check to a person with oral instructions to deposit it to the drawer's credit in the bank in favor of which it is drawn, and that person deposits it there to its own credit, as trustee for the drawer, and afterwards draws the money, the bank is liable to the drawer of the check for the money so paid. *Sims v. U. S. Trust Co.* 5 Cent. Rep. 395, 103 N. Y. 473.

Deposits are the sums of money received by the banks from depositors; they are not capital stock. *Society for Savings v. Coite*, 73 U. S. 6 Wall. 594 (18 L. ed. 397).

#### *Liable for collections made by its agents.*

Where a bank, as a collection agent, receives a note for the purpose of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents, and not the subagents of the owner of the note. *Hoover v. Wise*, 91 U. S. 308 (23 L. ed. 322).

Where a bank accepts a draft for collection, without any special contract as to its liability, and transmits it for collection to an agent, who collects and fails to account for the proceeds, the bank is liable for the amount collected. *Power v. First Nat. Bank*, 6 Mont. 251.

9 L. R. A.

claimed that they belonged to the receiver of the Fidelity National Bank.

At the trial in the Suffolk County Superior Court (James M. Barker, J.), judgment was ordered for defendants, and plaintiff alleged exceptions.

Further facts appear in the opinion.

*Mr. Joshua D. Ball* for plaintiff.

*Mr. J. R. Bullard* for defendants.

**Knowlton, J.**, delivered the opinion of the court:

In the transaction upon which the plaintiff's claim is founded, the plaintiff and the Fidelity National Bank stood in the relation to each other of principal and agent. The business in which they were engaged was the collection of checks and drafts which belonged to the plaintiff or to the plaintiff's customers. Their contract contained in their letters shows: first, an offer to the plaintiff by the Fidelity National Bank of its "services for making collections in the West," and then a proposition to credit sight items at par, subject to payment, and to make collections, remitting weekly in New York ex-

#### *Collection through clearing house.*

Where a draft sent to a bank for collection was paid by the drawee by check, which the bank collected through the clearing house, and a memorandum was placed with the bank's cash to indicate that the proceeds of the draft was the property of the sender, and the next morning the bank was closed and the receiver credited such proceeds to the sender of the draft on the books of the bank, the sender can recover the same, as the fund was not so mingled that it could not be traced and identified. *First Nat. Bank v. Armstrong*, 38 Fed. Rep. 59.

#### *Collection impressed with a trust.*

A bank which receives for collection a draft or promissory note, and collects the money thereon, holds the same as trustee of the owner; and, in the event of insolvency, the trust character still adheres to the fund in the hands of the receiver, irrespective of other creditors, even though the owner had credit therefor in the bank books, and the money cannot be traced into any specific property. *Thompson v. Gloucester City Sav. Inst.* (N. J.) 6 Cent. Rep. 323. See *Phila. Nat. Bank v. Dowd*, ante, 460.

#### *Collecting bank cannot apply collection upon debts due from other banks.*

A bank receiving a note indorsed to it "for collection" cannot retain the proceeds to apply to a balance due from the bank sending it unless authorized by some course of dealing, or by some other matter outside of the indorsement. *Sweeney v. Easter*, 68 U. S. 1 Wall. 166 (17 L. ed. 631).

Where a bank indorses a draft for collection to another bank, which bank, in turn, indorses it also for collection to a third bank, and that bank collects it, it cannot apply the proceeds to a debt due it by the second or intermediate bank, that bank being insolvent, but the proceeds belong to the bank first making the indorsement, the restrictive indorsements giving notice of such ownership. *City Bank v. Weiss*, 67 Tex. 331.

#### *Cannot set off collection against amount due to it.*

Where plaintiff bank sent to another bank a draft indorsed "for collection," with instructions to "collect and credit proceeds," which bank sent the draft to defendant bank, and the latter collected it and credited the amount to the bank from which it received it; and such last named bank suspended business after receiving notice of the credit, the bank making the collection, not having remitted the proceeds to the suspending bank, and said draft being sent only for collection and the title thereto being in the suspending bank, was liable to the bank owning it for its amount; and said collecting bank could not set it off against the amount due it from such suspending bank. *Circleville First Nat. Bank v. Bank of Monroe*, 33 Fed. Rep. 403.



change, without charge. This proposition was accepted by the plaintiff, and the Fidelity National Bank thereby became the plaintiff's agent to collect for it commercial paper. Under this arrangement the credit given for a check was merely provisional until the check was paid. It did not create a debt from the Fidelity National Bank to the plaintiff, and it did not change the ownership of the check. *Levi v. Mo. Nat. Bank*, 5 Dill. 104; *Balbach v. Frelinghuysen*, 15 Fed. Rep. 875.

In that respect their relations to each other were very different from those between a banker and a depositor, when checks are received on deposit as cash, and an absolute right to draw against them is given. *White v. Miners Nat. Bank*, 102 U. S. 658 [26 L. ed. 250]; *Scott v. Ocean Bank*, 28 N. Y. 289; *Dickerson v. Wason*, 47 N. Y. 439; *Metropolitan Bank v. Loyd*, 90 N. Y. 550; *Ayres v. Farmers & M. Bank*, 79 Mo. 421.

Their dealings under the contract were in conformity to this construction of it. It was a custom of the Fidelity National Bank to charge back to the plaintiff, and to return to it by mail, checks and drafts which were not paid. The indorsement of the check which the defendant collected was "for collection for Manufacturers National Bank of Boston, Mass." This indorsement would give notice of the plaintiff's title, to all parties into whose hands the check might come. *Sweeney v. Easter*, 68 U. S. 1 Wall. 178 [17 L. ed. 688]; *Blaine v. Bourne*, 11 R. I. 119; *Cecil Bank v. Farmers Bank*, 22 Md. 148; *Merchants Nat. Bank v. Hanson*, 38 Minn. 40.

In one particular the contract in question differed from an ordinary contract for the collection of a principal's money by an agent. Upon the collection of a draft or check the Fidelity National Bank was not required to keep the proceeds by itself, as the plaintiff's property, but might mingle it with its own money and make itself the plaintiff's debtor for the amount received. As soon as the proceeds became a part of the funds of the Fidelity National Bank under this arrangement, the plaintiff's right to control it as specific property was gone, and the plaintiff had instead a right to recover a corresponding sum of money.

The Fidelity National Bank ceased to do

business on June 20, 1887, and on the following day a national bank examiner was put in charge of its assets by the comptroller of the currency, and he continued in charge until a receiver was appointed under the laws of the United States.

The check was not collected by the defendant until June 22, 1887. At that time the right of the Fidelity National Bank to mingle with its own funds the proceeds of a check collected for the plaintiff had terminated.

It was implied in the contract under which the collection was made that the Fidelity National Bank should continue in business as a national banking association. When it ceased to do banking business it lost the right to appropriate to itself the proceeds of the plaintiff's property, and to substitute for the money its own liability as for a debt. It had lost the power to perform its undertaking, and to make weekly remittances of the amounts collected; for its doors had been closed, and it was in the custody of the law. Since it could not make the remittances, it could not lawfully, under its contract, collect the plaintiff's check and take the proceeds as its own. *Cragie v. Hadley*, 99 N. Y. 138.

If a payment to the defendant as its agent and an entry of a credit by the defendant for the money would have passed the property to the Fidelity National Bank if it had then been regularly doing business, such a payment, made after it was insolvent and in charge of the comptroller, had no such effect. The implied condition in reference to which both parties contracted had ceased to exist. The continuance of the right of the bank to do business under the laws of the United States was of the very essence of the agreement which permitted it to receive the plaintiff's money as a credit to be accounted for. *Audenried v. Betteley*, 8 Allen, 302; *Story, Agency*, 486.

This has been expressly decided in the case of *First National Bank v. First National Bank*, 76 Ind. 561, which is very similar to the case at Bar.

We are of opinion that the check in the hands of the defendant was the plaintiff's property until it was paid, and that the proceeds of it did not pass to the Fidelity National Bank, and that the plaintiff is entitled to recover.

*Exceptions sustained.*

## MINNESOTA SUPREME COURT.

STATE, *ex rel.* E. E. DAVIDSON, *Rept.*,

v.

E. S. GORMAN, Judge of Probate, *Appt.*

(....Minn....)

\*The statute requiring, as a condition precedent to probate proceedings for the settlement of estates, the payment to the county treasurer of specified sums arbitrarily prescribed with reference to the value of the estate in question—*held*, unconstitutional, being contrary to those clauses requiring equality of taxation, and the dispensation of justice freely and without purchase.

(March 7, 1889.)

\*Head note by DICKINSON, J.

3 L. R. A.

APPEAL by defendant, from an order of the Ramsey County District Court granting a mandamus requiring the Judge of Probate to proceed to the settlement of a certain estate. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Moses E. Clapp, Atty-Gen., J. J. Egan and M. R. Tyler*, for appellant.

*Messrs. Williams & Goodenow* for respondent.

*Dickinson, J.*, delivered the opinion of the court:

The proceeding in which this appeal is taken was mandamus requiring the probate court to proceed to the settlement of the estate of Will-

late F. Davidson, deceased, that court having refused so to do until payment should be made to the county treasurer, as prescribed by statute, of the sum of \$5,000—the estate having been inventoried at more than \$500,000. The district court held this requirement of the statute to be unconstitutional.

The statute (chap. 7, Gen. Stat. 1878, §§ 5, 7, 8 and 9, as amended by chapter 103, Gen. Laws 1885) prescribes annual salaries as compensation for the services of judges of probate “in lieu of the fees, costs and perquisites” theretofore allowed by law. Section 8 as amended in 1885 declares that “For the purpose of reimbursing the county treasury for the salaries provided to be paid in this Act to the judge of probate, it shall be the duty of each executor, administrator or guardian to pay or cause to be paid to the county treasurer for the use and benefit of the county in whose probate court proceedings are to be instituted, to settle the estate of any deceased person, minor, spendthrift or insane person, the following sums according to the value of the estate and property of such deceased person, minor, spendthrift or insane person, shown by the inventory and appraised: that is to say”—then follows a statement of the amounts to be thus paid, which are:

\$ 10	where the inventory exceeds	\$ 2,000	and does not exceed	\$ 5,000
\$ 25	where it exceeds	\$ 5,000	" " " "	\$ 10,000
\$ 35	" " "	\$ 10,000	" " " "	\$ 15,000
\$ 50	" " "	\$ 15,000	" " " "	\$ 20,000
\$ 75	" " "	\$ 20,000	" " " "	\$ 35,000
\$ 100	" " "	\$ 35,000	" " " "	\$ 50,000
\$ 200	" " "	\$ 50,000	" " " "	\$ 75,000
\$ 300	" " "	\$ 75,000	" " " "	\$ 100,000
\$ 500	" " "	\$ 100,000	" " " "	\$ 150,000
\$ 800	" " "	\$ 150,000	" " " "	\$ 200,000
\$ 1,000	" " "	\$ 200,000	" " " "	\$ 500,000
\$ 5,000	" " "	\$ 500,000	" " " "	

And in addition such executor, administrator or guardian shall pay all sums necessarily expended in serving or publishing notices required by law.”

In section 9 it is declared that “No proceedings of any kind shall be had in any cause pending in such probate court for the settlement of any estate, subsequent to the return of the inventory showing the value of such estate, until” such payment shall have been made.

The two constitutional provisions claimed to stand in the way of such legislation are section 8 of article 1, which declares that every person “ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay, conformably to the laws,” and section 1 of article 9, providing that “All taxes to be raised in this State shall be as nearly equal as may be; and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the States.”

We have no doubt that it is in the power of the Legislature to require suitors and litigants to pay reasonable, legally prescribed fees or costs. The constitutional right to obtain justice freely and without purchase, which is as ancient as *Magna Charta*, has not been understood to be a right to have judicial proceedings carried on without expense to the parties.

*Adams v. Corriston*, 7 Minn. 456; *Willard v.*

*Redwood County*, 23 Minn. 61; *Perce v. Hallatt*, 18 R. I. 363; *Hewlett v. Nutt*, 79 N. O. 263; *Harrison v. Willis*, 7 Heisk. 85.

But the sums required by the Act to be paid into the county treasury must be required as taxes in the ordinary sense of that word and as it is used in the Constitution. They are not in any proper sense fees or costs assessed impartially or with regard to the expense occasioned or services performed. The amounts are regulated wholly, but arbitrarily, with regard to the value of the estate. They have no proximate relation to the amount of the compensation to be paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may become necessary in the proceedings. There is no necessary, natural or even probable correspondence between the sums to be paid (widely different in amounts with respect to estates of different values), and the nature of the proceedings, or the character or extent of the services, which may be required in the probate court.

It cannot be assumed upon any ground of probability that these proceedings or services will be different or greater in the case of an estate of the value of more than \$500,000 than in one of the value of from \$35,000 to \$50,000; yet in the former case \$5,000 must be paid; in

the latter, \$100.

The formerly existing law for the payment of fees for the services of the probate judge is superseded. The only compensation which the probate judge may now receive for the performance of his judicial duties is a salary, fixed in amount, and payable from the county treasury. That salary is in no manner dependent upon, or affected by, the amounts which may be paid into the county treasury under this law; and if such payments shall exceed the amount of the judge's salary, no reimbursement to the estate or persons making such payments is contemplated.

The money remains in the treasury, a part of the general county funds. The declared purpose of the statutory requirement here under consideration is “reimbursing the county treasury for the salaries provided to be paid in this Act to the judge of probate.” The purpose for which such payments are required is strictly public in its nature, being directly “for the use and benefits of the county,” as the law declares, and indirectly for the support of a court established by the Constitution, with exclusive original jurisdiction in certain matters of great and general public concern. Nor is it practically optional with executors or administrators, or those interested in the settlement of the estate of deceased persons, as to whether they will pay these exactions or not. If the

law is valid, payment is practically necessary in the great majority of cases; and the mode adopted by the statute of securing payment by making that a condition precedent to the exercise of the functions of the probate court is as really compulsory, and perhaps as effectual in general, as the means generally employed to enforce the payment of taxes.

It is thus apparent that these exactions are taxes in the general and in the precise meaning of that word; and if the constitutional rule of approximate equality has been disregarded the law cannot stand.

It seems hardly necessary to refer particularly to the schedule of values and of amounts required to be paid, to show that the law wholly fails, in apportioning the burden imposed, to regard the constitutional rule of equality measured with reference to the value of the property taxed. In the first place estates not exceeding \$3,000 in value are wholly exempt from any contribution. If estates are taxable in this manner at all such an exemption is contrary to the requirement of the Constitution. *LeDus v. Hastings* (Minn.) 88 N. W. Rep. 808.

Again; while the schedule of sums to be paid is arranged somewhat with regard to values, yet this is done arbitrarily and not upon any rule of percentage; and the burden is very unequally distributed, as measured by the standard of values. To illustrate: an estate of a little less than \$50,000 pays a tax of \$100 or

about one fifth of one per cent of the value. An estate ten times larger pays a tax fifty times larger (\$5,000) or about 1 per cent of the valuation. An estate of \$500,000 pays a tax of \$1,000, while an estate inventoried at \$500,001—\$1 in excess of the former—pays a tax of \$5,000.

While a large discretion must be allowed to the Legislature in devising schemes for taxation so as to secure equality as nearly as may be, it can hardly be doubted that in this case the constitutional requirement was not observed—very likely for the reason that it was not considered that these exactions were taxes within the meaning of the Constitution. We feel certain that they must be so regarded.

The same reason, for the conclusion that these exactions constitute an unconstitutional mode of taxation, lead also to the conclusion that the law is opposed to section 8, art. 1, of the Constitution. Suits in this (probate) court of exclusive jurisdiction should not be required to pay, as a condition to their suits being entertained, a tax measured by the value of their property, and without regard to the nature or extent of the judicial proceedings which may be invoked or become necessary. That would be contrary to that clause of the Constitution which guarantees justice "freely and without purchase; completely and without denial."

*Order affirmed.*

## TENNESSEE SUPREME COURT.

William PENNEGAR *et al.*, *Plffs. in Err.*,  
v.  
STATE OF TENNESSEE.

(....Lea....)

**Citizens of Tennessee prohibited by its laws from marrying** because of their adultery while one of them was married to another person, are not protected from a prosecution in

that State, for lewdness in living together as man and wife, by leaving the State temporarily for the manifest purpose of evading its laws and contracting a marriage in Alabama, where such marriages are not prohibited.

(January 29, 1890.)

**ERROR** to the De Kalb County Circuit Court (Smallman, J.), to review a judgment convicting defendants of lewdness. *Affirmed.*

**NOTE.—Divorce for adultery; guilty party prohibited to marry.**

In many of the States the guilty party after a divorce is excluded by statute from entering into a second marriage during the lifetime of the innocent party. 1 Bishop, Cr. L. 5th ed. §§ 200-306; Stewart, Mar. & Div. § 200; N. Y. Code Proc. § 1761.

The New York Code does not, however, prevent the divorced couple from remarrying; or the guilty party may be excluded from marrying for a specified time (La. Civ. Code 1875, § 137; Mass. Pub. Stat. 1882, p. 814, § 22; Mo. Rev. Stat. 1879, § 2182; Oreg. Laws 1872, § 499; or without the consent of the court (Ga. Laws 1878-1879; Md. R. C. 1878, art. 51, § 12; Mo. Rev. Stat. 1879, § 2182); or with the *particeps criminis*. Del. 1874, p. 477, 12; Bright, Dig. 1872, p. 512.

Such statutes are constitutional. Elliott v. Elliott, 38 Md. 357; Sparhawk v. Sparhawk, 114 Mass. 355.

But no court can impose a restriction on the marriage of a divorced party without statutory grant of power. Barber v. Barber, 16 Cal. 378.

*Prohibition regarded as a penalty.*

A statute providing in general terms that the guilty party shall not marry after divorce applies only to divorces granted within the State. Bullock v. Bullock, 122 Mass. 3, 4.

In most States such a prohibition is regarded as a penalty, and therefore is deemed to have no extra-territorial force. Van Voorhis v. Brintnall, 80 N. Y. 18, 28.

2 L. R. A.

In such States the incapacity to marry depends entirely on the prohibition; the marriage relation is wholly dissolved. People v. Hovey, 5 Barb. 117, 119; Moore v. Hegeman, 27 Hun. 68, 70; Dickson v. Dickson, 1 Yerg. 110, 114, 115; Fuller v. Fuller, 40 Ala. 301, 306; Stevenson v. Gray, 17 B. Mon. 193; Com. v. Lane, 113 Mass. 458; Putnam v. Putnam, 8 Pick. 433; West Cambridge v. Lexington, 1 Pick. 506; Thorp v. Thorp, 90 N. Y. 602, 17 Am. Law Rev. 166; Kerrison v. Kerrison, 8 Abb. N. C. 444; People v. Chase, 28 Hun. 310, 313; Re Webb, 1 Tuck. 372, 373; Van Storch v. Griffin, 71 Pa. 240, 244; Stewart, Mar. & Div. § 432.

In general where the prohibition has any effect, a marriage in disregard of it is a mere nullity, though it be contracted with the innocent party and former spouse. Cropsey v. Ogden, 11 N. Y. 228, 235; Moore v. Moore, 8 Abb. N. C. 171, 173.

*Instances.*

The wife of M., a resident of New York State, procured a divorce from him on account of his adultery; the judgment forbade him from marrying again. He thereafter went into the State of New Jersey, and there married during the life of his first wife, returning with his second wife to this State, and continuing to reside here. The Statute Law of New Jersey declares that "All marriages, where either of the parties shall have a former husband or wife living at the time of such marriage, shall be invalid . . . and the issue thereof shall be illegitimate." In an action to test the right of

The facts appear in the opinion.

*Measra. Webb, Corley & Moore*, for plaintiffs in error.

*Mr. G.W. Pickle, Atty-Gen.*, for the State.

*Folkes, J.*, delivered the opinion of the court:

The defendants were indicted for lewdness, tried and convicted, and have appealed in error to this court.

The record discloses the following facts: E. N. Haney was divorced from her husband, John Haney, by a decree of the Circuit Court of De Kalb County, upon the petition of the husband, charging her with adultery with William Penegar. The decree adjudges the charge fully proven, and the divorce was granted the husband solely upon such charge.

The divorced wife and the partner in her guilt, shortly after the divorce went to Jackson County, State of Alabama, where they were married to each other, and on the next day after their marriage returned to De Kalb County, in this State, the place of their former and present residence, where they have been living and cohabiting openly and publicly, as man and wife, all within twelve months before the indictment found in this case; the divorced husband, John Haney, still living.

Section 8382, Mill. & V. Code, enacts: "When a marriage is absolutely annulled, the parties shall, severally, be at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed, during the life of the former husband or wife."

The marriage, being prohibited by statute, is void, if solemnized in this State. 1 Bishop, Mar. & Div. §§ 46, 228; *Carter v. Montgomery*, 2 Tenn. Ch. 226; *Owen v. Brackett*, 7 Lea, 448.

In the last case cited this court held the woman not entitled to homestead where the marriage was had in this State in violation of the statute quoted above.

It is admitted that there is nothing in the laws of Alabama prohibiting the guilty divorced party from marrying the paramour.

The question, therefore, presented in this record is whether citizens of this State, prohibited by the statute referred to from marrying, can, by crossing over into a sister State, where such

marriages are not inhibited, claim the benefit of the marriage there contracted, when they return at once to this State, having left it for the manifest purpose of evading our statute.

The question is of first impression in this State, and one not free from difficulty, by reason of certain well established principles, universally recognized in the law of marriage, which apparently would sustain such marriage, chief of which is that which says: "A marriage, valid where solemnized, is valid everywhere."

Adjudged cases are to be found which, under the supposed application of this rule, have sustained marriages identical with the one at bar in all of its essential facts, while others of equal respectability have reached a different result—to some or both of which we will refer later on. Before doing so, let us see what are the general principles controlling in cases of this character.

Marriage is an institution recognized and governed to a large degree by international law, prevailing in all countries, and constituting an essential element in all earthly society. The well being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property alike demand that one State or Nation shall recognize the validity of marriage had in other States or Nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular State demands otherwise.

It may be said, therefore, to be a rule of universal recognition in all civilized countries that in general a marriage valid where celebrated is valid everywhere. We say "in general," because there are exceptions to the rule as well established as the rule itself.

These exceptions or modifications of the general rule may be classified as follows: *first*, marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; *second*, marriages which the local law making power has declared shall not be allowed any validity, either in express terms or by necessary implication.

To the first class belong those which involve polygamy and incest; and in the sense in which the term incest is used, are embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which

plaintiff, a son born of the second marriage, to inherit, as the lawful heir of M., it was held that at the time of the second marriage the latter had no former wife living, within the meaning of said statute; that the Laws of New York State and the provision of the judgment prohibiting marriage had no effect, and M. had a right to marry in another State whose laws did not prohibit a second marriage by one divorced; and that plaintiff was legitimate and so entitled to inherit. *Moore v. Hegeman*, 98 N. Y. 531.

As to whether after a judgment of divorce on the ground of the adultery of one of the parties, and the consequent prohibition against another marriage by the guilty party, a second marriage of the parties in this State will be valid, *quære*. *Moore v. Hegeman*, 98 N. Y. 531.

A divorce has been granted to the wife on the ground of the husband's adultery, and it was decreed that it should not be lawful for him to marry again until after her death.

He afterward and during her life married again in the State of Connecticut. *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505.

The marriage being valid by the Laws of Connecticut, a child born from such a marriage is legitimate and entitled to inherit. Followed by the case of *Thorp v. Thorp*, 90 N. Y. 632, where the 2 L. R. A.

same rule is upheld. See also *Cropley v. Orden*, 11 N. Y. 238; *Moore v. Hegeman*, 98 N. Y. 531.

#### *How regarded in other States.*

In Maryland and North Carolina it is held not to be a penalty, but a denial of relief and continuance of the incapacity to marry which arises from an existing marriage. *Elliott v. Elliott*, 38 Md. 363, 383; *Williams v. Oates*, 5 Ired. L. 535, 538; *Calloway v. Bryan*, 6 Jones, L. 570.

In these last States, therefore, the capacity to marry depending on domicile, the prohibition would have equal effect no matter where the party tried to marry, as long as such party retained his or her domicile. *Williams v. Oates*, 5 Ired. L. 535, 538.

#### *Cohabitation under invalid second marriage is criminal.*

Parties who cohabit under color of an invalid marriage are guilty of fornication, if such cohabitation is open and notorious. *Searls v. People*, 13 Ill. 598; *Hood v. State*, 56 Ind. 271; *Com. v. Catlin*, 1 Mass. 10; *Milford v. Worcester*, 7 Mass. 97; *State v. Miller*, 23 Minn. 383; *State v. Smith*, 28 Tex. 167; *Kinney v. Com.* 30 Gratt. 333.

This, however, is not a general rule but depends more or less on statutory provisions.

relates only to persons in direct line of consanguinity, and brothers and sisters.

The second class, *i. e.*, those prohibited in terms by the statute, presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: *first*, where the statutory prohibition relates to form, ceremony and qualification, it is held that compliance with the law of the place of marriage is sufficient; and its validity will be recognized, not only in other States generally, but in the State of the domicile of the parties, even where they have left their own State to marry elsewhere, for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced, of "valid where performed, valid everywhere."

To the *second* subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy, as affecting the morals or good order of society.

It is not always easy to determine what is a positive state policy. It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances or between certain parties, is indicative of a state policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead dower, and the rights of property, in the face of the conclusions of approved text writers, and the concurrence of the adjudications in numerous cases, relating not only to forms or ceremonies and qualifications of the parties, but also to prohibited degrees of relationship, not incestuous in the common opinion of Christian countries, and relating to marriages between persons of different race and color. Each State or Nation has ultimately to determine for itself what statutory prohibitions are by it intended to be imperative, as indicative of the decided policy of the State concerning the morals and good order of society, to that degree which will render it proper to disregard the *jus gentium* of "valid where solemnized, valid everywhere."

The Legislature has, beyond all possible question, the power to enact what marriages shall be void in its own State, notwithstanding their validity in the State where celebrated, whether contracted between parties who were in good faith domiciled in the State where the ceremony was performed, or between parties who left the State of domicile for the purpose of avoiding its statutes, when they come or return to the State; and some of the States have in terms legislated on the subject. Where, however, the Legislature, as in our own State, has not deemed it proper or necessary to provide in terms what shall be the fate of a marriage valid where performed, but has in the particular case contented itself with merely prohibiting such marriage, the duty is devolved upon the courts of determining, from such legislation as is before it, whether the marriage in the other State is valid or void when the parties come into this State.

If, as we have seen, the statutory inhibition

relates to matters of form or ceremony, and in some respects to qualification of the parties, the courts would hold such marriage valid here; but if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void here, as *contra bonos mores*.

Thus, in *State v. Bell*, 7 Baxt. 9, this court held that a marriage between a white person and a negro, valid in Mississippi, where celebrated, was void here, in a case where the parties were domiciled in Mississippi at the time of the marriage. This case is distinguishable from the case at Bar, not only by reason of the domicile in Mississippi, but also in that we have a highly penal statute on the subject of marriages between whites and blacks, passed in 1870, in amendment of the Act which prohibited such marriage theretofore, and by the very pronounced convictions of the people of this State as to the demoralization and debauchery involved in such alliances.

The decision in the above case is so manifestly in keeping with sound principles now well established that it need not be here fortified by citation of authority; but we pause to call attention to a case relied on by counsel for defendants, holding not only that such a marriage, solemnized in Rhode Island (where it was legal), between persons domiciled there, would be valid in Massachusetts, but that it was valid in the latter State where the parties had left Massachusetts and gone into Rhode Island for the express purpose of evading the Massachusetts law prohibiting such marriages, and returned to Massachusetts. *Medway v. Needham*, 16 Mass. 157.

This was certainly carrying the doctrine of "valid where performed, valid everywhere," to an extreme limit. The case has been much criticised—more so, indeed, than it deserves, as it seems to us; for while, to our mind, the result is startling, it is not out of harmony, in its argument, with the principles we have stated. The learned Judge delivering the opinion, in speaking of the exception to the general rule, says:

"Motives of policy may likewise be admitted into consideration of the extent to which this exception is to be allowed to operate. If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a State where they were held unlawful and void, in countries where they were not prohibited, and the parties return to live in defiance of the religion and laws of their own country. But it is not to be inferred from a toleration of marriages which are prohibited merely on account of political expediency, that others, which would tend to outrage the principles and feelings of all civilized Nations, would be countenanced."

So that the difference between this case and *State v. Bell*, 7 Baxt. 9, is a difference in the "motives of policy" and ideas of "political expediency." We do not think, therefore, that the case is open to the criticism passed upon it by the Lord Chancellor in *Brook v. Brook*, 9 H. L. Cas. 193, which case is itself, with equal propriety, criticised by Gray, *Ch. J.*, in *Com. v. Lane*, 118 Mass. 454, which contains a very able and elaborate review of the subject under consideration. Though unable to concur in some of

the argument, and especially with the dictum that "A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere, according to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, unless the Legislature has clearly enacted that such marriages out of the State shall have no validity here."

Of course we refer to so much of the above as we have italicized, for it is the purest dictum; it being a case where there was no proof of an intent to evade the laws of Massachusetts, as shown by the judge himself, who concludes his opinion as follows: "Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another State, according to its laws, at least without proof that the parties went into that State, and were married there, with the intent to evade the provisions of the statutes of this Commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment was in due form."

This case being an indictment for polygamy, where a wife, having obtained a divorce on account of the husband's adultery (in which case he was prohibited from marrying again without leave of the court), the husband married another woman in another State, without proof that the second wife ever resided in Massachusetts prior to her marriage, and without proof of a purposed evasion of Massachusetts law.

Recurring for a moment to *Medway v. Needham*, it may well be that, recognizing and applying the same general principles, the courts in different States may reach different results in the same class of cases, according as the general and fixed sentiment of the public in the respective States may differ in matters of public policy, and, if not, of "political expediency."

What might be deemed a mere regulation in one State might be regarded as a matter vitally affecting the morals and good order of society in another; so that what is pointed out as a reproach to the law by reason of the conflict in the reported cases from different States and Nations is in fact evidence of the universality of the general principles recognized as fundamental by all enlightened courts; the different results reached being due to the statutory enactments of the different States as construed by the courts thereof, which interpret the meaning, intent and scope of each particular statute on the subject of marriage in the light of the known policy of the State, deviating from the general principles of the international law of marriage only so far as they are constrained to do so by the terms of legislative enactment or by the manifest and distinctive policy of the State, as understood by the courts.

Now, believing, as we do, that the statute in question, which we are called upon to construe in the case at Bar, is expressive of a decided state policy not to permit the sensibilities of the innocent and injured husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, nor the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, even

under the guise of a subsequent marriage performed in another State for the purpose of avoiding our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto, as upon the inherent right of the rule itself.

After what has been already said in the earlier part of this opinion, it is doubtless unnecessary to say that in reaching the conclusion just announced we do not intend in the slightest degree to encroach upon the principle which recognizes as valid marriages had in other States, where the parties have gone to such other States for the purpose of avoiding our own laws in matters of form, ceremony or qualification merely; but, confining ourselves to the facts of this case, we hold that where citizens of this State withdraw temporarily to another State, and there marry, for the purpose and with the intent of avoiding the salutary statute in question, passed in pursuance of a determined policy of the State, in the interest of public morals, peace and good order of society, such parties, upon their return to this State, and cohabiting as man and wife, are liable to indictment in the courts of this State for lewdness.

The case of *Dickson v. Dickson*, 1 Yerg. 110, has no concern with the point adjudged in the case at Bar. That case merely decides that a person divorced in Kentucky for adultery, and not by the laws of that State permitted to marry again, might contract a valid marriage in this State prior to the Act of 1835, which for the first time prohibited such marriages; and, having come to this State in good faith, married, and continued to reside here up to the time of her husband's death, she was held entitled to dower. The only instruction to be drawn from this case is that, notwithstanding our statute, these parties might have contracted a marriage in Alabama, where there is no similar statute, had they removed there in good faith, which would be valid in that State.

*Putnam v. Putnam*, 8 Pick. 433, is a case deciding directly contrary to the conclusion we have reached, and the facts in that case were identical with this. It is extremely brief, is unsatisfactory to us from every point of view, and is predicated entirely upon the case of *Medway v. Needham*, 16 Mass. 157, decided ten years before, which the court said was "binding upon it and the community until the Legislature shall see fit to alter it." While speaking of *Medway v. Needham*, the opinion continues:

"The court were aware of all the objections to the doctrine in that case, and knew it to be *verata questio* among civilians; but they adopted the rule of the law of England on this subject, on the same ground it was adopted there, namely: the extreme danger and difficulty of vacating a marriage which, by the laws of the country where it was entered into, was valid."

It is manifest that the effort to fortify *Medway v. Needham* by assuming that it is based on the law of England must fail if the House of Lords are competent to testify as to the state

of the law in England on the subject; for we find that in *Brook v. Brook*, 9 H. L. Cas. 219, the Lord Chancellor, in speaking of the case of *Medway v. Needham*, as we have already seen, says: "It is entitled to but little weight, and is based upon decisions which relate to form and ceremony of marriage;" and adds: "If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier, and entering another State in which the marriage is not prohibited, to celebrate a marriage forbidden by their own State, and, immediately returning to their own State, to insist on their marriage being recognized as lawful."

This is, in our opinion, the true doctrine, and we have quoted so much to show that the highest English Court does not hold to the principle upon which it is claimed by the Massachusetts Court the *Medway Case* is based. But with due deference we must be permitted to say that the decision in the case of *Brook v. Brook* goes further than we think the principle announced requires—further at least than we would be inclined to go—when, as was done in that case, it was held that, while both were resident in England, the man marrying his deceased wife's sister in Denmark, where such marriage was legal, and returning to England, the marriage was void there, because a marriage between parties so related was contrary to the laws of England.

Such a marriage would, we think, not fall within any of the exceptions to the general rule. It certainly cannot be said to be incestuous in the estimation of Christendom; and it would seem that under the policy of many of the States of this Union such a marriage is not immoral, nor tending to any social evil affecting the welfare of society. But, after all, it must be admitted that it was for that court to determine whether or not the law infringed was indicative of a decided and essential public policy in England; and the courts of that country would doubtless be as slow to approve our estimate of the public policy which condemns the marriage of the divorced adulterer, since the clause prohibiting such marriages was, upon the argument of Lord Palmerston, that the guilty party was preserved from ruin by such a marriage, stricken from the divorce bill in the House of Commons, as we are to accept their opinion that a marriage between a man and his deceased wife's sister is contrary to good morals.

We return for a moment to *Putnam v. Putnam*, *supra*, to note that the court in this case closes its opinion with this language: that "If it shall be found *inconvenient* or repugnant to sound principles [the italics are ours] it may be expected that the Legislature will explicitly enact that marriages contracted within another State, which, if entered into here, would be

void, shall have no force within this Commonwealth." The Legislature did shortly thereafter so enact; whether because the doctrine laid down in the case was inconvenient, or because repugnant to sound principle, does not appear. In our view of the law, both considerations might well have moved the Legislature.

*Stevenson v. Gray*, 17 B. Mon. 198, is a case holding the doctrine of *Putnam v. Putnam*, and, after what we have said about the latter case, need not be further noticed here.

*Van Storch v. Griffin*, 71 Pa. 240, does not sustain the contention of counsel on the point decided, as there is nothing in the case to show that the parties went from one State to the other for the purpose of evading the laws of the one. It merely holds that the decree of divorce in New York, which forbade the respondent from marrying again during the life of the libellant, had no extra-territorial effect; so that what is said in the opinion about going from one State to the other for the purpose of evading the law of the State granting the divorce is *dictum*, pure and simple.

In full accord with the conclusion we have reached in the case at bar is *Kinney v. Com.* 80 Gratt. 858, where it was held that a marriage between a negro and a white person, had in the District of Columbia, for the purpose of evading the law of Virginia, was void upon the return.

To the same effect, see *State v. Kennedy*, 76 N. C. 251; *Scott v. State*, 89 Ga. 821; *Dupre v. Boulard*, 10 La. Ann. 411.

The intention to evade the law by going into another State was made the test of its validity in North Carolina, as will be seen by reference to the two cases of *State v. Kennedy*, 76 N. C. 251, above cited, and *State v. Ross*, Id. 242—both marriages between a white person and a negro. In *Kennedy's Case*, such intention being shown, the marriage was held void; while in *Ross' Case*, it being shown that there was no intent to return to North Carolina, though the parties afterwards did so, the defendant was held not guilty of fornication. This was, however, by a divided court, and is contrary to our own case of *State v. Bell*, 7 Baxt. 9.

We conclude this opinion, already too long, by a reference to *Williams v. Oates*, 5 Ired. L. 585, where Chief Justice Ruffin, in delivering the opinion of the court in a case very similar to our own, says: "Now, if the law of South Carolina allow of such a marriage, and although it be true that generally marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws and their operation on its own citizens as not to allow them to be evaded by acts in another country, purposely to defraud them." See also Whart. Conf. Laws, §§ 135, 181, 182.

Let the judgment of the Circuit Court be affirmed.



## KENTUCKY COURT OF APPEALS

J. Edwin ROWE, Exr., etc., Appt.,

v.

Jesse E. FOGLE et al.

(.....Ky.....)

**Plaintiff's attorney has no lien on the land in controversy nor any claim against defendants personally for his fees under Kentucky General Statutes, chap. 5, § 15, giving an attorney a lien on a demand arising out of contract placed in his hands for collection, and on a judgment whether in contract or for a tort, and on property recovered, upon the dismissal in good faith of an action to enforce a contract for land, without any recovery or consideration except that each party shall pay his own costs although it is against the consent of such attorney.**

(January 10, 1890.)

**A**PPPEAL by defendant, from a judgment of the Ohio County Circuit Court (L. P. Little, J.), in favor of plaintiffs in an action to enforce an alleged attorneys' lien. *Reversed.*

Mary A. Neittman and Charles W. Neittman, her husband, brought a suit by their attorneys J. E. Fogle and H. B. Kinsolving against H. D. Hinton, for the specific performance of a contract for the sale of land, and in case this could not be done, the first named plaintiff sought to recover the money she had paid upon the land. After issue was joined the parties compromised and settled the case; it being agreed that the suit should be dismissed, each party paying his or her own costs, and plaintiffs receiving no consideration for the agreement to dismiss. Notwithstanding the above agreement plaintiffs' attorneys submitted the case, after which defendant's attorney moved to set aside the submission, filing in support of the motion an affidavit showing the agreement. Pending this motion Fogle and Kinsolving, plaintiffs' attorneys, caused a rule to issue against Rowe, as executor of Hinton, who had died in the mean time, and against whom the suit had been revived, to show cause why he should not pay them a fee of \$100 and why they should not be adjudged to have a lien on the land in controversy to secure the payment of their fees. The trial court sustained the claim and adjudged that the attorneys had a lien on the land for their fees, and also gave them a personal judgment against Rowe, as executor; and he appealed to the superior court, where the judgment below was reversed, and the case was then brought to this court.

*Messrs. Edward W. Hines and J. Edwin Rowe*, for appellant:

The Legislature never intended to prevent a plaintiff from dismissing his action without the consent of his attorney. This court expressly refused to sanction such a doctrine prior to the statute (*Evans v. Bell*, 6 Dana, 480); and in the absence of anything in the statute showing unmistakably that such was the legislative intention the court will not give the statute such a construction.

The court has held that in so far as the statute gives a lien upon the demand in suit it does 3 L. R. A.

not apply to unliquidated demands (*Wood v. Anders*, 5 Bush, 602); and the reasoning of the court in that case will prevent the application of the statute to any disputed claim, especially where the plaintiff agrees to dismiss for no other consideration than the agreement of the defendant to pay his own costs.

The courts all agree that the parties should as far as possible be allowed to settle their disputes in their own way, the courts going no farther than to prevent collusive settlements for the purpose of defeating attorneys.

Weeks, Attorneys at Law, § 879; Overton, Law of Liens, § 59; *Elwood v. Wilson*, 21 Iowa, 527.

The rule permitting an attorney to prosecute a suit after it has been settled by his client, if it be established, ought not to be extended beyond an undisputed debt.

*Hutchinson v. Pettes*, 18 Vt. 614. See *Platt v. Jerome*, 60 U. S. 19 How. 884 (15 L. ed. 623); *Brown v. Comstock*, 10 Barb. 68; *Young v. Dearborn*, 27 N. H. 824, 831; *Simmons v. Almy*, 108 Mass. 33; *Henckey v. Chicago*, 41 Ill. 186. *Mr. J. E. Fogle* for appellees.

*Pryor, J.*, delivered the opinion of the court:

The lien asserted or allowed an attorney for his services in this State is purely statutory. Where the demand arises out of contract, and is placed in the hands of an attorney, to be collected by suit or otherwise, the attorney has a lien; or where the claim is reduced to judgment, whether in contract or for a tort, or the property is recovered, the attorney has his lien. Gen. Stat. § 15, chap. 5.

The payment by the debtor to the creditor of a claim arising out of contract, with notice that it is in the hands of an attorney for collection, will not deprive the attorney of his lien, and an action brought by the attorney would be deemed sufficient notice.

Suppose, however, that no action is brought, and the plaintiff regards his claim as worthless, and proposes to withdraw it from the attorney or to dismiss it after suit has been instituted, is the statute giving the lien to be so construed as to prevent an abandonment of the claim, if done in good faith, and not with a view of defeating the lien? Such a construction would result in useless litigation, and compel the payment by the defendant to the attorney of the plaintiff of his fee, or to submit to a litigation upon an alleged cause of action, when both parties plaintiff and defendant agree that no recovery can be had.

Where the defendant has paid, or agrees to pay, the plaintiff for withdrawing the suit, or the claimant receives a consideration for forbearing to sue when the claim is in the hands of the attorney, and is known to the defendant, the rule would be different. In cases of tort before judgment, this court has held, and still holds, that the statute under which such liens are asserted does not prevent the parties from settling the litigation; and in such a case the attorney must look alone to his client for compensation.

In this case both the parties plaintiff and

defendant agreed that the action in which the lien is asserted should be dismissed, each party paying its own costs. Nothing was recovered by the defendant from the plaintiff, and no recovery had by the latter, and there is nothing in the record showing that the object to be accomplished was to defeat the claim of the attorneys for their services. The plaintiff in

good faith dismissed the action, and there was no reason for compelling the defendant to pay the attorneys of the plaintiff \$100, or any other sum, for their services. They must prosecute their claim against the plaintiff, and not the defendant.

*The judgment below is reversed, with directions to discharge the rules.*

## IOWA SUPREME COURT.

Hervey LINDLEY, *Appt.*,

v.

FIRST NATIONAL BANK of Waterloo.

(.....Iowa.....)

1. A telegram by a bank offering to pay a draft by a certain person for \$2,000 means to pay it at the bank's place of business, and imposes no obligation to accept a draft for \$2,000 "with exchange" on another place.

2. A custom which is not pleaded cannot be considered as modifying an unambiguous written promise on which an action is based.

(January 23, 1899.)

**A**PPEAL by plaintiff, from a judgment of the Blackhawk County District Court (Couch, J.), sustaining a demurrer to the petition in an action to recover upon an alleged acceptance of a draft. *Affirmed.*

The facts are stated in the opinion.

Mr. F. C. Platt, for appellant:

A letter or telegram written within a reasonable time before or after the date of a bill of

exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter or telegram, a virtual acceptance, binding the person who makes the promise.

Edwards, Bills & Notes, § 407; *Miltenberger v. Cooke*, 85 U. S. 18 Wall. 421 (21 L. ed. 864); *Coolidge v. Payson*, 15 U. S. 2 Wheat. 66 (4 L. ed. 185); *Schimmelpennich v. Bayard*, 26 U. S. 1 Pet. 264 (7 L. ed. 188); *Whilden v. Merchants & P. Bk.* 64 Ala. 1; *Louvy v. Adams*, 23 Vt. 160; *Boyce v. Edwards*, 29 U. S. 4 Pet. 111 (7 L. ed. 799).

An acceptance may be either qualified or general. If qualified, "it is an engagement to pay a bill according to the tenor of the acceptance;" if general, it is "a promise to pay according to the tenor of the bill."

Edwards, Bills & Notes, § 405; Bayley, Bills, chap. 6, § 1.

Acceptances have been held to be general or absolute wherein the amount of the draft is named; and none can be found where a statement of the denomination or amount of a draft

**NOTE.—Promise to accept equivalent to acceptance.**

By the *lex mercatoria* a promise in writing to accept an undrawn bill, communicated to the holder and relied on by him in taking the bill, is equivalent to an acceptance (*Milne v. Prest*, Holt, 181, 4 Campb. 386; *Johnson v. Collings*, 1 East, 98; *Whilden v. Merchants & Nat. Bank*, 64 Ala. 1; *Kendrick v. Campbell*, 1 Bailey, 522; *Storer v. Logan*, 9 Mass. 56; *Steman v. Harrison*, 42 Pa. 49; *Kennedy v. Geddes*, 8 Port. 363, 3 Ala. 581), but not otherwise (*Ontario Bank v. Worthington*, 12 Wend. 593; *Exchange Bank of St. Louis v. Rice*, 39 Mass. 288; *Central Sav. Bank v. Richards*, 109 Mass. 413; 2 Rand. Com. Paper, 242; and only where such agreement is communicated to the purchaser of the bill and relied on by him in taking the bill. *Byles, Bills*, 191; *Chitty, Bills & Notes*, 322, 323; 1 Daniel, Neg. Inst. 500; *Story, Bills*, § 249; 1 Parsons, Notes & B. lls, 294; *Milne v. Prest*, 4 Campb. 393; *Johnson v. Collings*, 1 East, 98; *Pierson v. Dunlop*, Cowp. 573; *New York etc. Bank v. Gibson*, 5 Duer, 574; *Sherwin v. Brigham*, 39 Ohio St. 187.

To constitute a breach of an agreement to accept a bill, the bill must be tendered to the drawee for acceptance. *Universal Permanent Building Society v. Kilpatrick*, 7 V. R. L. 58 (1881), cited in 2 Rand. Com. Paper, 244.

### Agreement by telegram.

An agreement by telegram to accept a bill has been held to be a sufficient acceptance, in Alabama (1876, Cole, § 2102, Act 1841); Arkansas (1874, 1 Rev. Stat. § 551); Idaho (1874, 1875, Rev. Laws, 653, § 8); Dakota (1877, Rev. Code, § 1899); California (1880, Hittell's Code & Stats. § 8197); so by the proposed Civil Code in New York (§ 1701).

And this is further provided by statute in many States, if the promise is an unconditional one: Arizona (1877, C. L. § 8471); District of Columbia (1897, Rev. Code, 134, §§ 6, 7, 8); Kansas (1879, C. L. chap. 14, § 10); Nevada (1873, 1 C. L. chap. 5, § 8); New York (1892, 1 Rev. Stat. 708, § 8, 2 Rev. Stat. 1882, p. 2223; 2 L. R. A.

Mississippi (1880, Rev. Code, § 1133); Utah (1882, Laws, 60, § 76); Washington Territory (1881, Code, § 2323); 2 Rand. Com. Paper, 242.

### Acceptance payable at banking house.

An acceptance may be made payable at a banking house, which amounts to an authority to the bankers to pay it out of the acceptor's funds in their hands. *Byles, Bills*, 198; *Kymer v. Laurie*, 18 L. J. Q. B. 218; 2 Rand. Com. Paper, 270.

He is not, however, liable to the holder of the acceptance, unless he has assented to its being made payable at his banking house (*Byles, Bills*, 198; *Williams v. Everett*, 14 East, 582; *Yates v. Bell*, 3 Barn. & Ald. 643; *Wedlake v. Hurley*, 1 Crompt. & J. 88); and he may show in defense that he was ready to pay at that place. *Green v. Goings*, 7 Barb. 652; 2 Rand. Com. Paper, 270.

### Local usages and customs must be specially pleaded.

A general usage or custom need not be pleaded but may be given in evidence at the trial, or be judicially noticed by the court for the first time on appeal. *Coyle v. Gozzler*, 2 Cranoh, C. Ct. 625; *Goldsmith v. Sawyer*, 46 Cal. 206; *Templeman v. Biddle*, 1 Harr. (Del.) 522; *Stultz v. Dickey*, 5 Binn. 285; *Carson v. Blazer*, 2 Binn. 475.

As to pleading customs in England, see *Hawkins v. Wallis*, 2 Wils. 173; *Tewkesbury v. Bricknell*, 1 Taunt. 141; *Morewood v. Wood*, 4 T. R. 157; *Griffin v. Blandford*, Cowp. 62; *Peter v. Kendal*, 6 Barn. & C. 703; *Paddock v. Forrester*, 8 Man. & G. 993; 3 Scott, N. R. 175; *Lawson, Usages & Customs*, § 64, p. 112.

But the custom of a particular place and local commercial usages must be pleaded; and all requisite to its validity should be averred. *Wallace v. Morgan*, 23 Ind. 399; *Governor v. Withers*, 5 Gratt. 24; *Jackson v. Henderson*, 3 Leigh, 196; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 554.

It is not sufficiently pleaded by a single averment that it has been constantly and uniformly recognized and abided by in a certain city in similar cases. *Antomarcil v. Russell*, 63 Ala. 365.

or note to be drawn is held to change the character of the contract from a general to a qualified or conditional acceptance or guaranty.

*U. S. v. Bank of Metropolis*, 40 U. S. 15 Pet. 877 (10 L. ed. 774); *Coffman v. Campbell*, 87 Ill. 98; *Edwards, Bills & Notes*, § 424; *Townley v. Sumrall*, 27 U. S. 2 Pet. 170 (7 L. ed. 386).

Appellee seeks to avoid liability because Baro drew his draft with exchange on New York; but the addition of one or two words to the telegram of acceptance would have expressed the condition it seeks to avail itself of, and under the rules it cannot now complain.

A contract susceptible of two constructions will not by preference be given the construction which will make it invalid.

*Standard Oil Co. v. Schofield*, 16 Abb. N. Cas. 372; *Lowery v. Adams*, 23 Vt. 160; *Topliff v. Topliff*, 122 U. S. 121 (80 L. ed. 1110).

"A custom known to the parties, whereby the meaning of the certain terms used in an instrument is fixed, may be shown by oral evidence;" and in such case the custom need not be averred in the pleading.

*Haddock v. Woods*, 46 Iowa, 433; *Haddock v. Citizens Nat. Bank*, 53 Iowa, 543; *Woods v. Miller*, 55 Iowa, 168; *Huse v. Hamblin*, 29 Iowa, 501; *Pilmer v. Branch of State Bank at Des Moines*, 19 Iowa, 112; *Smith v. Clark*, 12 Iowa, 32; *Adams v. Otterback*, 56 U. S. 15 How. 539 (14 L. ed. 805).

*Messrs. Boies, Husted & Boies*, for appellee:

No contract exists between the drawee and the payee of a bill of exchange until the drawee has accepted it.

*Aetna Nat. Bank v. Fourth Nat. Bank of N. Y.* 46 N. Y. 82; *First Nat. Bank of Canton v. Dubuque Southwestern R. Co.* 53 Iowa, 378.

The acceptor of a bill is not liable for exchange when not required to pay same upon its face. His agreement is to pay at the place on which the bill is drawn.

8 Rand. Com. Paper, § 1714; 1 Parsons, Notes & Bills, p. 650; 2 Daniel, Neg. Inst. 456.

The draft sued on did, by its terms, require appellee to pay a certain sum, in excess of the amount mentioned in its telegram, and in excess of the amount which it was legally obligated to pay by its promise therein contained.

When a party promises to pay a bill of exchange, thereafter to be drawn for a specified amount, before such promise will be regarded an acceptance of the bill, it must appear that the amount thereof is within the limit, and that the undertaking of the drawee, as contained in his promise, is in no manner enlarged by the terms of such bill.

Parsons, Cont. 7th ed. foot p. 308; *Merchants Bank of Canada v. Griswold*, 73 N. Y. 472-479; *First Nat. Bank of Lacon v. Bensley*, 2 Fed. Rep. 609; *Brinkman v. Hunter*, 39 Am. Rep. 492, 73 Mo. 172.

Before appellant can maintain an action upon the special contract of appellee, he must bring himself strictly and literally within its terms.

*Uster Co. Bank v. McFarlan*, 5 Hill, 432; *Gates v. Parker*, 43 Maine, 544; *Nevada Bank v. Luce*, 189 Mass. 488; *Murdock v. Mills*, 11 Met. 5-10.

That the agreement of appellee, in the case 3 L. R. A.

at bar, is not an agreement to accept bills generally, is clear.

*Brinkman v. Hunter*, 39 Am. Rep. 492, 73 Mo. 172; *Daniel*, Neg. Inst. § 561; *Bisell v. Lewis*, 4 Mich. 450; *Nelson v. First National Bank of Chicago*, 48 Ill. 39.

*Reed, O. J.*, delivered the opinion of the court:

On the 17th of November, 1887, George Baro sent a despatch from Los Angeles, Cal., to defendant, directing it to transmit \$2,000 by telegraph to plaintiff at Los Angeles, and charge the amount to his account, he having at the time a deposit of a larger amount with defendant. On the next day defendant's cashier telegraphed to plaintiff that the bank would pay Baro's draft on it for \$2,000. On the receipt of that despatch at Los Angeles, Baro drew his draft, and delivered it to plaintiff in payment of an indebtedness he was owing him. The following is a copy of the draft:

\$2,000. Los Angeles, Cal., Nov. 18, 1887.

At sight pay to order of Hervey Lindley, of Los Angeles, California, two thousand dollars, with exchange on New York, for value received, and charge to account of

George Baro.

To First National Bank, Waterloc, Iowa.

The draft was subsequently presented, but defendant refused to accept or pay it. On the same day on which he sent the despatch, the cashier also wrote to plaintiff that the bank would pay Baro's draft for \$2,000, but the letter was not received by plaintiff until after he had taken the draft. On the 28th of November, which was after the draft had been presented and refused, he also wrote to plaintiff that the bank had been enjoined from paying, and that but for such injunction it would have paid it when presented. The foregoing facts are alleged in the petition, and further it is alleged that the exchange provided for in the draft would have amounted to \$2. The petition is in three counts. The first and second counts are drawn on the theory that the telegram and letter of the 18th of November amounted to an acceptance. The third count states a cause of action on the breach of the contract to accept.

The ground of the demurrer is that the draft drawn is materially different from that which defendant agreed to pay, requiring the payment of a greater sum of money. Counsel for appellee concede that, if the draft had called for the payment of but \$2,000, the telegram, which was received by plaintiff before he took the draft, would have amounted to an acceptance; but their position is that, as the draft drawn required the payment of a greater sum, the promise of the bank to pay cannot be regarded as an acceptance of it, and its refusal to pay the amount demanded was not a breach of its contract.

The contention of counsel for appellant was that the promise to pay was in effect a general acceptance, and defendant was therefore bound to pay according to the tenor of the draft, and that the request to pay exchange related merely to its tenor. That the acceptor is by a general acceptance bound to pay the bill according to its terms, is certainly true. *Edwards, Bills & Notes*, chap. 9, § 1. But the

term "tenor of the bill," as used in the books and cases relates merely to the time and manner of payment.

Under a general acceptance the acceptor is bound to pay at the maturity of the bill as fixed by its terms, and in the manner designated. He is also bound to pay the amount named in the bill; and if it demands the payment of exchange, he is liable for the amount thereof. In such case, the acceptance being general, the terms of the contract are to be gathered from the language of the bill. But when he offers, in advance of the drawing of a bill, to accept or pay it, his undertaking is to be determined from the language of its offer. If a bill is drawn corresponding in terms with his offer, and is received by another in reliance on the offer, he will be liable from that time as an acceptor. But the bill drawn must correspond in terms with his offer, or no such result will follow. His liability, if any, is created by his contract, and it is impossible that he should be bound by conditions or stipulations to which he never gave his consent.

Judged by this rule, it is manifest that defendant is not liable. Its offer was to pay a specified sum on the draft of Baro. The offer implied, of course, that the payment was to be made at Waterloo, that being its place of business. But the draft required either that the money should be paid in New York, or that an additional amount should be paid to cover the exchange. In effect it was a draft for \$2,002, while defendant's promise was to pay one for \$2,000. If the draft had been for \$2,500, or any larger sum, it would hardly be contended that defendant was bound to pay it; yet the principle would not be different.

Our attention has not been called to any case involving the same state of facts; but the principle that one who promises in advance to accept or pay a bill of exchange is bound upon such promise only when the bill in its terms conforms to the terms of his offer, is well settled, and is founded in sound reason. *Brinkman v. Hunter*, 73 Mo. 172; *Uster Co. Bank v. McFarlan*, 5 Hill, 432; *Gates v. Parker*, 43 Maine, 544; *Murdock v. Mills*, 11 Met. 5.

The letter of the 28th of November was not an acceptance or promise to pay the draft, but was explanatory merely of the refusal.

It was urged in argument that it is a custom of bankers, in paying drafts drawn under like circumstances, to pay exchange in addition to the face of the paper, and hence that defendant's promise was impliedly a promise to pay with exchange. It is sufficient to say, with reference to that claim, that the custom is not pleaded. The action is upon the promise as written, and its language is unambiguous. The words made use of import a promise to pay \$2,000. Without some averment that the words made use of have a meaning different from their ordinary signification, it cannot be assumed that the undertaking was broader than it expressed.

We have no occasion to inquire whether the custom, if pleaded, could be shown for the purpose of modifying or explaining the undertaking. As we reach the conclusion that upon the facts alleged defendant is not liable, it is not necessary to consider the question as to the ruling of the district court in striking out portions of the petition. The error, if one was committed, in no manner affects the result.

*Affirmed.*

## MARYLAND COURT OF APPEALS.

David STEWART, *Appt.*

*v.*

Albert L. GORTER.

(....Md....)

1. **A lease for fourteen years**, with a covenant to renew for another fourteen years, especially when the covenant is that the second shall contain the same covenants as the first, is a lease for a longer period than fifteen years, within the meaning of the Maryland Act of 1888 making leases for more than fifteen years redeemable at the lessee's option, after the expiration of ten years.

2. **The lessee cannot waive his option of redemption** by any agreement in the lease, which option is given by the Maryland Act of 1888, providing that rents on leases for more than fifteen years shall be redeemable at any time after the expiration of ten years, the Act not being intended for the exclusive benefit of the lessee, but being based on grounds of public policy.

(February 8, 1889.)

**A** PPEAL by defendant, from a *pro forma* decree of the Circuit Court of Baltimore City in favor of plaintiff in an action for the specific performance of a contract. *Reversed.*  
2 L. R. A.

Argued before Miller, Stone, Robinson, Irving, Bryan and McSherry, JJ.

Gorter, on April 10, 1888, leased a lot of land in Baltimore City, belonging to himself, to one Mincher for the term of fourteen years from that date for the annual ground rent of \$120.

This rent was, by the terms of the lease, redeemable after ten years at 5 per cent.

Stewart, on April 12, 1888, agreed to convey in fee a lot owned by him, to Gorter. Stewart's lot was valued in the agreement at \$2,400, and he agreed to convey the same to Gorter as soon as Gorter gave him his reversionary interest in the annual ground rent of \$120 on the lot leased to Mincher, which rent Gorter stated to Stewart to be redeemable at 5 per cent, making it worth \$2,400 to Stewart. When Gorter tendered to Stewart the \$120 ground rent, Stewart refused to convey to Gorter his lot in fee, on the ground that the lease to Mincher creating Gorter's ground rent was made subsequent to the passage of the Act of 1844, chap. 485, as amended by chap. 395 of the Acts of 1888, and that consequently said ground rent could be redeemed at 6 per cent, making Gorter's rent worth only \$2,000 instead of \$2,400.

Further facts appear in the opinion.

*Messrs. John Stewart, Robert Rid-*

dell Brown, and David Stewart for appellant.

*Messrs. James P. Gorter and H. Arthur Stump* for appellee.

[Stone, J., delivered the opinion of the court: The question presented in this case is the true construction of the Acts of 1884, chap. 485, and 1888, chap. 895, relating to leases. It appears that on the 10th of April, 1888, Gorter leased a lot of ground in Baltimore City to Mincher for a term of fourteen years, and the rent reserved was \$120.

In this lease there is a covenant on the part of the lessor for the renewal of the lease for the further term of fourteen years, with the same covenants that are in the original lease. There is a further covenant on the part of the lessor that at any time after the expiration of ten years from the date of lease, upon payment to him of a sum of money equal to the capitalization of the rent at 5 per cent—that is to say of the sum of \$2,400, the property should be released.

There is also in the lease an agreement made by the lessee that he would not avail himself of any right that he might have by virtue of any Maryland statute to redeem the rent at a less sum than that fixed in the lease.

The Act of 1888, as applicable to this case, is in these words: "All rents reserved by leases or sub-leases of lands made in this State after April 5, 1888, for a longer period than fifteen years, shall be redeemable at any time after the expiration of ten years from the date of such lease or sub-lease at the option of the tenant, after a notice of six months to the landlord, for a sum of money equal to the capitalization of the rent reserved, at a rate not to exceed 6 per cent."

The two questions presented for our consideration are: first, whether the Law of 1888, above referred to, is applicable to this lease; and secondly, if said Act is applicable to this case, whether the lessee has waived or can waive his option of redemption at 6 per cent.

The first of these questions is easily answered. The Act of 1888 is applicable to the case before

us. A lease for fourteen years, with a covenant to renew for another fourteen years, is, in effect, a lease for a longer period than fifteen years; more especially when the covenant is that the second lease shall contain the same covenants that the first did; that is, that the lease should be renewed for another fourteen years, thus making the lease of indefinite duration, and placing it upon the same footing as an ordinary long lease. The leases for less than the fifteen years mentioned in the Act mean leases without the covenant for renewal, and which were intended by the parties to end at the expiration of the fifteen years or a less period of time.

The second question is equally easy of solution. It resolves itself into the question whether a party by his deed can be estopped from claiming the benefit of the Act of 1888, a general law of the State.

If the Act of 1884, as amended by the Act of 1888, had been passed for the exclusive benefit of lessees, there might be some color at least, to the claim set up that Mincher could waive the benefit of the capitalization clause of the Act of 1888. But such is not the fact. The Act of 1888 was the result of a well grounded belief that these long leases, with their covenants of renewal, were injurious to the prosperity of the City of Baltimore, and that sound public policy demanded that all leases hereafter made, if for more than fifteen years, might be ended at the option of the tenant or lessee upon paying the capitalization of his ground rent at 6 per centum. It was the system of these long leases, irredeemable until the end of the term, that the Legislature wished to break up, rather than for any special consideration for the lessees, that caused the act.

The lessee, therefore, cannot be estopped by any covenant, however strongly worded, from claiming the right guaranteed him by this Act. It would be a virtual repeal of the Act if covenants and agreements were allowed to supersede its express provisions.

The *pro forma* decree of the court below must therefore be reversed, with costs.

*Decree reversed, with costs.*

## INDIANA SUPREME COURT.

CITY OF ANDERSON *et al.*, Appts.,  
v.

James H. EAST.

(.....Ind.....)

1. A city is not liable for damages caused by the falling of a wall left standing after a build-

ing which belonged to a private owner was burned, although it had been notified of the fact that the wall was dangerous.

2. A recovery can be had against a municipal corporation only where it negligently performs or negligently fails to perform a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law.

**NOTE.**—*Municipal liability governed by statute.*

A public corporation is not liable to an action by individuals, unless it be given by statute. *White v. Charleston*, 2 Hill (S. C.) 571.

A corporation cannot be impliedly liable to a greater extent than it could make itself by express corporate vote or action. 2 Dillon, Mun. Corp. 878.

It is not liable in case, or other form of civil action, for neglect of public duty, unless such liability be expressly declared by statute. *State v. Hancock Co. Comrs.* 11 Ohio St. 190; *Hedges v. Madison Co.* 1 Gilman (Ill.) 587; *Freeholders of Sussex Co. v. Strader*, 8 Harr. (N. J.) 108; *Van Epps v. Mobile Co. Comrs.* 25 Ala. 480; *Larkin v. Baginaw Co.* 11 Mich.

2 L. R. A.

88; *Bray v. Wallingford*, 20 Conn. 416, 419; 2 Dillon, Mun. Corp. 872.

In New England there may be instances in which corporations are civilly liable for neglect of duty without an express statute to that effect. *Oliver v. Worcester*, 102 Mass. 499, 498; *Blodgett v. Boston*, 8 Allen, 237; *Stickney v. Salem*, 8 Allen, 374; *Chidsey v. Canton*, 17 Conn. 475, 478; approving *Mower v. Leicester*, 9 Mass. 247; *Heed v. Belfast*, 20 Maine, 246; 2 Dillon, Mun. Corp. 873.

*City not liable for damages from falling wall.*

In Georgia a city corporation, with the usual power to keep streets in repair and to remove build-

1. **The owner of a building** which is burned is liable for damages caused by the falling of one of its walls which he had negligently left standing, knowing it be dangerous.
4. **The promise of a city officer** to take charge of and, if necessary, take down a wall of a burned building, does not relieve the owner of the premises from liability for damages caused by the fall when he has negligently left it standing.
5. **General averments** of negligence are sufficient as against a demurrer.

(January 25, 1889.)

**A** PPEAL by defendants, from a judgment of the Madison County Circuit Court (Moss, J.), in favor of plaintiff in an action to recover damages for injuries done to plaintiff's building by the falling of a wall left standing after a fire. *Reversed in part and affirmed in part.*

The facts are stated in the opinion.

*Messrs. Eli B. Goodykoontz, Frank P. Foster, Charles L. Henry, H. C. Ryan and E. P. Schlater* for appellants.

*Messrs. Pierce & Gerard* for appellee.

**Elliott, Ch. J.**, delivered the opinion of the court:

The defendants severed in their defenses in the trial court, and here separately assign errors. Consequently there are two branches of the case, involving essentially different questions—one in which the rights of the City of Anderson are involved, and another which involves the rights of the appellant, Doxey. It is proper, as well as convenient, to first consider and dispose of that branch of the case in which the rights of the municipal corporation are involved.

ings and obstructions thereon, was held to be liable to a person injured by the fall of the high brick wall of a burned house, on private property, at the line of the sidewalk. If it was negligent in the discharge of its duty to have the wall abated or made secure. The court admitted that if the wall was firm and had been thrown down by a tempest, there would be no liability. *Parker v. Mason*, 39 Ga. 725.

But in Louisiana a precisely opposite conclusion, as to the liability of a corporation for the falling of an unsafe wall, was reached in *Howe v. New Orleans*, 12 La. Ann. 451; 2 Dillon, Mun. Corp. 921.

A building so negligently constructed or so greatly decayed that it is likely to fall upon an adjoining tenement, or upon persons lawfully making use of easements near it, is a nuisance. *Mullen v. St. John*, 87 N. Y. 567, 15 Am. Rep. 530—case of a suit for an actual injury; *Reg. v. Watts*, 1 Salk. 357; *Kappes v. Appel*, 14 Ill. App. 170; *Gorham v. Gross*, 125 Mass. 232; *Grove v. Fort Wayne*, 45 Ind. 429; *Cooley, Torts*, 72.

A municipal corporation cannot by the mere declaration that a structure is a nuisance subject it to removal by any person supposed to be aggrieved, or even by the city itself. *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497 (19 L. ed. 984); *Underwood v. Green*, 42 N. Y. 140; *Darst v. People*, 51 Ill. 256; *Miller v. Birch*, 32 Texas, 209; 1 Dillon, Mun. Corp. 410.

Where it is made the duty of a city to remove, as far as it may be able, every nuisance which may endanger the health, the courts cannot control the manner in which this shall be done. *Baker v. Boston*, 12 Pick. 184. See also *Kelley v. Milwaukee*, 18 Wis. 83; *Goodrich v. Chicago*, 20 Ill. 445; 1 Dillon, Mun. Corp. 179.

#### *What necessary to create liability.*

To create a liability to a civil action for damages it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment; it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to 2 L. R. A.

The judgment against the City of Anderson rests entirely upon the second paragraph of the complaint, and, if that is bad, the judgment is entirely destitute of foundation. Our first step, therefore, is to ascertain and determine whether the second paragraph of the appellee's complaint states a cause of action against the City of Anderson. That paragraph of the complaint contains three material facts:

On the 18th day of November, 1884, the plaintiff was the owner of a building in the City of Anderson. Ten feet distant from the plaintiff's building was a large brick structure, with walls thirty feet in height. That building was owned by the appellant, Charles T. Doxey. On the night of November 18, 1884, Doxey's building was burned, but the brick walls remained standing. Doxey's building stood on the line of a public alley sixteen feet in width. The cornice of the Doxey building projected over this alley. The cornice and wall of the burned building fell upon the plaintiff's building, and destroyed it. The city knew that the wall was dangerous, and likely to fall, and was notified of that fact, as was Doxey. Notwithstanding the notice and knowledge, the defendants negligently permitted the walls, weakened and made dangerous by the fire, to remain unsupported for nine days, when they fell, crushing the plaintiff's building.

Our judgment is that no cause of action is stated against the city. A municipal corporation is an instrumentality of government, and is not liable for a failure to exercise legislative or judicial powers, nor for an improper or negligent exercise of such powers. *Wheeler v. Plymouth* (Ind.) 18 N. E. Rep. 532; *Dooley v. Sullivan*, 112 Ind. 451, 11 West. Rep. 816;

it under any circumstances. *Broom, Com. Law Commentaries*, 550; 2 Dillon, Mun. Corp. 677.

But if the wrongful act be not in this sense *ultra vires*, it may be the foundation of an action of tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted, expressly or impliedly, by it, or when it was done by the officers, agents or servants of the corporation, in the execution of corporate powers or the performance of corporate duties of ministerial nature. *Thayer v. Boston*, 19 Pick. 511; *Anthony v. Adams*, 1 Met. 284; *Baker v. Boston*, 12 Pick. 184; *Perley v. Georgetown*, 7 Gray, 484; *Howell v. Buffalo*, 15 N. Y. 512; *Baltimore v. Eschbach*, 13 Md. 278; *Stare v. Kirkley*, 29 Md. 85, 110; *Harney v. Rochester*, 35 Barb. 177; *Leman v. Mayor etc. of N. Y.* 5 Bosw. 414; *Phila. etc. R. Co. v. Quigley*, 62 U. S. 21 How. 203 (16 L. ed. 73); 2 Dillon, Mun. Corp. 878.

#### *Not liable for misfeasance or neglect of officers.*

If the duty, though devolved by law upon an officer elected or appointed by the corporation, is not a corporate duty, in performing it the officers of the corporation do not act for the corporation; and the corporation is not responsible unless expressly declared to be by statute for the omission to perform it or for the manner in which it is performed. 2 Dillon, Mun. Corp. 378; *Hines v. City of Charlotte*, 1 L. R. A. 844 note.

#### *When impliedly liable.*

Municipal or chartered corporations are considered to be impliedly liable for acts done in what is termed their private or corporate character, and from which they derive some special or immediate advantage or emolument, not as to those done in their public capacity, as governing agencies, in the discharge of duties imposed for the public or general (not corporate) benefit. *Oliver v. Worcester*, 102 Mass. 489, 490; *Richmond v. Long*, 17 Gratt. (Va.) 375; *Western Saving Fund Society v. Phila.* 31 Pa. 175, 189. See also *Crossett v. Jaunesville*, 23 Wis. 420; 2 Dillon, Mun. Corp. 876.

*Terre Haute v. Hudnut*, 112 Ind. 542, 11 West. Rep. 833; *Faulkner v. Aurora*, 85 Ind. 180; *Lafayette v. Timberlake*, 88 Ind. 390; *McDade v. Chester City*, 117 Pa. 414, 10 Cent. Rep. 779; *McArthur v. Saginaw*, 58 Mich. 367; *Agnew v. Corunna*, 55 Mich. 428; *Hines v. Charlotte*, 40 N. W. Rep. 838, 1 L. R. A. 844; *Kiley v. City of Kansas*, 2 West. Rep. 201, 87 Mo. 108; *Hubbell v. Viroqua*, 67 Wis. 343; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857 and note.

The authorities we have collected, and to which many more might easily be added, illustrate all phases and postures of the general subject; but in one thing all unite: and that is in affirming that no recovery can in any event be had where the negligence of the municipal corporation consists in failing to perform a legislative, judicial or discretionary duty, or in simply performing such a duty in an improper method. The decision in *Kiley v. City of Kansas*, *supra*, is directly in point, and applies the rule we have stated to a case in principle precisely like the one before us.

A recovery can be had against a municipal corporation only where it negligently performs, or negligently fails to perform, a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. There must, in every case, be a duty, since where there is no duty there can be no negligence. It is, indeed, impossible to conceive a case where negligence can exist independent of a duty. It was therefore incumbent upon the appellee to show a ministerial duty, and its wrongful breach. This he has not done.

A municipal corporation owes a duty to those who use its streets, to exercise ordinary care to make them safe for passage. It is not without hesitation that some of the courts have assented to this rule, and there once was reason for doubt; for, as a municipal corporation is an instrumentality of government, it is difficult to perceive upon what principle it can be sued while the sovereignty of which it forms a part enjoys complete immunity. But the question is now closed. Municipal corporations are liable for a negligent breach of a ministerial duty. They are, however, liable only to one to whom they owe that duty, and to him only when the duty concerns something over which that duty extends. In many of the cases we have cited it is held that municipal corporations owe a duty only to persons using their streets, and to them only owe a duty to keep the streets safe for ordinary travel. In order to create a liability, the breach of duty must be such, many of the cases say, as to make the streets insufficient or unsafe for ordinary travel.

We can conceive of no principle, and we know of no authority, upon which it can be held that a municipal corporation is under a duty to protect the property of a citizen from injury from the walls of an adjacent building belonging to a citizen, which the owner's negligence has permitted to become dangerous. Municipal corporations are not charged with the duty of protecting private property. There is certainly nothing in the statute which imposes such a duty upon them, and if not in the statute it does not exist. The entire current of authority concentrates upon the proposition that

unless the law expressly or by clear implication imposes a duty upon a municipal corporation, none can be imposed by construction. Wharton says: "A duty, however, not imposed specifically on a corporation, cannot be constructively attached so as to make its neglect the subject of a suit." Whart. Neg. § 257.

Three cases are cited by the appellees:

The first, that of *Anderson v. O'Connor*, 98 Ind. 168, is not even remotely relevant. This is apparent, without more being said, when it is affirmed that the complaint in that case was to recover damages for a breach of contract.

The second case cited (*Grove v. Fort Wayne*, 45 Ind. 429), while it carries the principle on which it proceeds to the utmost verge, decides only that a person traveling on a public street may recover for an injury caused by the falling of an overhanging cornice. Conceding that the decision in that case is correct, it by no means justifies the conclusion that a municipal corporation is liable for the destruction of property by the fall of an adjoining building. The decision, as the opinion shows, is based solely on the proposition that municipal corporations "are bound to keep the streets, including the sidewalks, in a reasonably safe condition for ordinary travel."

The third case cited (*Lowrey v. City of Delphi*, 55 Ind. 250), in so far as it has the remotest resemblance to this case, simply announces and enforces the same general proposition. If the plaintiff were here seeking to recover for injuries received while using a street, these decisions would be relevant; but, as he seeks to recover for the destruction of a building standing on his own ground, they are totally irrelevant.

We proceed now to the branch of the case involving the rights of the appellant, Doxey. His counsel assert that the first paragraph of the complaint is bad, because it does not charge him with negligence. We cannot concur with them. The facts stated very clearly show that he was guilty of culpable negligence, and that his negligence was the proximate cause of the appellee's injury. It is charged, much as in the second, that the wall was unsafe and dangerous; that Doxey knew this; and that it constituted a public nuisance. In addition to these allegations, it is also averred that the wall was unsafe and dangerous from the 14th until the 22d of November, 1884, and that the defendant Doxey refused to make it safe, or to permit the plaintiff to do so. To the second paragraph it is objected by Doxey's counsel that the general averments of negligence are insufficient. This position rests on an undue assumption, for there are specific averments. But, if there were not, the objection is not well taken, for it is settled that general averments of negligence are sufficient as against a demurrer. *Ohio & M. R. Co. v. Walker*, 12 West. Rep. 781, 118 Ind. 196.

The second instruction asked by Doxey was properly refused, for the reason that there was no evidence to which it was applicable. Mr. Doxey testified that "Mr. Coburn, the marshal of the city, came to me the next morning after the fire, and said they would take charge of or appoint policemen to look after the walls, and have them torn down, if necessary. He says: 'You need not bother anything about them; you have lost enough.' I think those were the



exact words." This evidence, and it is the strongest adduced by Doxey, did not warrant an instruction that "Doxey is not liable if the Marshal of the City of Anderson and his deputies took charge and control of the premises, preventing any persons from going near the ruins until after the walls fell."

Waiving all question as to the authority of the marshal to exclude the owner of the building, and waiving also all question as to the fault of the instruction in not asserting that control was actually taken without the owner's consent, it was properly refused, because the owner could not shift his responsibility on to the municipal corporation. If there had been any testimony showing that the owner was compulsorily excluded by legal authority, a very different question would have been pre-

sented; but all that here appears is that the marshal informed Mr. Doxey that he would take charge of the walls, and that Mr. Doxey consented that he might do so. The most that can be said of the testimony of Mr. Doxey is that it proves he turned the matter over to the control of the marshal, for there was no legal process employed to secure control. At all events, it is quite clear that Doxey did not escape responsibility by acceding to the request of the marshal, for third persons injured by his negligence cannot be denied compensation because he delegated or conceded his duties and rights to a city officer.

*The judgment against the City of Anderson is reversed, and that against the appellant Doxey is affirmed.*

### TEXAS SUPREME COURT.

H. H. DOOLEY, *Appt.*,  
v.

Catherine MONTGOMERY *et al.*

(....Tex....)

1. **A conveyance of community property** in Texas, by the husband—who, under Texas Revised Statutes, art. 2852, has full power to sell it—passes the whole of the common title, although he signs only as agent of his wife under a power of attorney, which gave him no power to sell the property.

2. **Proof of an estoppel** is admissible in an action of trespass to try title under the plea of not guilty.

(January 15, 1889.)

**A**PPEAL by defendant from a judgment of the Harris County District Court in favor of plaintiffs in an action of trespass to try title to certain land. *Reversed.*

The facts appear in the opinion.

*Messrs. W. N. Shaw and S. R. Perryman*, for appellant:

Property purchased during marriage, whether by the husband or wife, is community property.

Revised Statutes, art. 2852; *Oss v. Miller*, 54 Tex. 16.

The husband alone, during coverture, has the right to dispose of the community property.

The sale of the property by Josiah T. Harrell to John H. Walton was valid and conveyed all the right, title and interest that he and his wife had in the same, as fully and effectually as it would had the deed been made by himself and in his own name and not under power of attorney from his wife.

*Heard v. Hall*, 16 Pick. 457; *Poor v. Robinson*, 10 Mass. 181.

*Mr. F. G. Morris*, for appellees.

**Henry, J.**, delivered the opinion of the court:

This is an action of trespass to try title. The defendant pleaded not guilty. The case was tried by the court without a jury, and judgment was rendered in favor of the plaintiffs for the land. The defendant appealed.

2 J. R. A.

The record shows a regular chain of title down to Amelia Harrell, she being at the time of the conveyance to her the wife of Josiah T. Harrell. The deed to her was made in 1845, and recited the receipt of a consideration of \$500. There was no recital in the deed or fact in evidence giving to the deed to the wife other than its operation of conveying the title to the community. The wife made to her husband a power of attorney in terms, authorizing him to sell the land.

Afterwards, and during the life of the wife, the husband, in pursuance of the terms of this power of attorney, deeded the land to John H. Walton. This deed contains the following clause: "I, the said attorney, declare that I am duly authorized to sell and convey said property, and that I will warrant and defend the same against any and all claims whatever." The record shows a regular chain of title from Walton to appellant. Amelia Harrell died intestate, and appellees are her only heirs.

Appellant assigns as error that "The court erred in giving judgment for plaintiffs, because the proof shows that the property in question was the community property of J. T. and Amelia Harrell, and the deed executed by him, and signed by him as attorney in fact for said Amelia Harrell, is in law a legal and valid conveyance of said community property."

We agree in every particular with this assignment. The wife's power of attorney gave the husband no power to sell the land; but because it was community property he had full power under the law to sell it. Rev. Stat. art. 2852.

The conveying clause of the deed to Walton sufficiently shows that the land was conveyed as the property of the wife, and the husband's name is signed to the deed only as the agent of his wife.

In the case of *Heard v. Hall*, 16 Pick. 460, it is said to be the well established rule of equity that "Where one having title acquiesces in the disposition of his property, for a valuable consideration, by a person pretending to title, and having color of title, he shall be bound by such disposition, and shall not afterwards be allowed to set up his own title against

the purchaser. And so it has been held that if one having title stands by while another purchases from a third person claiming title, and does not forbid the purchase or disclose his own title, he shall be bound. *A fortiori*, if he encourages the purchase, or, as in the present case, a person sells his own property as the property of another, to a *bona fide* purchaser, for a valuable consideration. In this case the petitioner expressly covenants that he is lawfully authorized and empowered to make sale of the granted premises. Most certainly he was not so authorized; and this covenant operates to avoid circuitry of action, by way of rebuttal, and estops the petitioner from setting up his title."

We think the deed of the husband conveyed

to Watson the common title of the husband and wife, and left no estate for the heirs of the husband or wife to take at their deaths.

It was objected in the court below and is insisted here, that the defense by estoppel must be specially pleaded. We think that in the action of trespass to try title the proof is admissible under the plea of not guilty. Rev. Stat. art. 4798; *Mayer v. Ramsey*, 46 Tex. 871.

*The judgment of the District Court will be reversed*, and such judgment here rendered as ought to have been rendered by the court below, which will be that the appellees take nothing by their suit, and that appellant recover of them all costs of the court below, and of this court; and it is accordingly so ordered.

### ALABAMA SUPREME COURT.

James C. RICHARDSON, *Appt.*,

LOUISVILLE & NASHVILLE R. CO.

(....Ala.....)

1. In an action by a man for the loss of a trunk containing the clothing of his wife and child, the presumption is that the child's clothing was furnished by the father, in the absence of evidence to the contrary.
2. Merely providing ordinary and necessary clothing for the wife by the husband in discharge of his duty growing out of the marital relation does not make it her property within the meaning of the Alabama Statute providing that all property acquired by a wife after marriage in any manner, including that acquired by gift from a contract with the husband, shall become her separate estate.

(January 14, 1899.)

**A** PPEAL by plaintiff, from a judgment of the Escambia County Circuit Court (Hubbard, J.), in favor of defendant in an action to recover for the loss of a trunk and its contents. *Reversed.*

The facts sufficiently appear in the opinion.

*Mr. James M. Davison* for appellant.  
*Messrs. Jones & Falkner* for appellee.

*Clopton, J.*, delivered the opinion of the court:

The action is brought by appellant to recover for the loss of a trunk and its contents, which his wife delivered to defendant for transportation, incidental to her carriage as a passenger from Milton, Fla., to Kirkland, Escambia County, Ala.

There is no controversy as to the delivery of the trunk to defendant, its loss, and the value of the trunk and its contents. The court gave the affirmative charge in favor of the defendant. The instruction is evidently rested on the theory that, under the proof, the trunk and

its contents were the statutory separate estate of the wife, for the loss of which she must sue alone, as provided by the statute. The contents of the trunk consisted of wearing apparel of the wife and of an infant child. A part of the wife's apparel, as testified by the plaintiff, was purchased with money furnished by him, and a part with the proceeds of her own labor. There being an absence of evidence as to who furnished the child's clothes, the presumption is that they were furnished by the father. For the loss of these the plaintiff was entitled to recover; and for this reason, if for no other, the affirmative charge was improperly given.

By the Act of February 28, 1887, the earnings of the wife are her separate property. Code 1886, § 2342.

Prior to this enactment they belonged to the husband. Whether the plaintiff is entitled to recover for the loss of the articles purchased with the proceeds of the wife's labor depends on the fact whether the earnings accrued before or after the passage of the statute, as to which the evidence is silent.

At common law, certain incidents attach to the contract of marriage, among which is the duty of the husband to maintain his wife, and to supply her with wearing apparel suitable to their social condition, and commensurate with his pecuniary circumstances. The wearing apparel of the wife, furnished by the husband, though intended for her personal and exclusive use, is none the less his property. On this principle is based the necessity of the statutory exemptions from levy and sale under execution or other process for the collection of debt, of the proper wearing apparel of the husband and family, and of the widow and minor children from administration. Code 1886, §§ 2511, 2545.

The question then is, Has this rule of the common law been changed or abrogated by the Act of February 28, 1887, creating and regulating the separate estates of married women?

Section 2341 of the Code of 1886 declares: "All the property of the wife, held by her pre-

**NOTE.**—*Gift of money or property by husband to wife invalid.*

Under the General Statutes of Massachusetts, chap. 108, § 10, there can be no valid gift of money or property by the husband to the wife, so as to 2 L. R. A.

constitute it the separate property of the wife. It still remains the property of the husband, and her possession is in legal contemplation his possession. *Thompson v. O'Sullivan*, 6 Allen, 304; *Baxter v. Knowles*, 12 Allen, 114.

vions to the marriage, or to which she may become entitled after the marriage, in any manner, is the separate property of the wife."

The property which becomes her separate estate is more particularly defined by section 2351, as all property of the wife, whether acquired by descent or inheritance or gift, devise or bequest, or by contract or conveyance, or by gift from a contract with the husband, excepting such property as may be conveyed to an active trustee for her benefit—property the ownership of which is acquired by the wife by some legal mode of transmission, or by operation of law.

The statutes make no reference, in terms, or by fair implication, to the wearing apparel of the wife, purchased during coverture on the credit of the husband, or with money furnished by him. The husband provides clothing for

his wife in the discharge and performance of a marital duty, without any intention to make a gift, as ordinarily or legally understood. If he purchases jewels or other personal ornaments, or even wearing apparel, and makes an express gift thereof to his wife, independent of and without reference to his marital duty, they undoubtedly would be her separate estate under the statute; also, if her wearing apparel is purchased with money which is her separate estate. But merely providing ordinary and necessary clothing for the wife, in discharge of his duty growing out of the marital relation, does not constitute a gift from a contract with the husband in the meaning of the statute. His right of ownership of the clothing so provided remains as at common law. *Hawkins v. Providence & W. R. Co.* 119 Mass. 596.

*Reversed and remanded.*

### ILLINOIS SUPREME COURT.

Charles S. FRENCH, *Appt.*,

vs.  
Julius WILLER.

(.....III.....)

1. A judgment by confession in an action of forcible detainer in Illinois, upon a warrant of attorney contained in a lease, is *coram non judice* and void. The proceeding provided by statute in such cases is exclusive.
2. Parties cannot by contract ingraft upon the procedure prescribed for a summary proceeding a remedy or practice not warranted by statute. (*Craig, Ch. J., Wilkin and Magruder, JJ., dissent.*)

(November 15, 1888.)

**A**PPEAL by plaintiff, from a judgment of the Appellate Court, First District, reversing a judgment of the Superior Court of Cook County, in an action of forcible detainer. *Affirmed.*

#### Statement per Curiam:

In this case the appellant, Charles S. French, filed, in the Superior Court of Cook County, his complaint in an action of forcible detainer, verified by affidavit, alleging that he was entitled to the possession of certain premises in Cook County, and that the appellee, Julius Willer, unlawfully withheld the possession thereof from him. Accompanying the complaint was an affidavit of the appellant stating, in substance, that the appellee was unlawfully holding said premises after the expiration of a certain lease of the same to him from the Connecticut Mutual Life Insurance Company, and after demand of possession, and that the appellant was the assignee of the reversion.

There was also filed with the complaint a certain lease from said insurance company to the appellee, demising to him said premises for a term which had then expired, the execution of said lease by the appellee being duly proved by affidavit; said lease containing, among other things, a covenant on the part of the lessee to surrender possession of the demised premises to the lessor or its assigns at the expiration of 3 L. R. A.

the term; and also a warrant of attorney authorizing an attorney of any court of record, for the lessee, and in his name and stead, to appear in any court of record, at any time after default or failure by the appellee in the performance of any of the covenants of the lease, to waive the issuing and service of process, and to file a *cognovit* and confession of judgment for the possession of the whole of the demised premises, and for costs of suit in an action of forcible entry and detainer or forcible detainer in favor of the lessor, its successors and assigns, and against the lessee, and a waiver and release in writing of all errors in entering such action and judgment, and a consent in writing that a writ of restitution might be issued and executed immediately; the lessee expressly agreeing to release all errors and defects whatever in entering such action or judgment, or any proceeding therein enforcing or concerning the same.

There was also filed a *cognovit*, in accordance with the terms of the warrant of attorney, confessing judgment in favor of the appellant and against the appellee, for the possession of said premises, in an action of forcible detainer, and consenting to the immediate issuing and execution of a writ of restitution, and waiving and releasing all errors that might intervene in the entry of the judgment or the issuing or execution of said writ. Upon the filing of said papers in the superior court, judgment was entered in favor of the appellant and against the appellee, for the possession of said premises, and for costs, and the writ of restitution was immediately issued. The appellee thereupon entered his motion to quash said writ, and to vacate said judgment, and introduced and offered certain evidence in support of said motion, but said motion was overruled by the court. The appellate court, on appeal, reversed said judgment, without remanding the cause for further proceedings, and awarded to the appellant a certificate that the case involved questions of law of such importance, on account of principal and collateral interests, that it should be passed upon by this court, and the appellant brings the record here by appeal. The appellate court, in deciding the case, filed the following opinion:

MORAN, P. J.: "The complaint filed in the court below contains allegations sufficient to entitle appellee to the remedy sought under the Forcible Entry and Detainer Act. In this respect this case differs from the case of *Burns v. Nash*, 28 Bradw. 552, decided by this court. The sole question for us to determine on the record is whether the superior court obtained jurisdiction of the person of the appellant, by means of the filing of the *cognovit* in pursuance of the warrant of attorney contained in the lease."

It is contended by counsel for appellee that a warrant of attorney to confess judgment is a familiar common-law security, and cases are cited which, it is asserted, show that it was the practice at common law to enter judgments in ejectment upon confession under a warrant of attorney, and that the practice has also obtained in Pennsylvania, and been sustained by the supreme court of that State.

There is some misapprehension as to the practice at common law. There were at common law, besides the judgment by default, two methods of obtaining judgment without trial—one, by a confession of judgment under a warrant of attorney; and the other, upon a *cognovit actionem*, signed by the defendant in the action. The warrant of attorney authorized the attorney named therein to appear for the defendant and receive a declaration in an action for debt, and to confess the action, or suffer judgment, by *nil dicit* or otherwise, to pass.

"A warrant of attorney," says Chitty, "is more frequently given independently of any action, and very generally is prospective security, and although at the time it is executed nothing is due from the party. It is in that respect a convenient collateral security to bankers and others, in consideration of their agreeing to make pecuniary advances, or to suffer a customer to overdraw his account." 8 Chitty, Pr. 669.

The *cognovit actionem*, was not an authority given before the action commenced, but was a confession signed by the defendant after the process was issued. "When a writ has already been issued against a defendant, a *cognovit actionem*, or, in other words, a written confession of the action, subscribed by the defendant, but not sealed, and authorizing the plaintiff to sign judgment and issue execution for a named sum, is a very usual mode of saving the expenses of further proceedings in the action." *Id.* 664.

Now, two at least of the cases cited by counsel to show that confession of judgment was permitted in ejectment, are cases in which the judgments were entered on a *cognovit actionem*. In *Doe v. Franklin*, 7 Taunt. 9, the plaintiff obtained from the defendants in possession a *cognovit* of the action and a *retract* of the plea, so that not only was there no warrant of attorney to appear and confess, but the defendants who did confess the action were already in court by service of process, and also by plea filed. *Doe v. Howell*, 12 Ad. & El. 696, was also a case where the defendant signed a *cognovit* confessing the action. These cases give no support to the contention that a warrant of attorney to appear and confess judgment was a recognized mode of procedure in ejectment at common law.

*Kingston v. Kingston*, 1 Dowl. N. S. 268, ap-  
2 L. R. A.

pears to have been a rule *visi* to set aside a judgment entered upon a warrant of attorney in an action of ejectment, for the reason that there was no attestation clause to the warrant of attorney, in conformity with the statute then recently enacted. Patteson, J., held that the statute had no application to actions in ejectment, and in that was clearly wrong, as the same statute was held applicable to actions of ejectment in *Doe v. Howell*, *supra*, where the question was decided by four of the Judges of the Court of King's Bench.

The point, as to the right to enter the judgment under a warrant of attorney, was not raised in the case, but the implication that it was a recognized practice, which might be drawn from the fact that the point was not made is negatived in the subsequent case of *Beaumont v. Beaumont*, 2 Dowl. N. S. 972, where, in moving for leave to enter a judgment on a warrant of attorney authorizing the landlord to sign a judgment in ejectment upon the determination of the tenancy by notice to quit, counsel admitted that no case of a similar description was to be found in the books, but contended that there could be no objection to such a warrant of attorney. Coleridge, J., said: "If a party enters into such an agreement, I see no reason why it should not be enforced," but for lack of a sufficient affidavit no judgment was entered in the case, and therefore it is no precedent, but it shows that as late as 1843 no such practice had obtained in England. The fact that no reference to such a method of proceeding in ejectment is found in works on common-law practice (so far as we have been able to examine) goes to show pretty conclusively that such a practice was unknown to the courts and to the profession.

It appears from the cases in Pennsylvania that there is known in that State a practice of entering what are termed "amicable actions," and that such actions, and judgments by confession in them, may be entered by the court on agreement by the parties. *McCalmont v. Peters*, 18 Serg. & R. 196; *Cook v. Gilbert*, 8 Serg. & R. 567.

In *Flanigan v. Philadelphia*, 51 Pa. 491, the lease provided that it might be terminated on the violation of any covenant, by a notice of five days, and that on such termination any attorney might sign an agreement for entering an amicable action in ejectment against the lessee. Such an action was entered, and judgment confessed, and on motion to set it aside on the ground that it was not entered in compliance with a rule of court governing the entry of judgments on warrants of attorney, the court said: "It nowhere appears in this record that the confession by the attorney of the defendant was in pursuance of a warrant of attorney. The amicable action and confession of judgment is according to ancient and established practice existing before the Act of 1806, as well as since."

The practice seems to be peculiar to the State of Pennsylvania; at least our attention has not been called to a similar practice elsewhere. We do not think it can be regarded as establishing the proposition that the practice of confessing judgment upon warrant of attorney, and without process having been issued, obtained at common law in actions of ejectment.

In *Secrist v. Zimmerman*, 55 Pa. 446, cited by counsel, there was no warrant of attorney, and no question of a confession on a warrant of attorney made or decided in the case. The action of ejectment was brought against the defendant for the land, and a year after its commencement the defendant confessed judgment to the plaintiff for the land in dispute and costs. The court held the judgment conclusive as to the parties and their privies, on the ground that the most important interests, not only of property and liberty, but of life itself, are habitually concluded, judicially, by solemn confession made by the party in interest in the face of a court of justice. The confession of which the court is speaking in that case was made in open court, in the face of the court, after service of process; and it has never been doubted that such a confession would authorize the judgment, and probably no one would say that such a confession would not be good in a forcible detainer case.

An examination of all the cases counsel have been able to find, seems to us to confirm what was said by this court in *Burns v. Nash*, *supra*, that "The practice of entering judgment by confession upon warrant of attorney, without process, in actions of tort, did not obtain, and there is no precedent for it at common law."

The practice of entering judgments in debt on warrants of attorney is very old, so old that the date of its origin is unknown. Chitty says: "How or when this peculiar security for a debt, authorizing a creditor, as it were *per saltum*, to sign a judgment and issue execution without even issuing a writ, was first invented, does not appear, but it has now become one of the most usual collateral securities on loans of money or contracts to pay an annuity and for debts, but usually accompanied with some other deed or security." 2 Chitty, Pr. 384.

It was early found that unconscionable advantage was taken of debtors by creditors by means of such warrants of attorney, obtained when the debt was incurred, and when the debtor was hopeful, and executed with harshness against him in the hour of his distress; and the courts were compelled to prescribe rules, and Parliament to enact statutes, to limit the operation of such warrants, and restrain the injustice to which the use of them frequently gave rise.

But if it were established that confessions of judgments upon warrants of attorney obtained as a practice at common law in an action of ejectment, or in other actions in form of tort, it would not authorize the practice, in an action of forcible entry and detainer, under the law of this State. This action is a special statutory proceeding, summary in its nature, and in derogation of the common law; and it is a rule of universal application in such actions that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be *coram non judice*, and void. *Davis v. Davis*, 6 Cent. Rep. 276, 115 Pa. 261; *Burns v. Nash*, *supra*, and cases there cited.

While forcible entry and detainer is a civil proceeding for restitution, it is based upon, and has by modern legislation been evolved from, the English forcible entry and detainer, which was a criminal proceeding merely. Ejectment,

from its slow progress, was an inadequate remedy to a landlord, and the Legislature provided the summary remedy by which a speedy recovery of possession may be secured; but to prevent hasty action, and to secure tenants and their families from the danger and inconvenience of being forcibly ejected without notice and reasonable time for preparation, certain safeguards were provided by the statute. A demand for possession is required to be made upon the tenant before the commencement of the action. A complaint in writing must be filed before summons issues. Service of the summons is to be made in a manner different from the service in other actions at law; and, if judgment is rendered against the tenant, the statute provides that "No writ of restitution shall be issued in any case until the expiration of five days."

There is in the statute a policy discoverable, as was said by Mr. Justice McAllister in *Burns v. Nash*, "based upon humane considerations of oppression and hardships which might ensue if families, in any kind of weather, and at any time of day or night might be thus forcibly ejected from their homes with all their effects, without notice or warning," which forbids the conclusion that a landlord, by exacting from his tenant a power of attorney in his lease, can obtain the right to an immediate judgment, without having demanded possession, or having process issued or served, and to an immediate writ of restitution, and to avail himself of the remedy against his tenant furnished by a statute, every provision of which, with reference to procedure, he has set aside by contract, and thus to proceed to the ejection of the occupants and the recovery of possession, "by leaps," as the creditor was enabled by a similar warrant to sign judgment and issue execution against his debtor at common law, without affording an opportunity to the tenant of raising any objection, or making any defense.

What wrong might be perpetrated, were such a practice to be established, is illustrated by the operation of the "amicable ejectment" proceeding in Pennsylvania, as shown in *Grossman's Appeal*, 103 Pa. 187, where, after the death of the lessee, and the acceptance of a month's rent in advance from the widow, and before the expiration of the month, the landlord, on an unfounded rumor that the widow had assigned the lease, and thus broken the covenant against assignment, confessed a judgment against the dead man, under the terms of the lease, and, without previous notice of the judgment or execution, the widow and heirs were dispossessed "at the early hour of 8 o'clock in the morning, in February."

Whatever may be thought of the public policy of such a practice, it cannot be ingrafted upon our forcible detainer proceeding, without the consent of the Legislature. The Act provides a new remedy, and the course of procedure to obtain it; and no remedy or mode of procedure can be pursued, except that directed by the Act. "If the Act has prescribed the remedy for the party aggrieved, and the mode of prosecution, all other remedies and modes are excluded." *Miller v. Taylor*, 4 Burr. 2824; *Smith v. Lockwood*, 18 Barb. 217.

Parties cannot, by their contracts, vary the procedure in courts of justice prescribed by the

statute. This was expressly decided by the Supreme Court of Iowa in a case which we consider in point, and decisive of the question under consideration. A judgment was entered up in the district court, under a warrant of attorney in a judgment note made in Pennsylvania, which authorized any attorney in any court of record within the United States to confess judgment against the maker of the note. A petition was filed by the maker of the note to have the judgment declared void, and the court so ordered. On appeal the supreme court said:

"It is claimed by appellant that the principles of the common law authorizing a warrant of attorney to confess judgment are in force in this State, and that the provisions of our Code respecting the recovery of judgment by action are merely cumulative. We do not think this position is correct. The whole subject of recovery and rendition of judgment is fully reviewed in the Code, and the course to be pursued in obtaining judgment is specifically pointed out . . . A confession of judgment pertains to the remedy. A party seeking to enforce here a contract made in another State, must do so in accordance with the laws of the State. Parties cannot, by contract made in another State, ingraft upon our procedure here, remedies which our laws do not contemplate nor authorize." *Hamilton v. Schoenberger*, 47 Iowa, 385.

*A fortiori*, parties within the State cannot by contract ingraft upon the procedure prescribed for a summary proceeding, a remedy or practice not warranted by the statute. While parties by consent may waive rights, they cannot thus amend the law. A fundamental requisite to the validity of a judgment is that the court should have jurisdiction of the subject matter and of the parties. A judgment against a defendant, who has not been served at all with process, and who has not appeared, is a nullity. The record shows no process to the defendant, and no appearance by him, but shows a departure from the course specifically pointed out by the statute, and an attempt to give jurisdiction of the defendant, and enter judgment against him in a manner which the statute does not contemplate nor authorize.

A confession of judgment upon a warrant of attorney in an action of forcible detainer in a court of record is as irregular and unauthorized as it would be in a justice's court. Such court of record does not proceed in forcible detainer by virtue of its power as a court of general jurisdiction, but derives its authority wholly from the statute, and in such proceeding is, therefore, to be treated as a court of special and limited jurisdiction. 2 Phil. Ev. 946, Cow. & H. notes; *Burns v. Nash*, *supra*.

A court of special and limited jurisdiction, like a justice's court, has no authority to enter a judgment by confession on a warrant of attorney, even in a case where such judgment would be authorized in a court of record by the common law. *Alberty v. Dawson*, 1 Binn. 105.

From no point of view are we able to sustain the authority of the court to enter the judgment appealed from. We have carefully examined the question, and re-examined the views expressed in the opinion of *Mr. Justice* 2 L. R. A.

*McAllister in Burns v. Nash*, *supra*, and such re-examination has tended to confirm us in the position there announced. The court has no power to enter the judgment in this form of proceeding on the warrant of attorney contained in the lease, and the judgment is therefore *coram non iudice*, and void, and must be reversed.

*Messrs. Williams & Thompson* for appellant.

*Messrs. Moses & Newman* for appellee.

#### Per Curiam:

We are satisfied with and adopt the foregoing opinion of the appellate court. Counsel for the appellant have furnished us with a brief, criticising both the conclusions and reasoning of the opinion with great apparent earnestness; and we have carefully examined the various propositions discussed and authorities cited. In the light of the suggestions thus made by counsel, and after having fully considered the case, we are disposed to concur with the appellate court, both in its conclusions, and in the process of reasoning by which those conclusions are reached.

*The judgment of the Appellate Court will therefore be affirmed.*

#### Craig, Ch. J., dissenting:

I do not concur in this decision. Forcible detainer is a mere civil proceeding authorized by the statute, under which the owner of lands may recover possession where the possession is unlawfully withheld. Forcible detainer is not an action of tort. At an early day this doctrine was announced in *Robinson v. Crummer*, 10 Ill. 222. It is there said:

"At common law, the party was liable to indictment, and might be convicted of either a forcible entry or a forcible detainer, each being considered a distinct offense. Not so under our statute. The proceeding is purely a civil remedy, the sole object of which is to regain the possession that has been invaded."

If it be true that a judgment could not be confessed under a *cognovit* in forcible detainer at common law upon the ground that the action was a tort, that fact does not, in my judgment, establish the doctrine that a judgment could not be entered under a *cognovit* in forcible detainer, as that action is known and recognized under our statute. A *cognovit* to confess a judgment on a note, bond or contract for a debt may be given, and a judgment rendered under such a *cognovit* has always been regarded as valid and binding. If binding and obligatory on a contract to pay money, why not on a contract to surrender possession of a lot or tract of land? A judgment rendered on a note or bond grows out of a breach of contract. So, too, a judgment for forcible detainer grows out of a breach of contract; and, if a *cognovit* to render judgment in the one case may be sustained upon principle, I see no reason why it may not in the other.

Again, in *Fabri v. Bryan*, 80 Ill. 182, this court held that, where a lease contains a license to the landlord to enter into possession of the leased premises without process of law, and expel and remove the tenant, and use such force as may be necessary in doing so, the landlord may enter and remove the tenant after

the expiration of the term, and the tenant cannot maintain an action of trespass against the landlord. If, as held, the tenant may make a lawful contract with the landlord, under which the latter may enter and remove the tenant, what principle of law forbids the tenant from incorporating in a lease a provision under which, upon default of surrendering possession at the end of the term, a judgment for possession may be confessed in a court of competent jurisdiction?

**Wilkin, J.:**

I concur in the views expressed by *Chief Justice Craig*.

**Magruder, J.:**

I concur in the dissenting opinion of *Chief Justice Craig*.

Petition for rehearing was denied March 22, 1889.

## MICHIGAN SUPREME COURT.

PEOPLE of the State OF MICHIGAN

v.

John ARMSTRONG, *App't*.

(....Mich....)

(January 18, 1889.)

1. The power given to a municipal corporation by its charter to control and regulate the manner in which streets shall be used, does not, expressly or by implication, give power to pass an ordinance prohibiting the circulation or giving away of any circulars, hand-bills or advertising cards in or upon any of the public streets and alleys of the city.
2. A municipal ordinance making it unlawful to "circulate, distribute or give away circulars, hand-bills or advertising cards of any description in or upon any of the public streets and alleys" of a city, even if it can be held to be within the general power granted by the city charter to control and regulate the use of streets, is unreasonable and unwarranted, so far as it applies to giving to those who express or appear to express a desire therefor, small cards of invitation to attend meetings of the Young Men's Christian Association.

### NOTE.—Powers of municipal corporations.

A city is an instrument for the exercise of the authority of the State, and its municipal powers in establishing and maintaining streets are exercised in the discharge of governmental functions. *Waterville v. Union Mill Co.* 72 Iowa, 437.

Municipal corporations possess only such powers as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted. *Ravenna v. Pa. Co.* (Ohio) 10 West. Rep. 463; *Brenham v. Brenham Water Co.* 67 Tex. 542.

The functions of cities and their officers are prescribed by the Legislature, and it rests in the sovereign discretion of that body to say how much of the police power shall be exerted by the municipality. *State, Atwood, v. Hunter*, 38 Kan. 573.

The power of making rules, regulations, by-laws or ordinances is incidental to every corporation, whether municipal or private. *Fertich v. Michener*, 9 West. Rep. 333, 111 Ind. 472.

The power granted to a municipality to enact ordinances must be strictly construed. *Re Standiford* (D. C.) 8 Cent. Rep. 740, 5 Mackey, 549.

By-laws authorized by charter have the same effect, within municipal limits, as a special law of the Legislature. *St. Johnsbury v. Thompson*, 4 New Eng. Rep. 509, 59 Vt. 300.

No ordinance or by-law of a corporation can enlarge, diminish or vary, its powers. *Thompson v. Carroll*, 63 U. S. 22 How. 422 (16 L. ed. 387); *Andrews v. Union Mut. Ins. Co.* 37 Maine, 258; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349 (20 L. ed. 453); 1 Dillon, Mun. Corp. 387; *Rex v. Miller*, 6 T. R. 277; *Rex v. Barber Surgeons*, 1 Ld. Raym. 585.

As to discretion in the exercise of their powers, see *Lucia v. Montpeller* (Vt.) 1 L. R. A. 160 and note.

*Powers vested must be exercised by ordinances.*

The powers vested in municipal corporations

2 L. R. A.

(CERTIORARI to the Recorder's Court of Detroit (George S. Swift, *Recorder*), to review a judgment convicting defendant of distributing cards on the streets of Detroit inviting persons to visit the rooms of the Young Men's Christian Association. *Reversed*.)

The facts are stated in the opinion.

*Messrs. Corliss, Andrus & Leete* for defendant, appellants.

*Messrs. John W. McGrath and Fred. H. Warren*, for the People, appellees.

**Long, J.**, delivered the opinion of the court:

This case comes from the Recorder's Court of the City of Detroit by writ of certiorari.

The complaint is made under section 12, chap. 55, Rev. Ordinances City of Detroit, as amended August 22, 1885, and charges that at the City of Detroit on the 18th day of June, 1888, within the corporate limits of said city, on Woodward Avenue, at the corner of Grand

should, as far as practicable, be exercised by ordinances, general in their nature and impartial in their operation. *Russ v. Mayor etc. of N. Y.* 12 N. Y. Legal Obs. 38; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *DeBen v. Gerard*, 4 La. Ann. 30; *Chicago v. Rumpff*, 45 Ill. 90; *Mayor etc. of Hudson v. Thorne*, 7 Paige, 231; 1 Dillon, Mun. Corp. 370.

Whatever regulation is made must operate uniformly under the same conditions—must be impartial and general, or it is no law. *Waite v. Garston Local Board of Health*, L. R. 3 Q. B. 5; *Re Frazee*, 8 West. Rep. 142, 63 Mich. 396.

### Power to regulate.

In cases relating to a common right, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit. *Taylor v. Griswold*, 14 N. J. L. 222; 1 Dillon, Mun. Corp. 573.

A prohibition which deprives a party of several hours of daylight during which he is forbidden to exercise a right conferred by statute, is unreasonable and oppressive. *Ward v. Greenville*, 8 Baxt. 223.

An ordinance contravening a common right cannot be made, although the power to do so be plainly conferred by legislative grant. *U. S. v. Ludlow* (D. C.) 9 Cent. Rep. 517.

Ordinances, by-laws and regulations are not to be against public right or unreasonable. *Coal Float v. Jeffersonville*, 10 West. Rep. 833, 112 Ind. 15.

A by-law is unreasonable when it suppresses what is in general perfectly lawful, and leaves the power of permitting or restraining to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions operating generally and impartially. *Re Frazee*, 8 West. Rep. 143, 63 Mich. 396.

### Special grant of power.

A special grant of power to a municipal corpora-



River Avenue, the defendant, John Armstrong, then and there unlawfully and willfully did circulate and distribute and give away circulars, hand-bills, and advertising cards, to the evil example of all others in like cases offending, and contrary to the ordinance of said city, etc.

The conceded facts proved on the trial are that defendant was distributing cards on the corners of Woodward and Grand River Avenues, in the City of Detroit, on the evening of June 18, 1888; that defendant is one of the invitation committee referred to in the cards; that no cards were to be seen upon the ground or sidewalk at or near the place of distributing the same; that cards were given to those only who expressed or appeared to desire the same, and took the same willingly; that the use of the Y. M. C. A. privileges offered by the cards was entirely gratuitous; that cards were offered persons unknown to defendant. The cards were in the following form and size:

THE	INVITES
INVITATION	CORDIALLY
COMMITTEE	YOU
TO SPEND	
THIS OR ANY MONDAY NIGHT,	
From 7:45 to 9 o'clock,	
AT THE Y. M. C. A. BUILDING.	
ICE-WATER AND FANS.	

The provisions of the Charter of the City of Detroit, under which it is claimed the city had power to pass the ordinance under which the complaint is made, reads: "That the council shall have power to provide for cleaning of highways, streets, avenues, drains, alleys," etc., "of dirt, filth and other substances," etc., also "to prohibit and prevent the incumbering or obstructing of streets, drains, alleys, crosswalks, sidewalks and all public grounds and places, with vehicles, animals, boxes, signs, barrels, posts, buildings, dirt, stone, brick and all other material and things whatsoever, of every kind and nature," etc., also "to control, prescribe and regulate the manner in which highways, streets, avenues, lanes, alleys, public grounds

and spaces in said city shall be used and enjoyed," etc., also "to prohibit and prevent the flying of kites, and all practices, amusements and doings therein having a tendency to frighten teams and horses."

The ordinance under which the complaint is made reads:

"Sec. 12. Hereafter no person shall, himself or by another party, attach, place, print, paint or stamp any placard, circular, showbill, or advertisements, of any description whatever, except such as may be expressly provided by law, on any street or sidewalk, or upon any public place or object in the city, or upon any fence, building or property belonging to the city, or upon any telegraph pole, telephone pole, electric-light pole or tower, or upon any hitching-post, horse block, or curb-stone in any public street or alley in the City of Detroit; and no person shall, himself or by another, circulate, distribute or give away circulars, hand-bills or advertising cards of any description in or upon any of the public streets and alleys of said city."

On the trial of the case, defendant's attorney asked for the discharge of the defendant, which the court overruled, and found the defendant guilty, and imposed a fine of \$3, in default of payment of which fine, defendant was ordered to be imprisoned in the Detroit House of Correction for a period not exceeding twenty days. The said fine was imposed under authority of section 19, chap. 55, of the ordinance, which reads:

"Sec. 19. Any violation of the provisions of this ordinance shall be punished by a fine not to exceed \$100, and costs of prosecution; and in the imposition of any fine and costs the court may make a further sentence that the offender may be imprisoned in the Wayne County jail or the Detroit House of Correction until the payment thereof; *Provided, however*, That the period of such imprisonment shall not exceed six months."

The allegations of error contained in the affidavit for the writ of certiorari are: that the ordinance upon which this complaint is based is invalid, in that the common council had no authority under the charter of the city to adopt the same; that the ordinance is invalid because unreasonable, oppressive and in contravention of constitutional rights; that the court had no authority to impose any fine or penalty, be-

tion to adopt ordinances on enumerated subjects connected with municipal concerns is in addition to the incidental power of the corporation. *State, Taintor, v. Morristown*, 38 N. J. L. 57; 1 Dillon, Mun. Corp. 366.

The enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions. *Helsambrittle v. Charleston*, 2 McMullen, 233; *Wadleigh v. Gilman*, 3 Fairf. (Maine) 403; *State v. Clark*, 8 Foster (N. H.) 176; *State v. Ferguson*, 53 N. H. 432; *State v. Freeman*, 38 N. H. 428; *Com. v. Turner*, 1 Cush. 493; *Collins v. Hatch*, 18 Ohio, 523; *N. O. v. Phillips*, 9 La. Ann. 44.

#### *Ordinance must be authorized by law.*

An ordinance must be shown to be authorized by the express provision of the charter, or be derived as an incidental power resulting from its incorporation as a city, or be found in some general or special statute. *Com. v. Stodder*, 2 Cush. 562, 568; *Herzog v. San Francisco*, 38 Cal. 134, 145; 1 Dillon, Mun. Corp. 372.

Power to pass necessary by-laws is incidental; but 2 L. R. A.

this power is limited not only by the terms, but the spirit and design, of the charter, and the general principles and policy of the common law. *Taylor v. Griswold*, 14 N. J. L. 222; *Mt. Pleasant v. Breeze*, 11 Iowa, 399.

#### *Implied powers to make by-laws.*

The power to make by-laws when not expressly given, is implied as an incident to the very existence of a corporation; but in the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication. *State v. Ferguson*, 33 N. H. 424, 430; citing 2 Kyd, Corp. 102; *Angell & A. Corp.* 177; *Child v. Hudson's Bay Co.* 2 P. Wms. 207; 1 Dillon, Mun. Corp. 366.

#### *Powers to be exercised with reason.*

In this country ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State. *Kip v. Paterson*, 26 N. J. L. 298;

cause the ordinance under which the penalty is claimed to be imposed is unconstitutional, in that it permits and authorizes the imposition of fines and penalties excessive and unreasonable and entirely disproportionate to offenses created and specified; that the court had no authority to impose a penalty, and the judgment is void because the ordinance under which the penalty imposed is claimed to be authorized is illegal, in that it provides for variable and uncertain penalties for offenses charged; that the defendant should have been discharged.

Corporations derive all their powers from legislative Acts, and they can pass no ordinance which conflicts with the charter. Where the Legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the Legislature distinctly says may be done will not be set aside by the courts, unless in conflict with the Constitution, because they may deem it unreasonable. But where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid. 1 Dillon, Mun. Corp. § 263.

The fact, however, that an ordinance covers matters which the city has no power to control is no reason why it should not be enforced as to those which it may control. The unauthorized provisions do not invalidate the whole ordinance, if they can be separated from the rest of the ordinance without so mutilating it as to render it inoperative. *Kettering v. Jacksonville*, 50 Ill. 89.

It is insisted upon the part of the prosecution that the power contained in the charter is sufficient to warrant the passage of the ordinance. There is an express power in the charter to provide for cleaning the highways, streets, avenues, lanes, alleys, public grounds and squares, crosswalks, and sidewalks in said city, of dirt, mud, filth and other substances; also to prevent the incumbering or obstructing of streets,

lanes, alleys, etc., and to control, prescribe and regulate the manner in which the highways, streets, etc., shall be used and enjoyed, as well as to prohibit and prevent the flying of kites, and all practices, amusements and doings therein, having a tendency to frighten teams and horses, or dangerous to life or property. This is not an express grant of power to the City of Detroit to pass a by-law or ordinance to prohibit a person from circulating, distributing or giving away circulars, hand-bills or advertising cards of any description, in or upon any of the public streets and alleys of said city, and to punish by fine and imprisonment in the county jail or the Detroit House of Correction for violation; and there is no such power implied in these provisions of the charter.

Even if it could be held that the charter authorized it, this part of the ordinance is not a reasonable exercise of the power granted. It is true that the miscellaneous throwing to the winds of hand-bills, circulars or advertising cards may be an act that would be very desirable to prohibit. Such a distribution of cards or paper of any kind would not only litter up the street and become a nuisance upon and along the streets, sidewalks and crosswalks, but naturally would tend to frighten teams and horses hitched upon or being driven along the streets, and great danger might be apprehended to life and limb; yet the reasonableness or unreasonableness of an ordinance is not determined by the enormity of some offense it seeks to prevent and punish, but by its actual operation in all cases that may be brought thereunder.

It is conceded in the present case that these cards were given to those only who expressed, or appeared to express, a desire for the same, and that no cards were to be seen upon the ground or sidewalk at or near the place where the defendant was distributing them; and it is not pretended that the rights of any person were interfered with by defendant, or that any teams or horses were frightened. There was no indiscriminate scattering of the papers to the winds, and the cards of the size of one and one half inches by two inches contained nothing but what was legitimate and proper for publication and distribution. The card itself was not only harmless, but the words printed thereon were an invitation to a moral and Christian assembly of people, gathered together for the public good. If this act can be classed as an

*Northern Liberties Comrs. v. Gas Co.* 12 Pa. 318; *Fisher v. Harrisburg*, 2 Grant, 291; *Com. v. Robertson*, 5 Cush. 488; *Waters v. Leech*, 3 Ark. 110; *Memphis v. Winfield*, 8 Humph. (Tenn.) 707; *Com. v. Steffee*, 7 Bush (Ky.) 161; *People, Mutr. v. Throop*, 12 Wend. 183, 188; *Columbia v. Beasley*, 1 Humph. 232; *State v. Freeman*, 38 N. H. 428; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *Pedrick v. Bailey*, 12 Gray (Mass.) 161; *Dunham v. Rochester*, 5 Cow. 463; *Clacon v. Milwaukee*, 30 Wis. 316; *Meth. P. Church v. Baltimore*, 6 Gill, 301; 1 Dillon, Mun. Corp. 369.

Ordinances passed under the general authority to enact all such as will be necessary, must be reasonable or they may be void. *Northern Liberties Comrs. v. Gas Co.* 12 Pa. 318.

Where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid. *Peoria v. Calloun*, 29 Ill. 317; *St. Paul v. Coulter*, 13 Minn. 41.

#### Reasonableness a subject of judicial inquiry.

The reasonableness of their exercise is a fit subject for inquiry. *St. Louis v. Weber* 44 2 L. R. A.

*Mo. 547; Kelly v. Meeks (Mo.) 2 West. Rep. 512.*

The power of the court to declare an ordinance unreasonable is restricted to cases in which the ordinance was passed under the supposed incidental powers of the corporation. *Coal Flat v. Jacksonville*, 10 West. Rep. 383, 112 Ind. 15.

Courts will declare void ordinances that are oppressive in their character. *Memphis v. Winfield*, 8 Humph. (Tenn.) 707.

The oppressiveness and inequality, alleged to invalidate a by-law, must be made apparent to the court. *Columbia v. Beasley*, 1 Humph. (Tenn.) 232; *St. Louis v. Weber*, 44 Mo. 547.

The judicial tribunals will not interfere with municipal corporations in their internal police and administrative government, unless some clear right has been withheld or wrong perpetrated. *State, Hardwick v. Swearingen*, 12 Ga. 23; 1 Dillon, Mun. Corp. 180.

Whatever establishes a distinction between classes or sects to the extent of that distinction a persecution. The extent of the discrimination is not material; it is enough that it creates an inequality of right or privilege. *Cooley, Const. Lim. 467. See Anderson v. City of Wellington*, 2 L. R. A. 110.

offense punishable by fine and imprisonment, then selling or distributing newspapers upon the streets of the city would be punishable in the same way.

To render ordinances reasonable, they should tend in some degree to the accomplishment of the object for which the corporation was created and its powers conferred. The unreasonableness of this ordinance is made apparent when we consider the penalty which may be imposed for its violation—a fine of \$100, and costs of prosecution, and, in default of payment, imprisonment in the county jail or Detroit House of Correction for a period of six months. If the conviction could be sustained, then any person upon any public street or alley, anywhere within the corporate limits of the City of Detroit, giving away advertising cards, however remote the street or alley from the business centers, could be convicted and punished in like manner. Laws which attempt to regulate and restrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty.

Under our Constitution and system of government the object and aim is to leave the subject entire master of his own conduct, except in the points wherein the public good requires some direction or restraint. What direction or restraint is required for the public good in the mere act of giving away an advertising card or hand-bill? This part of the ordinance is not aimed at the littering up of the streets, or to the frightening of horses; but the offense is made complete in itself by the mere act of

distributing or giving away of these enumerated articles.

In *Frazee's Case*, 6 West. Rep. 142. 63 Mich. 396, it was held by this court that a city ordinance providing that "No person or persons, associations or organizations, shall march, parade, ride or drive in or upon or through the public streets of the City of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor of said city," is unreasonable and invalid, because it suppresses what is, in general, perfectly lawful, and leaves the power of permitting or restraining processions to an unregulated official discretion. In that case *Chief Justice Campbell*, speaking for the court said: "No one in his senses could regard a penalty of \$500 for such trivial offenses as most of those covered by this by-law as within any bound of reason."

Many decisions of the courts of other States are to be found holding by-laws much less stringent and arbitrary in their terms unreasonable and invalid. 1 Dillon, Mun. Corp. § 253; *Clinton v. Phillips*, 58 Ill. 102; *Kip v. Paterson*, 26 N. J. L. 298; *Northern Liberties Comrs. v. Gas Co.* 12 Pa. 318; *Com. v. Robertson*, 5 Cush. 438.

This ordinance not only does not come within the powers granted by the charter, but it is also unreasonable and unwarranted.

It follows that the conviction must be set aside, the proceedings quashed, and defendant discharged.

The other Justices concurred.

## DELAWARE COURT OF ERRORS AND APPEALS.

DOE, d. Spencer HITCH *et al.*, *Plffs. in Err.*,  
v.

Wellington PATTEN.

(....Houst....)

A devise of "all the tracts or parcels of land belonging to" the testator, to his son, is sufficient, without any words of inheritance, to pass a fee, where preceding clauses of the will have expressly stated that each of testator's other children and his wife should receive a certain specific portion of property, "and no more," thus expressly disinheriting the other heirs; and where the introductory clause of the will indicates a purpose to dispose of testator's entire estate.

(January 16, 1889.)

**E**RROR to the Superior Court of Sussex County, to review a judgment for defendant in an action of ejectment. *Affirmed.*

Plaintiffs claimed title to the property in controversy as heirs at law of Spencer Hitch, Sr., deceased, whose will was admitted to probate February 21, 1797.

Defendant claimed title through Spencer Hitch, Jr., who died in 1873 and who was a devisee under the will of Spencer Hitch, Sr. The contention of plaintiffs was that Spencer Hitch, Jr., took but a life estate under said 2 L. R. A.

will, while defendant claimed that he took a fee simple.

The court below (Comegys, *Ch. J.*), directed a verdict for defendant, and plaintiffs took this writ.

Further facts appear in the opinion.

*Mr. N. B. Smithers*, for plaintiffs in error:

In order to pass a fee by a devise of lands there must be words of limitation or tantamount expressions having the same operative meaning. No words will be sufficient unless they import the gift of an inheritable interest.

It is not enough that there shall be probable intention to disinherit the heir, or that a layman would say that such intention was unequivocally manifested. It must be apparent to the legal eye.

Although a testator may have commenced his will with the declaration of his purpose to dispose of his whole estate, or may have given a nominal legacy to his heir, or may have declared his intention wholly to disinherit him, or may have given to the heir a prior estate for life in the subject matter, or there may be a general devise to one after an antecedent devise for life to another, none of these circumstances nor all concurring in the same instrument will give more than an estate for the life of the devisee in lands devised to him without words of limitation.

*Denn v. Gaskin*, Cowp. 657; *Right v. Sidebotham*, Doug. 759; *Doe v. Clarke*, 2 Bos. & P. N. R. 848; *Doe v. Wright*, 8 T. R. 64; *Doe v. Allen*, 8 T. R. 497; *Goodright v. Barron*, 11 East, 220; *Pocock v. Bishop of Lincoln*, 3 Brod. & B. 27, 7 Eng. C. L. 835; *Doe v. Tucker*, 3 Barn. & Ad. 478, 23 Eng. C. L. 128; *Doe v. Parratt*, 3 Barn. & Ad. 469, 23 Eng. C. L. 121; *Lloyd v. Jackson*, L. R. 2 Q. B. 269; 3 Jarman, 5th Am. ed. 267; *Wright v. Denn*, 28 U. S. 10 Wheat. 204 (6 L. ed. 308).

*Cordry v. Adams*, 1 Harr. (Del.) 489, is clearly distinguishable from this case, and besides has repeatedly received judicial condemnation.

See *Dodd v. Doe*, 2 Houst. 76; *Doe v. Alexander*, 2 Houst. 284; *Doe v. Biddle*, 2 Houst. 408; *Doe v. Lampleugh*, 8 Houst. 462. See also *Van Derzee v. Van Derzee*, 80 Barb. 381, 86 N. Y. 231; *Steele v. Thompson*, 14 Serg. & R. 84; *Beall v. Holmes*, 6 Harr. & J. 205.

**Messrs. Alfred P. Robinson and Charles M. Cullen**, for defendant in error:

Technical words are not required to pass a fee; nor is it necessary that the operative words be used in the devise itself; but such an intention, when clearly gathered from the whole will, will enlarge a general devise to a fee.

*Doe v. Dill*, 1 Houst. 410; *Cook v. Holmes*, 11 Mass. 580, 581.

In this will this intention is not left to mere conjecture as a case of *vuluit, sed non dicit*, but is to be clearly gathered from the words of the will itself. The introductory clause shows an evident intention of devising the whole estate.

While it is true that this is not of itself sufficient to enlarge a subsequent general devise to a fee, as was ruled by this very court in the case of *Dodd v. Dodd*, 2 Houst. 76, it is also true that it is always adverted to by the court in ascertaining the intention of the testator in subsequent devises.

*Beachcroft v. Beachcroft*, 2 Vern. 690; *Tanner v. Wise*, 3 P. Wms. 295; *Grayson v. Atkinson*, 1 Wils. 333; *Hogan v. Jackson*, Cowp. 299; *Locacres v. Blight*, Id. 352; *Smith v. Coffin*, 2 H. Bl. 444; *Wilce v. Wilce*, 7 Bing. 664, 20 Eng. C. L. 280; *Doe v. Gilbert*, 8 Brod. & B. 85, 7 Eng. C. L. 359; *Knight v. Selby*, 8 Man. & Gr. 91, 42 Eng. C. L. 57; *Butler v. Little*, 3 Maine, 289; *Kennon v. McRoberts*, 1 Wash. (Va.) 99; *Davies v. Miller*, 1 Call, 127; *Wyatt v. Sadler*, 1 Munf. 587; *Goodrich v. Harding*, 3 Rand. 280; *Winchester v. Tilghman*, 1 Harr. & McH. 452; *Clark v. Mikell*, 3 Desaus. 168; *Doe v. Harter*, 7 Blackf. 489; *Chartir v. Otis*, 41 Barb. 575; *Jackson v. Merrill*, 6 Johns. 185; *Fox v. Phelps*, 17 Wend. 899; *Van Derzee v. Van Derzee*, 86 N. Y. 231; *Shriver v. Meyer*, 19 Pa. 87; *Wood v. Hills*, Id. 518; *Shinn v. Holmes*, 25 Pa. 142; *Walker v. Walker*, 28 Pa. 46.

In addition to the general expressions of the introductory clause, the fact that the testator mentions and includes each one of his children and heirs in his will and that he is careful to add to the bequest to each of the others the words, "no more" shows conclusively that he intended to, and thought he had, disposed of his whole estate and had devised a fee to Spencer, Jr.

*Cordry v. Adams*, 1 Harr. (Del.) 489.

The following cases directly support the case of *Cordry v. Adams*:

2 L. R. A.

*Doe v. Clayton*, 8 East, 141; *Butler v. Little*, 3 Maine, 289; *Winchester v. Tilghman*, 1 Harr. & McH. 452; *Clark v. Mikell*, 3 Desaus. 158; *Doe v. Harter*, 7 Blackf. 488; *Cook v. Holmes*, 11 Mass. 528; *Baker v. Bridge*, 12 Pick. 27.

The words "belonging to or that I am possessed with," in the devise to Spencer, Jr., were used by the testator as expressive not only of the *corpus*, or subject of the devise, but also of his interest in the lands, and especially when taken in connection with the intention shown in the whole will, are operative to carry the fee.

*Smith v. Berry*, 8 Ohio, 866; *Pitman v. Stevens*, 15 East, 505; 4 Kent, Com. \*536; *Fogg v. Clark*, 1 N. H. 163; *Wilce v. Wilce*, 7 Bing. 664, 20 Eng. C. L. 280; *Shelton v. Alcox*, 11 Conn. 248; *Spear v. Hooper*, 22 Pick. 144; 3 Jarman, Wills, \*276.

**Houston, J.**, delivered the opinion of the court:

As the ruling in this case in the court below was made directly on the authority of the case of *Cordry v. Adams*, 1 Harr. (Del.) 489, and the soundness of that decision, under the facts and circumstances of the case, as reported by Judge Harrington, is questioned and denied by the learned counsel for the plaintiff in error in this case, I will, in the first place, remark that no one, I think, who has traced the current of decisions in England on the question of the construction of devises of this kind, from the times of Talbot and Hardwicke, Lord Chancellors, and Lord Mansfield and Lord Kenyon, Chief Justices, down to the commencement of the present century, at least, if not to the time of that first reported case of the kind in the courts of this State, in the year 1834, will either be surprised at that decision, or be prepared beyond a reasonable doubt to dissent from it.

And the less will he be so, I think, after reading, in connection with the multitude of decisions to which I have before adverted, what Lord Kenyon said on the subject, *first*, in the case of *Moor v. Mellor*, 5 T. R. 558, that: "Had there not been such a current of authorities as we find in the books, since the passing of the Statute of Wills, on the construction of wills, to 'further' (as it has been called) the intention of devisors, perhaps it would have been better that the same strict words had been required in testamentary dispositions of land as in those by deed; because then the language of passing estates would have been so familiar that few questions would have arisen on wills. For it has been often observed that few questions arise on the construction of deeds, when compared to those which daily arise on wills. But we are bound to consider the series of authorities on this subject as the law of the land; and it would be extremely dangerous now to remove those landmarks of real property, on which mankind has acted for such a length of time. In many of the cases that have been litigated, and in which it has been decided that the first devisee was only entitled to a life estate, one cannot but suspect, privately speaking, that it was the intention of the devisor to give the absolute property to the first taker; and Lord Mansfield used to observe that the common class of men imagined that they could devise a fee simple by the same words that are sufficient

to give a piece of plate. But the contrary of such a supposition has now been decided by so many authorities that it would be dangerous to shake them; and in deciding on the construction of wills we must not indulge in conjectures or wishes, but determine on the words used according to those authorities. Where the word 'estate' has occurred, that word has been held *ex vi termini* to pass a fee. The courts, indeed, have gone as far as they could to give the absolute interest to the first devisee; but there are certain limits which they have put on their construction of wills, and we must take care not to transgress them."

And in the same case *Grose, J.*, said: "In the construction of wills we must be guided by those rules which we find established in former cases. And one rule is clear: that the heir at law is not to be disinherited, unless the deviser's intention to disinherit him can be collected from the words of the will. What is a sufficient proof of that intention is not, indeed, accurately defined, as applicable to every case that may arise."

And again, in the case of *Doe v. Allen*, 8 T. R. 497, recurring to the same subject, *Lord Kenyon* remarked: "It has been frequently lamented that at first, after the passing of the Statute of Wills, the courts did not require the same technical expressions in a will to pass a real estate as are necessary in conveying the estate by deed, for then we should not have had more cases on the construction of wills than of deeds; and it very rarely happens now that a question arises on the construction of a limitation in a deed. There are certain received words that are well known, and have from time to time been used by conveyancers in drawing deeds, and these exclude all doubt as to their legal meaning. But in expounding wills a greater latitude of construction has been allowed. After an anxious endeavor to discover the intention of a testator, it frequently happens that we can only conjecture what his intention was, and sometimes there is scarcely enough to form even a conjecture. Formerly Sir J. Bland made his own will, and at the close of it he said that he had disposed of his estate in so clear a manner that he thought it impossible for any lawyer to doubt about it. This will was afterwards contested, and it came before *Lord Hardwicke*, who said that he was so utterly at a loss to conceive what was the real intention of the testator that he wished he could find some ground on which to form a conjecture. So in the case of *Right v. Sidebotham*, Doug. 759, *Lord Mansfield*, whose mind was as equal to the explanation of difficult points as that of any lawyer who ever sat in Westminster Hall, admitted the difficulty of deciding questions of this kind, saying: 'I verily believe that in almost every case where by law a general devise of lands is reduced to an estate for life the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. *All my estate*, or *all my interest*, will do; but *all my lands lying in such a place* is not sufficient. Such words are considered merely as descriptive of the local situa-

tion, and only carry an estate for life. Nor are words tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt but the testator's intention here was to disinherit his heir at law, as in the case of *Denn v. Gaskin*, Cowp. 657.' And yet in that case he was not bold enough to decide that the devisee took more than an estate for life."

But *Lord Kenyon* further observes: "The plaintiff's counsel, in arguing this case, anticipates the three grounds on which it might be contended on the part of the defendant that a fee passed by this will. The first is the introductory clause, on which the case of *Ibbetson v. Beckwith*, Cas. t. Talb. 157, is decisive.

That case was decided by a great lawyer, *Lord Talbot*, who thought that such a clause, accompanied by other words, in a will, would pass a fee, but that that alone was not sufficient for that purpose; and this case has been followed by a variety of others to the same effect;" and in which he might have added to the illustrious name of *Lord Talbot* the no less illustrious names of *Lord Hardwicke* and *Lord Mansfield* as having afterwards expressly decided the same to be a sound rule in the construction of wills and devises of real estates without such words of limitation as are usual and necessary in deeds to convey an estate of inheritance in land.

And thus stood the adjudged cases on this question in England, with the emphatic indorsement by *Lord Kenyon*; also that the case of *Ibbetson v. Beckwith* is decisive upon that question, when the decision was made to the same effect in the case of *Cordry v. Adams*, 1 Harr. (Del.) 441, in the Superior Court of this State in 1884.

But notwithstanding the number and variety of the cases on the construction of wills referred to by *Lord Kenyon*, there are two well settled rules of general application on the subject clearly deducible from them, the first of which is that the heir at law is not to be disinherited except by express words in the will, or by necessary implication arising from them; and the second is that, in the construction of a will, the intention of the testator, as expressed in it, and collected from the whole of it, must prevail, provided it can be carried into effect consistently with the rules of law on the subject; and that, although a general devise of land, or a devise of land without words of limitation, gives to the devisee an estate in it for his life only, if no intention on the part of the testator to the contrary is sufficiently expressed or indicated in the devise itself, or in some other part or parts of the will, yet, if in such a devise, or in any other part or parts of the whole will, the intention of the testator to give him a larger estate, as an estate of inheritance or a fee simple estate in the land, is sufficiently expressed or indicated, the devisee will take by virtue of it such enlarged estate in it. And in ascertaining in such cases if any such further intention on the part of the testator had been sufficiently expressed or disclosed in any part of the will by a careful view and consideration of the whole of it, it was early decided in the courts of England that among other parts of a will the introductory clause might be considered, though not sufficient of itself to enlarge such a general

devise; but it might be taken, with the other parts of it, to show the meaning which the testator attached to such devise, and to what extent he intended the devisee to be benefited by it.

And after this had been once adopted, it soon became a settled rule of construction that, if the introductory clause of the will contained such words as the following: "And touching all such worldly or temporal estate as it has pleased God to bless or endue me with in this life, I give and dispose of in the following manner," etc.—which were quite common in the form of wills at that period—as the word "estate" *prima facie* imported and included in its legal sense and meaning all the legal right and title which the testator then had in law in and to the land devised, it *ex vi termini* imported an evident intention on the part of the testator to devise all his right and title in it to the devisee named, and not as by any means descriptive of the *corpus* and locality of the land merely, but including with that the legal idea and conception of all the right and title to and ownership of the testator in the premises; and if, in addition to this, there was to be found anywhere else in the will the intention of the testator sufficiently expressed or necessarily implied to disinherit his heir at law, the court considered it conclusive evidence that he intended to give to the devisee his estate in the land absolutely, and not for life merely, although there were no words of limitation whatever expressed in the devise.

And in one case, which had been several times argued before the Court of King's Bench in Ireland, and afterwards was brought before the King's Bench in England, *Lord Mansfield* and the whole court, after a careful consideration of it, and against the argument of *Buller*, who was then one of the counsel in the case, concluded to apply the same ruling to a will in which the words employed in the introductory clause of it were, "And as to my worldly substance, I give and bequeath," etc., by interpreting the words "worldly substance" to mean the same in that case as the words "worldly estate." *Hogan v. Jackson*. Cowp. 299.

But *Lord Kenyon*, as we have already seen, had also held it to be an established and certain rule that express words of limitation or words tantamount are necessary, even in a will, to pass an estate of inheritance. He says: "'All my estate,' or 'all my interest,' will do; but 'all my lands lying in such a place' is not sufficient. Such words are considered merely as descriptive of the local situation, and only carry an estate for life. Nor are words tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else."

And, such having become the settled rule of testamentary construction in regard to disinheriting the heir at law in devises of real estate to a stranger, it was probably suggested to someone familiar with it, and with what is said to have been the legal rule in ancient Rome, that a father could not disinherit his son without leaving him at least something in his will, who first prepared a last will and testament in the form of *John Cordry's* and *Spencer Hitch's*, which were evidently drawn from one and the same original model, although by different rural scribes, presumably well on to a hundred years ago, when school teachers were few and

far between in their respective neighborhoods; for in what better or more emphatic and unequivocal terms could a testator express his intention to disinherit his heir at law in his will than to begin with the grave and solemn declaration of his intention to give and dispose of such worldly estate which it has pleased God to bless him with in this life in the following manner: "I give and bequeath to my well beloved wife, *Sophia Hitch*, the third part of my estate, after all my just debts are paid, or the third of my estate, and no more;" and then to follow it thus:

"*Item*. I give and bequeath to *Sarah Snellen* one hundred feet square of ground at the north-west side of my house, where the garden now is, and the back small room in my house, and one bed and bedding, and no more. *Item*. I give and bequeath unto *Anna Hitch*, my daughter, one cow and calf, one bed and bedding, and no more. *Item*. I give and bequeath unto *Lilly Hitch*, my daughter, one cow and calf, one bed and bedding, and no more. *Item*. I give and bequeath unto *Sovereign Hitch*, my son, one horse and saddle, and no more. *Item*. I give and bequeath unto *Nelly Hitch*, my daughter, one cow and calf, one bed and bedding, and no more. *Item*. I give and bequeath unto *William Hitch*, my son, one horse, one bed and bedding and no more. *Item*. I give and bequeath unto *Clement Hitch*, my son, one horse, one bed and bedding, and no more. *Item*. I give and bequeath unto *Elget Hitch*, my son, one cow and calf, one bed and bedding, and no more. *Item*. I give and bequeath unto *Polly Hitch*, my daughter, one young horse or mare, one bed and bedding, and no more. *Item*. I give and bequeath unto *Spencer Hitch*, my son, all the tracts or parcels of land belonging to me or that I am possessed of. And further, I do hereby appoint and ordain *Sophia Hitch*, my dear wife, my whole and sole executor of this my last will and testament, and hereby revoking all former wills," etc.

I was about to inquire, when I commenced reading this will, item by item, and at full length, by what clearer, stronger, and more expressive words could the testator have declared his intention to disinherit or cut off every one of the devisees or legatees named in it, from his widow down to his son *Spencer*, from taking any more of his worldly estate than he has expressly given to each one of them in the will, excepting only the last one named in it, his son *Spencer*, and who evidently was the favorite child and prospective heir at law in coparcenary of the testator, and the preferred and special object of his bounty, so far as his numerous children, ten in all, then living, were concerned in the disposition of his estate under the will, and to each of whom, in marked contrast with the liberal devise to his son *Spencer*, he is careful to give and bequeath a specific legacy of "one cow and calf, one bed and bedding," at least, "and no more," of this estate, obviously and necessarily implied, and so to be read and understood, when taken in connection with the first in the remarkable series of brief and concise items, in which he gives to his wife "the third part of his estate, after all his just debts were paid, or the third part of his estate, and no more," and which here clearly mean, and cannot possibly have any other meaning,

than "no more," or "no other part" of my estate.

And the same uniform words following in quick succession at the close of each succeeding item until we come to the last, to his son Spencer, they must be understood, of course, to have the same meaning in all the succeeding items which they have in the first; for if this be not the correct interpretation of their meaning, ridiculous and absurd as it would seem, we would have to hold that they literally mean, say, for instance, in the item just before specially adverted to, no more "one cow and calf, one bed and bedding," and nothing else; and equally unreasonable and absurd would be the meaning of them in every other item in the will, when so interpreted and read by me.

The case of *Cordry v. Adams* was decided about the time I commenced reading law, and was published in the first volume of *Judge Harrington's Reports* in the same year in which I was admitted to the Bar. The judicial history of the case and circumstances attending the hearing and determination of it in the superior court, as well as the novelty and importance of it at that time in this State, attracted a good deal of attention to it from the Bar throughout the State; but as the decision was known to have had, after deliberate and mature consideration, the sanction of as great a lawyer and as great a judge as ever adorned either the Bar or the Bench in this State (I mean Thomas Clayton, then Chief Justice of the Court and of the State), I never heard the validity or soundness of the decision called in question during the eighteen years I was in practice at the Bar, nor until after the case of *Dodd v. Doe*, 2 Houst. 78, had been decided in this court, at the June Term, 1859, four years after I came on the Bench.

Now, the devise in the will of John Cordry, of lands, without words of limitation, to his son William, was considered and construed by the court to constitute a devise in fee, to effect the intention of the testator as manifested in the devise, and other parts of the will taken in connection with it; and these consisted of the introductory clause of the will, which was as follows:

"As it respects what God has been pleased to bless me with in this life, I give, devise and dispose of in the following manner and form, viz.: *Item.* I give and bequeath to my daughter Milly Adams one shilling, and no more. *Item.* I give and bequeath to my son Spencer Cordry one shilling, and to have no more of my estate. *Item.* I give and bequeath to my daughter Unice Adams one shilling, and no more. *Item.* I give and bequeath to my son Isaac Cordry one shilling, and to have no more of my estate."

There was also an item in it giving and bequeathing twenty-five acres of land therein described to his son John Cordry, to him and his heirs forever. And also an item giving and bequeathing to his son William Cordry (which was the devise immediately and directly in question before the court in the case) "one feather bed, one cow and calf, and one half part of the residue of my lands which I have not devised or deeded away."

Then follows this: "*Item.* I give and bequeath to my son Elijah Cordry ten acres of

land adjoining a tract which I have deeded to him, to be laid off, etc.; also one feather bed, and one cow and calf."

And then this: "*Item.* I give and bequeath to my son James Cordry one half part of the residue of all my lands which I have not already disposed of by will or deed; but if James should die without issue it is my will and desire that my son William should have his part, to him and his heirs forever."

Then finally this: "*Item.* I give to my four youngest children, Sally, Betsey, Nelly and James Cordry, all the residue of my personal property which is not before named or given in this my last will, to them and their heirs forever."

And under this will the court held the devise to William Cordry, being general and without any words of limitation, carried but a life estate, unless a manifest intent was apparent, from the other parts of the will, to give him a larger estate; that the introductory clause, though important in a consideration of the whole will, is not of itself sufficient to enlarge the general devise, but may be taken in connection with the other parts to show the meaning which the testator attached to his devise to William, and the extent to which he designed him to be benefited by that devise; but, independently of the introductory clause, that it appeared from the will that the testator designed to dispose of his whole estate in it, and not to die intestate as to any part thereof; and, referring to the various items of the will, which they considered clearly manifested such an intention on his part, the court specially refers to the bequest to his daughter Unice Adams, who was the petitioner in the case, of "one shilling; and no more," as a conclusive indication that the testator intended that she should in no event have anything more than the shilling he bequeathed to her. And I must say that I do not think that the soundness of this particular conclusion and ruling in the case has ever been, or ever can be, reasonably questioned.

In one respect, however, the Cordry will falls short of the will of Spencer Hitch in this case, and that is in respect to the introductory clauses of them, perhaps—although in that particular the two wills are as much alike as in other respects; for the introductory clause in the former will is in these words: "As it respects what God has been pleased to bless me with in this life, I give, devise and dispose of in the following manner and form," etc.; while in the latter it is in these words: "And as touching such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of in the following manner," etc.

Lord Mansfield and his judicial associates in his day would doubtless have held the former to be tantamount to the latter, as each testator alike evidently meant to say, in the slightly different form of words used for one and the same purpose, that he intended to dispose of all his estate in the manner and form adopted by him in his will, although the brief and simple words, "all my worldly estate," or "all my estate," would be more exact and appropriate in legal contemplation to express such an intention by a testator in the introductory clause of his will.

And thus stood this State upon the question



on the authority of the decision in the reported case of *Cordry v. Adams*, when the case in regard to Aaron Dodd's will arose in the same county, some twenty-five years afterwards. It was in an action of ejectment, and on the trial of the case in the superior court a special verdict was taken after the will in question had been produced and put in evidence before the jury, subject to the opinion of the court on questions of law reserved to be heard before all the judges in the court of errors and appeals; and the question of law reserved upon the will was whether general words in the introductory clause of a will, such as, "Touching all my worldly things, I give and dispose of as follows," etc., which occurred in the will in question, will have the effect to enlarge a subsequent devise of lands in it, without words of limitation, to an estate in fee simple. It was heard before all the judges—Harrington, *Ch.*; Gilpin, *Ch. J.*; Milligan, Wooten and Houston, *JJ.*

Wooten, *J.*, announced the opinion of the court, and said: "The devise was of real estate, without words of limitation, to be equally divided between Absalom and Azael Dodd, sons of the testator; and the general words in the introductory clause of the will—'Touching the worldly things which it had pleased God to bless him with,' etc.—had been relied upon to enlarge the devise to a fee; and the case of *Cordry v. Adams*, 1 Harr. (Del.) 439, had been cited in support of such a construction. But the present was distinguishable from that case, inasmuch as the will of Cordry in the case referred to contained bequests on devises to the other heirs, with the express direction that they were to have no more of his estate, and on which the court rested their decision mainly, if not entirely; for they expressly recognized and affirmed the general principle contended for in this case by the counsel for the plaintiff below, that the introductory clause in a will, such as we have in the present instance, though important in the consideration of the whole will, is not of itself sufficient to enlarge a general devise—that is, a devise of land without words of limitation—to a fee; although they add, in that particular case, that it might be taken, in connection with the other parts of the will, to show the meaning which the testator attached to his devise to William, and the extent to which he designed him to be benefited by it, accompanied as it was with a preceding bequest to his daughter Unice, the wife of Adams, who were the plaintiffs in the action, with the express provision that she was to have "no more" of his estate. But *Cordry v. Adams* has never been considered an authority beyond the special circumstances and ruling of the court in that case." *Dodd v. Doe*.

This decision was made, without a dissenting opinion, by all the judges of the State, constituting a tribunal under a clause in the Constitution of the State specially provided for the purpose of giving to any question of law decided by its unanimous sanction the weight of the highest authority that can be given to a judicial decision in any of its courts, and also of higher authority within its own limits than any decision delivered elsewhere upon a question of this kind.

And rigidly restricting and confining it to

the special circumstances and ruling of the court, what does it clearly and conclusively decide as abstract rule or principle of law applicable in such a case? It affirmed in express terms the decision of the court below, and the right of the plaintiff below to recover in the devise in question, and that the devise, by virtue of it and the other parts of the will specially mentioned in the opinion, took an estate in fee in the lands devised; and expressly distinguished the case, then directly before it, of *Dodd v. Doe* from the case of *Cordry v. Adams*, and particularly affirmed the ruling of the court below that it was so distinguishable, inasmuch as the will of Cordry contained bequests or devises, which the Dodd will does not, to the other heirs, with express direction that they were to have no more of his estate, and on which the court rested their decision mainly, if not entirely; and upon which distinction, I may here add, the court in bank solely rested its decision in the case of *Dodd v. Doe*, on the Dodd will, as constituting such a wide and substantial difference between them.

And the reason for that ruling was that such bequests or devises to other heirs at law of the testator, with an express direction that they were to have no more of his estate, clearly showed that the testator must have intended by the general devise to give the devisee all his estate in the land, and not an estate for his life merely; as in that case, upon his death, every heir at law would take by descent his respective share in it, contrary to that intention so declared by him. But there was no such direction contained in any item or in any part whatever of the will of Aaron Dodd, the testator in the case then before the court, while the will now before us, of Spencer Hitch, is not only much stronger in this and other respects than the will of Aaron Dodd, but the will of John Cordry also; for, in the first place, the words employed in the introductory clause of his will are "worldly estate," which, according to the well established legal import of the word *estate* included not only his real and personal property, but also whatever estate in law he then owned in the former; and, in the next place, every item in the will, including even the first—the devise to his wife, after the payment of all his just debts, of the third part of his estate—down to the last—the devise to Spencer Hitch, his son—terminates with the express direction *and no more*, as in the Cordry will. But the fact that they are omitted from the last item, containing the devise to him of all the tracts or parcels of land belonging to him (the testator), is so peculiar as not only to attract our attention, but to justly entitle it to particular weight, when taken into consideration with all the other items in the will, consisting of ten in number, and in which a devise or bequest, made to every other son and daughter, together with the wife even of the testator, is terminated with the same uniform and express direction, in determining what the testator meant by this marked discrimination in the dispositions of his will between his son Spencer and every other one of his children and heirs at law. In my judgment it is susceptible of but one interpretation, and that is that: he evidently intended thereby to disinherit every one of them but Spencer as to the lands so devised to him.

and by so doing to devise them to him in fee, and not for his life only. And upon the authority of the similarity in the circumstances, and the ruling and the principle or rule of construction recognized in the case of *Dodd v. Doe*, I think Spencer Hitch took under the will of his father an estate in fee in the lands devised to him. And accordingly I have come to the conclusion that this case comes within the rule of construction stated by me in the commencement of this opinion: that, although a devise of real estate without words of limitation will give a life estate merely, yet, if the testator, in the devise itself, or in any part or parts of the will, expressly disinherits the heir at law; it will have the legal effect, by judicial construction, to enlarge it to a devise in fee.

As to the other cases cited from our state reports by the counsel for the plaintiffs, I must say with reference to the cases of *Doe v. Alexander*, 2 Houst. 284, and of *Doe v. Biddle*, Id. 402, that whatever conflict, discrepancy or inconsistency may appear or exist between them or either of them and the rulings of the court in the case of *Cordry v. Adams*, and expressly recognized and affirmed by the court in bank in the case of *Dodd v. Doe*, 2 Houst. 76, I have never considered those cases of equal weight and authority in our courts with the latter case, because they were decisions by three judges only, in an inferior court, and of course could not invalidate or overrule the decision in the last mentioned case as one of the very highest authority before this tribunal and throughout this State.

And although the case of *Doe v. Lamplough*, 8 Houst. 461, was also a decision by all the judges in bank, the court, in its opinion, casts some rather indefinite taint of suspicion upon the decision in the case of *Dodd v. Doe*, as an instance in which the court had overstepped the limit of its judicial power in the construction of such devises; and yet that case varies so much in the questionable words used in the introductory clause of the will, and in the special circumstances of it, from the *Cordry* will, and is withal marked with such an unlimited resort to the context, scope and apparent objects of the will in question, in order to discover from it that by a devise of real estate to one of his relations, "to him and his heirs, if any he should have; but if he should die without any heir, then in that case the land and premises so devised to him shall be the right and property of my grandson, George May," that the testator's intention was to give the first devisee an estate tail in the premises, and if he died without issue or heirs of his body—which he did—that the right and property in them should go to his grandson, George May, in fee; and although that case expressly intimates, as I have before observed, that the court had overstepped the limit in the case of *Cordry v. Adams*, it certainly goes quite as far if not further, in the same direction, in ruling in the case of George Black's will that, "Whether or not the words 'right and property,' when applied to a devised estate, are sufficient *proprio vigore*, unexplained by the context or scope of the will, to pass a fee, yet if it is clear to the court from the context and general scope of the will that they were used by the testator with an

intent to pass the fee simple, the court must so construe them;" for I must say that I know of no case that goes any further in that direction; and therefore, instead of impugning or weakening, I have always considered it as sustaining and affirming, the rule of construction laid down in *Cordry v. Adams*, and expressly recognized by all the Judges in *Dodd v. Doe*; and, having been thus twice rated by the highest court of last resort in this State, I have ever since considered the weight and authority of them paramount in the courts of this State to any decision elsewhere to the contrary, not even excepting a decision of the House of Lords in England.

**Paynter, J., concurring:**

The Statute of this State (Rev. Code, chap. 84, § 24) provides that "A devise of real estate in a will, without words of limitation, shall be construed to pass the fee simple, or other the whole estate or interest which the testator could lawfully devise in such real estate, unless a contrary intention appear by the will." This statute was first enacted February 20, 1849, and afterwards re-enacted in the Code of 1852.

The will of Spencer Hitch, Sr., now under consideration in this case, was made and admitted to probate in 1797, long before this said statute was enacted, which changed the rule of English Law in that regard. The late Act, therefore, has no application to this case, and the will of the said testator must be construed according to the law in force prior to the enactment of said statute. There being no Act of Assembly on the statute books of this State, prior to the passage of said Act, in conflict with the common law concerning the construction of devises of real estate without words of limitation, the rules of construction at common law must govern us in ascertaining the intention of Spencer Hitch, Sr., as expressed in his last will and testament.

The rule at common law, as laid down by Kent and other text book writers upon this subject, is that "The intention of the testator is the first and great object of inquiry; and to this object technical rules are, to a certain extent, made subservient. The intention of the testator, to be collected from the whole will, is to govern, provided it be not unlawful, or inconsistent with the rules of law. The control which is given to the intention by the rules of law is to be understood to apply, not to the construction of words, but to the nature of the estate—to such general regulations in respect to the estate as the law will permit. To allow the testator to interfere with the established rules of law would be to permit every man to make a law for himself, and disturb the metes and bounds of property. It does not require the word *heirs* to convey a fee, but other words denoting an intention to pass the whole interest of the testator, as a devise of 'all my estate,' 'all my interest,' 'all I am worth or own,' 'all my right,' 'all my title,' or 'all I shall die possessed of,' and many other expressions of the like import, will carry an estate of inheritance, if there be nothing in other parts of the will to limit or control the operation of the words."

The learned author says, further, that in the construction of devises the intention of the testator is admitted to be the pole star by which

the courts must steer; yet that intention is liable to be very much controlled by the application of technical rules, and the superior force of technical expressions. The question still occurs whether the settled rules of construction are not the best means employed to discover the intention. It is certain that the law will not suffer the intention to be defeated, merely because the testator has not clothed his ideas in technical language. But no enlightened judge will disregard a series of adjudged cases bearing on the point, even as to the construction of wills. Established rules, and a habitual reverence for judicial decisions, tend to avoid the mischiefs of uncertainty in the disposition of property, and the much greater mischief of leaving to the courts the exercise of a fluctuating and arbitrary discretion. The soundest sages of the law, and the solid dictates of wisdom, have recommended and enforced the authority of settled rules in all the dispositions of property, in order to avoid the ebb and flow of the reason and fancy, the passions and prejudices, of tribunals. When a particular expression in a will has received a definite meaning by express adjudications, that meaning ought to be adhered to, for the sake of uniformity and of security in the disposition of landed property. The generally accepted doctrine is that an expression used by the deviser denoting only a description of the estate, without the use of words of limitation, passes only a life estate to the devisee; but if the words used by the testator denote the quantity of interest which he possesses, then a fee passes.

In this case, Spencer Hitch, Sr., after mentioning in the introductory clause that, "As touching such worldly estate warwith it hath pleased God to bless me with in this life, I dispose of in the following manner," gives and bequeaths in ten items to each of his children and heirs at law, not including Spencer Hitch, Jr., certain legacies and properties therein mentioned, and saying at the end of each item, "and no more." He then, in the eleventh and last item of his said will, uses the following language: "I give and bequeath unto Spencer Hitch, my son, all the tracts or parcels of land belonging to or that I am possessed with. And further, I do hereby appoint and ordain Sophia Hitch, my daler Wife, my hole and Sole Executor, of this my last will and testament, and hereby revoking all former wills."

The question before us is whether Spencer Hitch, Jr., mentioned in the said eleventh and last item of said will, took a life estate or an estate in fee simple under and by virtue of the said last will and testament of Spencer Hitch, Sr., deceased. That the great object of inquiry in the construction of a will is to ascertain the intention of the testator, that such intention must be ascertained from the language of the whole will, and, when so ascertained, that the intention of the testator, if legal, must prevail—are general principles of law so clearly established that it seems almost unnecessary to cite authorities in their support.

The principles are laid down by Kent, Barr, Jarman, Roberts, Hawkins, and other elementary writers upon this subject, while the same principles are applied in numerous adjudicated

cases, both in the American and English reports. But such intention must be ascertained from the language of the testator. To jump to the conclusion that a testator meant to devise a fee when he did not express such an intention would not be justified by any established rule of law as to the construction of wills. The intention of a testator must not be left to mere conjecture, nor ought a devise without words of limitation to be construed a fee on the ground of *voluit, sed non dixit*. Such intention must be gathered from the language of the whole will. The testator must express by some means his intention: not necessarily in technical words, not necessarily by saying "his heirs," not necessarily in the perspicuous language of the legal expert, or with the polished expression of literary cultivation; but he must nevertheless so express himself that his intentions may be ascertained from the language used in the will. In some forms he must say as well as wish.

It has been decided in this State, in the case of *Dodd v. Doe*, 2 Houst. 76, that "A general devise in the introductory clause of a will, indicating a purpose on the part of the testator to dispose of all his estate by the will, cannot enlarge a subsequent and particular devise of land without words of limitation to a fee." But the court in this case, while deciding that such words in the introductory clause were not sufficient of themselves and alone to enlarge the estate into a fee, did not deny the principle as laid down in *Cordry v. Adams*, 1 Harr. (Del.) 441, that the introductory clause was important in a consideration of the whole will, and may be taken, in connection with the other parts, to show the meaning which the testator attached to his devise to the devisee, and the extent to which he designed him to be benefited by that devise. The same principle is recognized in the cases of *Wilce v. Wilce*, 7 Bing. 664, 20 Eng. C. L. 280; *Knight v. Selby*, 3 Man. & G. 92, 43 Eng. C. L. 57; *Jackson v. Merrill*, 6 Johns. 185; and in many other cases decided both in this country and in England.

The words used by the testator in this case in the introductory clause are: "And as touching such worldly estate warwith it hath pleased God to bless me with in this life, I give and dispose of in the following manner." His use of the words "such worldly estate," etc., if they had been used in the item of devise itself, would go far towards indicating his intention to pass his whole interest in the property, which was a fee. But in the introductory clause alone, without anything expressed in the will showing such intention, those words are not sufficient for that purpose. It becomes necessary, therefore, to examine the words of the will in connection with the language of the introductory clause. As we have seen, he mentions and includes each one of his children and heirs in his will, and adds to the bequest of each one the words "no more," until he mentions Spencer Hitch, Jr., to whom he devises the lands in question, without words of limitation.

The will of John Cordry, in the case of *Cordry v. Adams*, was very similar in many respects to the will now under consideration. The introductory clause said: "As it respects what God has been pleased to bless me with in this life, I give, devise and dispose of in the

following manner and form." He then bequeaths legacies, etc., adding to each sometimes the words, "no more," and again the words, "no more of my estate." He devised the lands in question in that case to the devisee, without words of limitation. Judge Harrington, in announcing the opinion of the court, after speaking of the introductory clause, to which we have already referred, said: "Independently of the introductory clause, it does appear from the will that the testator designed to part with his whole estate, and not to die intestate as to any part thereof; for he notices all of his children, even those to whom, having probably been advanced by him to the extent of their equal share, he bequeathed a shilling, and 'no more,' recognizes certain conveyances by deed which he had already made part of his property; and, after some devises of land, he gives to William one half part of the residue of all his lands which he had not already disposed of by will or deed. His personal property he in like manner parcels out, and in a very comprehensive residuary bequest disposes of all 'the residue of his property which is not before named or given in that, his last will,' to his four youngest children. It is impossible to suppose, from this view of the will, that the testator did not design to dispose of all his property, and he expressly declares his intention to do so in the introductory clause, 'As it respects what God has been pleased to bless me with in this life, I give, devise and dispose of,' etc."

The will in the case of *Conoway v. Piper*, 8 Harr. (Del.) 488, contained a devise to Isaac and John Short, without words of limitation, and afterwards a residuary clause, "that after all the legacies are paid, that the remainder of my estate should be equally divided between Isaac and Leonard and John and Nancy, to them and their heirs." The failure to use words of limitation in the devise to Isaac and John Short, and the use of such words in the residuary clause, showed that the testator omitted them intentionally, while the making of the residuary clause was of itself proof that he desired the reversion to go to his residuary devisees. This case is therefore not necessarily in conflict with *Cordry v. Adams*. The same questions did not arise.

In the case of *Dodd v. Doe*, 2 Houst. 76, the introductory clause had been relied upon to enlarge the fee. The court decided that the words, "touching the worldly things which it had pleased God to bless him with," in the introductory clause, would not of itself enlarge the devise to a fee. But though the Judge in announcing the opinion of the court said that the case of "*Cordry v. Adams* has never been considered an authority beyond the special circumstances and ruling of the court in that case," he thereby recognized the case as authority, as far as such circumstances and rulings were concerned, while he throughout the opinion distinguished the one from the other, "inasmuch as the will of Cordry contained bequests on devises to the other heirs, with the express direction that they were to have no more of his estate, and on which the court rested their decision mainly, if not entirely; for they expressly recognized and affirmed the general principle contended for in this case . . . that the introductory clause in a will such as we have in the

present instance, though important in the consideration of the whole will, is not of itself sufficient to enlarge a general devise—that is, a devise of land without words of limitation—to a fee; although they add, in that particular case, that it might be taken, in connection with the other parts of the will, to show the meaning which the testator attached to his devise to William, and the extent to which he designed him to be benefited by it, accompanied as it was with a preceding bequest to his daughter Unice, the wife of Adams, who were the plaintiffs in the action, with the express provision that she was to have 'no more' of his estate."

The case of *Doe v. Alexander*, 2 Houst. 234, as reported, is seemingly in conflict with *Cordry v. Adams*. But, upon examining the probated will of Hezekiah Morris, which was the will under consideration in that case, the testator did not use words of the same signification in the introductory clause as did the testator in the will considered in the case of *Cordry v. Adams*, or as did Spencer Hitch in the will now under consideration. Hezekiah Morris, in the introductory clause of his will, says: "As touching such worldly goods as it hath pleased God to bless me with, I give and dispose of in the following manner, viz." This language does not show the same intent upon the part of the testator as the words, "what God has been pleased to bless me with in this life," used by the testator in the case of *Cordry v. Adams*, or the words, "as touching such worldly estate war-with it hath pleased God to bless me with in this life," used by Spencer Hitch, Sr., in the will now under consideration. The word "goods," used by Morris, would only imply personality; or at any rate it does not carry with it as strong a signification of the entire estate as do the words in the introductory clause of the will of John Cordry, or Spencer Hitch, Sr. This language in the introductory clause of the will of Morris does not appear with the charge of the court; but the will, with the introductory clause, was before the court, when Chief Justice Gilpin charged the jury "that the court could not discover any such intention sufficiently apparent and certain in the whole body of it, when taken together, to control the legal signification and construction of the immediate item in question, and which must prevail in the absence of any words of inheritance, or limitation, or other technical and legal expressions necessary to create and confer a title by devise in fee simple." In the construction of the will of Morris, with the said introductory clause, the court had nothing to enable it to construe the devise to Constantine T. Morris a fee simple except the preceding items in the will, in which Morris had bequeathed a pecuniary legacy to each of his heirs at law except Constantine, concluding and terminating the item or clause of bequest to each, respectively, with the following words: "To have the aforesaid legacy, and no more of my estate." This the court decided to be insufficient, of itself, to express the intention of the testator in favor of a fee in the subsequent devise of real estate without words of limitation.

The case of *Doe v. Alexander* does not overrule the case of *Cordry v. Adams* in express terms, and is not really in conflict with it when the two cases are analyzed, because the decia-

ion in *Cordry v. Adams* was based upon the words "no more" and "no more of my estate," at the end of the bequests preceding the devise of real estate, in connection with the words, "as it respects what God has been pleased to bless me with in this life," in the introductory clause of the will, while in the case of *Doe v. Alexander* the introductory clause was not in the same words or of the same signification.

In examining and analyzing the different Delaware decisions we therefore find one case—*Dodd v. Doe*, 2 Houst. 76—deciding that a general devise in the introductory clause of a will indicating a purpose on the part of the testator to dispose of all his estate by the will cannot of itself enlarge a general devise—that is, a devise of lands without words of limitation—to a fee. We find another case—*Doe v. Alexander*, Id. 234—which virtually decides that when a testator bequeaths several legacies to his children, accompanying the bequest to each with the concluding words, "and to have no more of my estate," such words are not sufficient, of themselves, to construe a subsequent item of a will devising real estate without words of limitation as intending a fee simple.

Still another case—*Cordry v. Adams*—decides that when the introductory clause says, "As it respects what God has been pleased to bless me with in this life, I give and devise and dispose of as follows," and the body of the will contains bequests and devises to his other children, accompanied with the words at the end of each bequest of "and no more," or "no more of my estate," then upon a construction of the whole will, including the introductory clause, a devise in a subsequent item to another devise without words of limitation shall be considered a fee to effect the interest of the testator.

The case of *Doe v. Biddle*, 2 Houst. 403, and the case of *Doe v. Lamplough*, 8 Houst. 461, cited by the plaintiffs, do not decide the question as to the construction of language similar to the language employed by the testator in this case in connection with the introductory clause in the will before us.

In *Doe v. Lamplough*, speaking of a hypothetical case, the court incidentally mentioned *Cordry v. Adams* as overstepping the limit; but such was a mere *ipse dixit*, and not really a decision of the question then before the court.

I can therefore find no case in the Delaware Reports where the language was similar to the will in the case of *Cordry v. Adams*, and where the courts have absolutely overruled said decision in express language, or have decided a case similar to it in all respects in conflict with said decision. The principles then decided seem to be supported by both English and American authorities, notable among which are the cases of *Doe v. Clayton*, 8 East, 141; *Cook v. Holmes*, 11 Mass. 523; *Baker v. Bridge*, 13 Pick. 27.

In view, therefore, of the case of *Cordry v. Adams* having stood so long in our reports as an authority upon the questions then decided without being overruled in express terms, and supported, as it is, by both English and American authorities, I do not deem it proper to question it as an authoritative decision in this State at this time. The will of Spencer Hitch is very similar to that of *Cordry*. He bequeaths

legacies to all of his children, not including Spencer Hitch, accompanying each item with the words, "and no more," and says in the introductory clause: "Tuching such worldly estate wherewith it has pleased God to bless me with in this life, I give and dispose of in the following manner."

Upon a consideration of all the language in the whole will, and regarding the word "estate," used in the introductory clause, in connection with the entire will, as even stronger than the term used in the will of John Cordry, I am of the opinion that, according to the authorities we have had before us, we are perfectly justified in construing the intentions of Spencer Hitch, Sr., to devise an estate in fee to his son, Spencer Hitch, Jr., in the item where he devises all the tracts and parcels of land belonging to or that he is possessed with. The last mentioned item might not be sufficient, alone, to justify such a construction; but according to the authorities cited, upon a consideration of the whole will, and upon referring to the introductory clause, in connection with his other expressions, I am of opinion that it does not strain either the English or American rules to give the devise such a construction.

Under these circumstances, therefore, *the judgment below ought to be affirmed.*

**Saulsbury, Ch.**, dissenting:

I dissent from the opinions of the majority of the court just read. I have been familiar with the provisions of the will of Spencer Hitch for more than thirty years. I have never had a doubt in respect to the proper interpretation of that will. The sole question for our decision in this case is, What estate did Spencer Hitch take under the will of his father, dated the 5th day of February, 1787—whether an estate for life, or in fee? If the former, then the judgment of the court below is to be reversed; if the latter, it is to be affirmed. The last item of the will of Spencer Hitch, the father, and under which Spencer Hitch, the son, took whatever estate he did take—the spelling being corrected—is as follows: "I give and bequeath unto Spencer Hitch, my son, all the tracts or parcels of land belonging to or that I am possessed with." This is the whole of this item of the will which has relation to the devise to the son.

Where there are no words of limitation to a devise, the general rule of law as it existed in this State at the date of the will of Spencer Hitch was that the devisee takes an estate for life only, unless from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. It matters not, in determining the meaning of the will of Spencer Hitch, that more than fifty years after his death, and after the rights and interests of his devisees were fixed, and the quantity and quality of their estates determined by the provisions of his will, that the general rule in respect to the interpretation of wills was modified or changed by an Act of Assembly of this State, so as to give to a devisee of lands a fee therein, unless it should appear by the will that a less estate was intended to be given. This modification or change can have relation only to wills made subsequently to the date of the Act of Assembly making them, and not to wills made prior thereto. There are no words of

the devise of the father to the son—that is, from Spencer Hitch, Sr., to Spencer Hitch, Jr.—which admit of passing a greater interest than an estate for life. And if a greater interest than for life did pass by the will of the father to the son, it was because by considering the whole will, or specially some particular part thereof, the intention of the testator that such larger estate should pass to the son can be sufficiently gathered or ascertained. Now, there are eleven items in the will of Spencer Hitch, the testator, the eleventh of which is the item containing the devise to Spencer Hitch, the son. It was not contended in the argument, and cannot be successfully contended, that the first ten items of the will, or either of them, considered separately, can have the effect of enlarging the devise contained in the eleventh item to the son from a devise for life to a devise in fee. It was contended, however, by the counsel for the defendants below and defendants in error, that the intention of the testator to pass such larger estate to the son might be ascertained and should be determined by considering the will of the testator as an entirety, and give an effect to each of its provisions relatively, each to the other; and much stress was laid upon that part of the introductory clause of the will which recited that, "As touching such worldly estate wherewith it has pleased God to bless me with

in this life, I give and dispose of in the following manner."

"The most that can be said," says *Judge Story*, delivering the opinion of the court in the case of *Wright v. Denn*, 23 U. S. 10 Wheat. 228 [6 L. ed. 808], and so say the authorities generally, "is that, where the words of the devise admit of passing a greater interest than for life, courts will lay hold of the introductory clause to assist them in ascertaining the intention."

Does the devise by the father to the son, contained in the eleventh item of his will, admit of passing a greater interest than for life? If it does, I will gladly lay "hold of the introductory clause to assist us in ascertaining the intention;" otherwise I am precluded from so doing. I cannot find a sufficient warrant in the words of this will of Spencer Hitch, the testator, to pass the fee to Spencer Hitch, his son. The testator may have intended it, and probably did, as said by *Judge Story* in the case of *Dwight v. Denn*; but intention cannot be extracted from his words with reasonable certainty; and I have no right to indulge myself in mere private conjectures, for the law does not decide upon conjectures, but upon plain, reasonable and certain expressions of intention found on the face of the will. The judgment below should be reversed.

## NEW YORK COURT OF APPEALS.

Mary T. CONSTANT *et al.*, as Executors,  
etc., *Repts.*,

v.

UNIVERSITY OF ROCHESTER, Im-  
pleaded, etc., *Appt.*

(....N. Y....)

### 1. A mortgagee occupies the position of mortgagee for a valuable considera-

tion where the mortgage is taken for the surrender of a prior mortgage and accrued interest thereon.

2. An attorney who has done a large amount of business for a client in investing money upon mortgages, which aggregate \$3,000,000 or more, and who has in his office, in a pigeon-hole appropriated to satisfied mortgages, an unrecorded mortgage in favor of such client, taken eleven months before, will not be held, in the absence of any evidence upon that point, to have

#### NOTE.—Notice to agent is notice to principal.

Notice to the agent is notice to the principal, and notice to the trustee is notice to the beneficiary. *Brannon v. May*, 42 Ind. 101. See *Story*, Eq. Jur. § 408; *Myers v. Ross*, 3 Head, 59; *Hough v. Richardson*, 3 Story, 659; *Bracken v. Miller*, 4 Watts & S. 102; *Astor v. Wells*, 17 U. S. 4 Wheat. 466 (4 L. ed. 616); *Hovey v. Blanchard*, 13 N. H. 145; *Bonnell v. Sharp*, 9 Johns. 163; *Glover v. Winslow*, 9 Cow. 13; *Honkins v. Leek*, 19 Wend. 339; *Westervelt v. Hafl*, 2 Sandf. Ch. 98; *Blair v. Owles*, 1 Munt. 38; U. S. Bank v. Davis, 2 Hill, 451; *Watson v. Wells*, 5 Conn. 438; *Henry v. Morgan*, 2 Binn. 497; *Ross v. Houston*, 23 Miss. 591.

Notice of facts to an agent is constructive notice thereof to the principal when it is connected with the subject matter of the agency. *Howell v. Mills*, 53 N. Y. 238; *Howland v. Rowe*, 48 Conn. 432; *Saco Nat. Bank v. Sanborn*, 63 Maine, 840; *Bank of Ulster v. Phillips*, 3 Wend. 408; *Importers & T. Bank v. Shaw*, 144 Mass. 421, 4 New Eng. Rep. 347.

The rule that notice to an agent is notice to the principal alike includes and applies to the positive information or knowledge obtained or possessed by an agent in the transaction, and to actual or constructive notice communicated to him therein.

As a general rule, notice to an agent who has conducted or who has been active as a party to a transaction is sufficient constructive notice to his principal in reference to such matter. *Fisher v. Crescent Ins. Co.* 33 Fed. Rep. 544.

So notice to the agent of a company, whose duty it was to fix a door, that the opening of the door

was difficult, is notice to the company. *Sangamon Coal Min. Co. v. Wiggerhaus*, 11 West. Rep. 573, 123 Ill. 279.

Notice to an agent of fraud in the release of a prior mortgage is notice to the principal. *Connecticut Gen. L. Ins. Co. v. Burnside*, 24 L. ed. 700.

Notice, of a prior incumbrance, to an agent is notice to the principal. *Astor v. Wells*, 17 U. S. 4 Wheat. 466 (4 L. ed. 616).

#### Duty of agent to impart knowledge to principal.

The principle of law is that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption is that he will perform that duty. *The Distilled Spirits*, 78 U. S. 11 Wall. 367 (20 L. ed. 171); *Mathews v. Riggs* (Maine) 5 New Eng. Rep. 865.

When it is not the agent's duty to communicate his knowledge to his principal—as when it has been acquired confidentially as attorney—the principal is not bound by it. *The Distilled Spirits*, 78 U. S. 11 Wall. 366 (20 L. ed. 167).

Where an officer or agent of a private corporation or joint-stock company sells and conveys land to it, his knowledge of an outstanding equity does not charge the company with notice. *Frankel v. Hudson*, 32 Ala. 153.

#### Notice to solicitor or attorney.

Notice to the solicitor of a subsequent mortgagee who prepares the securities in his behalf, is notice to the client. *Westervelt v. Hafl*, 2 Sandf. Ch. 106.

remembered the facts as to such mortgage at the time of taking a mortgage on the same property for another client so as to charge the latter with notice of the prior mortgage.

3. To hold a principal chargeable with knowledge which his agent has obtained on a prior occasion in an independent transaction it must be shown that the knowledge was present to the mind of the agent at the very time of the transaction in question.
4. If an agent recollected that there had been a prior mortgage, but honestly believed that it had been satisfied, although mistaken upon that point, the principal for whom he takes a subsequent mortgage will not be chargeable with knowledge of the former one by reason of the agent's knowledge.
5. The burden of proof to show that an agent, in a transaction for his principal, had in mind knowledge gained by him on a former occasion and in a different transaction, is upon the party who seeks to charge the principal with notice by reason of such knowledge.
6. Whether a mortgagee can be held chargeable with notice of a prior unrecorded mortgage in the possession of his attorney in the transaction, who is also the attorney of the prior mortgagee, and whose duties to his clients are therefore conflicting, *quære*.  
(*Gray and Andrews, J.J., dissent.*)

(January 15, 1889.)

**A**PPEAL by defendant corporation, from a judgment of the General Term of the Superior Court of the City of New York affirming a judgment of the Special Term in favor of plaintiffs in an action brought to foreclose a mortgage. *Reversed.*

This suit was brought to foreclose a mortgage for \$6,000, made by Elizabeth Meehen and her husband, to plaintiffs' testator on February 17, 1888, covering premises on Lexington Avenue in the City of New York joining the University of Rochester as a subsequent incumbrancer.

The University answered that on January 10,

1884, the Meehens mortgaged the premises to it for \$9,000; that on January 11 its mortgage was recorded; that plaintiffs' testator had notice of it; that it had foreclosed its mortgage and become the purchaser of the property, and alleged that until the commencement of this action it had no notice of plaintiffs' mortgage, and that it was not recorded.

It appeared at the trial that John H. Dean acted as attorney for both Constant and the University at the times when their respective mortgages were executed, and that the Constant mortgage was left in his possession instead of being recorded, and found among his papers by his assignee for benefit of creditors.

It also appeared that the University held mortgages against property of the Meehens which were discharged about the time of the execution of the mortgage of January, 1884, which discharge was alleged to constitute the consideration for that mortgage.

Further facts appear in the opinion of the court:

*Mr. Martin W. Cooke*, for appellant:

The University for the mortgage in question relinquished the security which it held by its \$9,000 mortgage first lien, on 107th Street. Such relinquishing of previous security has always been held a valuable consideration.

*Wood v. Chapin*, 18 N. Y. 509; *Cary v. White*, 52 N. Y. 138; *Pickett v. Barron*, 29 Barb. 505; *Webster v. Van Steenbergh*, 46 Barb. 211.

Knowledge in Dean, occupying the relation to all parties interested, which he must have occupied, could not bind either party in favor of the other. Mr. Constant and the University of Rochester stand here, from a legal point of view, in the same relation to each other as if Dean had been a stranger to both parties. If Dean were really the borrower from both mortgagees, the lien of the University would be the prior one.

*Hope F. Ins. Co. v. Cambreleng*, 8 Thomp. & C. 496, 1 Hun. 498. See also *Volts v. Blackmar*, 64 N. Y. 646.

*Griffith v. Griffith*, 9 Paige, 315; *Tunstall v. Trappes*, 3 Sim. 305; *Kennedy v. Green*, 3 Myl. & K. 699; *Champlin v. Laytin*, 6 Paige, 189.  
Notice of an unrecorded deed to an attorney or agent is equivalent to notice to his principal. *Dickerson v. Bowers*, 7 Cent. Rep. 372, 42 N. J. Eq. 205.

#### *Knowledge of agent is knowledge of principal.*

The knowledge of the agent is knowledge of the principal. See *Smith v. Niagara F. Ins. Co.* 1 L. R. A. 216 and note; *McGurk v. Metropolitan L. Ins. Co.* 1 L. R. A. 563 and note.

The general doctrine that the knowledge of an agent is the knowledge of the principal cannot be doubted. *Hoover v. Wise*, 91 U. S. 310 (23 L. ed. 336); *Bank of U. S. v. Davis*, 2 Hill, 451; *Ingalls v. Morgan*, 10 N. Y. 178; *Fulton Bank v. N. Y. & S. Canal Co.* 4 Paige, 127; *Mathews v. Riggs* (Maine) 5 New Eng. Rep. 865.

Knowledge by the defendant's agent is just as effectual to charge the defendant with such knowledge as though he actually possessed it. *Re Meyer*, 2 Nat. Bankr. Reg. 422; *Vogel v. Lathrop*, 4 Nat. Bankr. Reg. 439; *North v. House*, 6 Nat. Bankr. Reg. 385; *Markson v. Hobson*, 2 Dill. 327; *Mayer v. Hermann*, 10 Blatchf. 256; *Mathews v. Riggs* (Maine) 5 New Eng. Rep. 865.

A principal in a transaction is chargeable with notice of matters affecting its validity, coming to the knowledge of his agent pending the proceedings. *Johnston v. Latlin*, 103 U. S. 800 (23 L. ed. 532.)

The rule that notice to the agent is notice to the principal applies, not only to knowledge acquired

by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction and present to his mind at the time he is acting as such agent; provided it be of such a character that he may communicate it to his principal without breach of professional confidence. *The Distilled Spirits*, 78 U. S. 11 Wall. 356 (20 L. ed. 167).

If the agent, at the time of effecting a purchase, has previous knowledge of any prior lien, trust or fraud affecting the property, his principal is affected thereby. *Ibid.*

Knowledge of an agent when acting for his principal, although obtained when acting outside of his employment, will be imputed to the principal. *Wilson v. Minnesota Farmers Mut. F. Ins. Assn.* 35 Minn. 112.

The knowledge of a cashier of his own insolvency affects his bank to which he transfers property, so as to make the bank a holder with knowledge, under an insolvency statute. *Witters v. Sowles*, 32 Fed. Rep. 758.

#### *Attorney's knowledge affects his client.*

An attorney's knowledge of an irregularity in a proceeding affects his client. *Prestman v. Mason*, 10 Cent. Rep. 514, 68 Md. 78.

Information to an attorney is information to his client; and the latter is affected with notice of all facts, notice of which can be charged upon his attorney. *Smith v. Ayer*, 101 U. S. 320 (25 L. ed. 955); *May v. Le Claire*, 78 U. S. 11 Wall. 217 (20 L. ed. 50); *Rogers v. Palmer*, 102 U. S. 263 (26 L. ed. 161).

Knowledge of a creditor's attorney in receiving a preference is imputable to the creditor. *Rogers v. Palmer*, *supra*; *Bush v. Moore*, 133 Mass. 198.



When two principals have opposing interests, but have a common agent, there is in reality a conflict of duty on the part of the agent. There can therefore be no presumption either way, and the question of notice depends upon whether he did, in fact, communicate the information.

*Bank of Pittsburgh v. Whitehead*, 10 Watts, 397, 36 Am. Dec. 186.

Agents cannot act so as to bind their principals where they have, or represent, interests adverse to the principals.

*Wassell v. Reardon*, 11 Ark. 705, 54 Am. Dec. 245. See *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368; *Loeb v. Herman*, 13 Jones & S. 336; *Marie v. Garrison*, 13 Abb. N. C. 210; *Bruce v. Davenport*, 36 Barb. 349; *Morrison v. Ogdensburg & L. C. R. Co.* 52 Barb. 178; *National L. Ins. Co. v. Minch*, 58 N. Y. 144; *N. Y. Cent. Ins. Co. v. Nat. Protection Ins. Co.* 14 N. Y. 85, 91; *Claflin v. Farmers & C. Bank*, 25 N. Y. 298; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271.

**Mr. John E. Parsons**, for respondents:

The omission by Dean to record Mr. Constant's mortgage gave no priority to the mortgage of the University.

The existence of Mr. Constant's unrecorded mortgage bore materially upon the title of the property mortgaged to the University. Knowledge or notice to Dean, which appertained to his employment was notice to the University.

Story, Agency, § 140; *The Distilled Spirits*, 78 U. S. 11 Wall. 356 (20 L. ed. 167).

**Peckham, J.**, delivered the opinion of the court:

In taking the mortgage of January, 1884, we think the University occupied the position of mortgagee for a valuable consideration. It surrendered a prior mortgage, with the accrued interest thereon, and took the mortgage in question.

If the University be not chargeable with notice of the prior mortgage to Constant, which

was unrecorded, then its own mortgage is the prior lien as between the two.

The first important question arising is, Did Dean, who acted in the transaction as the attorney and agent for the University at the time of the execution of the mortgage to the University, have knowledge of the existence of the prior mortgage to Constant, executed in February, 1883, and which he then took as agent for Constant? In other words, is there any proof that he, in January, 1884, had that fact present in his mind and recollection, so that it can be said from the evidence that he then had knowledge of its existence as an unpaid, outstanding obligation?

The transaction, out of which the mortgage to the University arose, occurred eleven months subsequent to the transaction out of which the mortgage in suit arose; and the former mortgage was neither a part of the same transaction as the latter, nor had it the least connection therewith.

Under the law, as decided by the older cases in England, such fact would have been an absolute defense to the claim that there was any constructive notice to the defendant arising out of notice to its agent, because such notice was in another and entirely separate transaction.

In *Warrick v. Warrick*, decided by Lord Chancellor Hardwicke in 1745 (3 Atk. 291, 294), that able Judge assumed it as unquestioned law that notice to the agent, in order to bind his principal by constructive notice, should be in the same transaction. He said "This rule ought to be adhered to, otherwise it would make purchaser's and mortgagee's titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions."

Cases were continually arising subsequent to that case wherein the principle was assumed as the law of England, although the cases did not, in their facts, absolutely call for a decision on that point.

See also *Graham v. Stark*, 8 Ben. 530; *Sartwell v. North*, 4 New Eng. Rep. 54, 144 Mass. 188.

#### Constructive notice.

No particular form of notice of sale of real property under deed of trust is prescribed by law; it is sufficient if the description of the land is reasonably certain, so as to inform the public of the property to be sold. *Newman v. Jackson*, 25 U. S. 12 Wheat. 570 (6 L. ed. 732).

Where, upon the face of the title papers, the purchaser has full means of acquiring complete knowledge of the title, he will be deemed to have constructive notice thereof. *Oliver v. Platt*, 44 U. S. 3 How. 338 (11 L. ed. 622).

Purchasers are not protected, but are considered purchasers with notice, if they close their eyes to facts which are open to investigation by the exercise of that reasonable diligence which the law imposes. *Brush v. Ware*, 40 U. S. 15 Pet. 93 (10 L. ed. 672).

When it is sought to affect a purchaser with constructive notice, the question is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence. *Wilson v. Wall*, 73 U. S. 6 Wall. 83 (18 L. ed. 727).

#### Possession of land as notice.

Possession and cultivation of land is constructive notice of rights in land. *Horbach v. Potter* (18 L. ed. 80); *Bowman v. Wathen*, 43 U. S. 1 How. 189 (11 2 L. R. A.

L. ed. 97); *Landes v. Brant*, 51 U. S. 10 How. 343 (13 L. ed. 449); *Lea v. Polk Co. Copper Co.* 63 U. S. 21 How. 493 (16 L. ed. 203); *Hughes v. U. S.* 71 U. S. 4 Wall. 232 (18 L. ed. 303); *Graham v. NeSmith*, 24 S. C. 235; *Mayo v. Leggett*, 96 N. C. 237.

The doctrine of constructive notice from possession is applied as a shield to protect equitable rights, and not for the benefit of one who is without equity. *Gill v. Hardin*, 48 Ark. 408.

Where possession is relied on as giving constructive notice, it must be open, and sufficiently distinct and unequivocal to put the purchaser on his guard. *Townsend v. Little*, 109 U. S. 504 (27 L. ed. 1012).

Where the facts are sufficient to put a purchaser on inquiry, he can be charged only with knowledge of the facts which he might have learned by inquiry. *Indiana & I. C. R. Co. v. Sprague*, 108 U. S. 736 (25 L. ed. 554).

#### Notice to mortgagees.

A mortgagee with notice of the fraudulent discharge of a prior mortgage is not a *bona fide* purchaser. *Connecticut Gen. L. Ins. Co. v. Burnside*, 24 L. ed. 707.

As to the mere holder of a subsequent mortgage the record of a prior mortgage is sufficient notice of its existence, and of the rights of the assignee thereof, although the assignment of the prior mortgage be not recorded. *Campbell v. Vedder*, 3 Keyes, 178.

If a purchaser has constructive notice of the assignment, he could not be a *"bona fide* purchaser" of the mortgage assigned. *Campbell v. Vedder*, 1 Abb. App. Dec. 301.

But in *Mountford v. Scott*, 1 Turn. & R. 374, upon an appeal from a decision of the vice chancellor, Lord Chancellor Eldon said that the vice chancellor proceeded upon the notion that notice to a man in one transaction is not to be taken as notice to him in another transaction. The Lord Chancellor continued: "In that view of the case it might fail to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it."

He further said that he would be unwilling to go so far as to say that if an attorney has notice of a transaction in the morning he shall be held in a court of equity to have forgotten it in the evening; that it must, in all cases, depend upon the circumstances.

In *Hargreaves v. Rothwell*, 1 Keen, 154, Lord Langdale, Master of the Rolls, held that where one transaction is closely followed by and connected with another, or where it is clear that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there is no ground for a distinction by which the rule that notice to the solicitor is notice to the client should be restricted to the same transaction.

In *Nixon v. Hamilton*, 2 Dru. & W. 364, decided in 1838, Lord Chancellor Plunkett adverted to the rule as to the necessity of notice in the same transaction, and stated if it were notice acquired in the same transaction, necessarily the principal was to be charged with the knowledge of the agent; but if it were notice received by him in another transaction then such notice was not to affect the principal, unless he actually had the knowledge at the time of the second transaction. See also the case of *Dresser v. Norwood*, decided in the Court of Exchequer Chamber and reported in 17 C. B. N. S. 466.

This modification of the old English rule is recognized in the comparatively late case of *The Distilled Spirits*, 78 U. S. 11 Wall. 356 [20 L. ed. 167]. Mr. Justice Bradley in delivering the opinion of the Supreme Court of the United States stated that the doctrine in England seems to be established that if the agent at the time of effecting a purchase has knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase no question can arise as to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it and has it present to his mind will depend upon facts and other circumstances. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English Rule as now understood. And the learned Justice states that the rule as finally settled by the English Courts is, in his judgment, the true one, and is deduced from the best consideration of the reasons on which it is founded. In this opinion the whole court concurred.

Story in his work on Agency (§ 140), says: "But unless notice of the facts come to the agent, while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the  
3 L. R. A.

principal. For otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice, therefore, to the agent before the agency is begun, or after it has terminated, will not ordinarily affect the principal."

In *Bank of the United States v. Davis*, 2 Hill, 451, it was held that the principal is deemed to have notice of whatever is communicated to his agent while acting as such in a transaction to which the communication relates. And it was held in that case that notice to a bank director, or knowledge obtained by him while not engaged officially in the business of the bank, would be inoperative as notice to the bank.

In *Holden v. New York & Erie Bank*, 72 N. Y. 286, the rule was explained, and it was therein held that where an agency was, in its nature, continuous, and made up of a long series of transactions of the same general character, the knowledge acquired by the agent in one or more of the transactions is to be charged as the knowledge of the principal, and will affect the principal in any other transaction in which the agent as such is engaged, and in which the knowledge is material. In that case it will be seen, upon reading the very able opinion of Folger, Ch. J., that there was no question as to the knowledge of the agent of the various facts, and the only question raised was whether it should be imputed to his various principals in the transactions.

In *Crugis v. Hadley*, 99 N. Y. 181, the doctrine that the knowledge of the agent should come to him in the identical transaction was alluded to, and it was held that it was not necessary in all cases that the notice should be thus given, and that notice to an agent of a bank intrusted with the management of its business was notice to the corporation in transactions conducted by such agent acting for the corporation in the scope of his authority, whether the knowledge of the agent was acquired in the course of a particular dealing or on some prior occasion. See also *Welsh v. German American Bank*, 78 N. Y. 424; *Atlantic State Bank v. Savery*, 82 N. Y. 291.

From all these various cases it will be seen that the farthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received or the knowledge obtained in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction at another time and for another principal, was present to his mind at the very time of the transaction in question. Upon a careful review of the testimony in this case we have been unable to find any such proof. It is true the learned trial judge finds that contemporaneously with the execution of the mortgage to the University, Dean caused to be made a statement, upon the basis that the amount was to be loaned to the mortgagors, and that out of the money coming to them as a consideration for the mortgage to the University, the amount of the bond and mortgage to the plaintiff's decedent, with interest, was to be paid and that mortgage was to be satisfied.

And he further found that the University, through Dean, had notice of the mortgage of the plaintiff's decedent in connection with, and as part of, any proposed transaction, by which there was to be loaned to the mortgagor the amount of the bond and mortgage to the University. What is meant by the word "contemporaneously," as used in this finding, is perhaps not absolutely clear. If it meant that the statement mentioned was procured to be made by Dean as a part of, and coincident with, the execution of the mortgage to the University, it is not, as we think, based upon any evidence. There is no proof whatever in this case that Dean procured this statement to be made by anybody; and Dean himself says that a statement of this nature would, by the course of practice in his office, have come to him (made by some one in his office) the day after the loan was closed. He does not pretend to recollect this particular statement, nor is there any evidence that he procured it to be made. His testimony shows that he had no special recollection of the things which took place upon the occasion of the execution of the bond and mortgage to the University, further than appeared by his books and other memoranda, then made by others; and he does not pretend to say that this particular statement was presented to him, or that he had the least knowledge of its existence, or of the facts therein stated, until the day after the closing of the transaction and the execution of the mortgage to the University.

This is every particle of evidence that there is upon which a finding could be based, such as the learned judge made, of knowledge or notice, on the part of Dean, of the existence of the Constant mortgage, at the time of the transaction with the University, and the execution of the mortgage to it.

The other facts in the case, uncontradicted, are that for some years prior to January, 1884, Dean and the plaintiff's decedent were acting together, and that the plaintiff's decedent was weekly and even almost daily in the habit of investing large amounts of money upon mortgages of this nature, and that the dealings of plaintiff's decedent in these various building mortgages, through Dean's office, had amounted at the time of the mortgage to the University, in the aggregate to \$3,000,000, if not more; that the mortgages were of all sizes, from \$6,000 up to \$40,000. It also appears that this very mortgage in suit, was found, after the execution of the University mortgage, in a pigeon-hole, in which satisfied mortgages were kept, and was found by the assignee of Dean after the assignment was made.

There is no proof in the case showing that Dean made any pretense of remembering at the time of the execution of the mortgage to the University that, eleven months before, he had taken a mortgage on the same property for the plaintiff's decedent, which was not recorded. Taking into consideration the enormous amount of business done by Dean for Constant, of this same general nature, and the length of time that elapsed since the taking of the Constant mortgage by him, and the fact that it was never taken from the office by the mortgagee, and that it remained there and was found in a pigeon-hole appropriated to satisfied mortgages, and that on the very statement in question,

upon which the learned judge evidently based his finding, it is alluded to as satisfied—all these facts would tend to show very strongly that Dean had no recollection whatever of the existence of the Constant mortgage, as an existing lien at the time he took the mortgage to the University.

But the burden is upon the plaintiff to prove, clearly and beyond question, that he did, and it is not upon the defendant to show that he did not, have such recollection. And we think that there is a total lack of evidence in the case which would sustain the finding that Dean had the least recollection on the subject at the time of the execution of the University mortgage.

Under such circumstances we think it impossible to impute notice to the University, or knowledge in regard to a fact which is not proved to have been possessed by its agent. If such knowledge did not exist in Dean at the time of his taking the mortgage to the University, then the latter is a *bona fide* mortgagee for value, and its mortgage should be regarded as a prior lien to that of the unrecorded mortgage of Constant, which is prior in point of date.

The plaintiff is bound to show by clear and satisfactory evidence that when this mortgage to the University was taken by Dean, he then had knowledge, and the fact was then present to his mind, not only that he had taken a mortgage to Constant eleven months prior thereto on the same premises, which had not been recorded, but that such mortgage was an existing and valid lien upon the premises, which had not been in any manner satisfied. If he recollected that there had been such a mortgage but honestly believed that it was or had been satisfied, then, although mistaken upon that point, the University could not be charged with knowledge of the existence of such mortgage.

Quite a strong reason for not imputing knowledge to the agent in this case, unless upon evidence clear and satisfactory, is that if he had such knowledge and thus knowingly took an utterly worthless security for his principal, he acted in the most improper and dishonest manner, and willfully caused a loss to his principal, of substantially the whole amount of the money represented by the mortgage which he took as a second lien. While this consideration is not controlling if the evidence justified the assumption, it is yet of considerable weight, and adds to the propriety of the rule requiring clear proof of such knowledge at the very time of taking the mortgage to the University.

One other question has been argued before us which has been the subject of a good deal of thought. It is this: assuming that Dean had knowledge of the existence of the Constant mortgage at the time of the execution of the mortgage to the University, is his knowledge to be imputed to the University, considering the position Dean occupied to both mortgagees?

While acting as the agent of Constant in taking the mortgage in question as security for the funds which he was investing for him, it was the duty of Dean to see that the moneys were safely and securely invested. The value of the property in question was between \$11,000 and \$12,000; it was obviously the duty of Dean to see to it that the mortgage which he took upon such property as a security for a loan of \$6,000

for Constant should be a first lien thereon. See *Whitney v. Martine*, 88 N. Y. 535.

In order to become such first lien, it was the duty of Dean to see to it that the Constant mortgage was first recorded. In January, 1884, when acting as agent for the University to invest its moneys, he owed the same duty to the University that he did to Constant; and it was his business to see to it that the security which he took was a safe and secure one. Neither mortgage was safe or secure if it were a lien subsequent to the other upon this property. This duty he continued to owe to Constant at the time he took the mortgage to the University.

At the time of the execution of the latter mortgage, therefore, he owed conflicting duties to Constant and to the University, the duty in each case being to make the mortgage to each principal a first lien on the property. Owing these conflicting duties to two different principals, in two separate transactions, can it be properly said that any knowledge coming to him in the course of either transaction should be imputed to his principal? Can any agent occupying such a position bind either principal by constructive notice, where confessedly that is all the notice that each principal had? It has been stated that in such a case where an agent thus owes conflicting duties, the security which is taken or the act which is performed by the agent may be repudiated by his principal, when he becomes aware of the position occupied by such agent. *Story, Agency*, § 210.

The reason for this rule is that the principal has the right to the best efforts of his agent in the transaction of the business connected with his agency, and where the agent owes conflicting duties he cannot give that which the principal has the right to demand, and which he has impliedly contracted to give.

Ought the University to be charged with notice of the existence of this prior mortgage when it was the duty of its agent to procure for it a first lien, while at the same time in his capacity as agent for Constant it was equally his duty to give to him the prior lien? Which principal should he serve? There have been cases where in the sale and purchase of the same real estate both parties have employed the same agent, and it has been held under such circumstances that the knowledge of the agent was to be imputed to both of his principals. If with a full knowledge of the facts that the agent was the common agent of both, each principal employed him, we can see that there would be propriety in so holding; for each then notes the position which the agent has with regard to the other, and each takes the risks of having imputed to him whatever knowledge the agent may have on the subject. See *LeNess v. LeNess*, Ambl. 496, Hardwicke, Chancellor, decided in 1747; *Toulmin v. Steere*, 8 Meriv. 209, decided in 1817 by Sir Walter Grant, Master of the Rolls.

The case of *Nixon v. Humilton*, already referred to, decided by Lord Plunkett, Lord Chancellor in the Irish Court of Chancery in 1888 (2 Dru. & W. 864), is a case in many respects somewhat like the one at bar, so far as the principal is concerned, if it be assumed that Dean really had the knowledge of the

prior mortgage as an existing lien. It will be observed, however, upon examination of it, that the question of whether the knowledge of the common agent in two different transactions with two different principals was notice to the second principal was not raised with reference to this particular ground. The whole discussion was upon the subject of imputing the knowledge of the agent to the second mortgagee of the existence of the prior mortgage not derived in the latter transaction. Whether such knowledge should or should not be imputed to the second mortgagee because of the conflicting duties owed by the common agent was not raised. The defense was that the information did not come to the agent of the second mortgagee in the course of transacting the business of the second mortgagee; and the question was simply whether such knowledge could be imputed to the second mortgagee because of the knowledge acquired by his agent at another time, in another transaction, with another principal.

The court held that where it appeared, as in this case it did appear, fully and plainly, that the matter was fresh in the recollection and fully within the knowledge of the agent and under such circumstances that it was a gross fraud on the part of the agent, in the first place in keeping a prior mortgage off the record, and in the second place in not communicating the knowledge which he had to his principal, the second mortgagee—that in such case the second mortgagee was charged with the knowledge of his agent.

The distinct ground taken was that, although the agent's knowledge was acquired in another and a prior transaction, and with another principal, still, as he had the knowledge, he was bound to impart it to his principal, and he was guilty of a fraud in concealing it, for which his principal must suffer.

Whether the same result would have been reached if the other ground had been argued, we cannot of course assume to decide.

I have found no case precisely in point where the subject has been discussed and decided either way. I have very grave doubts as to the propriety of holding in this case of an agent situated as I have stated, that his principal in the second mortgage should be charged with knowledge which he acquired in another transaction, at a different time, while in the employment of a different principal, and where his duties to such principal still existed and conflicted with his duty to his second principal. We do not deem it, however, necessary to decide the question in this case.

For the reasons already given, *the judgment should be reversed and a new trial ordered, with costs to abide the event.*

All concur except **Gray, J.**, who reads for affirmance; and **Andrews, J.**, concurs.

**Gray, J.**, dissenting:

The question presented by this appeal seems to possess sufficient interest to call for a brief statement of the grounds upon which I place my dissent from the views entertained by a majority of my associates.

With respect to the transaction of the loan to the University, Dean was, of course, not acting in any sense as the agent of Constant. In

that transaction Constant had no interest. But as Constant's agent with respect to his mortgage, Dean owed him a duty. He should have advised him of the contemplated mortgage to the University, so that his own mortgage might be recorded and made the prior lien. In failing to do so he violated his duty. In the transaction of the loan to the University, he was its agent; but was chargeable with the knowledge of the prior unsatisfied and unrecorded mortgage to Constant. That knowledge was imputable to his principal, the University, and affected it with such notice as to deprive it of the protection which, otherwise, it would have been entitled to under the Recording Act. Its rights were made, thereby, subject to those of Constant. The transaction in which the University was engaged was an independent one; but in it the knowledge of the agent who conducted it was visitable upon his principal.

The trial Judge found that Dean had knowledge of the Constant mortgage at the time of the transaction of the University loan; and I think the evidence supports such a finding in the proof of the circumstances attending it.

The general rule is not open to dispute that notice to the agent is notice to the principal. If the agent has knowledge of a fact, while he is acting for the principal, in the course of the very transaction which becomes the subject of the suit, this operates as constructive notice to the principal himself. For, upon general principles of policy, it must be taken for granted that the principal knows what the agent knows.

"To constitute constructive notice, it is not indispensable that it should be brought home to the party himself. It is sufficient if it is brought home to the agent, attorney or counsel of the party; for in such cases the law presumes notice in the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter." Story, Eq. Jur. § 408.

These rules are well recognized as underlying the law of principal and agent. In their application to the agents of a corporation, they were asserted recently by Andrews, J., in *Orange v. Hadley*, 99 N. Y. 131.

In *Brotherton v. Hatt*, 2 Vern. 574, A made three several mortgages to B, C and D, and in the last mortgage B is a party, and agrees that after he is paid, he will stand trustee for D. It was decreed by the Master of the Rolls and affirmed by the Lord Keeper, that the second mortgagee, C, should be paid before D; for the same scriveners being employed in all transactions, notice to them of C's mortgage was notice to D.

In *Norris v. Le Neve*, 3 Atk. 26, 85, a bill of review (which is granted upon discovery of new matter not known before the decree) was refused by Lord Hardwicke, where it appeared that the parties' attorney, solicitor or agent, in an ejectment upon the same title tried prior to the decree, had in his possession, at the time of that trial, the documents from which the new matter was collected.

In *Nixon v. Hamilton*, 2 Dru. & W. 364, W. B., a land and law agent of F. H., negotiated a deed of separation and maintenance between F. H. and his wife, and by fraud prevented its registry. Four years afterwards he was employed in the negotiation of a loan of money,

which was advanced on a registered mortgage of the estates comprised in the deed of maintenance as solicitor both for F. H. and the lender. In a contest for priority between the registered deed of maintenance and the registered mortgage, it was held that inasmuch as the knowledge acquired in the transaction of the deed of maintenance was brought home to W. B., and its continuance so clearly proved as to make it fraudulent on his part to conceal it, when acting in the mortgage transaction, such fraud on the part of W. B., the agent, was visitable on his principal, the lender, and that the latter should be treated as one who, through his agent, had actual notice of the deed of maintenance, and that consequently his deed should be postponed to the wife's unregistered deed.

Lord Plunkett, in *Nixon v. Hamilton*, said: "If from the circumstances of the case, it satisfactorily appeared that the attorney at the time of the second transaction, had full knowledge and recollection of the first transaction, it was fraudulent in him to conceal it from his principal; and if so, the principal should not be at liberty to derive a benefit from the fraud of his attorney. . . . However acquired, if its (knowledge) existed at the time of the second transaction, it was a fraud to conceal it, and this fraud of the attorney should be visited on the principal." It has been held that where in the purchase of real estates the same agent is employed for both parties, each side is affected with notice as much as if different agents had been employed. *Le Neve v. Le Neve*, Amb. 439.

In *Toussain v. Steers*, 3 Meriv. 210, where the purchaser of an estate employed the vendor's agent, who had notice of an existing incumbrance which affected it, the Master of the Rolls held that such notice to the agent operated constructively as a notice to his employer, notwithstanding an infant was interested in the purchase.

In *Champlin v. Laytin*, 6 Paige, 208, Chancellor Walworth said: "For certain purposes and where the equitable rights of third persons are concerned, it has been found necessary by this court to hold a purchaser to be chargeable with constructive notice of all the facts communicated to his attorney or agent for the purchase, or in the examination of the title, and that notice of the existence of a deed was good constructive notice of the contents of the deed itself, especially if it was one of the deeds under which the purchaser derived his title to the premises;" and see *Griffith v. Griffith*, 9 Paige, 317.

The conclusion at which I have arrived, after the examination of this record, is that the University was chargeable with notice of the existing unrecorded mortgage, through the knowledge coming to its agent and attorney, Dean; and it cannot therefore be regarded as a subsequent purchaser in good faith.

In *Page v. Waring*, 76 N. Y. 463, 469, 470, there is nothing conflicting with my views. Judge Earl recognizes the well settled rule that the valuable consideration required by the statute to support a subsequent conveyance must be accompanied by the element of good faith; that is to say, an absence of notice of the previous unrecorded conveyance.

There can be no reasonable doubt as to his complete representation of the University as

its agent, attorney, and indeed managing trustee, in the transaction forming the subject of this investigation; while, in refusing to find any facts showing Dean to have been at the time, in the transaction, empowered to represent or bind Constant, the learned trial judge was sustained by the absence of proofs to estab-

lish them. This is not a question of morals; but one simply as to what is the legal conclusion from the facts disclosed by the proofs.

I think the judgment at special term was right, and that the judgment of the general term affirming the same should be affirmed by this court.

### ARKANSAS SUPREME COURT.

J. T. STULL, *Appt.*,

v.

Mary A. HARRIS.

(....Ark....)

1. The grantee in a deed, executed by a husband and wife, of the land of the wife, who is also an infant and who was married before any of the Married Women's Enabling Acts were passed, except the one empowering her to sell her land by joining her husband in the conveyance, takes the husband's right to the possession and enjoyment of the rents during his lifetime, and also the wife's interest in the land subject to her right of disaffirmance.

2. When an infant married woman, who was married before any of the Married Women's Enabling Acts were passed, except the one empowering her to sell her land by joining her husband in the conveyance, joins with her husband in a conveyance of her land, the grantee has a rightful possession as against her during the lifetime of her husband; and the Statute of Limitations does not run against her right of disaffirmance until coverture is ended.

3. An infant married woman, who has joined with her husband in a conveyance of her land, may file her bill to disaffirm the conveyance during her husband's lifetime.

4. A married woman who, during minority, joins with her husband in a conveyance of her land in which he has a life interest, is under no obligation, before rescinding, to refund purchase money paid to the husband and which did not come to her hands, but which may be presumed to have been paid for his interest; she must, however, pay her individual indebtedness to the grantee which he canceled at the time of the conveyance as part of the consideration thereof.

(March 16, 1889.)

**APPEAL** by defendant, J. T. Stull, from a decree in chancery of the Circuit Court of Crittenden County in favor of plaintiff in a suit for the cancellation of a deed. *Modified.*

Statement by Cockrill, *Ch. J.*:

This was a bill filed by Mrs. Harris, a *feme covert*, against her brother-in-law and former administrator of her father's estate, and her agent and adviser Dr. Stull, and her husband J. W. H. Harris, to cancel a deed made by her and her husband to said Stull for certain lands in 1867, she then being a minor and covert. The consideration was \$500 cash paid her husband, and a credit of \$400 on her indebtedness to Stull for necessities furnished her during her minority.

Stull denied that she was a minor; denied her right to rescind, especially after so long a time and after he had made valuable improvements

without objection by her; alleged that the suit was premature, being brought during coverture and during the lifetime of her husband, who had an estate for life in the land; and contended that in case of rescission she must refund the consideration and pay for taxes and improvements, etc.

The proof tended to show that Mrs. Harris was a minor when she executed the deed; that Stull was her confidential agent and adviser and stood *in loco parentis* to her; that he was the administrator of her father's estate; that she was indebted to him for necessities furnished her during minority; that the consideration of the deed was \$900, of which \$500 was paid to her husband in cash, and \$400 credited on her indebtedness to Stull for necessities furnished her during minority; that Stull owned two thirds of the land, and purchased her one third for the consideration aforesaid; that Stull had improved the lands as his own; that Mrs. Harris was still covert, and that no act of affirmance or disaffirmance had been done or made by her until she filed this bill.

The court canceled the deed so far as Mrs. Harris was concerned, but held that Stull was entitled to keep possession during the life of the husband, without account of rents, taxes or improvements.

**Mr. O. P. Lyles**, for appellant:

This action is premature, because the rights of the husband at least passed to Dr. Stull.

*Jones v. Freed*, 42 Ark. 357.

Mrs. Harris has fully ratified the sale by delay. She waited seventeen or eighteen years after obtaining her majority before she brought suit. She sees Dr. Stull spending thousands of dollars in making improvements on the land, yet she remains silent.

*Vaughan v. Parr*, 20 Ark. 606; 1 Parsons, Cont. 295; *Fetrow v. Wiseman*, 40 Ind. 148; *Stokes v. Brown*, 4 Chand. (Wis.) 39; *Robinson v. Weeks*, 56 Maine, 102; 5 Wait, Act. & Def. 61, and the authorities there cited; *Lawson v. Lovejoy*, 8 Maine, 405; *Kline v. Beebe*, 6 Conn. 494; *Doe v. Abernathy*, 7 Blackf. 442; *Clauser v. Doe*, 5 Blackf. 300; *Wallace v. Lewis*, 4 Harr. (Del.) 75; 2 Kent, Com. 286; 7 Wait, Act. & Def. 144, 138, 139, 141, 142; 6 Wait, Act. & Def. 687.

If, in fact, she was a minor at the date of the deed to Dr. Stull, she practiced the greatest fraud on him by representing herself as of lawful age, and for this fraud she ought to be held to strict proof of infancy; and if she was not of lawful age and represented herself as of age, and by that fraud and misrepresentation induced Dr. Stull to buy the land, she is in equity bound by her deed.

3 L. R. A.

*Clarks v. Cogley*, 2 Cox, Ch. 173; *Arnot v. Biscoe*, 1 Ves. Sr. 95; *Beckett v. Cordley*, 1 Bro. Ch. 353; *Ex parte Taylor*, 8 DeG. M. & G. 254; *Hannah v. Hodgson*, 30 Beav. 23; *Wright v. Snow*, 2 De G. & Sm. 321; *Bartlett v. Wells*, 1 Best & S. 386; *Burley v. Russell*, 10 N. H. 184; *Storfoos v. Jenkins*, 12 Serg. & R. 399; *Brown v. McCune*, 5 Sandf. 224.

Equity would not allow her to appropriate to herself without compensation, satisfaction or indemnification, the improvements of the defendant, which by her silence she permitted to be made, and have enhanced the value of the property.

*Grider v. Driver*, 46 Ark. 118; *Summers v. Howard*, 83 Ark. 490; *Davidson v. Barclay*, 63 Pa. 406; *Morris v. Terrill*, 2 Rand. 6.

*Messrs. W. G. Weatherford and J. C. Boals*, for appellee:

Plaintiff may, of right, at any time during coverture, elect to disaffirm her minority conveyance; and this is a proper proceeding for that purpose.

*Harrod v. Myers*, 21 Ark. 592; *Bagley v. Fletcher*, 44 Ark. 156.

**Cockrill, Ch. J.**, delivered the opinion of the court:

Where there has been no act on the part of the *quondam* infant from which a ratification of the contract after his majority may be inferred, his right to avoid a conveyance of his lands on account of his minority is not lost until his right of entry is barred by the Statute of Limitations. *Bozeman v. Browning*, 31 Ark. 364; *Kountz v. Davis*, 34 Ark. 590. See *Chandler v. Neighbors*, 44 Ark. 479.

In the case of a minor who is also a married woman at the time the conveyance was executed, the right of disaffirmance will exist as long as she remains covert, unless legislation has swept away the disabilities of coverture; or, as Mr. Bishop expresses it, "If the infant is also a married woman, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended." 2 Bishop, Married Women, § 516.

Such a party labors under a double disability — infancy and coverture; and it is the statutory rule in this State that when there are two co-existing disabilities when the action accrues, the party is not bound to act until the last is removed. Mansf. Dig. § 4508.

In this case the right of entry has never accrued to Mrs. Harris. She was married before any of the Married Women's Enabling Acts were passed, except that which empowered the wife to sell her land by joining her husband in the conveyance. By the marriage the husband acquired a freehold interest in the land and became entitled to the rents and profits. It was an interest capable of sale. When therefore he and his wife joined in the execution of a deed to Stull in 1867, Stull took the husband's right to the possession and enjoyment of the rents and also the wife's interest in the land subject to her right of disaffirmance. That she can file her bill to disaffirm during her husband's life was determined in *Harrod v. Myers*, 21 Ark. 592.

She cannot, however, disturb the possession of her husband's vendee. The most that she could do during coverture was to give notice 2 L. R. A.

to her vendee of her intention to disaffirm or sue for that purpose, as she has done. Was it necessary that she should have done so earlier? Acquiescence in the possession where the right of entry exists does not bar the suit of a married woman under our statute. *Herby v. Latham*, 42 Ark. 305.

Where the right of entry does not exist, but the possession is rightful against her by reason of the husband's conveyance of his estate, the statute does not run against her until coverture is ended. The Statute of Limitations has never been set in motion, therefore, in this case. The wife had done nothing to ratify the deed. Indeed, it was intimated in *Bagley v. Fletcher*, 44 Ark. 158, that a deed executed by a married woman who was under age at the time could not be confirmed during coverture except by deed. It is not necessary to determine the point in this case.

The only argument for a ratification is based upon the assumption that Mrs. Harris stood by and permitted Stull to improve the land upon the faith of her conveyance. But that is not true. She has always resided in Tennessee, and it is not shown that she had notice that the defendant was making improvements upon the land. Moreover, the defendant was the absolute owner of two undivided thirds of the land, as well as the husband's life interest in the other third; and even if it was her duty to have inquired and learned what Stull was doing with the land, she might well have referred his improvements to his absolute estate in the land. The proof shows nothing more than a passive acquiescence on the part of Mrs. Harris; and we have found no decision denying her right to disaffirm under such circumstances, at any time during coverture.

In *Sims v. Everhardt*, 103 U. S. 800 [26 L. ed. 87], the privilege was exercised by the wife twenty-three years after her deed was executed and twenty-one years after she came of age; and in *Sims v. Bardonier*, 86 Ind. 87, where the bill was filed during coverture as in this case, the disaffirmance was allowed twenty-seven years after the execution of the deed. 8. C. 44 Am. Rep. 263. See, too, *Harrod v. Myers*, *supra*; *Watson v. Billings*, 38 Ark. 278; *Vaughan v. Parr*, 20 Ark. 600; *McMorris v. Webb*, 17 S. C. 558; *Wilson v. Branch*, 77 Va. 65; *Williams v. Baker*, 71 Pa. 476; *Youse v. Norcoms*, 12 Mo. 549; *Dodd v. Benthall*, 4 Heisk. 601; *Schouler*, Dom. Rel. § 96.

It is argued that the plaintiff should be required to refund the consideration paid by the vendee before rescinding.

While it is a somewhat controverted point, it is settled here that an infant may disaffirm his contract without restoring the consideration. *Railway Company v. Higgins*, 44 Ark. 293.

The rule is subject to the qualification that if the consideration received by the infant remains in his hands after he becomes of age, he at least becomes liable for its value on disaffirming the contract. *Id.*; *Price v. Furman*, 27 Vt. 263, and note; *Ewell's Leading Cases*, 119, and cases collected in *Field's Law of Infants*, § 15.

If he appeals to equity to avoid his contract, that court may impose upon him the duty of returning the consideration he has in hand as a



condition upon which relief shall be granted. *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Eureka Co. v. Edwards*, 71 Ala. 248.

Now, the consideration which was paid to the husband in this case, not only did not come to the hands of the wife, but we may presume was paid to him for his interest in the land. There is therefore no obligation to refund it. But Mrs. Harris was legally bound to Stull for necessities furnished her during her minority. Upon her marriage her husband also became liable therefor, and executed a note to Stull for the amount thus due; but that did not extinguish the wife's liability; for it is the rule that the execution of a note by one of several joint obligors is not payment of the prior indebtedness unless it is agreed that it shall be

taken as such. *Henry v. Conley*, 48 Ark 207.

There was no agreement of that kind in this case; but Stull released \$400 of the wife's indebtedness to him, as a part consideration of her conveyance; and he has been prevented thereby from collecting that amount of her as he has done the residue of that indebtedness. Now, to the extent that this indebtedness was discharged by the conveyance, to that extent does Mrs. Harris still hold the consideration. It is a benefit *in case* and still enjoyed by her. It is inequitable to permit her to retain it and retake the land. She must pay this debt to Stull with legal interest from the date of her conveyance, as a condition of recovery.

*The cause will be remanded, with directions to modify the decree in accordance with this opinion.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

Vesta A. DEMING

v.

David H. DARLING.

(....Mass.....)

1. In an action against an individual for fraudulent representations made for the purpose of inducing the purchase of property, if the evidence shows the sale to have been made by a firm, an amendment will be allowed at any time.

2. False representations by one selling railroad bonds, that the "bond was an A. No. 1 bond," and that "the railroad was good security" therefor, made to the purchaser for the purpose of inducing the sale, will not render him liable to damages even though he made the statements in bad faith.

(February 23, 1889.)

ON defendant's exceptions. *Sustained.*

This was an action of tort in the nature of deceit to recover damages alleged to have been

sustained by the plaintiff on account of false and fraudulent representations made by defendant to her through her agent, Dr. Charles Jordan, in the sale of a certain railr ad bond.

At the trial in the superior court before Brigham, Ch. J., the jury found for plaintiff, and defendant alleged exceptions.

Further facts appear in the opinion.

Mr. S. K. Hamilton for defendant.

Messrs. Lund & Welch and W. C. Jordan for plaintiff.

Holmes, J., delivered the opinion of the court:

This is an action for fraudulent representations alleged to have been made to the plaintiff's agent for the purpose of inducing the plaintiff to purchase a railroad bond from the defendant.

It appears that the bond was purchased from the defendant's firm, and not from the defendant alone; but we shall not consider very care-

**NOTE.—False representations; requisites to action for.**

To make a false representation the subject of an indictment or of an action, two things are necessary, viz.: that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be the statement of an existing fact. *Sawyer v. Prickett*, 86 U. S. 19 Wall. 146 (23 L. ed. 106).

In an action of fraud by false representations, a representation, to be material, should be in respect of an existing and ascertainable fact, as distinguished from a mere matter of opinion or advice, and must be false and one that the party at the time knew to be false. *Cooper v. Schlesinger*, 111 U. S. 148 (28 L. ed. 382). See *Davis v. Nuzum*, 1 L. R. A. 774.

The requisites to sustain an action for deceit, says Baron Parke in *Watson v. Poulson*, 15 Jur. 1111, are the telling of an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage. *Pasley v. Freeman*, 8 T. R. 51; *Polhill v. Walter*, 3 Barn. & Ad. 114; *Levy v. Langridge*, 4 Mees. & W. 387; *Brown v. Castles*, 11 Cush. 348; *Tryon v. Whitmarsh*, 1 Met. 1; *Ming v. Woolfolk*, 116 U. S. 599 (29 L. ed. 740).

It is not every untruthful statement or false representation that will amount to fraud. If the false statement is made in respect to a matter concerning which the person making it is under no legal duty to the other party for the correctness of the declaration, and upon which the latter would be incautious to rely, it is regarded as *gratuit dictum* and cannot form the basis of an action. *Schoelkopf v. Leonard*, 8 Colo. 162.

2 L. R. A.

**Party deceived must have acted with care and prudence.**

One who has been misled, to his damage, by the false misrepresentations of another, cannot recover therefor unless he himself acted with that degree of care and prudence which characterizes the conduct of ordinarily careful men in the management of their affairs; and whether or not the degree of intimacy existing between the parties justified the plaintiff in accepting defendant's statements as true, was a question for the jury, and not for the court. *Gee v. Moss*, 68 Iowa, 318.

Equity will not relieve a party from the consequences of his own inattention and carelessness in relying upon the representations of another, instead of his own judgment, when the means of information are open to both parties alike. *Gammill v. Johnson*, 47 Ark. 335.

A purchaser of land who fails to avail himself of the sources of information within his reach, but who chooses to rely on representations which, though false, were not made with fraudulent intent, is subject to the maxim *Caveat emptor*, which applies as it does to personal property; and courts will not aid him. *Walsh v. Hall*, 66 N. C. 233; *Anderson v. Rainey*, 100 N. C. 338.

**More expressions of opinion not actionable.**

Expressions of opinion which are not statements of facts do not constitute fraud. *Southern Development Co. v. Silva*, 125 U. S. 248 (31 L. ed. 879).

No action will lie for the expression of opinions, however fallacious they may prove, or whatever the injury reliance upon them may produce, when they are given concerning the value of property which depends upon contingencies which may nev-

fully whether this constituted a variance, since, if it did, an amendment would be allowed at any time. If the contract had been sued upon instead of being a collateral matter, nonjoinder would have had to be pleaded in abatement; and there seems to be no obvious reason for greater strictness in this case. *Wilson v. Nevers*, 20 Pick. 20, 22; *Tuttle v. Cooper*, 10 Pick. 281, 283.

Among the representations relied on, one was that the railroad mortgaged was good security for the bonds, and another was that the bond was of the very best and safest and was an A No. 1 bond. With regard to these and the like, the defendant asked the court to instruct the jury "that no representations which the defendant might have made or did make to Dr. Jordan in relation to the value of the bond in question or of the railroad, its terminals or other property which were mortgaged to secure it, with other bonds, even though false, were representations upon which Dr. Jordan ought to have relied, and are not sufficient to furnish any grounds for this action;" and also "that each of the expressions 'and that the same' (meaning said rail and all the property covered by the mortgage) 'was good security for said bonds,' 'that said bond was of the very best and safest, and was an 'A No. 1 bond'—are expressions of opinion of value, and, even though false, are not such representations as Dr. Jordan had a right to rely upon, and are not enough to furnish any grounds for this action.

The court declined to give these instructions, and, instead, instructed the jury that "An expression of opinion, judgment or estimate, or a statement of a promissory nature relating to what would be in the future, so far as they were expressions of opinion, if made in good faith, however strong as expressions of belief, would not support an action of deceit."

It will be seen that the fundamental difference between the instructions given and those asked is that the former require good faith.

The language of some cases certainly seems to suggest that bad faith might make a seller

liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. *Pike v. Fay*, 101 Mass. 184.

But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague v. Irwin*, 127 Mass. 217); and as to which "It always has been understood, the world over, that such statements are to be distrusted." *Brown v. Castles*, 11 Cush. 348, 350; *Gordon v. Parmelee*, 2 Allen, 212; *Parker v. Moulton*, 114 Mass. 99; *Poland v. Brownell*, 181 Mass. 133, 142; *Burns v. Lane*, 138 Mass. 350, 356.

*Parker v. Moulton* also shows that the rule is not changed by the mere fact that the property is at a distance and is not seen by the buyer. Moreover, in this case market prices, at least, were easily accessible to the plaintiff.

The defendant was known by the plaintiff's agent to stand in the position of a seller. If he went no further than to say that the bond was an A No. 1 bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case; even if he made the statement in bad faith. See, further, *Veasey v. Doiton*, 3 Allen, 380; *Belcher v. Costello*, 122 Mass. 189.

The rule of law is hardly to be regretted when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed.

To show the knowledge of the plaintiff's agent concerning the bond, the defendant was allowed to put in evidence of the agent's purchase, two years before, of bonds and stock of a connecting road of a different name, to the system of which the road in question was said to belong. The price paid was excluded. The circumstances are not brought out very plainly by the bill of exceptions. There is nothing to

er occur, or developments which may never be made, and as to which opinions must be more or less of a speculative character. *Gordon v. Butler*, 105 U. S. 553 (23 L. ed. 1166).

An executed contract will not be rescinded in equity for representations which are mere expressions of opinion, or for errors as to facts, which did not change the conduct of the parties. *Johanson v. Stephanson*, 23 L. ed. 1009.

A mere expression of opinion, to constitute fraud, must be knowingly false, made with intent to deceive, and must have been accepted and relied on as true. *Wilcox v. Henderson*, 64 Ala. 535; *Dyer v. Tilton*, 23 Vt. 313; *Jude v. Woodburn*, 27 Vt. 415; *Smith v. Richard*, 38 U. S. 13 Pet. 23 (10 L. ed. 42); *Margrart v. Freeman*, 27 Ind. 531; *Lester v. Mahan*, 25 Ala. 445; *Hicks v. Stevens*, 8 West. Rep. 494, 121 Ill. 191; *Fish v. Clelland*, 33 Ill. 243; *Upton v. Tridick*, 91 U. S. 50 (23 L. ed. 306); *Starr v. Bennett*, 5 Hill. 305; *Grant v. Grant*, 56 Maine, 573; *Abbott v. Treat*, 1 New Eng. Rep. 694, 78 Maine, 123.

A person who falsely represents to another the actual cost of property which he puts, at its falsely alleged cost, into a corporation they are then forming, as part of its plant, is not relieved from liability, on the ground that it was a mere opinion as to value and not the representation of a fact. *Teachout v. Van Hoosen*, 1 L. R. A. 664.

*Representations as to value, not to be relied on.*

A naked representation of the value of property

sold, by which the buyer is induced to take it at a price in excess of its value, of which the seller is aware at the time of making the representation and sale, furnishes no cause of action for fraud. *Ellis v. Andrews*, 56 N. Y. 83; *Chrysler v. Canaday*, 90 N. Y. 272.

The reason of the rule is that the representation imports only an opinion. But this does not give immunity to the seller to take advantage of the fact that the purchaser has no opportunity of ascertaining the value.

The misrepresentation of value may by the aid of circumstances charge the seller with liability for fraud. *Simar v. Canaday*, 56 N. Y. 298; *Weidner v. Phillips*, 30 Hun. 1.

Statements of value are insufficient to sustain an action where such statements were mere matters of opinion. *Hickey v. Morrell*, 3 Cent. Rep. 655, 103 N. Y. 454; *Simar v. Canaday*, *supra*; *Hoffman v. Wilhelm*, 68 Iowa, 510.

They are no defense to the obligations given for the claim. *Blease v. Carlington*, 62 U. S. 1 (23 L. ed. 521).

Whether the representations were false affirmations of a fact, or were mere opinions, where there is evidence from which either might be inferred, is a question for the jury to determine. *Moses v. Katzenberger*, 84 Ala. 95; *Brudford v. Bush*, 10 Ala. 265; *Ricks v. Dillahunty*, 8 Port. 1; *Sledge v. Scott*, 56 Ala. 202; *Brown v. Freeman*, 79 Ala. 404.

show the bearing of the price or any of the alleged representations; and we see no reason why it should have been admitted.

*Exceptions sustained.*

Robert B. CAVERLY

v.

Mary C. ROBBINS.

(.....Mass.....)

No person is entitled to demand or receive greater compensation for services rendered as agent or attorney to another in procuring for him a pension from the United States than that provided by the Statutes of the United States, although such person is not recognized by the commissioner of pensions as a pension agent or attorney.

(March 2, 1880.)

ON plaintiff's exceptions. *Overruled.*

The action was in contract to recover as upon a *quantum meruit*, and as upon an account annexed for services rendered by plaintiff as an attorney to defendant in procuring a pension from the United States.

At the trial in the supreme court before Marcus P. Knowlton, J., neither appeared, nor was it pretended that the plaintiff was known or recognized at the department in Washington as a pension agent in this case, or that he had in any way connected himself with the pension department in this matter, the business there having been done solely by written communications by the defendant and in her name, his not appearing on any of the papers there, and that before this suit defendant had recovered a pension of \$2,729, and a life pension of \$17 per month; that in the obtaining it, she had induced plaintiff to do her clerical work, such as the drafting of depositions, etc., which she had sent to the pension department under her own name; that the plaintiff had appeared and represented her before a commissioner appointed by the pension department in the taking of testimony, and had received, through his box at the postoffice, for her, communications from the department relating to the pension, and had written for her a large number of letters pertaining thereto, the defendant having at the time of the plaintiff's service no agent or attorney known as such at said department at Washington, and had advised her as to the different things to be done in the proper presentation of her claim; and also included in plaintiff's first item of charge were a retainer and advice in reference to a suit at law in which she was interested with her father, in her father's lawsuit.

Under the pleadings defendant contended that a Law of Congress of June 20, 1878, and other pension statutes, prescribed the measure of plaintiff's damages in this case; but defendant did not otherwise controvert the items of plaintiff's account, which he had sustained by evidence tending to prove the same fairly due as alleged, under the laws of Massachusetts, if not barred by the United States Statutes aforesaid, except that she claimed that she did not employ him in said lawsuit.

Plaintiff requested the court to charge, in 3 L. R. A.

effect, that the action was brought to recover for the professional services of a lawyer under the laws of Massachusetts and not under any law of the United States; that the rules as found in the Pension Statutes were not to be regarded by the jury as having anything to do with the case; and that plaintiff was entitled to recover to the amount of all the items of the account.

But the court refused to so charge, and did charge that if the jury found that the services rendered by plaintiff were within the descriptive language of the United States Statutes relating to services, plaintiff could not recover more than \$10 and interest for such portion of his claim.

The jury returned a verdict for plaintiff for \$10.25, and he alleged exceptions.

*Mr. J. L. Hunt* for plaintiff.

*Messrs. G. A. A. Pevey, Charles S. Lilley and George W. Poore*, for defendant:

The laws of the United States relating to pensions must govern this case, and not the laws of Massachusetts'ts.

*Wolcott v. Friswell*, 184 Mass. 1; *Kellogg v. Waite*, 12 Allen, 529.

The plaintiff could not recover more, even upon a *quantum meruit*.

*Morgan v. Davis*, 47 Vt. 610; U. S. Dig. 1875 (6 N. S.) Pension Pl. 3.

Even if the pensioner pays the attorney a larger fee than allowed by the statutes the excess may be recovered back from the attorney, whether the pensioner knew of the statutory protection or not.

*Smart v. White*, 78 Maine, 332, 40 Am. Rep. 356; *Powell v. Jennings*, 3 Jones, L. (N. C.) 547.

The policy indicated in all the enactments of Congress relating to pensions is plainly to secure to pensioners the full benefit of the sums granted; and no attempt to evade these laws by any scheme or contrivance will be tolerated. The pensioner himself is not permitted to pay the attorney a larger fee than prescribed, no matter how willing.

*U. S. v. Moyers*, 15 Fed. Rep. 411; U. S. Dig. 1888 (14 N. S.) Pension Pl. 2. See *U. S. v. Hall*, 98 U. S. 343 (25 L. ed. 180).

*Field, J.*, delivered the opinion of the court:

The question of law raised by these exceptions seems to be whether, if the plaintiff as an attorney at law rendered services to the defendant in Massachusetts in procuring a pension for her from the United States, and if he was not known or recognized by the commissioner of pensions as a pension agent, and had in no way connected himself with the pension office, the amount of his fees for such services is to be determined by the Statutes of the United States, or by what a jury may think they were reasonably worth.

The Statute of the United States in force when the services were rendered was either Statute 1878, chap. 367, 20 Stat. at Large, 243, or Statute 1884, chap. 181, 28 Stat. at Large, 98.

The latter statute makes it an offense punishable by fine or imprisonment, or both, for "any agent, or attorney, or other person instrumental in prosecuting any claim for pension," etc.,

to directly or indirectly demand or receive "any greater compensation for his services or instrumentality in prosecuting a claim for pension . . . than is therein provided;" and the provision of the statute for compensation is "In all cases where application is made for pension . . . and no agreement is filed with the commissioner as herein provided, the fee shall be \$10 and no more." Sec. 4, *Ibid*.

Section 1, chap. 867, Statute of 1878, is: "It shall be unlawful for any attorney, agent, or

other person to demand or receive for his services in a pension case a greater sum than \$10."

It is plain that these statutes are not limited to persons who are recognized or known to the commissioner of pensions as attorneys or agents of applicants for pensions. If the defendants' services were such as these statutes were intended to provide for, they determine the amount of the compensation he is entitled to receive. *Wolcott v. Frissell*, 184 Mass. 1.

*Exceptions overruled.*

## UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF GEORGIA.

### REPUBLIC IRON MINING CO.

v.  
C. M. JONES.

(....Fed. Rep.....)

**1. Jurisdiction; suit by assignee of contract; pleading.** In an action founded upon contract brought by an assignee of the contract the declaration should show that the suit could have been maintained by the assignor, if no assignment had been made.

**2. An action for damages for the breach of a written contract of lease is an action "founded upon contract" in the sense of that language as used in the restriction contained in the first section of the Act of March 3, 1875; and a Circuit Court of the United States cannot take cognizance of such a suit in favor of an assignee unless the same might have been prosecuted by the assignor if no assignment had been made.**

\*Head notes by NEWMAN, J.

**NOTE.—Jurisdiction of United States Circuit Court.** The circuit court has jurisdiction in a real action for the possession of land brought by an assignee of the note and mortgage. *Whiting v. Wellington*, 10 Fed. Rep. 810; *Desty, Removal of Causes*, 70.

If a note and mortgage are assigned by delivery, the assignee cannot maintain the action if the assignor and mortgagor are citizens of the same State (*Mersman v. Werges*, 3 Fed. Rep. 378; *Desty, Removal of Causes*, 72); so of the assignee of a bond and mortgage. *Sheldon v. Sill*, 49 U. S. 8 How. 441 (12 L. ed. 1147); *Hill v. Winne*, 1 Biss. 275; *contra*, *Dundas v. Dowler*, 3 McLean, 204.

If both maker and payee are citizens of the same State, an indorsee cannot sue in the federal courts. *Keary v. Farmers & M. Bank*, 41 U. S. 16 Pet. 89 (10 L. ed. 897); *Gibson v. Chew*, 41 U. S. 16 Pet. 315 (10 L. ed. 977); *Dromgoole v. Farmers & M. Bank*, 43 U. S. 2 How. 241 (11 L. ed. 252); *Coffee v. Planters Bank*, 54 U. S. 18 How. 183 (14 L. ed. 106); *Wellis v. Newberry*, 4 McLean, 226; *Shuford v. Cain*, 1 Abb. U. S. 302; *Small v. King*, 5 McLean, 147.

Nor can he sue a remote indorser if the intermediate indorser could not. *Mollan v. Torrance*, 22 U. S. 9 Wheat. 537 (6 L. ed. 154).

But if the indorsee and the immediate indorser are citizens of different States, the remote indorser may sue in the circuit court although the intermediate indorser could not. *Young v. Bryan*, 19 U. S. 6 Wheat. 148 (5 L. ed. 228); *Evans v. Gee*, 36 U. S. 11 Pet. 80 (9 L. ed. 639); *Coffee v. Planters Bank*, 54 U. S. 18 How. 183 (14 L. ed. 106); *Wilson v. Fisher*, *Id.* 138; *Milledollar v. Bell*, 2 Wall. Jr. 334; *Campbell v. Jordan*, *Hemp*, 534; *Dennison v. Larned*, 6 McLean, 406.

The circuit court has no jurisdiction of an action founded on a judgment brought by the assignee thereof, unless the assignor might have sued (*Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729); but otherwise with the assignee of a promissory note who obtained judgment thereon in a state court. *Ober v. Gallagher*, 93 U. S. 199 (23 L. ed. 829).

**Assignment, to enable court to entertain jurisdiction.**

The circuit court has jurisdiction of a controversy between citizens of different States, although prop-

(March 1, 1889.)

**ON** demurrer to the complaint, in an action brought to recover damages for breach of contract. *Sustained.*

The facts fully appear in the opinion.

*Messrs. Broyles & Johnston, Graham & Graham and J. D. Conyers* for plaintiff.

*Messrs. Hopkins & Glenn, J. M. & J. W. Neel, B. H. Hill and William Phillips* for defendant.

**NEWMAN, J.**, delivered the following opinion:

This case has been heard on a demurrer to the declaration, the ground of demurrer being that it is a suit brought by the assignee of a contract, when suit could not have been prosecuted by the assignor, and that therefore the court has no jurisdiction of the case.

erty was conveyed to one of the parties to enable the court to entertain the suit; but the assignment must be absolute (*McDonald v. Smalley*, 2 U. S. 1 Pet. 630 (7 L. ed. 237); *Smith v. Kernochen*, 43 U. S. 7 How. 128 (12 L. ed. 666); *Osborne v. Brooklyn City R. Co.*, 5 Blatchf. 308; *Foot v. Hancock*, 15 Blatchf. 343; *Newby v. Oregon Cent. R. Co.*, 1 Sawy. 38; *Briggs v. French*, 2 Sumn. 251; *Hoyt v. Wright*, 11 Fed. Rep. 168; *DeLaveaga v. Williams*, 5 Sawy. 373; and not merely colorable, nor collusive. *Maxwell v. Levy*, 2 U. S. 2 Dail. 581 (1 L. ed. 424); *Jones v. League*, 38 U. S. 18 How. 76 (15 L. ed. 253); *Barney v. Baltimore*, 73 U. S. 6 Wall. 280 (18 L. ed. 825). See *Richardson v. Mattison*, 5 Biss. 31; *Coffin v. Haggin*, 11 Fed. Rep. 219; *Marvin v. Ellis*, 9 Fed. Rep. 367; *Marion v. Ellis*, 10 Fed. Rep. 410; *Williams v. Nottawa Twp.*, 104 U. S. 209 (26 L. ed. 719).

**When assignee of chose in action may sue in United States Circuit Court.**

A suit to enforce the contract contained in a chose in action cannot be brought by the assignee unless it might have been brought before the assignment was made. *Corbin v. Black Hawk Co.*, 105 U. S. 659 (26 L. ed. 1130); *Bradley v. Rhine*, 75 U. S. 8 Wall. 313 (19 L. ed. 467).

Where a party claims through an assignment, he must affirmatively show that the action might have been sustained by the assignor. *Turner v. Bank of North America*, 4 U. S. 4 Dail. 8 (1 L. ed. 718); *Bradley v. Rhine*, *supra*.

If the assignor could maintain the action at the time the suit was commenced, the assignee may sue. *Chamberlain v. Eckert*, 2 Biss. 123. But see *Thaxter v. Hatch*, 6 McLean, 68; *Desty, Removal of Causes*, 71.

Since the Act of 1875 the assignee of a chose in action may sue in the federal court. *Van Bokkelen v. Cook*, 5 Sawy. 587.

A suit to recover a chose in action in favor of an assignee, which could not have been prosecuted if no assignment had been made, is within the very terms of the law. *Sere v. Pitot*, 10 U. S. 6 Cranch, 332, 336 (3 L. ed. 240); *Foster*, Fed. Jud. Acta, 24.

Where a transfer of choses in action requires assignment, the federal court has no jurisdiction of

The following is a synopsis of the plaintiff's declaration:

Plaintiff is a corporation created by the laws of Missouri, and a citizen of that State. Defendant is a citizen of Georgia. On the 18th day of August, 1881, A. R. Silva, plaintiff's assignor, obtained a lease from defendant to certain land in Bartow County, Georgia, which lease was for a term of five years, in writing and under seal. The purpose of the lease was that Silva should mine for iron ores, have all necessary rights for railroads, houses, dams, sluiceways, etc. Silva was to pay defendant a royalty of seventeen cents per ton.

On the 6th day of January, 1882, Silva assigned in writing his interest in this lease to plaintiff. On said 6th day of January, 1882, plaintiff entered and took possession of said premises and after that time performed all the covenants to be performed by Silva; but notwithstanding this, on or about the first of September, 1882, the defendant with force entered the premises and dispossessed plaintiff. Plaintiff while in possession had cleared the ground, opened mines, tested ores, erected houses, machinery, etc., and was, by its dispossession by the defendant, deprived of the use, issues, rents and profits, etc. Defendant, after dispossessing plaintiff, commenced and is still mining upon said land and retaining to himself the profits. An amendment to the declaration sets forth that on the third day of August, 1881, Silva made a contract with a furnace company in Tennessee, whereby he agreed to furnish 30,000 tons of iron ore within a year at \$1.50 per ton, which contract was assigned to plaintiff, and the profits of the contract were lost by the breach of the lease by defendant.

It is said in one of the contracts attached that Silva is a citizen of Missouri, and in another that he is a citizen of Georgia; but it is not alleged anywhere that he could have maintained this suit. This is held to be necessary. *Corbin v. Back Hawk Co.* 105 U. S. 659, and cases cited at the conclusion of the opinion, page 667 [26 L. ed. 1136, 1139].

There is no contention, however, that Silva could have prosecuted this suit. It has been assumed all through that he could not, and that is taken as conceded. This suit was commenced in 1885, and the sole question discussed by counsel has been the application to the case of the language of the Act of March 8, 1875, as follows: "Nor shall any circuit or district court have cognizance of any suit founded on a contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

It is urged by counsel for plaintiff that this is not a suit "founded on contract," within the meaning of the extract from the Act of 1875 just quoted. It is contended that this expression, "founded on contract," is limited in its meaning, and should be construed to cover only suits brought on the contract to recover the amount called for by the contract, or to have a specific performance of its terms; and that it should not be extended to embrace a suit for damages for a breach of a contract. This view of the law would give it a much narrower construction than its language and evident purpose justifies.

A suit for damages for breach of a contract

a suit by the assignee, unless it would have had jurisdiction if the assignor had sued. *Newgas v. New Orleans*, 33 Fed. Rep. 186; *Simons v. Ypsilanti Paper Co.* 33 Fed. Rep. 193.

Under United States Revised Statutes, § 629, the circuit court has not jurisdiction of a suit to enforce performance of a contract in favor of an assignee where the assignor could not have sued, such suit being one to recover the contents of a chose in action. *Shoecraft v. Bloxham*, 124 U. S. 730 (31 L. ed. 574).

An equitable assignee of a claim to an account cannot sue if his assignor could not. *Wilkinson v. Wilkinson*, 2 Curt. 532; *Sere v. Pitot*, *supra*.

#### *Choses in action; what include.*

Choses in action include all debts and all claims for damages for breach of contract (*Bushnell v. Kennedy*, 76 U. S. 9 Wall. 387 19 L. ed. 738; *Desty, Removal of Causes*, 71); open accounts or unliquidated accounts, as well as promissory notes. *Sere v. Pitot*, *supra*; *Wilkinson v. Wilkinson*, 2 Curt. 532.

The assignee of a mortgage given to secure a note cannot sue unless his assignor could. *Sheldon v. Sill*, 49 U. S. 8 How. 441 (12 L. ed. 1147).

All contracts, promises, and covenants for the delivery of the chattels or money are within the Act (*Id.*); and all torts when connected with contracts (*Bushnell v. Kennedy*, *supra*; *Desty, Removal of Causes*); an assignee of a right of action for damages for failure to protect a note from protest (*Barney v. Globe Bank*, 5 Blatchf. 107; *Desty, Removal of Causes*, 73); but not torts arising from the breach of some duty to which the law attaches damages. *Barney v. Globe Bank*, 5 Blatchf. 107.

Nor does the term apply to an action by an assignee to recover the possession of the chose in action or damages for its wrongful detention. *Deahler v. Dodge*, 37 U. S. 16 How. 622 (14 L. ed. 1084).

#### *Who not within terms of the Act.*

Receivers are also not within the terms of the Act. *Davies v. Lathrop*, 12 Fed. Rep. 353; *Bradford v. Jenks*, 2 McLean, 130; *Foster*, Fed. Jur. Acts, 24.

The representatives of a deceased person are not 2 L. R. A.

usually designated by the term "assignees," and are therefore not within the terms of the Act. *Chappelaine v. Dechenaux*, 8 U. S. 4 Cranch, 306 (3 L. ed. 629); *Childress v. Emory*, 21 U. S. 8 Wheat. 642 (5 L. ed. 705); *Mayer v. Foulkrod*, 4 Wash. C. Ct. 349.

Nor are assignees by operation of law included in the Act. *Sere v. Pitot*, 10 U. S. 6 Cranch, 332 (3 L. ed. 240).

#### *Dismissal of suit; when justified.*

To justify a dismissal it must appear that the object was to create a case cognizable under the Act of 1875. *Lanier v. Nash*, 121 U. S. 404, 410 (30 L. ed. 947, 949); *Foster*, Fed. Jur. Acts, 42.

When the plaintiff acquired the causes of action, which he sought to enforce solely for the purpose of collection under an agreement to pay back a proportion of the net proceeds to his assignors, who could not have sued in a federal court, it was held that the case should be dismissed. *Farmington v. Pillsbury*, 114 U. S. 133 (29 L. ed. 114); *Williams v. Nottawa Twp.*, 104 U. S. 339 (26 L. ed. 719); *Bernard's Twp. v. Stebbins*, 109 U. S. 341 (27 L. ed. 956); *New Providence v. Halsey*, 117 U. S. 336 (29 L. ed. 904); *Little v. Giles*, 118 U. S. 506 (30 L. ed. 209); *Foster*, Fed. Jur. Acts, 42.

Where the conveyance was held collusive, and the court had no jurisdiction, the case will be dismissed. *McLean v. Clark*, 31 Fed. Rep. 501; *Norton v. European & N. A. R. Co.* 32 Fed. Rep. 865.

Where a conveyance of the subject matter of the controversy has been made for the purpose of vesting an interest in parties competent to litigate in the federal courts, but the ownership of the property remains in the assignor, the court has no jurisdiction. *Banigan v. Worcester*, 30 Fed. Rep. 332.

Under Colorado Acts 1887, § 1, the circuit court has no jurisdiction of a suit by the assignee on a county warrant payable to the order of the person named therein and passing only by indorsement, in the absence of the averment that the assignor was qualified to sue in that court; but it has jurisdiction of a suit by the holder on one payable to the bearer. *Rollins v. Claiffee County*, 34 Fed. Rep. 91.

would seem to be, for present purposes at least, as much a suit "founded on contract" as a suit to recover a specific amount called for by a contract. Both are based on a contract and require its support to sustain them.

This suit is brought by the plaintiff on account of the deprivation of specified rights which it says it acquired by the terms of the contract in writing, which it sets out in full in the declaration.

The gravamen of its action is the violation by the defendant of his agreement contained in the contract. It is the foundation of plaintiff's rights; and if the suit proceeded to trial, the first evidence offered by it in the case would necessarily and properly be the contract.

But it is further urged that this expression, "founded on contract," as used in the Act of 1875, should be construed in connection with the language of the Judiciary Act of 1789, "the contents of any promissory note or other chose in action," and also the language of the Act of March 3, 1837.

Why a change was made in the language, restrictive of the jurisdiction of the court as to suits by assignees, in the Act of 1875, and why the language of the original Act of 1789 was readopted (so far as applicable here) in the Act of 1837, is not apparent—especially as to the last enactment. It would seem probable, however, that the purpose in using the language adopted in 1875 was to simplify the matter, and to avoid the difficult questions and nice distinctions, which had arisen in interpreting the expression, "the contents of any promissory note or other chose in action," as used in the original Act. However this may be, it is difficult to see how the plaintiff is benefited by viewing the Act of 1875 in connection with the other legislation on the subject.

It would seem that the construction which has been given to the Act of 1789 by the supreme court would be fatal to the jurisdiction in this case, even if the suit had been brought while it was in force.

Without discussing any of the former cases, the case of *Corbin v. Black Hawk County*, *supra*, is decisive of the question made in the case at Bar. In the opinion, page 665 [1188], the term "the contents" is thus defined: "The contents of a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it, which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents."

This construction clearly covers the case now under consideration. In it the plaintiff seeks to enforce a stipulation, and the most important stipulation, of the contract set out in its declaration, and made the foundation of its claim.

In the latter case of *Shoecraft v. Bozham*, 124 U. S. 780 [81 L. ed. 574], in the opinion of the court this language is used: "Section 629 of the Revised Statutes, which was in force when the suit was commenced, declares that no 'circuit court shall have any cognizance of any suit to recover the contents of' any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." The terms used 'the contents of any promissory note or other chose in action,' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of *Corbin v. Black Hawk County*, 105 U. S. 659 [26 L. ed. 1186], where the subject is fully considered and the decisions cited.

"There, a suit brought to enforce the specific performance of a contract was held to be a suit to recover the contents of a chose in action, and therefore not maintainable under the statute in question, in the Circuit Court of the United States, by an assignee, if it could not have been prosecuted there by the assignors had no assignment been made."

The case of *Simons v. Ypsilanti Paper Co.* 33 Fed. Rep. 193, in the Circuit Court of the Eastern District of Michigan, was brought after the passage of the Act of March 8, 1837; and in that case it was held that "an action to recover damages for the refusal to accept and pay for merchandise purchased under an oral contract is a suit to recover the contents of a chose in action, within the meaning of the Act of March 8, 1837; and a circuit court has no jurisdiction of such suit in favor of an assignee unless it might have been prosecuted in such court if no assignment had been made." In the opinion the court reviews the decisions of the supreme court on the Act of 1789, and derives therefrom authority for deciding as above. So that if, as has been urged by plaintiff here, a suit to come within the restriction of the Act of 1875, must be to recover "the contents" of the contract, it would seem that following the interpretation repeatedly given the term "contents" this suit could not be maintained.

The decision in the case of *Blacklock v. Small*, 127 U. S. 96 [32 L. ed. 70], so far as it touches upon the question here presented, would seem to be adverse to plaintiff's rights to maintain this suit. That case was brought under the Act of 1875, and while the direction of the supreme court to dismiss the bill for want of jurisdiction seems to have been mainly upon another ground, yet, so far as it affects this case at all, it is not favorable to the plaintiff's rights. Other reasons have been urged for giving this restriction the limited meaning contended for by plaintiff; some of which would be important if doubt was entertained as to its construction in this connection; but none of the reasons suggested can have force in view of what appears to be the plain meaning and intent of the language used. It seems clear, therefore, that *this demurrer must be sustained, and it will be so ordered.*

The Circuit Judge concurs in the conclusions reached.

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

Frederick FRADLEY

v.

Josiah A. HYLAND, Impleaded, etc., *App't*.

(....Fed. Rep. ....)

**\*1. Where an agent, authorized by a principal to purchase supplies for the use of the principal, and instructed to purchase only for cash, purchases in his own name, upon credit, of a seller who supposes the agent to be buying for himself only, and the principal pays or settles with the agent for the supplies in good faith, supposing that the agent had purchased them for cash or upon his personal credit, he is not liable over again to the seller for the price of the supplies.**

**\*2. The rule that a seller who deals with the agent of an undisclosed principal can, upon discovering the principal, resort to the latter for payment, unless by his conduct he has led the principal in the mean while to pay or settle with the agent, does not apply to a case in which the agent bought contrary to his instructions, and the seller gave credit to the agent supposing him to be the only principal, and the principal has in the mean time paid the agent.**

(December 1, 1888.)

**A** PPEAL by respondent, in admiralty, from a decree for libelant upon a libel for supplies furnished respondent's agent in charge of a canal-boat. *Libel dismissed.*

The facts appear in the opinion.

*Mr. Josiah A. Hyland* for appellant.*Mr. Peter S. Carter* for appellee.

**Wallace, J.**, delivered the following opinion:

The libel sets forth two causes of action for supplies purchased by one Gibson. The district court decreed in favor of the libelant upon the first cause of action, and dismissed the libel as to the other. The respondent in the court below is the appellant here; but the libelant, although he has not appealed from the part of the decree by which the libel as to the second cause of action was dismissed, cites the case of *Irvine v. The Hesper*, 123 U. S. 256 [80 L. ed. 1175], and insists that he is entitled to urge that this court should decree in his favor as to that cause of action.

The facts which appear in evidence are these: During the period in which the supplies were purchased, one Gibson, who was the owner, and was managing certain canal-boats of his own, was employed by the appellant to manage certain canal-boats for the latter. Gibson was to obtain employment for the boats, and return the net earnings monthly to appellant, after paying for all repairs and supplies, and deducting his own commissions. His instructions were not to obtain supplies upon credit,

\*Head notes by WALLACE, J.

**NOTE.**—Principal not liable when credit given exclusively to agent.

Where a third party, knowing that the agent acts for his principal, elects at the time of the making of the contract to give exclusive credit to the agent, he cannot afterwards sue the principal. *Ford v. Williams*, 62 U. S. 21 How. 287 (16 L. ed. 36); *Jones v. Aetna Ins. Co.* 14 Conn. 501; *Johnson v. Cleaves*, 15 N. H. 322; *Stackpole v. Arnold*, 11 Mass. 27; *Cole-*

\*2 L. R. A.

but, if not in funds from the earnings, to call upon the appellant. Monthly settlements of account took place between Gibson and the appellant, in which Gibson was allowed all items for supplies paid or contracted for by him against the earnings of the boats, and a considerable fund was always left in his hands by the appellant. Gibson ceased to act as appellant's agent September 1, 1886. The supplies were sold to him prior to that time. The libelant supposed that Gibson was the owner of all the boats he was managing, and dealt with him as such, selling him supplies for all indiscriminately, charging the price to him, and taking his notes from time to time, or those of one Isham, his clerk. The claim to recover the part of these supplies used on appellant's boats is the first cause of action set forth in the libel.

One Kelly had also sold supplies to Gibson for the same boats, supposing that Gibson was the owner, and had received Gibson's notes, or notes of Gibson's clerk, for the amount. After these notes had matured, Gibson asked the libelant to pay them for him to Kelly, and the libelant did so, receiving new notes from Gibson for the amount. There was no assignment to libelant of Kelly's original demand against Gibson. The claim for the supplies thus sold by Kelly to Gibson is the second cause of action set forth in the libel. After Gibson ceased to act as agent for appellant, the libelant discovered that some of the supplies had been purchased for the appellant's boats, and, being unable to collect his demands of Gibson, made claim against the appellant therefor. Until then the appellant did not know of the transactions between Gibson and the libelant, or between Gibson and Kelly. The moneys left by appellant in Gibson's hands were at all times more than the amount of the libelant's demands, and Gibson was indebted to the appellant in more than that amount when he left the appellant's employ, and when this libel was filed.

As to the first cause of action no question is made by the appellant that it is not of admiralty cognizance, but he insists that he is not liable as a principal for the supplies sold to his agent by the libelant, under the circumstances of the case. The general rule is familiar that, when goods are bought by an agent, who does not at the time disclose that he is acting as agent, the seller, although he has relied solely upon the agent's credit, may, upon discovering the principal, resort to the latter for payment. But the rule which allows the seller to have recourse against an undisclosed principal is subject to the qualification stated by *Lord Mansfield* in *Ratton v. Hodgson*, 4 Taunt. 576, and by *Tenderden, Ch. J.*, and *Bayley, J.*, in *Thomson v. Davenport*, 9 Barn. & C. 78.

As stated by *Mr. Justice Bayley*, it is "that

*man v. First Nat. Bank*, 53 N. Y. 388; *Cunningham v. Soules*, 7 Wend. 106; *Cheever v. Smith*, 15 Johns. 276; *Silver v. Jordan*, 136 Mass. 319; *Raymond v. Crown & E. Mills*, 2 Met. 319; *James v. Bixby*, 11 Mass. 34; *Winchester v. Howard*, 37 Mass. 303; *Palmer v. Stone*, 10 Met. 160; *French v. Price*, 24 Pick. 13; *Friestley v. Fernie*, 3 Hurst. & C. 77; *Kymer v. Suvercropp*, 1 Camp. 112; *Wheeler v. McGuire*, post, —; *Hubbard v. Tenbrook*, post, —.



the principal shall not be prejudiced by being made personally liable if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to the action brought by the seller, where he has looked to the responsibility of the agent."

The principal must respond to and may avail himself of a contract made with another by an undisclosed agent. When he seeks to enforce a bargain or purchase made by his agent the rule of law is that, if the agent contracted as for himself, the principal can only claim subject to all equities of the seller against the agent. In the language of Parke, B.: "He must take the contract subject to all equities, in the same way as if the agent were the sole principal" (*Beckham v. Drake*, 9 Mees. & W. 98), and accordingly subject to any right of set-off on the part of the seller (*Borries v. Imperial Ottoman Bank*, 29 L. T. N. S. 683).

Thus the rights of the principal to enforce, and his liability upon, a contract of sale or purchase made by his agent, without disclosing the fact of the agency, are precisely co-extensive, as regards the other contracting party, if the limitation of his liability is accurately stated in the earlier cases.

The qualification of the principal's liability to respond to his agent's contract, as stated in the earlier authorities mentioned, was narrowed by the interpretation adopted in *Heald v. Kenworthy*, 10 Exch. 789, to the effect that the principal is not discharged from full responsibility unless he has been led by the conduct of the seller to make payment to or settle with the agent; and the doctrine of this case has been reiterated in many subsequent cases, both in England and in this country, where the agent did not contract as for himself, but as a broker, or otherwise as representing an undisclosed principal. One of the more recent English cases of this class is *Davison v. Donaldson*, L. R. 9 Q. B. Div. 628.

But, as is shown in *Armstrong v. Stokes*, L. R. 7 Q. B. 599, the version of *Heald v. Kenworthy*, while a correct interpretation of the rules of the principal's liability, when applied to cases in which the seller deals with the agent relying upon the existence of an undisclosed principal, is not to be applied in those in which the seller has given credit solely to the agent, supposing him to be the principal. This case decides that the principal is not liable when the seller has dealt with the agent supposing him to be the principal, if he has in good faith paid the agent at a time when the seller still gave credit to the agent, and knew of no one else. See also *Irvine v. Watson*, L. R. 5 Q. B. Div. 102.

Under such circumstances it is immaterial that the principal has not been misled by the seller's conduct or laches into paying or settling with his agent. It is enough to absolve him from liability that he has in good faith paid or settled with his agent. In that case the court was dealing with a contract made by an agent which was within the scope of the authority conferred on him, but which was nevertheless

made by the agent as though he were acting for himself as principal. In the present case Gibson had no authority at all to make a purchase upon the credit of the appellant. But as it appears that appellant, in the monthly settlements of account with Gibson, allowed him out of the earnings charges for supplies for which the latter had not actually paid, he must be deemed to have authorized Gibson to purchase supplies for him upon Gibson's own credit. Under the circumstances, if Gibson had purchased supplies, purporting to act as an agent of appellant in doing so, appellant, by consenting to their being used for his benefit, and by allowing the price in his settlements with Gibson, would have been liable to those who sold to him upon the theory of ratification. But, as Gibson did not assume to act as agent in making the purchases, there is no basis for applying the doctrine of ratification.

Very different considerations govern the case in which an agent who assumes to represent an undisclosed principal buys of a seller upon credit, and one in which the agent assumes to be acting for himself, and the seller deals with him, and gives him exclusive credit, supposing him to be the only principal. In the first, if the agent has authority, express or implied, to buy upon credit for the principal, or ostensible authority to do so, upon which the seller relies, then, by the familiar rules of law, the contract is the contract of the principal, and is none the less so because the name of the principal does not happen to have been disclosed. The principal is bound by the acts of his agent within the scope of his real or apparent authority; and the seller understands that, even though he may hold the agent personally responsible, he may also resort to the undisclosed principal. But in the other, as the seller does not rely upon any ostensible authority of the one with whom he contracts to represent a third person, he can only resort to the third person as principal, and charge him as such, when the purchase is made by one having lawful authority to bind the third person. It is immaterial, in such a case, whether the contract is made by an agent who is employed, in a continuous employment or in a single transaction, by a principal, or whether he is one who may be deemed a general, instead of a special, agent.

"When the agency is not held out by the principal by any acts or declarations or implications to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent beyond what he has apparently authorized, because he has not misled the confidence of the other party who has dealt with the agent." Story, Ag. § 188.

It is therefore difficult to understand how, as an original proposition, it could be reasonably maintained that there is any liability on the part of one who has employed another to manage his interests in a business, or series of transactions, in which, as an incident, purchases of goods are to be made, has given him instructions not to purchase on credit, and has

supplied him with funds to purchase for cash, to a seller who has sold to the person employed upon credit, and dealt with him as the only principal. *Taft v. Baker*, 100 Mass. 68.

Of course he would be liable, and the instructions not to buy on credit would go for nothing, if he did not supply the agent with funds to pay for the necessary goods, because in that case the agent would have implied authority to buy them on credit.

So, also, in a case which may be supposed, where a principal knows, or ought to know, that the agent is buying on credit in his own name, yet the principal takes all the income of the business without making any provision for payment to those who have trusted the agent, the principal would be liable, because in such a case his conduct would be inconsistent with good faith, and he ought not to be permitted to avail himself of the benefits without incurring full responsibility for the agent's acts. But it is probably too late to consider the questions thus suggested upon principle; and it may be accepted as law that the seller, under the circumstances of a case like the present, upon discovery of the principal, can resort to and recover of him, if he has not *bona fide* paid the agent in the mean time, or has not made such a change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller. *Story*, Ag. § 291; 1 Pars. Cont. 68; *Fish v. Wood*, 4 E. D. Smith, 827; *Thomas v. Atkinson*, 38 Ind. 248; *Clealand v. Walker*, 11 Ala. 1058; *McOullough v. Thompson*, 45 N. Y. Super. Ct. [18 Jones & S.] 449; *Laing v. Butler*, 87 Hun, 144.

In the case last cited the court used this language:

"Where the purchase has been made by the agent upon credit authorized by the principal,

but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable."

According to these authorities, if it should be conceded that the facts in the present case warrant the inference that the appellant gave Gibson authority to buy either upon his own credit or upon the credit of the appellant, the libelant cannot recover. It certainly is not material that the appellant did not pay Gibson, or make any settlement with him, on account of the libelant's demands specifically. It is enough that he did settle with Gibson for, and allowed him to retain in his hands sufficient moneys to pay, all outstanding liabilities contracted by him for the appellant's benefit, including the demands of the libelant. At the time of the last settlement the appellant had paid the libelant's demands and all outstanding liabilities contracted by Gibson as between Gibson and himself; and this was before the libelant knew any principal in the purchases, other than Gibson himself.

As respects the second cause of action, the case may be briefly disposed of without considering the question whether the libelant can be heard to urge that the decree from which he has not appealed ought to be reversed. The transaction was merely a loan from libelant to Gibson. Whether the appellant is liable as upon a loan made by his agent or not, his obligation is in no sense a maritime one, and cannot be enforced in a court of admiralty. The libelant did not, by paying the notes to Kelly, and receiving Gibson's notes for the amount, succeed to any rights which Kelly may have had to enforce a claim for the supplies.

*The libel is dismissed, with the costs of this Court and of the District Court*

## NEW YORK COURT OF APPEALS.

James BRADY, *Appt.*,

v.

MAYOR, etc., OF the City of NEW YORK,

*Repts.*

(....N. Y....)

1. The certificate of the proper officer that certain work is necessary to complete or perfect a particular job which is being performed for the City of New York or that any supply is needful for any particular purpose, is conclusive as between the one contracting to furnish such work or supply and the city, where there is no allegation of fraud, and where the facts indicate that the necessity certified is a possible incident of such work or supply.

2. The court of appeals will not review the conclusion of the officer specially charged with the determination of the question of the necessity of certain work to complete a job or of certain supplies for the City of New York, where it appears that the facts called for the exercise of his judgment, and that a reasonable necessity might by possibility have existed.

3. A contract with the City of New York, for the consideration of \$975, to substitute cherry for pine in finishing the interior of a public building in process of construction under a valid con-

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tract, need not be founded upon a sealed bid or proposal under the Consolidation Act, § 64, requiring contracts for extra work to be so founded "where the several parts of the said work or supply shall together involve the expenditure of more than \$1,000.

(March 5, 1880.)

**A**PPEAL by plaintiff, from an order of the General Term of the Superior Court of the City of New York, reversing a judgment of the Special Term in favor of plaintiff and ordering a new trial in an action to recover the amount alleged to be due upon a contract for labor and materials. *Reversed.*

The facts sufficiently appear from the opinion.

*Messrs. Theodore DeWitt*, and *George G. DeWitt, Jr.*, for appellant.

*Messrs. David J. Dean*, *John J. Townsend, Jr.*, and *Henry R. Beekman*, for respondents:

To permit a change to be made subsequent to the award of the contract and during the progress of the work, in specifications originally complete of their kind, would open the door to the very evil the prevention of which was the object of the statute.

*Brady v. N. Y.* 20 N. Y. 312; *Re Merriam*, 64 N. Y. 596.

The clause of the Act relating to the extra work was doubtless intended for cases of work omitted in a contract from inadvertence, or the necessity of which, to complete a job, was unforeseen when the contract was made.

*People v. N. Y.* 32 Barb. 35; *Llagus v. Phila.* 48 Pa. 527; *McBrian v. Grand Rapids*, 56 Mich. 96; *Bonesteel v. N. Y.* 22 N. Y. 163.

**Finch, J.**, delivered the opinion of the court:

The reversal by the general term is sought to be sustained by two propositions argued on behalf of the city; first, that no necessity existed for the change authorized by the new or supplemental contract; and second, that it involved an expenditure of more than \$1,000 and so was invalid unless submitted to public competition. Our judgment is adverse to both propositions.

The law, requiring contracts on behalf of the city to be founded on sealed bids or proposals, describes its own application thus: "Whenever any work is necessary to be done to complete or perfect a particular job, or any supply is needful for any particular purpose, which work and job is to be undertaken or supply furnished for the corporation, and the several parts of the said work or supply shall together involve the expenditure of more than \$1,000."

The new contract here was to substitute cherry for pine in the hall, vestibule, café and wine room, and for newels, balusters and rails of the principal staircase in the Mount St. Vincent Restaurant, which was being constructed in the Central Park. The first inquiry is, Who is to judge of the necessity, and what is the effect of that judgment? The same section which prescribes the necessity (Con. Act, § 64) also requires that it shall be certified to by the head of the appropriate department. That certificate was made in this case, but is now asserted to be in no respect conclusive and to leave open the question whether the particular necessity existed. As between the contractor and the city, the certificate of the proper officer is certainly conclusive where there is no allegation of fraud or collusion, and where the facts indicate that the necessity certified was a possible incident of the work to be done or the supply to be furnished.

We ought not to review or reverse the conclusion of the officer specially charged with the determination of the question where we can see that the facts called for the exercise of his judgment, and that a reasonable necessity might by possibility have existed. We think that was the situation in the present case. A restaurant for the use and convenience of the public was being erected in the Central Park. Upon that park large sums have been expended to enhance its attractions, and make it not only useful but beautiful. Much of that expenditure has been necessary, not in the hard and narrow sense of the word, but relatively to the standard of taste and beauty adopted as the controlling guide. Much was reasonably to be deemed necessary there, which elsewhere could not be, and would verge upon pure extravagance. A restaurant in that park should not disgrace the standard of its surroundings. It was better not to build it at all, than with a cheap parsimony and bad

taste. These considerations might rightfully influence the constructing board and take their place among the reasonable necessities of the work. In their plans the main vestibule and café, and even the principal staircase, were to be finished in pine. Undoubtedly when so finished the job would be "complete," but would it also be "perfect?" Great changes have come about in the construction of interiors. The use of hard woods has become the rule where any degree of elegance is sought, and a café in the Central Park finished in pine, even to the staircase rails and balusters, might well be deemed unfit and inappropriate, not only as it respected its appearance, but also its durability. During the pleasant months it would probably be thronged, and the evidence shows that the pine would yield and wear while the cherry would remain permanent and durable. Looking at the situation with its surroundings, I think such reasonable necessity for the change existed as to call into play the judgment of the board. The wisdom or prudence of its exercise we are not called upon to discuss.

The remaining question is whether the change ordered and made involved an expenditure of over \$1,000. The general term has so held upon the ground that to the \$975, which was the contract price of the change, must be added the cost of the pine fitting under the original contract. We think that is a mistaken view.

The original contract was to be performed for about \$29,000. That was founded upon sealed bids, and included the fitting of the rooms and construction of the staircase. The contractor was not released from that work and did perform it, and so was entitled to his full pay under the old or original contract. If he had used cherry without any arrangement for an extra compensation he would simply have completed the original contract for their original price. The supplemental contract was for extra work and material beyond the original contract price, and the price of that was simply the \$975. I think we may see it in another way by the inquiry how much of additional expenditure was incurred by the change. The \$29,000 was payable for the work of the original contract. That required doors, architraves, bases and staircase. All these were built and furnished and the contract price thus earned, but an additional expenditure of \$975 was involved in the change ordered from pine to cherry.

The total expenditure was increased only by the value of the extra material and labor beyond that already covered by a valid contract; and the two contracts together, when both were fulfilled, did not add to the original and authorized expenditure, more than \$1,000. The order made related to and covered only the excess of value due to the extra work and material. The price of the pine and its fittings went as far as it could in paying for the cherry and its fittings, and the new contract began and its expenditure commenced at the point where the old one was exhausted. Viewing the matter thus, we think the contractor should have his pay, which he has fairly earned.

*The order of the General Term should be reversed and that of the Special Term of the Superior Court be affirmed, with costs.*

All concur.

## OHIO SUPREME COURT.

John B. MANNIX, Assignee,

John B. PURCELL *et al.*

(46 Ohio St....)

\*1. It is competent to prove by parol evidence that land conveyed to a grantee by a deed absolute on its face is in fact held by him in trust for charitable uses; but such evidence should be clear, convincing and conclusive.

\*2. Where such grantee is in fact Archbishop of the Roman Catholic Church for his diocese, its canons and decrees, regulating the mode of acquiring and holding church property, are competent evidence to show that the property so held by him is held in trust for purposes of public religious worship and other charitable uses.

\*3. Such a trust is one of which the courts will take cognizance and assume control for the purpose of preventing its abuse, perversion or destruction.

\*4. Where such property is held by the archbishop in trust to be devoted to the uses of public religious worship, cemeteries, orphan asylums and schools, each church, cemetery, asylum and school is held upon a separate trust and for its own separate uses; and one piece of property so held is not chargeable with any part of the expense of improving another, nor of improving church property generally in the diocese.

\*5. Property held upon such trusts by the archbishop does not pass to his assignee in insolvency by a deed of assignment made in his individual capacity for the payment of his individual debts. Such an assignment passes to the assignee no better or different title to the assigned property than the assignor held; and *cestui que trustent* may assert as against the assignee and the creditors of the assignor the same rights that they could against the latter if no assignment had been made.

\*6. Though the several congregations of the churches so held in trust, and the persons respectively possessing and having charge of such schools, cemeteries and asylums, are severally unincorporated and otherwise incapable of holding the legal title to the property so used, they nevertheless have such an interest in the trust property as permits them to be represented in court by a number less than the whole, having a common interest with them, for the purpose of protecting the property from seizure and sale for the satisfaction of the private debts of the trustee.

\*7. Changes in the membership of such congregations and bodies do not affect their legal identity; and for the purposes of continuing and enjoying the uses to which the properties respectively possessed by them are devoted they respectively remain, in legal contemplation, the same congregations and bodies.

\*8. It is not essential to the existence or enjoyment of a trust for charitable uses that the individual beneficiaries are able to show that they contributed to, or have a personal, pecuniary interest in, the trust property; their interest is measured by, and limited to, the uses for which the property is held.

\*9. Where such trustee has made advances

\*Head notes by the COURT.

NOTE.—Charitable uses.

See Fire Ins. Patrol v. Boyd, 1 L. R. A. 417, and note.

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from his own private means, otherwise than as donations, to assist in buying or improving the trust property, he has a claim upon the particular property so purchased or improved, which passes to his assignee in insolvency as individual assets; and in a proceeding by the assignee to subject the assets of his assignor to the payment of his debts, it is competent for the court to order an accounting of the advances so made with a view to subjecting such property to the satisfaction of such claim.

10. Such a trustee has power, by contract, to charge the trust property with the reasonable expense of its necessary preservation, improvement and repair, in favor of one who expends money, labor or materials for that purpose.

11. Cross petition in error. A defendant in error against whom, as cross petitioner in the trial court, a judgment had been rendered which is in favor of all the other parties to the suit, and to which no error is assigned by another party, is required to file his cross petition in error within two years after the rendition of such judgment, in order to obtain its reversal.

(December 21, 1888.)

ERROR to the District Court of Hamilton County. *Affirmed, with modifications.*

Statement by Owen, Ch. J.:

This cause comes to this court by a proceeding in error to reverse the judgment of the district court upon the following finding of facts and conclusions of law:

"1. That in the year 1833 the defendant, John B. Purcell, was appointed Bishop of the Roman Catholic Diocese which includes the City of Cincinnati, in this State; that afterwards, in the year 1855, he was appointed the archbishop of said diocese, and continued as such bishop or archbishop from the time of his first appointment as aforesaid until after his assignment, made in March, 1879; that his brother, Edward Purcell, came to Cincinnati in the year 1837, to be one of the Roman Catholic priests of this diocese, and was appointed as one of the priests for the congregation worshipping at the Cathedral, and was also appointed by the said archbishop as vicar general of the diocese, and has had the general management and control of the financial matters of the said archbishop; that, with the knowledge and acquiescence of the said archbishop, the said Edward Purcell, as soon as he came into the diocese, began to receive money on deposit, paying interest thereon, and loaning it out upon interest, and continued to receive money in said business until his indebtedness, arising out of said business, became too great to pay, and he made the assignment to the plaintiff; that he assumed to have authority to do this from the said John B. Purcell, who recognized such authority, and has assumed this entire indebtedness thus created by the said Edward Purcell as his own, and for which he has acknowledged that he is liable.

"2. That at the time the said John B. Purcell was appointed bishop as aforesaid, and from that time, and for all the time till he made the assignment hereinbefore named, the canons, rules and regulations governing the Roman

Catholic Church of this diocese, and all its members, required that all property, land and buildings, acquired and used for ecclesiastical purposes and parochial residences, including schoolhouses and seminaries of learning, asylums and cemeteries, should be conveyed to the bishop or archbishop of the said diocese by name, and his heirs and assigns forever, to be held by him in trust for the uses and purposes for which it was acquired; and, since he has been such bishop and archbishop as aforesaid, numerous churches and other institutions have been acquired in this diocese for ecclesiastical purposes, according to the form and discipline of the Roman Catholic Church, including the churches, schoolhouses, parochial residences, asylums, seminary and cemeteries named in the petition in this case, and the same when acquired were conveyed by deed to the said John B. Purcell, his heirs and assigns, by reason of the said rules of the said church requiring it.

"3. That the said John B. Purcell, being unable to pay his debts, on the 4th of March, 1879, conveyed certain specific real estate, including some of the lots named in the petition in this case, to his brother, Edward Purcell, to enable him to pay the debts incurred by him on account of the said John B. Purcell; and on the same day the said Edward Purcell did convey the same, and all his own property, to the plaintiff, in trust for the payment of said debts, and on the 11th of March, 1879, the said John B. Purcell also made an assignment to the plaintiff, in trust for the payment of his debts, of all his property which could by law or in equity be subjected to the payment of his debts; but said assignment did not include, nor was it intended to include, any property held by the said John B. Purcell in trust for others; and said instrument of assignment also recited that all the debts contracted by his brother were contracted on his account, for which he was morally and legally bound, and that all the debts were intended to be covered by this assignment, without discrimination; that said last named deed of assignment did not enumerate any specific property, but at the time it was made the said John B. Purcell held the legal title by conveyances to him, his heirs and assigns, of the lots of land, with the churches and other institutions thereon, which are named in the petition, and at the same time was the owner of other property which had been devised or deeded to him unaffected by any trust, and which could be in law and equity subjected to the payment of his debts.

"4. That all the churches, institutions and other property named in the petition are situated in the Roman Catholic Diocese of Cincinnati.

"5. That the canons, rules and regulations existing for the government of the Roman Catholic Church, and all its members, in said diocese, and in force therein during the time when the said churches, institutions and other property were acquired, required that all churches acquired by the gifts, donations and contributions of the members of the several congregations worshipping therein, and others, and all asylums, seminaries, cemeteries and other property acquired and used for ecclesiastical and charitable purposes, acquired by the gifts, devises and contributions of the friends of said institutions and others charitably disposed, to

be deeded to the said John B. Purcell, the bishop of the diocese, his heirs and assigns; and that the said churches and other institutions above named were thus deeded to the said John B. Purcell, his heirs and assigns, by reason of said rules and regulations, and for no other reason; and that the said John B. Purcell held the same in trust for the uses and purposes for which they were acquired.

"6. That the several churches known as the 'Holy Trinity Church,' 'St. Mary's Church,' 'St. Anthony's Church,' 'St. John's Church,' 'St. Philomena's Church,' the 'Church of the Atonement,' 'St. Michael's Church,' and the land on which they are situated, named in the petition, were severally bought, built and paid for by the gifts and contributions of the members of the several congregations worshipping therein, respectively, and others, for the purpose of a church where public worship might be held according to the forms, doctrine and discipline of the Roman Catholic Church; that they were severally conveyed to the said John B. Purcell, his heirs and assigns, because the rules and regulations of the said church required them to be so conveyed; that neither the said John B. Purcell, nor his brother, Edward Purcell, contributed any money or other pecuniary aid towards them which has not been repaid; that, as to the said churches known as the 'St. Mary's' and the 'St. John's,' the said John B. Purcell, as archbishop, before the assignment to the plaintiff, by instruments in writing duly executed, executed declarations of trust, reciting that he held said churches in trust for the several congregations who occupied them.

"7. That the said church known as the 'St. Patrick's Church,' on the corner of Third and Mill Streets, in Cincinnati, and the 'St. Patrick's Church in Cumminsville,' were bought, built and paid for, except as hereinafter named, by the gifts of the members of said congregations worshipping therein, and others, for the purpose of a church where public worship might be held according to the forms, doctrine and discipline of the Roman Catholic Church; but the same were conveyed to the said John B. Purcell, his heirs and assigns, because the rules and regulations of the said church required them to be so conveyed; that either the said John B. Purcell, or his brother, Edward Purcell, advanced, by way of loan, money to aid in the purchase or building of each of said churches; and the court finds that the money advanced to aid the building of St. Patrick's Church in Cumminsville has not been repaid, but is unable to state the amount due; and as to the money advanced in the purchase of St. Patrick's Church in Cincinnati the court is unable to state whether it has all been repaid or not.

"8. That the Cathedral and parsonage attached were bought and built by the said John B. Purcell, bishop of said diocese, for the purpose of a cathedral for said diocese, and for the use of a congregation worshipping therein, but he took the title to said property in his own name, because the rules and regulations of the Roman Catholic Church for said diocese so required; that at the time of said purchase he intended, and so declared his intent, that it was for a cathedral for the whole diocese; that at the time he bought he solicited and received large sums of money, given him for the purpose of

building said cathedral; that he caused it to be consecrated as such in 1845, and to be used as a place for public worship for a congregation worshipping therein according to the forms, doctrine and discipline of the Roman Catholic Church; and the court finds that he held the same in trust for the uses and purposes for which it was acquired, but that in purchasing and building the said cathedral the said John B. Purcell, or his brother, advanced largesums of money, which have not been entirely repaid, but the court is unable to state the amount now due on account of such advances. The several congregations occupying said churches were composed of men, women and children of the Roman Catholic faith, worshipping therein, and there receiving the sacraments. They were not incorporated nor organized under any statute of the State, nor were they unincorporated associations where the members incurred any personal liability. They were not separated by territorial limits, though Catholics were usually expected to attend the church nearest their residence, but could change from one church to another by a change of residence, and for other reasons, or even caprice. Taking a pew and paying the pew rates by a Roman Catholic would constitute such person a member of the congregation. Leaving the church and going elsewhere, he would cease to be a member. The churches were open to all for public worship, the poor as well as the rich having the right to attend free of cost. There were trustees chosen annually for some of said churches; and men over twenty-one years of age, and renting pews, could vote in the choice of trustees. The pastor of the congregation was appointed by the bishop, and removable at his pleasure, but his salary was paid by the congregation; and the pastor for the time being, with his congregation, had the actual possession of the church.

"9. That the said Cathedral School, on the corner of Elizabeth and Mound Streets, in Cincinnati, and included in the petition, was bought and built by the said Edward Purcell for the purposes of a public school, to be kept in connection with the Cathedral; that the title was taken in the name of the said John B. Purcell, archbishop as aforesaid, his heirs and assigns, because the rules and regulations of the Roman Catholic Church in his diocese so required; that said purchase was intended for a schoolhouse, and a large proportion of the money for buying and building the same was given by the members of the Cathedral congregation and others for the purpose of a cathedral school, to be open to the public; that the said John B. Purcell received the conveyance of the said land knowing that it was intended that he should hold it in trust for said school, and did, in fact, hold it in trust for said school; that the said Edward Purcell made advances towards said schoolhouse which have not been repaid, but the amount which is now due thereon the court is unable to state.

"10. The court does further find that one Jacob Hoffner, in the year 1852, being the owner thereof, conveyed to the said John B. Purcell, his heirs and assigns, eleven and sixty-seven one hundredths acres of land in Cumminsville, for the purpose of an orphan asylum; that the consideration named in the deed was \$8,220, but the estimated value of said land

was much greater; but it was sold at the reduced price because it was understood to be used, and was expressly conveyed, for an orphan asylum. The said Hoffner also, in consideration of the objects for which it was conveyed, remitted one half of the \$8,220 named in the deed as the consideration of the said conveyance. The court does also find that under the direction of Edward Purcell, and with gifts, legacies and contributions furnished him for that purpose by the friends of the asylum, it was built and improvements made under the care and management and at the expense of the sisters in charge, and a large number of orphans received, taken out and supported therein, under the care of a sisterhood of the Roman Catholic Church, who have constantly occupied it, and had the management and control of said asylum and said orphans, for an orphan asylum; that the said John B. Purcell received the said deed from the said Hoffner with the distinct understanding that the said land therein conveyed would be held by him for an orphan asylum, and did in fact hold it in trust for an orphan asylum; that the said Edward Purcell was treasurer of said asylum, and received and held the moneys, and also made advances towards it, from time to time; but whether he has been repaid all he advanced the court is unable to say.

"11. We find, as to the claim of the cross petitioner Benedetto Gatto, and Louis Nardini, his trustee, that they hold a mortgage, dated December 24, 1878, given by John B. Purcell to his brother, Edward Purcell, on the orphan asylum property heretofore mentioned; that the same was given to secure the note of John B. Purcell for \$17,005, dated December 14, 1878, payable to the order of Edward Purcell three years after date, and indorsed by Edward Purcell to Benedetto Gatto. The consideration of said note consisted in part of money deposited with Edward Purcell in 1875, and the remainder of loans made in June, 1878, evidenced by notes, which were surrendered, and the note given for the full amount. At the time the said mortgage was given, and for all the intervening time since 1854, the said orphan asylum had been in the actual and notorious possession and occupancy of the sisters of charity, who there maintained several hundred children, and administered said charity, which was well known to said Gatto and Nardini; also that the said Gatto and Nardini were members of the Roman Catholic Church.

"12. The court finds, as to St. Mary's Seminary, that one Patrick Considine, in the year 1848, then being the owner, gave a tract of land in the western part of Cincinnati for the purpose of a seminary to educate young men for the priesthood, and conveyed it by deed to the said John B. Purcell, his heirs and assigns; that J. and J. Slevin, at their own expense, erected the main building for said seminary, and presented it to the said archbishop and his successors in said office; that the said John B. Purcell received the said conveyances of said land and building, and held them in trust for the purposes and uses for which they were given; that subsequently large additions were made to said seminary, at great expense, part of which were paid from the current receipts; that it received many gifts, donations and lega-

cies towards such improvements; that Edward Purcell controlled the erection of said building and received the gifts contributed for that purpose; that he also made advances, the amount of which, and whether he has been repaid what he advanced, the court is unable to state.

"18. As to St. Joseph's Cemetery, the court finds that in 1842 one Wm. Terry and wife conveyed nineteen and twenty-two one hundredths acres of land to Edward Purcell, who deeded one half thereof for a German Catholic cemetery; and the other half, nine and sixty-one one hundredths acres, he retained for a cemetery for the Roman Catholics of this diocese, called the 'Old St. Joseph's,' that it was consecrated for a Roman Catholic cemetery, used as a burial place by Roman Catholics in this diocese, and is now nearly filled up with graves; that in 1858 the said John B. Purcell purchased a tract of sixty-one and thirty-one one hundredths acres, about two miles distant, known as the 'New St. Joseph's,' taking the deed to himself, his heirs and assigns; that he caused a part of the same to be platted, laid out into burial lots, announced in the cathedral that he had purchased this as a cemetery for the use of Catholics of this diocese, and invited them to purchase burial lots therein, and in 1854 caused a greater part thereof to be consecrated as a cemetery, and from that time persons of that faith began to purchase lots and burial permits therein; that a road ran through the tract, cutting off eight or ten acres from the residue, which had never been consecrated; that Edward Purcell, from the time of the purchase, in 1858, till the assignment, had the general superintendence, employed the engineer to lay it out in lots of various sizes, appointed the sexton, fixed the price of lots, and sold the same to purchasers, sometimes at so much per lot, or so much per half lot, sometimes at so much per square foot, and sometimes in single graves—the quantity taken as a burial lot, when sold by the square foot, being at the option of the purchaser. He also issued certificates of ownership to the several purchasers of lots. The first kind was for a single grave, and signed by the sexton; the next kind was a certificate for a lot, or half lot, in a certain range, containing so many square feet, and signed by the superintendent; a third was in this form, viz.:

*Certificate of Ownership.* The Most Rev. J. B. Purcell, Archbishop of Cincinnati, hereby certifies that N. B., in consideration of \_\_\_\_\_ dollars, is the owner of a lot in St. Joseph's New Cemetery.

[Signed]

Edward Purcell.

—and countersigned by the sexton as secretary; and the last form adopted was issued in the name of the 'directors of the cemetery,' and certified that the 'purchaser, his heirs and assigns, are entitled to the use of said lot, in fee simple, for the purpose of sepulture alone, subject, however, to the rules and regulations of the Roman Catholic Church regarding interments in consecrated ground.' That there were no directors, and the money received from the sale of lots and burial permits ever since 1842, as to the Old St. Joseph's, and 1854 as to the New St. Joseph's, was paid to him, except what was reserved to defray the expenses about

the ground, and has been used by him as his own, for any purpose he saw fit. Of the portion of the New St. Joseph's that was consecrated a narrow strip was designedly left unconsecrated, and reserved for those who were not entitled to a Catholic burial. A permit from some priest in the diocese was required in all cases for burial, and for those who could not afford to pay for the right of burial no charge was made. In June, 1874, Archbishop Purcell, in the petition signed and sworn to by him in an action brought in the Hamilton County Common Pleas Court, to enjoin the township trustees from laying out a road through the tract, alleged that he is the Archbishop of the Roman Catholic Church in and for the Diocese of Cincinnati, Ohio; that as the archbishop of said diocese, under the laws governing the said Roman Catholic Church, all the property of the said church within said diocese, except such as vests in certain incorporated societies, is held by him in his own name, in trust for the sole use and benefit of the said church; that as such archbishop he holds the legal title of the following described real estate. Here follows a description, by metes and bounds, of the New St. Joseph's Cemetery; and the deed of John Terry and wife to John B. Purcell, dated November 22, 1858, is referred to for a more particular description. Then follows the further declaration that said premises were purchased and have been used solely for the purposes of a cemetery.

"14. The property known as the 'Catherine Street Cemetery' was purchased by Edward Dominick Fenwick, the Roman Catholic Bishop of the Diocese of Cincinnati, and the immediate predecessor in the said office of bishop of John B. Purcell, for a cemetery. The said Fenwick died in the year 1832, leaving a will, duly executed and dated July 3, 1830, which was duly probated. By said will said Fenwick devised and bequeathed said Catherine Street Cemetery, together with other property, to trustees, in trust that the trustees aforesaid shall, as soon as a Roman Catholic Bishop for the Diocese of Cincinnati shall have been canonically appointed and consecrated, convey to him said Catherine Street Cemetery property. John B. Purcell was the next Roman Catholic Bishop canonically appointed and consecrated. Immediately thereafter said trustees did grant, give, sell, convey, release and confirm to the Right Rev. John B. Purcell, Roman Catholic Bishop of the Diocese of Cincinnati, canonically appointed and consecrated, and the immediate successor in the said office of bishop of the said Edward D. Fenwick, the said Catherine Street Cemetery tract. *Habendum:* 'To have and to hold the same, and every part and parcel thereof, to him, the said John B. Purcell, bishop as aforesaid, and his heirs, forever, for the uses and purposes of the said church.'

"15. The Old St. Joseph's Cemetery, on the tax duplicate of Hamilton County, has been exempted from taxation since 1844, as being a graveyard.

"16. The whole sixty acre tract known as the 'New St. Joseph's Cemetery' was exempted from taxation, as being a burial place, since 1854.

"17. In 1859 the larger part, about fifty acres east of the road, was on the tax duplicate for



taxation, but has been exempted from taxation since 1862, as being a graveyard.

"18. The court also finds that said John B. Purcell assigned the revenues of the Old and New St. Joseph's Cemeteries to certain trustees, in a deed of trust made for the payment of his debts before this assignment, and afterwards canceled.

"19. After the assignment of John B. Purcell and Edward Purcell, and prior to September 1, 1880, the income and revenues of the Old and New St. Joseph's Cemeteries were paid to John B. Mannix, assignee, and he still holds the same. The amount paid Mr. Mannix by Eugene Sullivan, sexton, during said time, was \$9,631.89. The amount collected by said Mannix himself during that time was —dollars—at least \$2,000.

"20. The said St. Joseph's Cemetery Association was not organized or incorporated until August, 1880, after the assignment.

"21. And, in addition, the court further finds the following facts, which were agreed to be true by the assignee and his counsel on one side, and the St. Joseph's Cemetery and its counsel on the other side: that there was sufficient money realized from the sales of burial lots and graves in the Catherine Street burying-ground, prior to the purchase of the Old St. Joseph's Cemetery, to pay the original price of both the said Catherine Street burying-ground and the Old St. Joseph's Cemetery, over and above all other outlays made on account of said Catherine Street burying-ground.

"22. That subsequent to the purchase of the Old St. Joseph's Cemetery, and prior to the purchase of the New (present) St. Joseph's Cemetery, a sufficient sum has been realized from the sale of lots and graves in the Old St. Joseph's Cemetery to pay the original cost of the Old St. Joseph's Cemetery, and all improvements thereon, and left a surplus much more than sufficient to pay for the New St. Joseph's Cemetery, which surplus sums were paid to Edward Purcell, as representative of John B. Purcell.

"23. That in the year 1885, and prior thereto, it was common for farmers and others throughout the State to have private or family burying-grounds on their premises, many of which did not exceed \$50 in value.

"24. The title to the property described in the answer and cross petition of the St. Joseph's Cemetery Association known as the 'New St. Joseph's Cemetery' was conveyed to John B. Purcell, Archbishop of Cincinnati, and the part known as the 'Old St. Joseph's Cemetery' to Edward Purcell, in fee simple, many years before the deeds of assignment executed by them to John B. Mannix, respectively, and so remained until at the time of said assignments, subject to conveyances of lots for interment purposes, as hereinafter stated.

"25. At the date of said assignment said John B. Purcell was, and ever since has remained, justly indebted to divers persons in divers sums, amounting in all to more than three and one-half million dollars, of which there have been presented, and proper proof has been made to the assignee, to the extent of more than two and one half million dollars.

"26. By the rules of the Roman Catholic

Church only Catholics dying in the communion of the church are permitted to be buried in consecrated ground.

"27. The petition in case No. 48,897, Hamilton County Common Pleas Court, shall be taken to be the same in all respects as the copy here produced, and was sworn to by said John B. Purcell, as appears in said copy.

"28. The portion of the New St. Joseph's Cemetery west of the road mentioned in the petition of John B. Purcell, in 48,877, and sought to be by said petition enjoined from being made a public road, has never been consecrated as a cemetery, and no interments have been made therein; but it has been used and cultivated by the sexton as part of his compensation as sexton.

"29. At the date of assignment not over one third of the New St. Joseph's Cemetery, but nearly all of the Old St. Joseph's Cemetery, had been actually used or occupied for burial purposes, and burial rights in writing had been granted by deed and otherwise to divers lot holders, to the extent aforesaid.

"30. The mortgage dated January 20, 1879, from John B. Purcell to P. A. Quinn and others, in trust, recorded same day in Book 420, p. 228, Hamilton County Records, was executed as appears on its face, and may be offered in evidence, subject to proper exceptions.

"31. Previous to the purchase of the Old St. Joseph's Cemetery, John B. Purcell announced that he would have to purchase other grounds for a cemetery, on account of being obliged to give up the Catherine Street Cemetery. Soon after the purchase of the old St. Joseph's Cemetery, in 1842, he announced that he had purchased the same, and set it apart as a cemetery of the Roman Catholics of his diocese. Thereupon members of the Roman Catholic Church commenced the purchase of lots and graves therein, the whole of which had been previously consecrated.

"32. The court find that on the 26th day of November, 1878, Edward Purcell, as the agent of said John B. Purcell, made, executed, and delivered to Henry Bokop, for \$5,965 loaned, the note as follows, to wit:

No. 1. Cincinnati, November 26, 1878.

The Archbishop of Cincinnati promises to pay, one year after date, to the order of Henry Bokop, five thousand nine hundred and sixty-five dollars, for value received, with six per cent interest for one year only.

[Signed]

\$5,965.00

John B. Purcell,

Edward Purcell.

—that there was paid on said note \$50 on February 6, 1879, and there have been no other or further payments thereon. That there is due thereon the sum of \$5,915 with interest. That at the date of said note, and for a long period prior thereto, John B. Purcell was Archbishop of the Diocese of Cincinnati, and the said Edward Purcell was his agent, with full power to do and transact the financial business of John B. Purcell as the archbishop of said diocese.

"33. That Patrick Brannan, a creditor of the said John B. Purcell, before the commencement of this proceeding, filed in the Court of Common Pleas of Hamilton County a bill in

behalf of himself, and such creditors as might join, under section 6845 of the Revised Statutes, to set aside the deed hereinbefore referred to, made March 4, 1879, by John B. Purcell to the said Edward Purcell, on the ground that it was fraudulent as to creditors. That the said Jefferson National Bank of Steubenville, and the First National Bank of Covington, which had severally discounted the notes of the said John B. Purcell, indorced by the said Edward Purcell, and were creditors of the said John B. Purcell, and had severally recovered judgments against him on said notes, have become parties to the said proceedings of the said Patrick Brannan, praying for the same relief; and such proceeding is now pending in the Supreme Court of Ohio.

"34. That the defendant John G. Hendricks, another creditor of the said John B. Purcell, has recovered judgment by default against him in the sum of \$89,327, composed of sundry items for paving around the Cathedral and putting on a new tin roof, and the greater part for the proceeds of certain United States government bonds deposited with Edward Purcell, and by him sold, and the proceeds credited on a pass-book to said Hendricks as so much money on deposit.

"And as conclusions of law the court finds that at the time of the assignment to the plaintiff the said John B. Purcell, holding the said property named in the foregoing articles of this finding, except the St. Joseph's cemeteries, in trust for religious and charitable uses, the same did not pass to the plaintiff by the said instrument of assignment, nor can the said assignee subject it to the payment of the debts referred to and included in the said assignment; but as to the said churches and other properties known as the 'Church of St. Patrick's,' on the corner of Third and Mill Streets, the 'Church of St. Patrick's in Cumminsville,' the 'Cathedral,' the 'Cathedral School,' the 'Orphan Asylum,' and the 'Mt. St. Mary's Seminary,' the said assignee is entitled to recover whatever sums of money, if any, have been advanced by the said John B. Purcell, or Edward Purcell, for buying or building, or to aid in buying or building, any of said churches or other properties, or improving, repairing, insuring, or for taxes or other purposes, and has not been repaid; and, unless said parties can agree as to said amounts, if any, due from the said several churches and other institutions last above named, the said matter be referred to a master to ascertain the amount due the said John B. Purcell or Edward Purcell on account of advances to any of said churches or other property; but as to the other churches—the Holy Trinity, St. Anthony's, St. Michael's, St. Mary's, St. John's, Church of the Atonement, and St. Philomena's—the petition should be dismissed, with costs.

And, as a further conclusion of law, the court finds that as to the several claims of Henry Bokop, Patrick Brannan, the Jefferson National Bank of Steubenville, the First National Bank of Covington, John G. Hendricks, and Louisa Sturhoff, the equity of the case is against them, and with the defendants, and as to each of them their answer and cross petition be dismissed. And that the said mortgage made by the said John B. Purcell to Edward Purcell,

and by him assigned to the said Louis Nardini in trust, is not a lien upon said orphan asylum. The court also finds, as a conclusion of law, that so much of the New St. Joseph's Cemetery as has not been sold into burial lots, or otherwise appropriated to the burial of the dead, as is reasonably practicable to be separated from the residue and sold, is subject to sale by the assignee for the payment of debts under the assignment; and, unless the parties can agree upon the quantity of ground that may be thus sold, the said master above named shall ascertain the quantity, and report to the court; and that the fund on hand received for the sale of said lots of ground in the cemetery for burial purposes since the assignment, and which has not been expended for improvements, belongs to the plaintiff as assignee; and that the claim and rights of the said assignee are not affected by the organization of the St. Joseph's Cemetery Association since the assignment. And the court having found that, as to the claim of Henry Bokop, Patrick Brannan, the Jefferson National Bank of Steubenville, the First National Bank of Covington, John G. Hendricks, Louisa Sturhoff, the equity of the case is with the defendants—the said parties representing the said congregations and other charitable and educational institutions; and as to the defendants herein last named, and each of them, their answers and cross petitions be dismissed, at the cost of each defendant made by him. That as to the mortgage of Benedetto Gatto, set up in his cross petition, and in the cross petition of Louis Nardini, his trustee, the equity of the case is with the defendant the St. Peter's and St. Joseph's Orphan Asylum, and that he is not entitled to recover his said claim, or any part thereof, in this suit, and that their cross petitions be dismissed, with costs; the costs for which each defendant shall be liable being only the costs incurred by each in maintaining the issue upon his part. The court does further order, adjudge and decree that if the parties shall not be able to agree upon the amounts, if any, due from the congregation of the St. Patrick's of Mill Street, St. Patrick's of Cumminsville, the Cathedral Congregation for the Cathedral and the Cathedral School, the St. Peter's and the St. Joseph's Orphan Asylum, and the Seminary of Mt. St. Mary of the West, and the amount of ground unsold in the Cemetery of St. Joseph, the said master proceed to find what, if anything, was due John B. Purcell from each of the congregations and institutions at the time of the assignment to the plaintiff, and the amount of ground still unsold; that in so doing all the evidence before the court at the hearing, and such other competent evidence as any of the congregations or other institutions, or any party, may offer, be received by him; and that such parts thereof be examined as he is referred to; and that he make his report at as early a time as may be.

And the court appoints Alexander B. Huston as master to hear and determine the several matters above set forth; and that he find what other indebtedness for borrowed money there was due to other parties from such last named churches and institutions, and any other fact claimed to have a legal bearing upon such indebtedness. And to each of the conclusions of law above stated, and to the decree, the fol-

lowing parties thereupon severally excepted, namely: John B. Mannix, the plaintiff, the defendant John G. Hendricks, Louisa Sturroff, and the First National Bank of Covington, Ky., the Jefferson National Bank of Steubenville, the defendant the St. Joseph's Cemetery Association, and the defendant Henry Bokop, and likewise the said Benedetto Gatto and Louis Nardini, trustee, except to each of the conclusions of law above stated, and to the decree. That as to so much of the decree as finds there may be anything due from the Cathedral, the Cathedral School, the St. Peter's and St. Joseph's Orphan Asylum, the Seminary of Mount St. Mary of the West, the Congregation of St. Patrick's of Mill Street, and refers the same to a master to ascertain the same, in each case the several parties representing said institutions except; and the several parties, having filed motions for a new trial, presented a bill of exceptions, which is signed, sealed and allowed by the court, and ordered to be recorded."

**Messrs. Hoadley, Johnson & Colston, Mannix & Cosgrove and Samuel A. Miller** for plaintiff in error.

**Messrs. T. D. Lincoln, Lincoln, Stephens & Slattery** for defendants in error.  
**Mr. Alfred B. Benedict** for St. Joseph's Cemetery Association.

**Messrs. Yapple, Moss & McCabe** for St. Mary's Congregation.

**Mr. J. W. Goss** for St. Michael's Congregation.

**Mr. E. W. Kittredge** for John G. Hendricks and others.

**Messrs. Thomas A. Logan and Logan & Slattery**, for Louis Nardini, trustee.

**Owen, Ch. J.**, delivered the opinion of the court:

1. The case has been considered by us upon the facts found by the district court. While we have examined the evidence sufficiently to see that it tends to support these findings, we have not undertaken to determine its weight.

These facts, so far as they have engaged the consideration of this court and are involved in this opinion, may be more briefly summarized as follows:

John B. Purcell was bishop of the Roman Catholic Diocese of Cincinnati from 1833 to 1855, and archbishop from that time to and after his assignment in March, 1879. From 1837 to the time of such assignment, his brother, Edward Purcell, was priest, serving at the Cathedral, and also, by appointment of the archbishop, vicar-general of the diocese, to whom was confided the general management and control of the financial affairs of the archbishop. During all the time above mentioned the canons, decrees and rules of the Roman Catholic Church for the diocese required all property held and used for ecclesiastical purposes to be conveyed to the bishop or archbishop of the diocese by name, his heirs and assigns forever, to be held by him in trust for the uses for which it was acquired.

In the manner and for the uses above stated the churches, schoolhouses, parochial residences, asylums, seminary and cemeteries involved in this controversy were acquired and conveyed  
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to "John B. Purcell, his heirs and assigns forever," because the rules and canons of the church required the legal title to be so vested, and for no other reasons. As soon as Edward Purcell came into the diocese, and in his capacity of vicar-general, he began to receive money on deposit—paying interest thereon, and loaning it out upon interest, all with the acquiescence of the archbishop, and so continued to receive money until the indebtedness so incurred amounted to more than \$3,500,000, which has been assumed by John B. Purcell as his own.

Finding themselves without available means to pay his indebtedness they made an assignment in insolvency to the plaintiff, before whom about \$2,500,000 of indebtedness have been duly proved. It is only necessary to deal with the assignment of John B. Purcell. On March 11, 1879, the latter, in his individual capacity, made his assignment to Mannix in trust for the payment of his debts, of all his property which could at law or in equity be subjected to such payment, expressly excepting all property held by him in trust for others. No specific property was named or described in the deed; but in addition to the church property held in his own name, the assignor owned a large amount of property which had been deeded or devised to him unaffected by any trust, and which was legally subject to the payment of his debts, and about which there is no controversy.

All the church edifices involved in this controversy, except three (which include the Cathedral), were severally bought, built and paid for wholly by the gifts of the members of the several congregations worshipping therein, respectively, and others, for the sole purpose of public religious worship therein. To the purchase and building of the three excepted as above, John B. and Edward Purcell advanced money by way of loan (and otherwise than as gifts), which, as to the Cathedral and St. Patrick's Church in Cumminsville, has not been repaid. Except the money so advanced, these church buildings were paid for by contributions from members of the respective congregations, and others; and the legal title vested in the archbishop to be by him held in trust for the use of the congregations, respectively, using them as places of public worship. The congregations of the several churches were composed of men, women and children of the Roman Catholic faith, worshipping and receiving the sacraments of the church therein.

These congregations were not incorporated nor organized under any law of the State, nor were they unincorporated associations whose members incurred any personal liability; although some of them had trustees appointed for purposes other than for control over the title to church property. Members could change from one church to another by change of residence or from mere caprice. Taking a pew and paying the pew rates by a Roman Catholic constituted such person a member of the congregation. Upon leaving the church and going elsewhere, the membership ceased. The churches were open and free to all for purposes of public worship. The pastor of each congregation was appointed by the bishop and removed at his pleasure, but his salary was paid

by the congregation; and the pastor for the time being, with his congregation, had actual possession of the church. None of the congregations nor any bodies of individuals representing them were so organized as to be capable of holding the legal title to the church property. The other properties held and used for ecclesiastical purposes—asylums, schools, cemeteries (with the qualifying facts found by the court below concerning the property represented by the St. Joseph's Cemetery Association a part of which was subjected to the payment of creditors), were, like the churches, openly, notoriously, continuously and exclusively possessed and used for the purposes for which they were acquired and deeded to the archbishop. But they were so possessed, used and managed by persons with whom it was impracticable to invest the legal title, by reason of the want of permanency in the *personnel* of their possession and management.

2. The original action was brought by the assignee for the purpose of procuring a sale of all this property free of all clouds and incumbrances by reason of the assertion of the trusts and uses for which it is claimed the archbishop held it—the contention of the assignee being that (1) the debts before mentioned were not the individual debts of the archbishop, but contracted for diocesan purposes; and that the church property is justly chargeable with their payment, and this prior to all other charges upon the property; and (2) that the archbishop was so far the absolute owner of the property—such was his dominion over it—that it is subject to the payment of even his general indebtedness and passed by the deed of assignment to the assignee; that there was no trust of which the civil courts can take cognizance or assume control, or which can stand in the way of the ordinary course of administration of the assignment.

Except as to the claim of John G. Hendricks for improvements put upon the Cathedral property (which will be considered in another connection), the central and controlling question in the case is whether the church property, including all the property above mentioned, is liable for the debts of the archbishop, contracted as above, and passed to the assignee, by the deed of assignment, and is now held by him to be applied to the extinguishment of the indebtedness proved before him. There are in all over two hundred pieces of church property in the diocese described in the petition of the assignee; but it was agreed by counsel upon the trial that fourteen different churches, institutions and properties, selected by them as representing the various questions of law and fact in the case, may be considered as representing all the property involved in the controversy.

The case is one of unusual magnitude and interest, as well in the questions as in the amount involved. It has received that consideration at our hands which its importance seemed to demand. We desire to acknowledge our obligation to the eminent counsel whose great learning, tireless research, and strong presentation of the case, in all its varied aspects and complications, have so greatly assisted us in its consideration.

3. It will facilitate the consideration and disposition of this question to keep in mind a few 2 L. R. A.

fundamental facts and propositions which assume prominence at the threshold of the investigation:

The archbishop, in his official capacity, has made no assignment. The diocese of Cincinnati has not gone into insolvency, nor have any of the churches or other institutions involved in this controversy. We are not dealing with church debts, nor with the assets of the church. John B. Purcell, the individual, made an assignment in insolvency of all his individual property to an assignee to be by the latter applied to the payment of his individual debts. No property held by him in trust for others could, or was intended to, pass by the deed of assignment. 1 Perry, Trusts, §§ 334, 335, 336.

This word *trust* is here employed in its legal sense, and is not intended to comprehend mere confidential relations or duties of which the civil courts may not take cognizance or assume control. All property subject, at law or in equity, to the payment of John B. Purcell's debts, whether held nominally in trust or not, passed, by the assignment, to the plaintiff below. No higher or better right or title to any of this property passed to the assignee than the assignor held. His creditors acquired no new rights or remedies in or against it by force of the assignment. The assignee simply represents them and their rights which he has undertaken to enforce by the plain processes appointed by statute. They do not, in any sense, stand to the assigned property in the relation of purchasers. The beneficiaries of the property which the assignee is now seeking to subject to the payment of the assignor's debts, are free to assert against the latter every right and claim which, before the assignment, they could have asserted against the assignor. *Morgan v. Kinney*, 38 Ohio St. 610; *Burrill, Assignments*, § 891.

The questions before us are very similar to those which would have arisen if John B. Purcell, claiming to be in possession of this property, had brought suit to quiet his alleged title against those who now assert the trust, or as if, claiming to be the unqualified owner in fee simple, he had brought his actions against them to recover possession of the several properties held by them. The practical and substantial subject of the present inquiry is, Have these supposed beneficiaries an interest in this property which they can assert as superior to the right of John B. Purcell or his creditors to subject it to the payment of his debts?

Another important consideration, which should be kept in view, is that none of the defendants are asking to have any trust performed or executed. They are simply standing upon the defensive—asking that the properties which they respectively speak for and represent be left free from assault; asking that the relations which have obtained between them and their archbishop concerning these properties since they were first respectively possessed and used by them, be permitted to continue uninterrupted and unaffected. Instead of asking that the execution of the trusts be decreed, they simply pray that their destruction be averted. They are content that the legal title to this property should remain where, by all the canons of their church, it has

for so many years been reposed; but they ask that the uses to which, during all these years, it has been devoted be not abused, perverted or destroyed.

4. The parties have gone back fifteen centuries into the laws and canons of the church for proof of the nature of the tenure by which the archbishop held the legal title to ecclesiastical property; and the proof is overwhelming that he was not invested with an absolute title to it as his own. It is practically conceded that he held it in trust; but the parties are very far from a concurrence of views concerning the terms of the trust. The right to go to the rules and canons of the Catholic Church for the purpose of establishing, defining and limiting the trust is denied. That parol evidence may be resorted to, to engraft a trust upon a title held by deed absolute upon its face, is a question which in this State has passed beyond the range of serious discussion; though the proof in such cases should be clear, strong and convincing. *Mathews v. Leaman*, 24 Ohio St. 615; *Broadrup v. Woodman*, 27 Ohio St. 559.

The contention is that to resort to the law of the church as proof upon which to qualify the absolute terms of the grant is to permit the law of the church to supersede or dominate the civil law; and much sensitiveness is shown by eminent counsel upon this subject.

There is here no ground for alarm. It is no innovation upon the law of evidence, in determining questions like the one at bar, to call, in aid of the civil tribunal, upon the law of the particular church involved for the purpose of determining the title to church property. It surely is not unreasonable in a case like the present, to hold one of the great prelates of the Church of Rome to the terms upon which, by the very law to which he has vowed his fealty, he has consented to accept the legal title to property which is appointed to the uses of the church to whose service he has with most solemn unction dedicated his life. It is but a form of establishing, by convenient and very convincing proof, what entered into the contemplation of the parties to the grant at the time the title vested. It has been held that where a religious body becomes divided, and the right to the property is in conflict, the civil courts will consider and determine which of the divisions submits to the church, local and general. This division is entitled to the property. In determining which of the divisions has maintained the correct doctrine, the findings of the supreme ecclesiastical tribunal of the denomination in question is binding upon the civil courts. *McGinnis v. Watson*, 41 Pa. 9; *Ramsay's App.* 88 Pa. 60; *First Presb. Society v. First Presb. Society*, 25 Ohio St. 128; *Ferraria v. Vasconcellos*, 81 Ill. 25; 3 Am. & Eng. Encyclop. of Law, 185.

So where a bequest is made for a church, to take effect whenever a congregation should be formed, the proper ecclesiastical authorities are the judges of the formation of such congregation. *Fidelity Ins. T. & S. D. Co's App.* 99 Pa. 443.

If by the laws of a masonic lodge the master, or of an odd fellows' lodge, the noble grand, was to be the repository of the legal title to all the real property of the lodge, to be held in trust for its uses, would there be any-

thing startling in the proposal to prove the law of the lodge in a controversy between the latter and its chief officer, involving the title to such property? Yet in such a case it could as well be contended that the courts were permitting the law of freemasonry or odd fellowship to supersede the law of the State, as it can now be asserted that we are enforcing the canons and decrees of Rome. It is no more than establishing by a form of proof which the courts have held to be competent, the terms upon which by the convention of the parties, the title to church property was granted and accepted.

5. It is to be observed, however, that the court below was not limited to such evidence in determining whether any and what trust was raised upon the title which the archbishop held. Formal written declarations of trust, sworn pleadings in other cases, and other written concessions of the archbishop made before any controversies like the present arose, were before the court to aid in the determination of this question. It is true that from time to time during the archbishop's service he exercised acts of apparent private ownership over property held for ecclesiastical uses. He sold property, received the proceeds, reinvested it in other property for church uses, executed mortgages upon property purchased and received mortgages upon property sold; but so far as appears in the case all this was done with the free acquiescence of the respective congregations and others interested in the property affected.

There was evidence tending to show that the archbishop and his vicar-general represented to depositors that the entire church property was bound for repayment of deposits as well as payment of interest. Counsel maintain that these representations charged such property with a liability to answer to such creditors. The court below very properly omitted to make a finding upon this evidence. The fact if so found would have been immaterial. The law will not permit a trustee thus to talk away the trust estate. The infirmity of the argument lies in its assumption of the very proposition in controversy. If the archbishop's control over church property was such that he could incumber it by his mere declarations, it was liable for his debts. He could not estop the *actus que trahunt* by his words. The latter were found by the court below to have been continuously in possession of the property.

It also appears that the congregations through representative members have, without objection from the archbishop, bonded and mortgaged church property in large sums. But prior to the transactions which led to the assignment, no occasion is shown where any collision or difference has arisen between the archbishop and any of the beneficiaries of the church property respecting its management or control. It has been reserved for the case at bar to present for the first time in the administration of the archbishop, a condition of things which called upon the various beneficiaries to question his right or power or that of his successor in title, the assignee, to interrupt or interfere without their consent with their enjoyment of the uses to which the property has heretofore been devoted. This question is now fairly presented; and the nature of the trust upon which it is

conceded the assignor held the property is, for the purpose of determining whether any and what control a court of chancery may assume or exercise over it, squarely presented for adjudication.

6. The contention of the creditors is that though the archbishop may not have held this property by an absolute, unqualified ownership, yet the vagueness of the alleged trust, the uncertainty and indefiniteness of the *cestuis que trustent*, together with the absence of all other persons capable of dealing with, acquiring or incumbering, the legal title to this property, necessarily left the holder to the legal title supreme in his power of disposition and control.

Let us once assume that John B. Purcell was a trustee of this property and a solution of the question at bar is relieved of much of the difficulty which would otherwise involve it. Wherever there is a trustee there is necessarily a subject of the trust—the estate, an object of the trust—the use, and a *cestui que trust*—the beneficiary of the trust. A trust is where property is conferred upon and accepted by one person on the terms of holding, using or disposing of it for the benefit of another. Wherever such a trust is shown it is cognizable by a court of equity. The law knows no trust which simply binds the conscience. An alleged trust which is cognizable only in the court of morals or the forum of conscience is no trust at all; it is an absurdity. The law does not acknowledge a trust over the exercise of which it will not, through its tribunals, assume control to avert its destruction, perversion or abuse. *Morris v. Bishop of Durham*, 9 Ves. Jr. 400.

It is true that in some cases alleged trusts may, as they do, fail by reason of some hard rule of evidence which prevents their proof; but let them once be established, and the power of a court of equity to control their exercise is almost universally conceded. This was among the earliest subjects of chancery jurisdiction. While it was for a time supposed that the Statute of Uses—43 Elizabeth—was the origin of this jurisdiction, it is now conceded that it antedated that statute and is now freely exercised in States which do not regard that statute as in force within their jurisdiction. *Urney v. Wooden*, 1 Ohio St. 180.

7. Indefiniteness in the number and identity of the alleged *cestuis que trustent* is urged as conclusive against the assumption that this property is held upon any trust of which the court will take cognizance.

The cathedral and other church buildings have been, since their completion, actually and openly possessed and used by their respective priests and congregations; the schools by their pupils and teachers; the orphan asylum by the sisters of charity in charge and about four hundred orphans; and the grave yards (except the part devoted by the court below to the payment of debts), by those in charge who have daily devoted them to the burial of the dead. It is true that none of these have been incorporated or otherwise organized under any law of the State. Indeed, their immediate management and control have been in such hands as to illustrate that very principle or element of indefiniteness which has, for many centuries, been one of the controlling characteristics of a trust for charitable and pious uses. It is said that

vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins. *Fountain v. Ravenel*, 58 U. S. 17 How. 884 [15 L. ed. 83]; *Saltonstall v. Sanders*, 11 Allen, 456; *Russell v. Allen*, 107 U. S. 163 [27 L. ed. 397]; 8 Am. & Eng. Encyclop. of Law, 127; 2 Perry, Trusts, § 687.

The individual recipients of the charity are constantly changing. For illustration, take the case of a congregation of one of the churches in question. It may be that among those who comprise it there is not one member who worshiped there ten years ago. Yet it is in legal contemplation the same congregation. It is the congregation for whose uses, as a place of religious worship, the church has been from the first devoted. Its name and the location of its place of worship renders its identification easy.

8. Is it such an entity as that it may constitute a beneficiary to support a trust for a charitable use? If these congregations, and other beneficiaries are sufficiently tangible and substantial to have a standing in court the question ought, it would seem, to be resolved in their favor. This seems to us a fair test of the question. Are they in court? They are represented each by prominent members who answered below for themselves and the other members; the orphan asylum by prominent contributors to its establishment and support, with whom were associated several members of the Catholic sisterhood in charge; the schools are similarly represented, and the cemeteries by the St. Joseph Cemetery Association, incorporated since the assignment, to which the legal title has been conveyed by John B. Purcell, or whatever interest then remained in him. It is a well recognized practice for certain persons, belonging to a voluntary, unincorporated society, and having a common interest, to sue in behalf of themselves and others having a like interest, as part of the same society, for purposes common to all and beneficial to all.

In *Beatty v. Kurtz*, 27 U. S. 2 Pet. 566 [7 L. ed. 521], several members of an unincorporated Lutheran congregation, having no trustees capable of holding the legal title to church property, were permitted to appear in court in behalf of themselves and others having like interests, for the purpose of preserving a trust in a lot set apart upon a town plat, "for the Lutheran Church," upon which they had established a place of burial and erected a school-house, but the legal title to which was still in the heirs of the original proprietor. See also *Philadelphia Bapt. Assn. v. Smith*, 28 U. S. 3 Pet. 500 [7 L. ed. 755]; *African M. E. Church v. Conover*, 27 N. J. Eq. 159; *Hullman v. Honcomp*, 5 Ohio St. 242; *Brown v. Manning*, 6 Ohio, 298; *Le Clercq v. Gallipolis*, 7 Ohio, 218.

It does not follow, however, that, in the light of the facts established in the court below, it would not have protected the uses for which the property was held, even if these beneficiaries had not been formally in court. But they are in court.

9. It is scarcely necessary to cite authority to show that the uses for which this property is held are such as the courts will uphold. The education of the youth; the care, education and nurture of orphans; the religious instruc-

tion of the living and the decent repose of the dead, are among the most prominent and common objects of charitable trusts. 2 Perry, Trusts, §§ 869-701, 706; 8 Am. & Eng. Encyclop. of Law, 122; *Gerke v. Purcell*, 25 Ohio St. 229 (where some of the property now in controversy is declared to be held in trust); *McIntire v. Zanesville*, 17 Ohio St. 852; *McIntire Poor School v. Zanesville Canal Mfg. Co.* 9 Ohio, 287.

Surely this court ought not to be expected to declare that the trusts in the case at bar are too vague or indefinite to be recognized by it after its decision in the two cases last cited. It there upheld and enforced a charitable bequest to an unincorporated association "for the use and support of a poor school which they are to establish for the use of the poor children of the Town of Zanesville"—the donee afterwards becoming incorporated. Compared with such a use, the objects of the trusts in the case at bar are simple and definite.

Lane, J., in the case last cited, says, concerning the extent of chancery jurisdiction over charities: "One of the earliest elements of every social community, upon its lawgivers, at the dawn of its civilization, is adequate protection to its property and institutions which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture, and sepulchers," etc.

In *Miller v. Teachout*, 24 Ohio St. 525, this court sustained a bequest to an executor "for the advancement and benefit of the Christian religion, to be applied in such manner as in his judgment will best promote the object named."

In *Urney v. Wooden*, 1 Ohio St. 160, the court sustained a bequest to "the poor and needy, fatherless, etc., of Jefferson and Madison Township, of the county aforesaid, to such poor as are not able to support themselves, to be divided as my executors may deem proper without any partiality."

In *Sowers v. Cyrenius*, 39 Ohio St. 29, it sustained a testamentary disposition "for the preaching of the gospel of the blessed Son of God, as taught by the people now known as the Disciples of Christ, the preaching to be well and faithfully done in Loraine County in Birmingham, and at Berlin in Erie County, Ohio."

In *Williams v. First Presbyterian Society*, 1 Ohio St. 478, the court held that a deed to certain persons as "trustees for the Presbyterian Congregation of Cincinnati, and their successors forever, for the use, benefit and behoof of the congregation forever," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, although they were not then incorporated. This bears with much weight upon the questions at bar. In none of these cases could the beneficiaries assert any special pecuniary interest in the trust estate; but the uses upon which the legal title was conferred were recognized and enforced.

10. Much of the complication and difficulty in which the discussion of the present case has involved it arises from an attempt to solve it by the tests which are usually applied to cases of alleged resulting trusts, and from a failure to mark the distinction between active trusts,

where the nature of the trust is such as to render it necessary, for the purposes of the trust, that the legal title should remain in the trustee (who cannot be compelled to convey), and a passive trust, where the *cestui que trust* has the right to be put in actual possession of the property, or the right to call upon the trustee to convey the legal estate, as the former may direct. Bispham, Eq. § 50.

The distinction between resulting trusts and trusts for charitable or pious uses is almost as clear and as broad as that between legal and equitable estates. The foundation of a resulting trust is the payment, or the securing to be paid, by the *cestui que trust*, out of his own means, the consideration of the conveyance, or some part thereof, at its completion. *McGovern v. Knox*, 21 Ohio St. 552.

A resulting trust is to be performed or executed by the trustee by transferring the title to the *cestui que trust* at his request. *Millard v. Hathaway*, 27 Cal. 119; 1 Perry, Trusts, § 165 a.

No one seriously claims that the donors of the various charities now in question—those whose donations and contributions so largely comprise the funds to which they owe their existence—have a definable, pecuniary interest in, or claim upon, them which is enforceable in any court. Indeed, no such claim is made in their behalf. Nor is any personal or pecuniary interest asserted by or on behalf of those to whose uses they are being devoted. Their interest in them is limited to the enjoyment of these uses. As already observed, they are not seeking or asking the enforcement or execution of any trusts in their behalf. The trusts which attach to these various properties have been and are still being performed and executed. Each day that public religious worship is held by, or the sacraments of the church administered to, members of the congregations of any of these churches therein; each day that pupils are instructed in the schools; that the orphans are sheltered and cared for in the asylum; that the cemeteries are opened to receive the dead—witnesses the performance of the trusts upon which they are held by the archbishop of the diocese. The prayer is identical with that of the bill in *Beatty v. Kurtz*, 27 U. S. 2 Pet. 566 [7 L. ed. 521] *supra*, that they be left undisturbed in the enjoyment of the uses to which the property actually possessed by them has been so long devoted. In this view, the assumed difficulty or impracticability of enforcing these trusts disappears entirely as an element in the case.

Upon this feature of the case the eminent counsel for the assignee, among other things, says:

"Can the beneficiaries be the individuals who attend the church, or who constitute the so called congregation? Certainly not; as no private advantage can be claimed for them, nothing can pass to them, nor can they as individuals act in any capacity in relation to the property. They are not only not an incorporated body or association, but they never can be incorporated as a body and continue to be part of the Roman Catholic Church. Take away the bishop and there can be no priest to manage the affairs of the church, and there can be no Catholic Church without a priest. Take away the bishop and the church is gone for-



ever. The congregation no longer has an existence, and the property must descend to the heirs of the grantee in the deed, unless it is disposed of by the deed of the grantee himself."

It is sufficient answer to this to say that it will be time to deal with such an aspect of the case when such a calamity overtakes the church as the one suggested by counsel.

We are not called upon to prophesy what this court would or ought to do with this property when, if ever, bishop, priests, churches and congregations are "gone forever." We are dealing with a present, acting bishop (the successor of Archbishop Purcell, deceased), with officiating priests, with living churches and with worshipping congregations. It is against a disaster quite as fatal as that supposed by counsel that the court is asked to interpose its res raint.

Instead of asking that the head of the church of the diocese convey, or be divested of, the legal title, the beneficiaries asked that it remain in him upon the same trusts and for the same uses to which, from the first, it has been devoted. Indeed, it is quite indispensable to the existence of the trust that the legal title be held by some one other than the *cestuis que trustent*, who are incapable, by reason of the indefiniteness which characterizes their personality, of holding it.

11. Was the dominion of the archbishop over this property such as to render it subject at law or in equity to the payment of his debts? The debts are almost, if not quite, exclusively such as were contracted in the business of receiving money on deposit upon the terms of paying interest upon it while on deposit and finally restoring the principal. It surely cannot be seriously claimed that this important branch of the banking business was within the terms or powers of the trust upon which the property was held. It originated with, and was prosecuted exclusively by, the vicar-general, Edward Purcell. The archbishop stated, among other things, upon this subject, that this business had its origin in the failure of the banks and the desire of the depositors that Father Edward should take their money and keep it for them, they refusing any security, but trusting to his integrity and good faith; and that he labored for them without compensation, to earn for them interest on their money. While the findings of the court below do not in form embrace one upon this subject, they are entirely inconsistent with any such power, as are also the conclusions of law.

The member of the court below who prepared the opinion for the court (Smith, J.) in a very able and exhaustive presentation of the reasons which prompted the judgment says that: "Most of the present indebtedness grew out of his brother's banking business; receiving money on deposit, paying interest and lending it out on interest. The canon law strictly forbade this to be done by ecclesiastics. All the canonists concur in this testimony. It could hardly be a debt of the trust when the authority creating and regulating the trust strictly forbade it."

There is no serious attempt by any creditor to trace moneys deposited by him into any specified property. There was but one fund.

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The bookkeeping was crude and primitive. While some money deposited must have gone into church property, donations must have gone to pay interest upon, and repay the principal of, deposits; but the controversy is chiefly between depositors who expected interest and finally their principal, and those who gave with out hope of either interest or principal, except as it came in the enjoyment of the uses to which the property was devoted.

12. The theory that these are diocesan debts to be satisfied out of diocesan or general church property is untenable. It is not made to appear in this case that a diocese is a body or an organization capable of owning property or of contracting debts. A diocese is the circuit or extent of a bishop's jurisdiction—the district in which a bishop exercises his ecclesiastical authority; but it has not been made to appear that it is constituted to hold either the legal or equitable estate in any property which is devoted to church purposes. Certainly no such party was summoned or has made its appearance in this cause, and we have not heard of any complaint of a defect of parties in the courts below. The legal title to all this property is in the bishop; while the equitable or beneficial interest is in the several congregations and others for whose several uses they are respectively held. There seems to be no room for another owner. There is no such triangular title as this theory assumes.

Each of these congregations and other beneficiaries is here defending for itself and in its own right. Each piece of property is held upon a separate trust and for a distinct use. No warrant is shown for charging upon one the expense incurred on account of another.

In the case of *Tuigg v. Treacy*, 104 Pa. 493, the right to charge upon one congregation of a Catholic Church expenses incurred for the benefit of another, was under consideration in the light of the rules of the Church. They were under the same general canonical laws which prevailed in the diocese of Cincinnati. The court says: "Whether or not, therefore, Father Treacy (who was pastor of St. Bridget's congregation) paid and expended the money of St. Bridget's as his own, in the St. Joseph's Mission, at the instance and request of the bishop, is not important, as the bishop had no more right to pledge the credit of the congregation in an enterprise it had not undertaken or assumed, and in which it had no particular concern, or to divert the funds of the congregation from their use, than the pastor himself; and neither, it would seem, had any power."

While this is not an adjudication of the power of the archbishop which controls us in the case at bar, it affords strong support to the finding of the court below, especially as the sources of information were practically the same in both cases.

Our conclusion is that the property sought to be subjected to the payment of the individual debts of John B. Purcell (except so much of the cemeteries as was devoted to such purposes) was "held in trust for others," and did not pass to the assignee by the deed of assignment.

18. Some of the defendants and cross petitioners acquired judgments upon their claims against John B. Purcell after the assignment,

but we are not able to discover how their situations are improved by that fact.

14. The claim of John G. Hendricks, another cross petitioner below and cross petitioner in error in this court, stands upon ground distinct from all the others. He obtained a judgment against John B. Purcell, also after the assignment, upon a claim composed in part of an indebtedness for money deposited to bear interest, and in part for improvements and repairs placed upon the Cathedral, and for its preservation, at the request of the archbishop. We are all in accord upon the proposition that the latter claim possesses peculiar merit, upon the principle that trust property should answer for the reasonable expense incurred in its preservation and necessary repair and improvement. We are not in accord, however, as to the means of effectuating this right. A majority of the court is of opinion that the remedy may be granted in this case; and for this purpose the judgment as to this claim is reversed and the cause remanded for further proceedings upon this branch of the controversy.

The eminent counsel who represents Hendricks predicates his claim to be reimbursed out of the general church property chiefly (to the extent of his entire claim) upon the authority which he maintains is conferred upon the archbishop by an Act of the General Assembly passed January 8, 1825, which it is claimed was in force at the time of the assignment. 2 Chase, Stat. 1460.

It is entitled: "An Act Securing to Religious Societies a Perpetuity of Title to Lands and Tenements Conveyed in Trust for Meeting-houses, Burying-Grounds, or Residences for Preachers."

It is as follows:

"Sec. 1. *Be it enacted, etc.*, That all lands and tenements, not exceeding twenty acres, that have been or hereafter may be conveyed by devise, purchase or otherwise, to any person or persons as trustee, trustees, in trust for the use of any religious society within this state, either for a meeting-house, burying-ground, or residence of their preacher, shall descend with the improvements and appurtenances in perpetual succession in trust to such trustee or trustees as shall from time to time be elected or appointed by any such religious society, according to the rules and regulations of such society respectively.

"Sec. 2. That the trustee or trustees, for the time being, of any religious society aforesaid, shall have the same power to defend and prosecute suits at law or in equity, and do all other acts for the protection, improvement and preservation of said property, as individuals may do in relation to their individual property."

Upon this proposition the counsel stands alone, and his contention has provoked a vigorous cross fire from the assignee and his codefendants. It is by them contended that the Act, if in force, does not and never was intended to apply to the Catholic Church and its bishops. We have not found it necessary to attempt a solution of this controversy. Conceding, for the purposes of the discussion, that it is broad enough to comprehend Catholic bishops and church property, it still falls far short of supporting the claim of Hendricks, that his

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claim for money deposited is a charge upon church property. It is maintained that the effect of this statute is to give to the official holding the trust, power to sue and be sued in his own name—to defend and to prosecute suits at law or in equity—and to do all other acts, such as to make contracts, which individuals may do in relation to their individual property, for its protection, improvement and preservation. It is maintained that this Act invested the archbishop with all the characteristics of a corporation *sole*; though it is said that this position is not essential to the argument.

The antecedent of "said property" in the second section of the Act, is "all lands not exceeding twenty acres conveyed, etc., to any person as trustee, either for a meeting-house, burying ground, or residence of their preacher." The power given is to do acts "for the protection, improvement and preservation of 'said property.'"

As we have indicated, it required no legislation to authorize a charge upon this property for money expended "for its protection, improvement and preservation." The Act in question contemplates the protection, etc., of specific property—"a meeting-house, burying ground, or residence for the preacher." There is no pretense that the money deposited by Hendricks was applied to the improvement, etc., of any particular church property. There is evidence that some of it was expended in the education of some young men for the priesthood. But the claim is supported upon the theory that the debt is diocesan, and that diocesan (meaning general church) property should satisfy it. This view of the case has already been sufficiently considered, and an adverse conclusion reached.

15. No cross petitions in error are filed by the various congregations, etc., to the order of the court below, for an account of the assets of John B. Purcell, in the form of claims for money advanced by him for the construction of various churches, etc.; nor is the claim made that such order is not a final one. We are all impressed with the general equity and fairness of this feature of the judgment below, and it is, for the reason stated, left undisturbed.

16. Louis Nardini, trustee for Benedetto Gatto, one of the defendants below, filed his cross petition setting up a mortgage upon the orphan asylum executed by John B. Purcell, with which issue was joined, trial had, and judgment rendered against him, to which he excepted. He filed his separate motion for a new trial, which was overruled; he excepted and took his separate bill of exceptions. His claim was adverse to all the other parties in the case. He failed to file a cross petition in error in this court within two years after the judgment against him. Has he a standing in this court?

A cross petition in error is not expressly authorized by our Code.

It was claimed in *Seits v. Union Pacific Railway Company*, 16 Kan. 183, that the proceeding was unauthorized; and the court so held, and that a separate proceeding in error was necessary.

The same question was first presented in this court in *Shinkle v. First National Bank*, 23

Ohio St. 516. It was contended that such a pleading was unauthorized. The court, by Welch J., said:

"There is no good reason why cross petitions in error should not be allowed equally as in original actions. They were allowed at common law, and there is nothing in the Code which forbids their use. On the contrary, they are calculated to subserve a leading object of the Code, namely: to avoid multiplicity of suits, and to render litigation simple, cheap and speedy. . . . To summon the opposite party, who is already in court, and to bring in a copy of the record, a copy of which is already in court, would be a useless labor, and involve an unnecessary expense and delay, etc."

The Supreme Court of Kansas was again called upon to consider this question in *Stettauer v. Carney*, 20 Kan. 496, when it overruled its former decision upon the authority of *Shinkle v. First National Bank*, *supra*, saying:

"We are constrained to believe that in this respect the decisions of the Supreme Court of Ohio are the better exposition of the law."

Again, in *Bundy v. Ophir Iron Company*, 35 Ohio St. 80, a motion was made in this court for leave to file a cross petition in error. At that time no leave was required to file "petitions in error." It was said by the court:

"As held in *Shinkle v. First National Bank*, 22 Ohio St. 516, it is competent for a defendant in error to file a cross petition asking the reversal of the judgment for errors prejudicial to him, and not assigned in the plaintiff's petition. And as a petition in error may, under the present legislation, be filed without leave of court, the same rule will be applied to the cross petition."

The just inference is that if the law had required leave to file a petition in error, the same rule would necessarily have applied to a cross

petition in error. In the case before us the errors which Nardini relied upon were not assigned by the plaintiff in error; he stood upon his own right. The judgment against him stood unchallenged upon the record. There can be little doubt that if the proceeding in error by the plaintiff had been dismissed at any time before Nardini's cross petition in error was filed, his branch of the case would also have gone out of court. The logic of the foregoing cases and considerations is that such a proceeding is the prosecution of a proceeding in error; but to avoid a multiplicity of suits he may in the same case and upon the same record predicate that prosecution. If a law requiring leave to file a petition in error would apply as well to a cross petition in error, they are as far upon the same footing as that if the two years' limitation applies to one, it applies with the same force to the other. All parties in whose favor the judgment of which he complains was rendered (and it was in favor of all but himself) had a right to suppose, after the expiration of two years from its rendition, that it stood unquestioned and was forever at rest. The cross petition in error was filed too late. This conclusion relieves us of a further consideration of the question arising upon this mortgage, and the judgment thereon is affirmed.

17. The writer of this opinion does not concur in so much of the judgment as remands the case to the court below for further proceedings upon the claim of Hendricks; nor does he concur in the affirmance of so much of the judgment below as devotes a part of the St. Joseph Cemeteries to the payment of creditors, believing that these are quite clearly shown to be trust property, and that they did not pass to the assignee by the assignment.

With the modification above indicated, of the judgment against Hendricks, the judgment below is affirmed.

## TEXAS SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,

Appt.,

v.

J. M. BROWN.

(....Tex....)

**Delay in delivering a telegram stating the death and time of burial of a person referred**

**NOTE.—Rate of damages in breach of contract.**

*Hadley v. Baxendale*, 9 Exch. (W. H. & G.) 841, 354, the leading English case upon this subject, is the one invariably cited with approval in America, as follows: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The rule in England at the present day is narrower than this rule. *Horne v. Midland R. Co.* L. R. 7 C. P. 558, L. R. 8 C. P. 181; *Wood's Mayne, Damages*, §§ 36-42; *Gray, Telegr. Companies*, 147.

In *Griffin v. Colver*, 16 N. Y. 490, 498, a leading American case upon this subject, *Mr. Justice Sel-*

den states the rule as follows: "The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions—the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed." *Gray, Telegr. Companies*, 149; *Daughtery v. Am. U. Telegr. Co.* 75 Ala. 168; *Hart v. Western U. Telegr. Co.* 96 Cal. 579; *Western U. Telegr. Co. v. Graham*, 1 Colo. 230; *U. S. Telegr. Co. v. Gildersleeve*, 29 Md. 232; *True v. International Telegr. Co.* 60 Maine, 9; *Bartlett v. Western Union Telegr. Co.* 62 Maine, 200; *Beaupre v. Pacific & A. Telegr. Co.* 21 Minn. 155; *Mackay v. Western U. Telegr. Co.* 16 Nev. 222; *Baldwin v. U. S. Telegr. Co.* 45 N. Y. 744; *Leonard v. New York, A. &*

(November 13, 1888.)

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**A** PPEAL by defendant, from a judgment of the Hopkins County District Court (Foster, *Special Judge*), in favor of plaintiff in an action to recover damages for the nondelivery of a telegraph message. *Reversed.*

The facts are fully stated in the opinion of the court.

*Messrs. Stemmonds & Field* for appellant.

*Messrs. Leach & Templeton* for appellee.

**Walker, J.**, delivered the opinion of the court:

This is an appeal from a judgment for \$275 in favor of the appellee against appellant. The suit was brought the 15th day of March, 1887, by Brown, to recover of the appellant, the Western Union Telegraph Company, \$10,000 damages for delay in transmitting and delivering to him a telegram sent to him from Hallville, Tex., on the 11th day of December, 1886, by one Wilson Livingston, in the following language:

Hallville, Texas, Dec. 11, 1886.

J. M. Brown, Sulphur Springs: Willie died yesterday evening at six o'clock; will be buried at Marshall Sunday evening.

[Signed] Wilson Livingston.

Plaintiff alleged that Livingston acted as his agent in sending the message, and that by "Willie," named in said message was meant Willie Brown, a brother of appellee, and that the price paid for sending said message was paid by appellee in the following manner: that the sum of forty-five cents paid to the defendant for transmitting and delivering the said telegram was money belonging to the estate of said Willie Brown, one third of which plaintiff owned as an heir, and the other two thirds by payment to the other two heirs, there being no administration, nor need of any.

The plaintiff alleged that the dispatch was not delivered until noon of the 12th of December, 1886, and by reason of said delay, caused by the willful neglect or failure of defendant to transmit and deliver said message, he was prevented from being present at the burial of his brother, whom he had raised and cared for from childhood, and from receiving the consolation and condolence of his sister in his grief; whereby he suffered great disappointment, grief and mental anguish, etc.

Defendant answered by general demurrer, special demurrer and general denial. The demurrers were overruled, to which defendant excepted.

The exceptions were: (1) Because the petition on its face failed to state any cause of action, in this, that plaintiff sues for an injury to his feelings in tort, he being an addressee of the message, and no party to the contract under which said message was accepted and transmitted, and fails to state facts necessary to recover in tort. (2) There is nothing in the alleged message to put the defendant upon notice that there was any relationship between the addressee and the said Willie Brown, or that anything except the mere announcement of the death of said Willie Brown was contemplated by the defendant and the sender of said message, at the time the message was delivered to and accepted by this defendant for transmission and delivery."

There is no allegation in the petition that the nature and importance of the telegram were made known to the telegraph operator to whom the message was delivered, otherwise than as conveyed by the terms of the message. The words of the dispatch were sufficient to notify the operator, as agent of the defendant, that a human being had died at Hallville, Tex., at 6 o'clock of the evening of the 10th of December, 1886; that the funeral of the deceased was to

B. E. M. Teleg. Co. 41 N. Y. 544; Landsberger v. Magnetie Teleg. Co. 32 Barb. 550; Rittenhouse v. Independent Line of Teleg. 1 Daly, 474, 44 N. Y. 238; Western U. Teleg. Co. v. Griswold, 37 Ohio St. 501; Daniel v. Western U. Teleg. Co. 61 Tex. 452; Western U. Teleg. Co. v. Hyer, 22 Fla. 637; Kinghorne v. Montreal Teleg. Co. 18 Up. Can. Q. B. 85; Lane v. Montreal Teleg. Co. 7 Up. Can. C. P. 23; Candee v. Western U. Teleg. Co. 34 Wis. 471.

The general rule of compensatory damages stated and defined in the leading cases of Hadley v. Baxendale, 9 Exch. (W. H. & G.) 341, and Griffin v. Colver, 16 N. Y. 489, applies to telegraph cases. The party injured is entitled to recover all his damages, including gains. If ignorant of its real nature and importance, it cannot be said to have been in his contemplation, at the time of making the contract, that any particular damage or injury would be the probable result of a breach of the contract, on his part. Candee v. Western U. Teleg. Co. 34 Wis. 471; Sanders v. Stuart, L. R. 1 C. P. Div. 329; Beaupre v. Pacific & A. Teleg. Co. 31 Minn. 155; Baldwin v. U. S. Teleg. Co. 45 N. Y. 744, 748; Belun v. Western U. Teleg. Co. 8 Cent. Rep. L. J. 445; Shields v. Washington Teleg. Co. 9 West. L. J. 283; 3 Sutherland, Damages, 288.

*Damages for injury to feelings, caused by neglect of duty to deliver message.*

Injury to feelings, caused by a failure to deliver a message relating to domestic affairs, where the failure is the result of negligence of the company or its servants, is an element of actual damages. Western U. Teleg. Co. v. Cooper, 1 L. R. A. 728, following Stuart v. Western U. Teleg. Co. 66 Tex. 580; So Relle v. Western U. Teleg. Co. 55 Tex. 310; Gulf, C. & S. F. R. Co. v. Levy, 59 Tex. 548, 568; Hays v. Houston & G. N. R. Co. 48 Tex. 272; Gulf, C. & S. F. R. Co. v. Wilson, 69 Tex. 730.

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*Damages for mental anguish alone not recoverable.*

Neither in an action of tort nor in one of contract can a party recover damages for mental anguish alone. Wood's Mayne, Damages, 1st Am. ed. 54, note; Gray, Teleg. Companies, 147.

The law implies injury to the feelings only where there is serious personal injury or insult. Phillips v. Hoyle, 4 Gray, 568; 1 Sutherland, Damages, 766.

The injury to feelings is only allowed to be considered in those torts which consist of some voluntary act or very gross neglect, and practically on the degree of fault evinced by all the circumstances. It has been very wisely left to the jury to determine each case upon its own surroundings, because the only safe rule of damages in matters of feeling is to give what, to the ordinary apprehension of impartial men, would seem proportionate to an injury which must be measured by the instincts of our common humanity. Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

Generally, in actions upon contracts no damages can be given which cannot be stated specifically, and the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract. Hamlin v. Great Northern R. Co. 1 Hurst. & N. 408. See Denton v. Great Northern R. Co. 5 El. & Bl. (55 Eng. C. L.) 560; 1 Sutherland, Damages, 101.

The action being upon contract, mental distress and sense of wrong are too remote, and could not have been in contemplation of the parties when the contract was made. Hobbs v. London & S. W. R. Co. L. R. 10 Q. B. 111; Walsh v. Chicago, M. & St. P. R. Co. 42 Wis. 23; Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342.

take place at Marshall on the evening of Sunday, December 12; that the deceased was known to the person sending and the person to whom the dispatch was sent; that intimate and familiar relations existed between them and the deceased, from the use of the name "Willie;" and even, perhaps, it may be understood that the message was an invitation to the funeral.

These suggestions intimated from the face of the message were sufficient notice of its importance to require corresponding care and diligence in transmitting it to its destination. Whatever damages might naturally result under such conditions from a failure to receive the message will be considered as being in contemplation of the parties to the contract; that

is, between the plaintiff, having the right to the message, and the telegraph company. *Daniel v. Western U. Teleg. Co.* 61 Tex. 456.

But the message gave nothing to indicate that "Willie" was the brother of the plaintiff. The damages alleged are from the fraternal feelings outraged by the failure to hear of his brother's death in time to attend the funeral, and condole with his sister. Giving the most liberal meaning to the words of the message, they cannot be construed into a notice of the special matter of complaint in the petition.

The special exceptions should have been sustained, for which error the judgment is reversed.

*Reversed and remanded.*

## MASSACHUSETTS SUPREME JUDICIAL COURT.

*Re George A. CHAPIN et al., Petitioners.*

(....Mass.....)

**Where a will gives property to trustees upon certain trusts, and directs that "if at the expiration of ten years a majority of his children then living shall desire it, the trustees shall sell the real estate and shall divide the net proceeds," if necessity compels the sale of part of the real estate before the ten years expires the proceeds of the sale will be held upon the same trusts as was the real estate, and will not be distributed upon petition of the children before the expiration of such time.**

(February 23, 1890.)

**ON appeal. Decree affirmed.**

This was a bill in equity for instructions by the trustees under the will of David Chapin, deceased.

At the trial in the Supreme Judicial Court of Suffolk County, the court entered a decree that the proceeds of the real estate, known as the Liverpool North Wharf property, mentioned in the bill, is held in trust, the income thereof to be paid to the persons entitled to the income of the real estate held in trust by the terms of the will. From this decree Melissa A. Todd, Martha J. Pendleton and Harriet M. Chapin, defendants, appealed.

The point in controversy appears from the opinion.

*Messrs. E. W. Hutchins and W. S. Frost* for defendants, appellants.

*Mr. H. S. Dewey* for petitioners.

*Morton, C.J.*, delivered the opinion of the court:

The testator, who died in 1890, by his will devised all his real estate to trustees upon trust to pay the net income to his children and the issue of any deceased child by right of representation. The will further provides that if at the expiration of ten years a majority of his children then living shall desire it, the trustees shall sell the real estate and shall divide the net proceeds equally among all his children then living and the issue of any deceased child

by right of representation; and until such sale is made the trustees shall hold the estate and divide the net proceeds in manner aforesaid; and if no sale is made during the lives of his children, then, at the death of the surviving child, the estate shall be sold and the net proceeds divided among his grandchildren *per stirpes*.

It is perfectly clear that the testator intended that the trust should continue for at least ten years after his death. There is nothing in the will which suggests that he contemplated an earlier termination of the trust in any contingency.

It is also clear that the children now living have a contingent interest only in the trust fund, and that those who will ultimately take cannot be determined until the period of distribution arrives.

The trust cannot be terminated, in whole or in part, without defeating the intentions of the testator.

The testator owned at his death an undivided half of a wharf estate in Boston. Upon the petition of his cotenants, partition of this estate was made under our statutes, and, under the order of the Judge of Probate, the commissioners appointed to make partition sold the whole of the estate, being of opinion that the estate could not be advantageously divided, and paid to the trustees the proceeds of one undivided half. The rule is well settled that in such a case the proceeds of the real estate are to be held upon the same trusts as those upon which the real estate was held. The money takes the place of the real estate, and is affected by the same trusts as if it had remained specifically real estate. *Holland v. Crust*, 3 Gray, 162; *Simonds v. Simonds*, 112 Mass. 157.

In the case at Bar, therefore, the claim of some of the children that the proceeds of the wharf property should now be divided cannot be sustained. The period of distribution fixed by the testator has not arrived, and there is no certainty that the children now living will be living and entitled to a share of the trust fund when that period does arrive.

*Decree affirmed.*

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## INDIANA SUPREME COURT.

Kate C. COOK, *Appt.*,

v.

Mary C. WALLING.

(....Ind....)

1. A mortgage by a married woman, on her separate property, in which her lawful husband does not join, is void under 1 Revised Statutes of Indiana, 1876, p. 550 (Rev. Stat. 1881, § 5117), although he has been absent fifteen years and she, believing him to be dead, is living with another man whom she believes to be her lawful husband and who joins with her in executing the instrument. *Quare* as to the effect of the Indiana Statute of 1881, touching estoppels *in pais* affecting married women, on such an instrument if made after the passage of that Act.

2. The doctrine of estoppel cannot be invoked in order to remove the incapacity of a married woman, where her contract relates to a matter concerning which all the common-law disabilities continue, so that the contract is utterly void for want of power or capacity to make it.

(January 22, 1889.)

**A**PPEAL from a judgment of the Floyd County Circuit Court (Ferguson, J.), in favor of defendant in an action brought to foreclose a mortgage. *Affirmed.*

The facts are fully stated in the opinion.

Mr. J. V. Kelso for appellant.

Mr. A. Dowling for appellee.

Mitchell, J., delivered the opinion of the court:

The question for decision arises upon the following facts, which are admitted by the pleadings:

In December, 1855, the appellee, Mary C. Walling, became the lawful wife of Creed A. Walling, who, after living with her until some time in the year 1860, went to parts unknown, and was not again heard of until the year 1876, a period of some sixteen years. After Walling had been thus absent for more than seven years, acting under the supposition that he was dead,

the appellee married Alexander E. Hughes, and removed from a foreign State with him, where they had theretofore resided, to Floyd County, Ind. She purchased a tract of land in the above named county, which was conveyed to her by the name of Mary C. Hughes. In 1875 the appellee, by the name of Mary C. Hughes, joined with her supposed husband, Alexander E. Hughes, in mortgaging the real estate so purchased and owned by her, to secure a debt due from Hughes to the appellant, to Kate C. Cook. The appellee lived and cohabited with Hughes, and claimed him as her husband, and claimed and was reputed to be his lawful wife, during all the time they lived in Indiana, until the year 1876, when Walling returned, and made the fact known that he was still in life; whereupon, the appellee obtained a divorce from Hughes, and resumed, and has ever since continued, marital relations with Walling.

The question is whether or not, in a suit to foreclose the mortgage given as above, the facts hereinbefore recited are sufficient to avoid a special plea by Mary C. Walling, in which she alleged that the lands described in the mortgage were her separate estate, and that at the time of the execution of the mortgage she was, and ever since had been, the wife of Creed A. Walling, and that he did not join in the execution of the mortgage.

A statute touching the marriage relation, in force at the time the mortgage was executed, as well as that now in force, declares that a married woman shall have no power to incumber or convey her real estate, except by deed in which her husband shall join. 1 Rev. Stat. 1876, p. 550 (§ 5117, Rev. Stat. 1881).

It being conceded by the record that the appellee was at the time she executed the mortgage the lawful wife of Creed A. Walling, and that he did not join therein, it follows inevitably that the mortgage was a nullity.

The power of a married woman to convey or incumber her separate real estate is wholly statutory; and any deed or other instrument purporting to convey or incumber her land, in

**NOTE.—Executory contracts of married women.**

A married woman has the same power to make executory contracts, and is as much bound thereby, as if she was unmarried, except that she cannot, without her husband joining her, convey or mortgage her real estate, or enter into any executory contract to sell, convey or mortgage the same. Rev. Stat. 1881, §§ 5117, 5119; McLead v. *etna* L. Ins. Co. 5 West. Rep. 333, 107 Ind. 396.

Where it is sought to enforce a contract against the property of a married woman, plaintiff must aver and prove that the contract was one which she had power to make. Vogel v. Lechner, 102 Ind. 55; Cupp v. Campbell, 1 West. Rep. 255, 103 Ind. 217.

**Estoppel; doctrine applied to married women.**

While a married woman is now subject to an estoppel *in pais*, she is not to be estopped in any manner different from any other person. In the absence of fraud, misrepresentation or concealment she is not estopped by the mere form of a contract which she had no power to make. Cupp v. Campbell, 1 West. Rep. 255, 103 Ind. 220.

Such an estoppel can only be predicated on a wrong. It cannot exist if the person dealing with her knew the fact or was ignorant from a failure to inquire, unless he was misled by the representations of the woman. Orr v. White, 4 West. Rep. 422, 105 Ind. 341.

Prior to September, 1881, a married woman could  
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not, during coverture, estop herself by her speeches and conduct from asserting title to her lands and divest herself of such title. *Wihite v. Hamrick*, 32 Ind. 596; *Parks v. Barrowman*, 83 Ind. 562; *Behler v. Weyburn*, 59 Ind. 143; *Hamar v. Medsker*, 60 Ind. 413; *American Ins. Co. v. Avery*, 60 Ind. 566; *Unfried v. Heberer*, 63 Ind. 67; *Richards v. O'Brien*, 64 Ind. 418; *Williams v. Wilbur*, 67 Ind. 42; *Suman v. Springate*, 67 Ind. 118; *Liberty Twp. Draining Assn. v. Watkins*, 72 Ind. 459; *Müller v. Albertson*, 73 Ind. 343; *Brandenburg v. Seigrist*, 75 Ind. 568; *Levering v. Shockey*, 100 Ind. 558; *Buchanan v. Hubbard*, 96 Ind. 1; *Applegate v. Conner*, 93 Ind. 185; *Snoddy v. Leavitt*, 3 West. Rep. 392, 105 Ind. 357.

The statute is prospective and not retroactive in its operation. *Levering v. Shockey*, 100 Ind. 561; *Wihite v. Hamrick*, 32 Ind. 596.

Although these statutory provisions are, to some extent, in derogation of the common law, and must be construed strictly, yet, in so far as they are inconsistent with the common law and the marital unity of husband and wife recognized therein, they must be regarded as the law of this State. This is settled by our decisions. *Haas v. Shaw*, 91 Ind. 384; *Frazer v. Clifford*, 94 Ind. 482; *Dodge v. Kinzy*, 101 Ind. 102; *Barnett v. Harshbarger*, 3 West. Rep. 750, 105 Ind. 410; *Garrett v. State*, 8 West. Rep. 363, 109 Ind. 537. See, as to application of doctrine of estoppel, applied to married women, note to *Galbraith v. Lunsford*, 1 L. R. A. 523.

which her husband has not joined, is absolutely void because of the want of power or capacity on her part to execute such an instrument without being joined therein by her husband. As has been said: "The instrument has the form and semblance of a deed, and nothing more." *Louell v. Daniels*, 2 Gray, 181.

It is without legal force, and of itself creates no equity which the courts can recognize or protect. *Otis v. Gregory*, 111 Ind. 504, 10 West. Rep. 791, and cases cited.

Tacitly conceding the invalidity of the instrument, it is nevertheless contended with much plausibility that because the appellee was living and cohabiting with Hughes, and because the latter, assuming to be her husband, joined in the execution of the mortgage, she ought now to be estopped from asserting that her husband did not join therein. An estoppel *in pais* has for its foundation the proposition that a person *sui juris* has, by misrepresenting the truth, purposely induced another to believe in and act upon the existence of certain facts which, if they were now made to appear different from what they were represented to be, would cause substantial injury to the person who acted on the faith of the representation.

When, therefore, a married woman deals or assumes to deal, in respect to a matter concerning which her common-law disabilities have been removed, she will be bound by an estoppel *in pais*, as any other person; and in case she makes affirmative representations concerning the character in which she proposes to contract, whether for the benefit of herself or some third person, and thereby induces another who acts in good faith to contract with her, supposing the contract to be of the character represented, she will be estopped to deny the representations in case she would have been *sui juris* in respect to the contract, had the facts been as represented. *Orr v. White*, 106 Ind. 341, 4 West. Rep. 492; *Logers v. Union Cent. L. Ins. Co.* 111 Ind. 848, 9 West. Rep. 828; *Lane v. Schlemmer*, 114 Ind. 290, 12 West. Rep. 922; *Bodine v. Killeen*, 53 N. Y. 83.

Where, however, the contract relates to a matter concerning which all the common-law disabilities continue, so that the contract is utterly void for want of power or capacity to make it, the doctrine of estoppel cannot be invoked in order to remove the incapacity. In other words, while a married woman may be estopped by affirmative representations concerning the character of a contract which, if her representations be true, she is, notwithstanding her coverture, under no legal disability to make, she cannot by her own act or representation remove her legal incapacity to make a contract which coverture alone, under any and all cir-

cumstances, disqualifies her from making, except in a prescribed way. *Carpenter v. Carpenter*, 45 Ind. 142; *Levering v. Shockey*, 100 Ind. 558; *Bank of America v. Banks*, 101 U. S. 240 [25 L. ed. 850]; *Sims v. Eschhardt*, 102 U. S. 300 [26 L. ed. 87]; *Keen v. Coleman*, 59 Pa. 299; *Klein v. Caldwell*, 91 Pa. 140; *Morrison v. Wilson*, 18 Cal. 495; *Todd v. Pittsburgh, Ft. W. & C. R. Co.* 19 Ohio St. 514.

The statute as well as the common law, deprives a married woman of all power to convey or incumber her separate real estate, except by deed in which her husband shall join. Without the joinder of the person who occupies towards her the legal relation of husband, the impediment in the way of a deed by a married woman is an absolute incapacity to contract; and this legal incapacity is not cured nor removed because some person other than her husband has joined in the deed, even though she may be at the time cohabiting with such person in the honest belief that he is her husband. It would present a contradiction in terms to hold that an abortive attempt by a married woman to make a deed which she had no legal capacity to make should remove her incapacity by the application of the doctrine of estoppel. *Behler v. Weyburn*, 59 Ind. 143.

Desertion or continued and unheard of absence may constitute a ground of divorce; and in case a husband shall have absented himself from his usual place of residence, and gone to parts unknown, for a given period, the court having probate jurisdiction may appoint an administrator, after which appointment the wife of the departed person shall have all the rights and independent powers of a *feme sole*, and may contract and execute deeds for herself. Sections 2281-2284, Rev. Stat. 1881.

But a married woman who has been deserted cannot lawfully contract a second marriage during the lifetime of her husband without obtaining a divorce; nor can she alienate or incumber her real estate in his absence, except by pursuing the course indicated by the statute. *Rhea v. Rhenner*, 26 U. S. 1 Pet. 105 [7 L. ed. 72]; *Beckman v. Stanley*, 8 Nev. 257; *Harrison v. Brown*, 16 Cal. 287.

The appellee's second marriage was a nullity, because her husband was alive at the time; and for the same reason her deed was void, although joined in by a person supposed to be her husband, but who in fact was not. Whether or not the conclusions above stated would be in any way modified, had the mortgage in suit been executed since the Statute of 1881, touching estoppels *in pais* affecting married women, came in force, we need not now inquire. It is enough to say the statute referred to has no application to the contract in question.

*The judgment is affirmed, with costs.*

## CALIFORNIA SUPREME COURT.

PEOPLE, *ex rel.* George A. JOHNSON,  
Atty-Gen., *Appts.*,

v.

W. E. EICHELROTH, County Physician,  
*Resp't.*

(....Cal....)

The words "suitable graduate in medicine," in the California Act providing for the appointment of a county physician, include one legally licensed to practice medicine and surgery under the laws of the State, although he was never graduated at any college, school or university which confers the degree of doctor of medicine.

(January 19, 1893.)



**A**PPEAL by plaintiffs, from a judgment of the Tuolumne County Superior Court (C. V. Gottschalk, J.), in favor of defendant in proceedings in the nature of *quo warranto* to oust him from the office of county physician. *Affirmed.*

The facts which led to the institution of the proceedings sufficiently appear in the opinion.

*Messrs. George A. Johnson, Atty-Gen., and F. P. Otis* for appellants.

*Messrs. P. Reddy, W. H. Metson, F. W. Street and F. D. & G. W. Nicol*, for respondent:

A diploma is "an instrument given by colleges and societies on commencement of any degree. A license for a clergyman to exercise the ministerial function, or a physician, etc., to practice his art."

1 Burrill, Law Dictionary, p. 493, Lawrence & Rapalje, Law Dictionary, p. 889; Webster's Unabridged Dictionary.

The state medical society was a duly incorporated medical society of the State of California. They appointed a board of examiners as provided by an Act, entitled "An Act to Regulate the Practice of Medicine in the State of California," approved April 3, 1876. Statutes 1875-6, p. 792.

Defendant was duly examined before said board of examiners, and after such examination said board issued to the defendant, on the 18th day of December, 1876, a certificate which is evidence of the fact that defendant is a graduate of the Medical Society of the State of California, and by complying with the other requirements of the Act constituted his license to practice medicine and surgery in this State. It is his diploma.

*Finch v. Gridley's Executors*, 25 Wend. 468.

If the Statute of 1876 is doubtful or ambiguous, such construction will be given to it as not to deprive a person of a substantial right.

*People v. Hodgdon*, 55 Cal. 72.

In the construction of a statute the intention of the Legislature is to be ascertained; and to ascertain that intent regard is to be had, not so much to the phraseology in which that intent has been expressed as to the general tenor and scope of the whole legislative scheme embodied in the statute.

*Palache v. Pacific Ins. Co.* 42 Cal. 418; *People v. Utica Ins. Co.* 15 Johns. 358.

If the words "suitable graduate in medicine," as used by the Legislature in subdivision 5, § 25, of the County Government Act, are susceptible of two constructions, all of the Acts bearing upon the subject should be read together.

*Merrill v. Gorham*, 6 Cal. 41; *People v. Wells*, 11 Cal. 321; *McMinn v. Bliss*, 81 Cal. 122.

The purpose of legislation on this subject was to prevent persons not properly qualified from practicing medicine in this State.

The tests of qualification to practice medicine in this State were of two kinds, viz.: first, the diploma; second, a satisfactory examination before the board. But the diploma and certificate in one case and the certificate in the other conferred precisely the same right and evidenced the same qualification. After the issuance of the certificate to the two classes the law does not indicate nor require any distinction to be marked or made between them.

2 L. R. A.

See *Ex parte Spinney*, 10 Nev. 323; *Leighton v. Sargent*, 81 N. H. 119.

*Patterson, J.*, delivered the opinion of the court:

This is an action to oust the defendant from the office of County Physician of Tuolumne County, on the ground that he was not at the time of his appointment, and is not now, "a suitable graduate in medicine."

On March 8, 1887, the Board of Supervisors of Tuolumne County appointed the defendant physician for the county hospital and jail and indigent sick of said county for the term of one year. The Act under which the appointment was made provides that "The board shall also appoint (not let to the lowest bidder) some suitable graduate in medicine to attend such indigent sick or otherwise dependent poor." County Government Act, § 25, subd. 5.

The case was submitted upon an agreed statement of facts, and the court below rendered judgment for the defendant.

The defendant has been in the continuous practice of medicine and surgery for about forty-three years, in this State, since 1852. During the fourteen years last past he has been the county physician of Tuolumne County, and while engaged in the practice of medicine and surgery has attended to the indigent sick of said county. He studied medicine for one year in the University of Yena, Germany, and has been superintendent of hospitals in different parts of this country; but has never received a diploma from any medical college, and never was graduated at any college, school or university which confers the degree of doctor of medicine.

Under the Act of April 3, 1876, the state medical society of this State appointed a board of examiners. The defendant went before said board of examiners, and, after being duly examined, received from said board, on the 18th day of December, 1876, a certificate and license in due form, signed by the members of the board, authorizing him to practice medicine and surgery in this State.

The case turns on the meaning of the words "some suitable graduate in medicine." Technically the word "graduate" implies a degree and regular curriculum. Webster defines the verb "graduate," "to pass to, or to receive, a degree in a college or university." But we do not think it necessary to give to the word, as used in this statute, a strict and technical definition. In the construction of a statute, the intention of the Legislature is to be ascertained, not so much from the phraseology in which the intent has been expressed, as the general tenor and scope of legislation on the subject. *Palache v. Pacific Ins. Co.* 42 Cal. 419; *Endlich, Interpretation of Statutes*, § 76.

The purpose of legislation on the subject before us was to prevent persons not properly qualified from practicing medicine in this State, and to prevent injury to helpless people under the protection of the county, through the incompetency of the physician in charge of the hospitals and jails. For that purpose the board of examiners, composed of competent physicians, was provided for; and said board was required to make such an examination of applicants as would show their qualification to practice medicine and surgery.

The tests of qualification to practice medicine in this State are of two kinds: *first*, the diploma from a medical college or incorporated society; and *second*, a satisfactory examination before the board. The evidence required in the first class of cases to entitle the applicant to practice is a diploma and certificate of the board; and in the second class a certificate showing that the holder thereof has been duly examined and is entitled to practice. We do not think it was the intention of the Legislature to provide that while those confined in the jails or hospitals might be treated by a physician holding a diploma from some medical institute, authorized by law to confer the degree of doctor of medicine, a physician who had passed a satisfactory

examination before the board of examiners of the state medical society of this State should not be qualified or allowed by law to treat such patients. The words "suitable graduate in medicine," we think, as used in the Act before us, mean one legally licensed to practice medicine and surgery under the laws of this State. It cannot be said that the meaning of the words is clear; and in such cases the statute should be given such construction as will not deprive the person interested in its construction of a substantial right. *People v. Hodgdon*, 55 Cal. 72.

*Judgment affirmed.*

We concur: *Beatty, Ch. J., Thornton, J., Works, J., McFarland, J., Sharpstein, J.*

## NEW YORK COURT OF APPEALS.

PEOPLE, *ex rel.*, COMMONWEALTH INS. CO. of New York, *Resp't.*,  
c.

Michael COLEMAN *et al.*, Comrs. of Taxes, etc., *Appts.*

(....N. Y. ....)

An assessment on the property of an insurance company which is attacked by certiorari, on the ground that the net surplus of the company is assessed unlawfully, because it is less than 10 per cent of the capital, cannot be sustained by the commissioners of taxes by showing that the net surplus as fixed by them is too small, and that unearned premiums deducted therefrom by them should not have been deducted. Having made the deduction, they are bound by it, and the regularity of the assessment must be determined on the basis of the valuation which they fixed, and which they cannot, at that stage, either increase or diminish.

(March 5, 1890.)

**A**PPEAL by defendants, from an order of the General Term of the Supreme Court, First Department, reversing an order of the Special Term in favor of defendants in proceedings taken by certiorari to review the action of the commissioners of taxes in assessing the capital stock of relator, and vacating the assessment. *Affirmed.*

The point in controversy sufficiently appears from the opinion.

*Meers. David J. Dean and George S. Coleman*, with *Mr. Henry R. Beekman*, for appellants:

The relator was not entitled to a deduction of its unearned premiums.

See *People v. Ferguson*, 88 N. Y. 89; *People v. Tax Comrs.* 76 N. Y. 64; *People v. Davenport*, 91 N. Y. 574.

In all of the above cases the court has assumed that some amount may properly be allowed for unearned premiums in assessing the capital of an insurance company. But there is no express provision of statute requiring any allowance for liability in estimating the taxable value of property. Contingent liabilities are not allowed as deductions to other corporations or to individuals; and the record in the present case does not afford sufficient evidence of the amount of the liability for which allowance should be made

2 L. R. A.

See *State v. Parker*, 84 N. J. L. 479, 85 N. J. L. 575; *Kenton Ins. Co. v. Covington* (Ky.) 5 S. W. Rep. 461.

*Mr. Joseph Larocque*, for respondent:

The deductions made by the appellants in arriving at their valuation of the capital stock and surplus of the relator were properly made. It was the duty of the commissioners, in estimating the value of the capital stock for the purpose of assessment, to make a proper deduction from the value of the assets to cover existing liabilities; and in adopting the basis of 50 per cent of the premiums collected on unexpired risks as a proper measure of liability on outstanding policies, they but acted in accordance with the teachings of experience and a rule often approved by this court.

*People v. Ferguson*, 88 N. Y. 89; *People v. Tax Comrs.* 76 N. Y. 64.

*Andrews, J.*, delivered the opinion of the court:

We think the question which the appellants seek to have determined, *viz.*: whether in estimating the property of an insurance company for the purpose of taxation, any deduction is to be made on account of unearned premiums, and whether they are to be considered to any extent as debts or liabilities of the company, does not arise and cannot be decided on this record.

It appears from the return of the commissioners of taxes that they fixed the valuation of the capital stock and net surplus of the relator at \$321,219, according to the report of the insurance department of the State to which they refer.

Reference to the report shows that this sum was arrived at by valuing the capital stock of the relator at \$800,000, its par value, and its net surplus at \$21,219. The net surplus was ascertained by deducting from the sum of \$45,885.21, the gross surplus, the liabilities for unearned premiums, amounting to \$24,666.16. This left the net value of its assets, as estimated, the sum before mentioned, *viz.*: \$321,219.

From this aggregate the commissioners deducted United States bonds held by the company, to the amount of \$304,577, leaving a balance of \$16,642, which latter sum was fixed by the commissioners as that for which the relator was liable to taxation. This sum rep-

resented part of the surplus of \$21,219, as ascertained by the commissioners; and as by chapter 456 of the Laws of 1887, only that part of the surplus of the relator exceeding 10 per cent of its capital was liable to taxation, the assessment of any part of it was plainly erroneous.

The commissioners cannot now be heard to say that the deduction made in arriving at the net surplus of the unearned premiums was erroneous and should not have been made. They

did make the deduction, and are bound by it. They can neither increase nor diminish, at this stage, the valuation upon which the assessment proceeded. Nor can their error be obviated by proof that the surplus was in fact much larger than was fixed by them. The regularity of the assessment is to be determined on the basis that the full net surplus was \$21,219.

We think the order appealed from is right and should therefore be affirmed.

All concur.

## UNITED STATES CIRCUIT COURT, DISTRICT OF OREGON.

Edward TRACY

v.

Mary A. REED.

(....Sawyer.... Fed. Rep....)

**1. Assessment of real property; to whom made.** By the Act of 1883 (Comp. 1887, § 2735), real property must be assessed to the owner thereof, unless it is unoccupied and the owner unknown; and an assessment made to a person not the owner of the property is invalid.

**2. The owner of property for the purpose of taxation** is the person having the legal title or estate thereto or therein, and not one who by contract or otherwise has a mere equity therein or a right to compel a conveyance of such legal title or estate to himself.

\*Head notes by DEADY, J.

**NOTE.—Taxes; resident or occupied land must be assessed to the owner.**

The statutes generally require that real property shall be listed and assessed to the actual owner, or to the owner or occupant, and this requirement is imperative. *State v. Vanderbilt*, 38 N. J. L. 38; *Johnson v. McIntire*, 1 Bibb, 295; *Whitney v. Thomas*, 28 N. Y. 281; *Thibodaux v. Keller*, 30 La. Ann. 508; *Workmen's Bank v. Lannes*, 30 La. Ann. 871; *Lague v. Boagni*, 33 La. Ann. 912; *Le Blanc v. Blodgett*, 34 La. Ann. 107; *Desmond v. Babbitt*, 117 Mass. 238; *Bell v. Fry*, 5 Dana, 341; *Martin v. Mansfield*, 3 Mass. 419.

But a mere mistake in the name of the owner, not calculated to mislead, will not vitiate the assessment. *People v. Whipple*, 47 Cal. 561; *Smith v. Reed*, 51 Conn. 10; *Pierce v. Richardson*, 37 N. H. 304; *Van Voorhis v. Budd*, 39 Barb. 479.

Where the statute requires land to be assessed to the true owner, if known, a tax sale based upon an assessment to a person who was not the true owner is absolutely void. *Himmelmunn v. Steiner*, 38 Cal. 175; *People v. Castro*, 39 Cal. 65; *Milner v. Clarke*, 61 Ala. 258; *Guidry v. Broussard*, 32 La. Ann. 924; *Lague v. Boagni*, Id. 912; *Pix v. Dierker's Succession*, 30 La. Ann. 175; *Baskins v. Doe*, 24 Miss. 431; *Dunn v. Winston*, 31 Miss. 135; *Yenda v. Wheeler*, 9 Tex. 408; *Gardner v. Brown*, 1 Humph. 354; *Abbott v. Lindenbower*, 42 Mo. 103; *Hume v. Wainscott*, 46 Mo. 145; *Hecht v. Boughton*, 3 Wyo. 385.

Where land is returned delinquent for the nonpayment of taxes in the name of the former owner, and sold in his name for such taxes, and the purchaser at the sale procures a deed, such deed will be null and void. *Bradley v. Ewart*, 18 W. Va. 598.

A deed of land for nonpayment of a tax assessed upon it in the name of a former deceased owner, when the land was in the actual occupancy of a nonresident owner known to the assessors, conveys no title to the purchaser. *Burpee v. Russell* (N. H.), 2 Now Eng. Rep. 898; *Thompson v. Gerrish*, 37 N. H. 83; *Thompson v. Ela*, 30 N. H. 562.

The statute, however, may provide that no deed shall be invalid on account of the assessment being in any other name than that of the real owner if such land be otherwise sufficiently described in the tax book (*Merrick v. Hill*, 15 Ark. 331; *Kinsworthy v. Mitchell*, 21 Ark. 145; *Guribaldi v. Jenkins*, 27

**3. Tax deed, effect of.** An Act of the Legislature (Comp. 1874, p. 797, § 90), made a tax deed conclusive evidence of the regularity of the assessment, except for fraud; and on the trial of an action brought by the grantee in such a deed, to recover possession of the premises mentioned therein, the parties stipulated the existence of certain facts, from which it appeared in the judgment of the court that the assessment in question was made to a person not then the owner of the property. Held, that the effect of such stipulation was a waiver by the plaintiff of the conclusive character of the deed in this respect, and an admission that if in the judgment of the court the person to whom the property was assessed was not the true owner thereof, then the assessment was invalid and the tax deed void.

**4. A tax deed made in pursuance of a sale of property for a delinquent tax, under an Act which provided that such deed shall be conclusive evi-**

Ark. 453; *Schrodt v. Deputy*, 38 Ind. 90); or if such precautions were taken as to give the true owner reasonable constructive notice of the liability of his land to sale. *Strauch v. Shoemaker*, 1 Watts & S. 166; *Glass v. Gilbert*, 58 Pa. 266.

### Contesting tax title.

The original owner, or other person contesting the tax title, must lay his finger upon the precise point or points where he claims the proceedings to have been irregular or unauthorized, and must establish, by sufficient and satisfactory legal evidence the illegality or fault which vitiates them. *Colman v. Shatruck*, 32 N. Y. 345; *Meeks v. Whately*, 48 Miss. 337.

It is necessary to point out some specific defect, or raise a reasonable presumption against the sufficiency of some particular act, or of the nonperformance of some necessary duty. *Lacey v. Davis*, 4 Mich. 140; *Black, Tax Titles*, § 254.

It is not enough to prove facts from which irregularity may be inferred. *Sams v. King*, 15 Fla. 557; *Black, Tax Titles*, § 254.

**Tax deed, as prima facie evidence of prerequisites complied with.**

The Legislature has the constitutional power to provide that a tax deed shall be received as *prima facie* evidence that certain or all the prerequisites of the law have been complied with, and thus shift the burden of proof. *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213 (6 L. ed. 608); *Webb v. Den*, 58 U. S. 17 How. 576 (15 L. ed. 35); *Williams v. Kirtland*, 80 U. S. 18 Wall. 310 (20 L. ed. 684); *Freeman v. Thayer*, 33 Maine, 76; *Orono v. Veazie*, 57 Maine, 517; *Dequasse v. Harris*, 16 W. Va. 354; *Pillow v. Roberts*, 54 U. S. 18 How. 472 (14 L. ed. 223); *Stendman v. Planters Bank*, 7 Ark. 420; *Morton v. Reeds*, 6 Mo. 74; *Flanagan v. Grimmer*, 10 Gratt. 421; *Cairo & F. R. Co. v. Parks*, 32 Ark. 147; *Donahue v. O'Connor*, 13 Jones & S. 297; *Hand v. Ballou*, 12 N. Y. 543; *Burbank v. People*, 30 Ill. 555; *Graves v. Bruen*, 11 Ill. 431; *Sullivan v. Oneida*, 61 Ill. 247; *Townsend v. Radcliffe*, 63 Ill. 11; *Til. Cent. R. Co. v. Phillips*, 55 Ill. 194; *Roby v. Chicago*, 64 Ill. 447; *Fales v. Wadsworth*, 23 Maine, 553; *Kendall v. Kingston*, 5 Mass. 524; *Holmes v. Hunt*, 122 Mass. 503; *Com. v. Thurlow*, 24 Pick. 374; *Com. v. Kelly*, 10 Cush. 69; *Forbes v. Halsey*, 36 N.

dence of the regularity of the assessment, except for fraud, is a contract with the State that the deed shall so far remain conclusive evidence of title in the grantee therein, and a subsequent Act of the Legislature, making such deed only *prima facie* evidence of such regularity, is void, because it impairs the obligation of the contract. The ruling in *Marz v. Hanthorn*, 12 Sawy. 377, on this point, affirmed.

(March 4, 1889.)

**ACTION** to recover possession of real property. *Judgment for defendant.*

The facts are fully stated in the opinion.

*Messrs. W. Scott Beebe and John M. Gearin* for plaintiff.

*Messrs. Alfred F. Sears and Paul R. Deady* for defendant.

**Deady, J.**, delivered the following opinion:

This action is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to recover the possession of lot 3, in block 208, of the Couch Addition to Portland.

The pleadings consist of the complaint, answer and reply, from which it appears that the plaintiff claims title to the lot under a sale thereof for a delinquent tax thereon, on June 18, 1884, to which claim two defenses are pleaded: (1) the assessment on which said tax was levied is void, because not made to the owner of the property; and (2) the tax was paid before the sale took place. The defendant also brings into court, and deposits with the clerk, under section 2823 (Comp. 1887), the sum of

\$15.65 the same being the amount of the tax of 1883 and the accruing cost and interest thereon.

The case was submitted to the court for trial without the intervention of a jury, and upon a stipulation concerning certain facts, with the right to either party to introduce further evidence on the trial.

From this stipulation it appears that the property in question exceeds in value the sum of \$2,000, and that on July 10, 1880, R. Glisan, being the owner thereof, bargained and sold the same to the defendant by an agreement of that date, signed by himself and wife, and by the defendant.

By the terms of this agreement, erroneously called "a bond for a deed," the defendant was to pay \$800 for the property—the one half down, and remainder in quarterly payments of \$18.75 each, with interest; whereupon the vendors were to convey the premises to her in fee simple. It was also agreed that the defendant might take possession of the premises at once, and that she would pay all taxes that might be levied on the property; and that if the purchase money due under the agreement was not all paid by July 10, 1882, the agreement should become null and void at the option of Glisan, and all money then paid thereon become forfeited to the vendors.

On September 14, 1881, the defendant paid the remainder of the purchase money, and on June 7, 1887, the vendors duly conveyed the premises to her.

Prior to July 10, 1880, the property was assessed to R. Glisan as the owner thereof, but after the making of said agreement and for

Y. 53; *Groesbeck v. Seeley*, 13 Mich. 329; *Hart v. Smith*, 44 Wis. 223; 2 *Desty*, Taxn. 949.

But such legislation has been strictly construed by the courts, and the *onus probandi* is regarded as shifted only to the extent that the words of the statute require. *Dequasie v. Harris*, 16 W. Va. 354; *Moulton v. Blaisdell*, 24 Maine, 233; *Gavin v. Shuman*, 23 Ind. 32; *Sterlin v. Daley*, 37 Mo. 433; *Garratt v. Wiggins*, 2 Ill. 336; *Shoalwater v. Armstrong*, 9 Humph. 217; *Parker v. Smith*, 4 Blackf. 70; *Curtis v. Longworth*, 5 Ohio, 368; 2 *Desty*, Taxn. 949.

Such a statute did not dispense with the performance of all the requirements prescribed by law for the sale of the lands. It only shifted the burden of the proof of such performance from the party claiming under the deed to the party attacking it. *Williams v. Kirtland*, *supra*; *Parker v. Overman*, 59 U. S. 18 How. 137 (15 L. ed. 318); *Thomas v. Lawson*, 62 U. S. 21 How. 331 (16 L. ed. 32).

#### *As prima facie evidence of truth of its recitals.*

Where the statute makes tax deeds *prima facie* evidence of the truth of their recitals, if the deed fails to recite any of the facts material to the sale, the party relying on the deed must aid the omission by evidence *aliunde*; for the conveyance proves nothing but what it recites. *Milliken v. Patterson*, 91 Ind. 515; *Bonnell v. Roane*, 20 Ark. 114; *Steeple v. Downing*, 60 Ind. 473. See *Steadman v. Planters Bank*, 7 Ark. 424; *Black, Tax Titles*, § 256.

#### *As evidence of sale.*

It has generally been held that a statute making a tax deed evidence of a regular sale applies only to the sale, and does not dispense with the necessity of proof of the levy and assessment, and other preliminary steps; nor does it make the recitals in the deed evidence of such preliminary matters. *Bridges v. Bracken*, 8 Chand. 75; *Parker v. Smith*, 4 Blackf. 70; *Wilson v. Lemon*, 23 Ind. 453; *Ward v. Montgomery*, 57 Ind. 278; *Hill v. Leonard*, 5 Ill. 140; *Scott v. Detroit Y. M. Society*, 1 Doug. (Mich.) 121; *Latimer v. Lovett*, 2 Doug. (Mich.) 204; *Striker v. Kelley*, 2 Denio, 323; *Tallman v. White*, 2 N. Y. 66; *Beckman v. Bigham*, 6 N. Y. 366; *Shackelford v. Hooper*, 65 Ga. 366; *Ives v. Kimball*, 1 Mich. 308; *Doughty v. Hope*, 3 Denio, 554; *Westbrook v. Willev*, 47 N. Y. 457; *Rowland v. Doty*, Har. Ch. (Mich.)

2 L. R. A.

3; *Yenda v. Wheeler*, 9 Tex. 408; *Black, Tax Titles*, § 255.

#### *As conclusive evidence of title.*

A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because not a law regulating evidence, but an unconstitutional confiscation of property. *McCready v. Sexton*, 29 Iowa, 351. And see *Groesbeck v. Seeley*, 13 Mich. 329; *Case v. Dean*, 16 Mich. 12; *White v. Flynn*, 23 Ind. 44; *Corbin v. Hill*, 21 Iowa, 70; *Abbott v. Lindemower*, 42 Mo. 162, 46 Mo. 291; *Wright v. Cradlebaugh*, 8 Nev. 341, 349; *Young v. Beardsley*, 11 Paige, 463; *E. Kingston v. Towle*, 48 N. H. 57, 2 Am. Rep. 174; *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558; *Powers v. Fuller*, 30 Iowa, 476; *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Cooley, Taxn.*, 256.

That statutes undertaking to prescribe conclusive rules are not to be extended by construction, see *Upton v. Kennedy*, 36 Mich. 215; *Cooley, Taxn.*, 522.

#### *As presumptive evidence of title.*

In some jurisdictions the tax deed is made presumptive evidence of title in the grantee. Where this is the case, the deed not only proves, *prima facie*, the regularity of the sale, but is also evidence of the existence and legality of all the antecedent steps required by law and of the authority of the several officers who acted in the matter, and is sufficient, unless rebutted by evidence, to enable the grantee to recover possession of the land. *Huntington v. Central Pac. R. Co.*, 2 Sawy. 508; *Curtis v. Follett*, 15 Barb. 337; *Lee v. Jeddo Coal Co.*, 84 Pa. 74; *Biscoe v. Coulter*, 18 Ark. 423; *Bonnell v. Roane*, 20 Ark. 114; *Luak v. Harber*, 8 Ill. 156; *Graves v. Bruen*, 11 Ill. 431; *Spellman v. Curtenius*, 12 Ill. 409; *Ballance v. Curtenius*, Id. 416; *Manly v. Gibson*, 14 Ill. 136; *Jeffrey v. Brokaw*, 35 Iowa, 505; *Stewart v. McSweeney*, 14 Wis. 418; *Nelson v. Bountree*, 23 Wis. 367; *Black, Tax Titles*, 257.

#### *Alabama.*

In Alabama the tax deed is *prima facie* evidence that the land was subject to taxation for the years

and during the years 1880 to 1887, both inclusive, the same was assessed to the defendant without complaint or objection from anyone. It is admitted that during the same period except for the year 1883, the defendant paid the taxes levied on the property in pursuance of said assessments—and she claims to have paid it for that year also.

On May 17, 1884, the Sheriff of Multnomah County, in pursuance of a warrant from the county court thereof, levied on the premises, as the property of the defendant, for the purpose of collecting the tax levied thereon in 1883, alleged to be then delinquent, and amounting to \$3.90, notice of which levy and the sale thereon was duly published in *The Daily Oregonian* on May 19, 1884; and on June 18, 1884, the property was offered for sale and bid in by the plaintiff for the sum of \$6.47, and no redemption being made thereof, on June 6, 1887, he received a deed from the sheriff therefor.

In December, 1884, the defendant took possession of the premises and moved into a house thereon, which she commenced to build on the 4th of July previous, in which she has ever since resided.

The defendant testifies that she can neither read nor write; that in the spring of 1884 her daughter, Mrs. Belle Reed, came to her house with a newspaper in her hand and called her attention to the fact that her lot was advertised for sale for a delinquent tax, and that she and her daughter went the same day to the sheriff's office and paid the tax to the deputy, A. W. Witherell, then in attendance there; but wheth-

er she got a receipt or not she is not certain, and if she did she says it is lost or mislaid. In this statement she is corroborated throughout by her daughter. James Sheridan, who was boarding with the defendant in the spring of 1884, testifies that he heard the conversation between the daughter and the mother concerning the property being advertised for sale and saw them go out of the house later in the same day, saying they were going to the sheriff's office to pay the tax.

The deputy testified that he has no remembrance of the tax being paid, that there is no stub in the receipt book showing the payment of the tax, as there should be if it was paid, and he is therefore quite confident it never was paid.

The defendant and her daughter both state that a Mrs. Ann Keating, with whom the latter was living at the time, accompanied her to the house of the defendant, to inform her that the tax was delinquent, and then went with them to the sheriff's office and saw the same paid. The deposition of Keating was read by the plaintiff, in which she denies this story, so far as she is concerned, *in toto*. But Sheridan testified that a woman, not known to him, came to the house on this occasion with the daughter, and afterwards left the house with her and the defendant, when the latter said she was going to pay the tax.

The testimony of the deputy Witherell, that the tax was not paid, because he does not remember it, and because there is no stub to that effect in the receipt book, amounts to but little more in effect than the legal presumption that he did his

stated, that the taxes were not paid, and that the land was not redeemed. *Lassiter v. Lee*, 63 Ala. 287; *Stoudenmire v. Brown*, 57 Ala. 481; 2 Desty, Taxn. 950.

Save as to these things, the recitals in the deed are not evidence, and the onus is on the purchaser to prove their truth. *Stoudenmire v. Brown*, 57 Ala. 481; *Cooley*, Taxn. 521.

The deed of the judge of probate to the purchaser of lands sold for delinquent taxes is *prima facie* evidence of the facts therein recited (Code, § 460) only when executed in substantial compliance with the requirements of the statute, and properly recorded. *Bolling v. Smith*, 79 Ala. 535.

#### Arkansas.

By a law of Arkansas, sales and conveyances made by the sheriff and collector for the nonpayment of taxes shall vest in the grantees a valid title and shall be *prima facie* evidence of the regularity and legality of the sale. *Thomas v. Lawson*, 62 U. S. 21 How. 331 (16 L. ed. 82); *Pillow v. Roberts*, 54 U. S. 13 How. 472 (14 L. ed. 228).

In proceedings for the confirmation of the tax title, when the tax deed is "in the usual form," it is to be taken as *prima facie* evidence, not merely of the qualification of the officer, but that the prerequisite steps have been regularly taken, including the description of the land sold and the price at which it was sold, and irregularities must be proved by the party impeaching the deed. *Bonnell v. Roane*, 20 Ark. 114; 2 Desty, Taxn. 950.

#### California.

In California tax deeds are *prima facie* evidence of title. *Norris v. Russell*, 5 Cal. 249; 2 Desty, Taxn. 949.

The recital, in a tax deed, as to whom the property was assessed, is conclusive. *Brady v. Dowden*, 50 Cal. 51; *Grotefend v. Utz*, 53 Cal. 666; *Grimm v. O'Connell*, 54 Cal. 522. See *Mayo v. Haynie*, 50 Cal. 70; 2 Desty, Taxn. 964.

#### District of Columbia.

As a general rule a tax deed is not even *prima facie* evidence of title. It is incumbent on the holder who asserts title under it to prove affirmatively that the taxes were not paid, and that the land was not redeemed. *Lassiter v. Lee*, 63 Ala. 287; *Stoudenmire v. Brown*, 57 Ala. 481; 2 Desty, Taxn. 950.

tively that all the preliminaries to the sale which the law prescribes were complied with. *Brewer v. D. C. (D. C.)*, 4 Cent. Rep. 622, 5 Mackey, 274.

#### Illinois.

A tax deed, in due and regular form, made upon the record of judgment and sale for taxes, and affidavit made for the purpose of obtaining the deed, is *prima facie* evidence of seven distinct specified facts, among which are: that the real estate was sold for taxes or special assessments, and that the sale was conducted in the manner required by law—thus obviating the necessity of introducing the precept in evidence, in the first instance. *Ransom v. Henderson*, 1 West. Rep. 639, 114 Ill. 523.

The Legislature has the constitutional power to change the common-law rules of evidence, and provide that a tax deed shall be received as *prima facie* evidence that certain or all prerequisites of law have been complied with, and thus shift the burden of proof. See *Burbank v. People*, 90 Ill. 554; *Sullivan v. Oneida*, 61 Ill. 247; *Townsend v. Radcliffe*, 63 Ill. 11; Cent. R. Co. v. Phillips, 55 Ill. 194; *Roby v. Chicago*, 64 Ill. 447; *Ransom v. Henderson*, 1 West. Rep. 639, 114 Ill. 523.

In Illinois, in order to make a tax deed *prima facie* evidence, it is first necessary to show a judgment against the parcel of land in default for nonpayment of the tax, an order for the sale, and a precept thereon; these facts are not proved by the recitals of the deed. The same rule probably obtains in some other States. *Little v. Herndon*, 77 U. S. 10 Wall. 26 (19 L. ed. 878); *Spellman v. Curtenius*, 12 Ill. 409; *Marsh v. Chestnut*, 14 Ill. 224; *Charles v. Waugh*, 35 Ill. 817; *Dukes v. Rowley*, 24 Ill. 210; *Baily v. Doolittle*, 24 Ill. 577; *Elston v. Kennicott*, 46 Ill. 187; *Wilding v. Horner*, 50 Ill. 50; *Cottingham v. Springer*, 88 Ill. 90; *Gage v. Lightburn*, 93 Ill. 248; *People v. Doe*, 81 Cal. 220; *Bolan v. Bolan*, 4 Nev. 150; *Black Tax Titles*, 250.

The Illinois Act of February 21, 1861, does not dispense with the necessity of producing the judgment and precept as the foundation of a sale for taxes, and of the validity of the deed. *Little v. Herndon*, *supra*.

#### Iowa.

In Iowa a tax deed is conclusive evidence of the

duty in the premises; that is, if the tax was paid, he gave the party a receipt therefor, and made a corresponding entry on the stub thereof. Comp. 1887, § 766, subd. 15; 2 Whart. Ev. §§ 1818, 1819.

The statute (Comp. 1887, § 2801) makes it the duty of the sheriff on "the receipt of money for taxes" to give a receipt therefor, and contains a form of the stub thereof, which he keeps in his office, and the particulars to be entered thereon.

The direct, affirmative testimony of one altogether credible witness to the fact of payment of taxes ought to be sufficient to overcome this presumption. But the defendant is peculiarly interested in the result, and the daughter is as likely to be influenced by that fact as her mother.

I fear it would in some, if not many, instances, make tax titles a delusion and a snare if they could be avoided by the mere oath of the delinquent or his immediate relatives or prospective heirs, that the taxes had been paid without taking a receipt therefor.

And the fact that no receipt was taken by the defendant for the payment of this tax is a circumstance of some weight against the statement that the same was paid. The officer would naturally give the defendant a receipt; and she would most naturally, if necessary, demand one.

The testimony of Mrs. Keating does not contradict the testimony of the defendant and her daughter as to the payment of the tax, but only a collateral circumstance of the transaction, as related by them, namely: her presence at such payment.

But, notwithstanding Keating's testimony, the defendant may have paid the tax; and what is more, her testimony may not be true. It is not apparent what object the defendant could have in falsely connecting her with the transaction. Her memory may be at fault with reference to the person who came to the house with her daughter and went with them to the sheriff's office; for Sheridan, who seems to be a disinterested and fair witness, says that some woman came to the house with the daughter on the occasion in question, and went with the parties when they left the house.

I was certainly impressed on the trial with the apparent fairness and candor of the defendant and her daughter as witnesses; and it does not seem probable that the former would, even if she had allowed this property to go to sale for the paltry sum of this tax, have taken no steps to redeem the same, within the two years allowed by law—or would have continued to pay the taxes on the property in the mean time. I can but think she was at least laboring under the impression that the tax of 1888 was paid. The property was her home, and probably all she had of any value in the world; and it seems improbable that she would consciously sacrifice it for the paltry sum of \$3.90.

And yet I do not feel satisfied, under the circumstances, to find as a matter of fact that this tax was paid by the defendant. This leads to the consideration of the question, Was there any valid assessment of this property preparatory to the levy of this tax?

Section 2735 of the Compilation of 1887 (§ 2 of Act Oct. 26, 1882), provides: "All lands shall be assessed and taxed in the county where the

fact of a lawful sale. Gould v. Thompson, 45 Iowa, 451; McCready v. Sexton, 29 Iowa, 856. See Chandler v. Keller, 44 Iowa, 871; Desty, Taxn. 955.

Statutes are sustained which make tax deeds conclusive evidence of regularity in the listing and assessment, and that the property was regularly advertised and sold. Allen v. Armstrong, 16 Iowa, 508; McCready v. Sexton, 29 Iowa, 856; Rima v. Cowan, 31 Iowa, 125; Clark v. Thompson, 37 Iowa, 536; Madison v. Sexton, Id. 532; Smith v. Easton, Id. 534; Easton v. Perry, Id. 631; Bullis v. Marsh, 56 Iowa, 747; Robinson v. First Nat. Bank, 48 Iowa, 354; Cooley, Taxn. 522; Scofield v. McDowell, 47 Iowa, 130; 2 Desty, Taxn. 954.

A treasurer's deed for land sold for taxes, in the State of Iowa, if substantially regular in form, is, under the statute of that State, *prima facie* evidence of sale; and if there was a *bona fide* sale in substance or in fact, the deed is conclusive evidence that it was made at the proper time and in the proper manner—these being merely directory, and not fundamental. Callanan v. Hurley, 98 U. S. 387 (23 L. ed. 361); Phelps v. Meade, 41 Iowa, 470; Slocum v. Slocum, 70 Iowa, 263; Shawler v. Johnson, 52 Iowa, 476; Clark v. Thompson, 37 Iowa, 536; 2 Desty, Taxn. 954; Rima v. Cowan, 31 Iowa, 125; Black, Tax Titles, § 253.

But it is not constitutional to make the tax deed conclusive evidence of an assessment of the property, this being a jurisdictional prerequisite. Imme-gart v. Gorgas, 41 Iowa, 436; Phelps v. Meade, 41 Iowa, 470; Nichols v. McGlathery, 43 Iowa, 186; Easton v. Savery, 44 Iowa, 654; Black, Tax Titles, § 253; Cooley, Taxn. 522.

It is not conclusive evidence that notice was given of the expiration of time in which to redeem (Wilson v. Crafts, 56 Iowa, 450; Reed v. Thompson, Id. 453); nor that the description of the land is correct (Imme-gart v. Gorgas, 41 Iowa, 436; Black, Tax Titles, § 253; Cooley, Taxn. 522); nor that a sale which was in fact private, fraudulent and illegal was public and legal. Butler v. Delano, 42 Iowa, 250; Thompson v. Ware, 43 Iowa, 455; Cooley, Taxn. 522.

#### Kansas.

In Kansas a deed issued upon a certificate is *prima facie* evidence of sale. 2 L. R. A.

*factis* evidence of title, and regularity of all prior tax proceedings. Ide v. Fineran, 29 Kan. 506; Gardenhire v. Mitchell, 21 Kan. 87; McCauslin v. McGuire, 14 Kan. 234; Hobson v. Dutton, 9 Kan. 477; 2 Desty, Taxn. 950.

#### Kentucky.

In Kentucky it is *prima facie* evidence of the facts recited. Allen v. Robinson, 3 Bibb, 326; Hord v. Bodley, 1 J. J. Marsh. 79; 2 Desty, Taxn. 950.

#### Louisiana.

A tax deed in Louisiana is *prima facie* evidence of a valid sale, but in the absence of recitals in the deed and of proof *alunde* of the appointment of a curator, and the service of notice on him, the sale of the land of a nonresident owner is void. Rapp v. Lowry, 30 La. Ann. 1272; Cooley, Taxn. 519.

A sale is defeated in Louisiana by showing that the land stood of record in the name of the owner and was assessed to another. Lague v. Boagni, 39 La. Ann. 612; Guidry v. Broussard, 33 La. Ann. 534; Cooley, Taxn. 521.

It seems that in Louisiana a tax deed cannot be collaterally attacked. See Lannes v. Workingmen's Bank, 29 La. Ann. 112; Jurey v. Allison, 30 La. Ann. 1234; Cooley, Taxn. 519.

Louisiana Act 48 of 1861, § 62, providing for obtaining an auditor's deed of sale, does not impair the effectiveness of the tax collector's deed as a title. Barrow v. Wilson, 39 La. Ann. 408.

#### Maine.

In Maine if the deed does not show on its face that the tax had remained unpaid for the statutory time before notice of sale; that the notices were legally posted and personal notice given; or if it does show that sale was made *en masse* and no offer made to sell a fractional part—it is void. Wiggin v. Temple, 73 Maine, 390; Cooley, Taxn. 519.

In Maine parol testimony is inadmissible to prove that the grantee named in the deed is not the one intended by the grantor. Whitmore v. Learned, 70 Maine, 233; Crawford v. Spencer, 8 Cush. 418; 3 Desty, Taxn. 954.

#### Minnesota.

In Minnesota a tax deed is not *prima facie* evi-

same shall lie; and every person shall be assessed in the county where he resides when the assessment is made, for all real and personal property then owned by him within such county; and unoccupied land, if the owner is unknown, may be assessed as such, without inserting the name of any owner."

By this Act, the rule prescribed in § 6 of the Act of 1854 (Comp. 1874, p. 750, § 7), which allowed "land owned by one person and occupied by another" to be assessed in the name of either, was changed. In the Act of 1882, sometimes called "The Mortgage Tax Law," the provision allowing an assessment to be made in the name of a mere occupant was omitted for some reason; and now and since then land is required to be assessed to the owner, unless it is unoccupied, in which case it may be assessed, as such, without naming the owner.

When a person is assessed "for" real property, as being "owned" by him, he must be designated on the assessment roll as the owner of the same. It is not sufficient to assess or value the land for taxation generally. It must be assessed or valued as the land of the owner thereof and not another. Cooley, Taxn. 278.

In *Marz v. Hanthorn*, 12 Sawy. 373, this court held that where the statute requires property to be assessed in the name of or to the owner, the name is a part of the description of the premises, and, I may add, is a material part of the transaction.

It may be that the action of the assessor in assessing unoccupied land to an unknown owner cannot be attacked in a proceeding like

this, except by fraud. But the ownership of this land was known. It had been assessed to R. Glisan, prior to 1880, as the owner thereof, and so far as appeared of record, he was still such owner. Nor is it claimed that the owner was unknown.

Was that ownership changed prior to 1890 when this assessment of the property was made to the defendant? The legal title and estate was still in Glisan. By virtue of the agreement of sale and the payment of the purchase price, the defendant had an equity, as against Glisan or anyone who might take the legal title from him, with a knowledge of the facts, to have a conveyance of the property made to her—to have a specific performance of the contract of sale. But the property was not "owned" by her in the legal acceptance of the phrase, until the conveyance was made to her in 1887.

Nor is the fact that she agreed in the mean time to pay the taxes material. This was a mere private arrangement between the vendors and vendee, of which the law took no cognizance. A lessee of property might agree to pay the taxes thereon, but that would not make him the owner of the property for the purpose of taxation or otherwise.

Nor is it material that the defendant paid the taxes on the property after the sale to her. She did so, not because the State had any legal claim upon her for such taxes, but in pursuance of her contract with her vendors to that effect. And in so doing, so far as the State was concerned, she was acting as the agent of such vendors. Nor was she bound to object to the

dence of title unless it be first shown that the county auditor had authority to make the deed; and a mere recital in the deed that the state auditor directed the sale is not sufficient. Shearer v. Corbin, 1 McCrary, 305; 3 Fed. Rep. 705; 2 Desty, Taxn. 951; Black, Tax Titles, § 259; Cooley, Taxn. 518.

#### Mississippi.

In Mississippi one claiming under a tax title derived from the State must not only produce his deed from the State, but must show how the State acquired title. Vaughan v. Swayzie, 50 Miss. 704; Black, Tax Titles, 259.

The Legislature has power to make the deed *prima facie* evidence of the title, and to provide that it shall not be invalidated except by proof of fraud or mistake in the assessment or sale, or that the taxes were paid. Griffin v. Dogan, 48 Miss. 11; Virden v. Bowers, 55 Miss. 1; Bell v. Coates, 54 Miss. 583; Cooley, Taxn. 523.

The tax title may be defeated by showing that the land was not legally assessed. Davis v. Vanardale, 50 Miss. 367.

Or that the assessment roll in the hands of the collector was not properly certified by the clerk. Gibbs v. Dortch, 63 Miss. 671; Black, Tax Titles, § 260.

The statute which makes deeds conclusive evidence of title five years after sale, cures the failure of a collector to give the bond required by statute. Powers v. Penny, 50 Miss. 5; 2 Desty, Taxn. 954.

#### Missouri.

The Revenue Act makes tax deeds in Missouri conclusive evidence that everything has been done, the omission of which would have been only an irregularity in procedure, and *prima facie* evidence of everything else. Raley v. Guinn, 76 Mo. 270; Abbott v. Lindenbower, 42 Mo. 182, 46 Mo. 291. Compare Ewart v. Davis, 76 Mo. 134; 2 Desty, Taxn. 953; Cooley, Taxn. 523.

#### Nebraska.

By the law of Nebraska, a deed executed by the treasurer of the county to the purchaser at a tax sale vests in him a complete legal title to the premises, unless some defect affecting the assessment and sale exists, or fraud has been committed in the sale. Holland v. Challen, 110 U. S. 15 (28 L. ed. 52).

3 L. R. A.

#### New Jersey.

In New Jersey in any action in which title to land is involved, if the deed, declaration of sale, or conveyance are in proper form, it is conclusive evidence of title. Woodbridge v. State, 43 N. J. L. 202.

#### New York.

In New York the deed proves only the regularity of the proceedings at the sale, the regularity of prior proceedings must be shown, under a statute which makes the deed evidence of the regularity of the sale. Striker v. Kelly, 2 Denio, 323; Tallman v. White, 2 N. Y. 66; Doughty v. Hope, 3 Denio, 504; Beekman v. Bigham, 5 N. Y. 306; Westbrook v. Willey, 47 N. Y. 457. See also Wilson v. Lemon, 23 Ind. 433; Rowland v. Doty, Harr. Ch. (Mich.) 3; Ives v. Kimball, 1 Mich. 308; Scott v. Detroit, Y. M. Society, 1 Doug. (Mich.) 119; Latimer v. Lovett, 2 Doug. (Mich.) 204; Yenda v. Wheeler, 9 Tex. 408; 2 Desty, Taxn. 951.

Where the statute makes tax deeds "conclusive evidence that the sale was regular," a deed, in proper form and containing the usual recitals, may well be conclusive that the proceedings of the comptroller in making the sale were regular and according to law; but it will not be even presumptive evidence of the existence of those facts which are necessary to invest the comptroller with power to sell. Beekman v. Bigham, 5 N. Y. 306; Black, Tax Titles, § 255.

Notwithstanding the fact that there may be a statute making a tax deed *prima facie* or conclusive evidence of the regularity of the proceedings, if the holder of such a deed goes into proof of the steps necessary to make the sale valid, he will be deemed to have waived the benefit of the presumption in favor of the deed. Curtiss v. Follett, 15 Barb. 337; Black, Tax Titles, § 254.

#### Ohio.

It is competent for the Legislature to make a tax deed evidence of the legality of all prior proceedings so far as respects the essential prerequisites for the exercise of the taxing power. McGruder v. Emmy, 35 Ohio St. 221. See also McCready v. Benton, 29 Iowa, 357; Abbott v. Lindenbower, 42 Mo. 182; White v. Flynn, 23 Ind. 46; 2 Desty, Taxn. 953.

But to be *prima facie* evidence, the deed must



assessment of the property in her name, if she was ever aware of it. It was not her duty to instruct the assessor to whom to assess the property; and it is not claimed that she ever returned it for assessment as her own. And finally, no one was prejudiced by her silence or acquiescence. Cooley, Taxn. 578.

It is true that the term "owner" is sometimes used in a large and comprehensive sense, or at least is so construed. For instance, where it is used to designate the person who may redeem property sold for taxes or upon execution, it may be and is construed in the interest of justice and convenience to include the holder of an equity or what is sometimes called the owner of the "equitable estate."

In *Dubois v. Hepburn*, 35 U. S. 10 Pet. 23 [9 L. ed. 325], the supreme court held that a statute of Pennsylvania, which gave the "owner" or "owners" of land sold for taxes the right to redeem the same, included an owner of an undivided part of the property—so that he might redeem the whole tract. In the course of his opinion, Mr. Justice Baldwin said such a law ought "to receive a liberal and benign construction;" nor should the right to redeem be "narrowed down by a strict construction." And continuing he said: "Any right, which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession or enjoyment, or any part of it which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem."

But the owner spoken of in the statute relating to assessment of land for taxation is the legal owner—the one having the *jus disponendi* or the right of disposal. The statute declares that a

sheriff's deed to a purchaser at a tax sale shall pass the "legal title" to the premises, thereby necessarily implying that if the land is not assessed to owners unknown, it must be assessed in the name of the person in whom such title is vested at the time. The record of deeds is *prima facie* the proper evidence of ownership for the purpose of taxation; and the statute should have limited the word "owner" to the last vendee of record.

In *Washington v. Pratt*, 21 U. S. 8 Wheat. 631 [5 L. ed. 714], it was held that a statute authorizing a sale of lots in Washington City for delinquent taxes, on a notice varying in length according to the residence of the parties, whether within the District of Columbia or without the United States, to whom "the property belongs," which notice, among other things, was required to contain "the name of the person or persons to whom the same may have been assessed," did not authorize the sale of a lot to anyone but the "actual" owner.

In *Davis v. Cincinnati*, 38 Ohio St. 27, it was held that where a statute made an assessment on a lot for street improvements, a debt or demand that could be enforced against the "owner" thereof in a personal action, that such action could not be maintained against a lessee of the property; and that no one was the "owner" of the same, within the meaning of the statute, who had less than a freehold interest therein.

In reply to the suggestion of counsel, that the assessment of this property is a proceeding *in rem*, and that the name in or to which it is entered on the assessment roll is a matter non-essential, attention is called to the cases of *Dowell v. Portland*, 13 Oreg. 248, and *Hawthorne v.*

recite enough of the proceedings to show authority to sell, and to authorize the officer to make the deed. *Woodward v. Sloan*, 27 Ohio St. 522; *Turney v. Yeoman*, 14 Ohio, 208.

It is not, without other evidence, *prima facie* evidence of the validity of the sale; nor will the destruction of the records warrant the presumption of its validity. *Rhodes v. Gunn*, 35 Ohio St. 387; *Jones v. Devore*, 8 Ohio St. 420.

#### Oregon.

Under the Oregon Statute making a tax deed conclusive evidence of regularity save as to certain specified matters, it may be shown that the sale was made after the warrant had expired. *Kelly v. Herrall*, 20 Fed. Rep. 364; Cooley, Taxn. 522.

#### Pennsylvania.

The deed from the commissioners is not the title; it is merely evidence of title. *Kunes v. McCloskey*, 7 Cent. Rep. 401, 115 Pa. 461, 19 W. N. C. 286.

In Pennsylvania it is held that a copy of a treasurer's deed, from the registry in the treasurer's office, is not evidence, and cannot be made to take the place of the original. *Townsen v. Wilson*, 9 Pa. 271; Black, Tax Titles, 259.

#### South Carolina.

In South Carolina the auditor's deed for delinquent land is *prima facie* evidence of good title under the statute, but there is no such provision relating to forfeited lands; in such case the State must prove its title. *State v. Thompson*, 18 S. C. 538; *Cooke v. Fennington*, 15 S. C. 125; 2 Desty, Taxn. 952.

#### Tennessee.

In Tennessee inquiry into irregularities occurring before judgment of condemnation and order of sale is precluded, unless shown to have been previously paid; otherwise as to subsequent irregularities. *Douglass v. Mumford*, 7 Baxt. 415; *Sampson v. Marr*, 7 Baxt. 436; *Tharp v. Hart*, 2 Sneed, 570; *Henderson v. Starritt*, 4 Sneed, 472; 2 Desty, Taxn. 955. 2 J. R. A.

#### Texas.

A tax deed is of no force unless accompanied by proof of a valid sale by virtue of which the deed was executed. *Caldier v. Ramsey*, 65 Tex. 218.

Independent of constitutional and statutory law, a tax deed does not affect the title, unless the authority of the maker of the deed is shown by proof of performance of all precedent requisites. *Meredith v. Coker*, 65 Tex. 22.

#### West Virginia.

The material fact stated in the deed that the land was taxed in the name of a certain named party, while *prima facie* true, may be contradicted by the sheriff's report of sales. *Dequasie v. Harris*, 15 W. Va. 345.

#### Wisconsin.

A tax deed issued by the county clerk to the county, duly witnessed and acknowledged, is presumptive evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to and including the execution of the deed, and may be recorded with like effect as other conveyances of land. *Bemis v. Weege*, 67 Wis. 427.

It is *prima facie* evidence of title although it fails to show the year the taxes were delinquent. *Marshall v. Denson*, 48 Wis. 558; 2 Desty, Taxn. 952.

It is conclusive of the existence of the contingency which authorizes a deputy to perform the duties of the clerk. *Huey v. Van Wie*, 23 Wis. 612; 2 Desty, Taxn. 955.

A tax deed after the expiration of the statutory period of limitation is conclusive of the regularity of the proceedings upon which it is based only in cases where the lands were taxable by the town or other taxing district whose authorities assumed to levy the tax. *Smith v. Sherry*, 54 Wis. 114; Black, Tax Titles, 257.

Under the General Laws of Wisconsin of 1861, a tax deed given on a sale for taxes, but which included an illegal charge of five cents for a stamp, becomes conclusive evidence of title after three years from recording the deed. *Geekle v. Kirby Carpenter Co.* 106 U. S. 379 (27 L. ed. 157).

*E. Portland*, 18 Oreg. 271. Both cases were assessments for improving streets, and the statutes under which they were made required that they should be entered in a record, called the "Docket of City Liens," in the name of the owner of the property. In the first case the name of the father of the owner was used, and in the second one the property was assessed to the estate of a deceased person. The court held the assessment void, because they were not entered in the docket in the name of the true owner.

The warrant for the collection of a delinquent tax requires the sheriff to make the tax out of the personal property of the delinquent. Comp. 1887, § 2814.

But how can this command be obeyed unless the assessment is made to the owner of the property? So far, the tax is a personal charge, to be enforced by the sale of the owner's goods and chattels, if any be found. If the real property of A may be assessed to B, then the personal property of B may be taken and sold to pay the tax on the real property of A; which could never have been the intention of the Legislature.

Something remains to be said concerning the legal effect of the sheriff's deed to the plaintiff.

By the law in force when this sale was made such deed was *prima facie* evidence of the regularity of the prior proceedings, which presumption could not, as to the assessment, be overcome except by proof that the same was fraudulent. Comp. 1874, p. 767, § 90.

An assessment cannot be considered fraudulent simply because, so far as appears, the assessor has ignorantly or carelessly assessed the property to the wrong person as owner. *Marz v. Hanthorn*, 12 Sawy. 874.

The Legislature may make a tax deed conclusive evidence of the regularity of all such prior proceedings as are mere matters of expediency—acts which might have been dispensed with in the first place. And in my judgment the entry of property on the assessment roll in or to the name of the owner is one of them. *Marz v. Hanthorn*, 12 Sawy. 874, 875.

It follows from these premises, that when the State sold this lot to the plaintiff it contracted with him that the legal effect of his deed should not be changed or overcome by proof that the property was assessed, without fraud, to the wrong person as owner.

The Act of February 21, 1887 (Comp. 1887, § 2828), makes the sheriff's deed *prima facie* evidence only of the regularity of the prior pro-

ceedings, and therefore it may be overcome by proof to the contrary in any respect—as that the property was assessed, without fraud, in the name of a person who was not the true owner. In this respect the Act of 1887, if held applicable to the plaintiff's deed, would change its legal effect as a muniment of title, and so far impair the obligation of the contract with him, contrary to the Constitution of the United States. *Marz v. Hanthorn*, 12 Sawy. 876.

Nor is it material that the deed was not executed until after the passage of the Act of 1887. The contract of the State with the plaintiff arose out of the circumstances of the sale and the law then in force and applicable to the transaction.

I am aware that the majority of the supreme court of the State, in *Stroile v. Washer*, 16 Pac. Rep. 928, since the decision of this court in *Marz v. Hanthorn*, *supra*, but apparently without being aware of it, have decided this question otherwise. But the question is a federal one, and the national instead of the local courts give the law on the subject. I admit that there is no question but that the Legislature may shift the burden of proof between the purchaser and the delinquent taxpayer. But this is not that case. The section 90, *supra*, closed the door against all further proof and said in effect that no evidence should ever be received to impair the legal effect or operation of the deed in this respect.

A deed given by the State on such a legislative assurance is a contract, a warranty against the existence of any such defect in the prior proceedings, which the State cannot vary or impair.

But by the voluntary stipulation of the parties it is admitted that certain facts exist which, in the judgment of the court, show that the property was not assessed to the true owner, and that therefore the assessment is invalid. The plaintiff thereby waived the conclusive effect of his deed in this respect and practically admitted that if, upon the facts stated, the defendant was not, in the judgment of the court, the owner of the property within the purview of the tax law, the assessment was invalid and his deed void.

A finding of fact will be filed, to the effect that the tax was not paid by the defendant and that the assessment was made to the defendant as owner, when R. Glisan was the true owner, and of law that the defendant is entitled to the possession of the premises, and a judgment in bar of the action, and for costs.

## MARYLAND COURT OF APPEALS.

Elizabeth ATTRILL, Appt.,

v.

Collis P. HUNTINGTON.

(....Md.....)

### 1. The liability imposed on the officers of

NOTE.—Penal laws of foreign State not enforceable.

The courts of no country execute the penal laws of another. *The Antelope*, 23 U. S. 10 Wheat. 60, 123 (6 L. ed. 238, 232).

The only cases in which the Courts of the United States have entertained suits by a foreign State have been to enforce demands of a strictly civil nature. *The Sapphire*, 73 U. S. 11 Wall. 164 (20 L. ed. 127); *King of Spain v. Oliver*, 2 Wash. C. C. 429.

The rule that the courts of no country execute

The rule that the courts of no country execute

2. A judgment rendered in one State for the debt of a corporation against one of its directors, under a statute making them individually liable for such debts by reason of making a false certificate, cannot be enforced in another State; the nature of the original claim, being for a penalty, is not charged by its reduction to a judgment.
3. A judgment against a director of a corporation for a corporate debt, based on his liability as director under the New York Act of 1875, by reason of having made a false certificate, merges a claim for the same debt against him as a stockholder.
4. A defense of the Statute of Limitations properly arises under a demurrer when the facts creating the bar are shown by the complaint.

(Stone and McSherry, JJ., dissent.)

(February 8, 1899.)

**APPEAL** by defendant, from an order of the Baltimore City Circuit Court overruling a demurrer to a bill filed to set aside certain transfers of stock. *Reversed.*

The facts are fully stated in the opinion.

Argued before Alvey, Ch. J., Miller, Irving, Stone, Yellott, Bryan and McSherry, JJ.

*Messrs. S. Teackle Wallis and William A. Fisher*, for appellant:

The cause of action was for a penalty.

*Merchants Bank v. Bliss*, 85 N. Y. 412; *Wiles v. Suydam*, 64 N. Y. 176, 177; *Veeder v. Baker*, 88 N. Y. 159; *Stokes v. Stickney*, 96 N. Y. 828.

The New York Court held the statute to be penal, and regarded the judgment in controversy to be the enforcement of a penalty. It is so regarded by the Maryland Court.

*First Nat. Bank v. Price*, 33 Md. 492, 498, 494, 499.

The 21st section of the New York Act being of a penal nature, it had no operation in Maryland, and "could not be taken notice of" by her courts. *Ibid.*

It was simply nonexistent here, and could present no obstacle to any assignment which Mr. Attrill might think proper to make.

Story, Conf. L. §§ 7, 92, note a; Whart. Conf. L. §§ 4, 883; Cook, Stock & Stockh. § 218, notes 1, 2, 3; *Flash v. Conn*, 109 U. S. 876 (27

L. ed. 968, 969); *Seoville v. Canfield*, 14 Johns. 340; *Folliott v. Ogden*, 1 H. Bl. 135; *Ogden v. Folliott*, 3 T. R. 733; *King of Two Sicilies v. Willcox*, 1 Sim. N. S. 830, 831; *Brigham v. Claphin*, 31 Wis. 607.

The acts denounced by the 21st section are criminal and the penalty is a punishment.

*Shaler & H. Quarry Co. v. Bliss*, 84 Barb. 809; *Mitchell v. Hotchkiss*, 48 Conn. 18, 19, 20; *Thomp. Liability of Officers*, pp. 417, 427, 431-433; *U. S. v. Lathrop*, 17 Johns. 8, 9; *Story*, Conf. L. §§ 620, 621, 625 a.

Whenever justice requires it, a judgment will be treated as only the former cause of action in a new form.

*Freem. Judgm. § 244; Owens v. Bowie*, 2 Md. 457.

Courts will not enforce foreign judgments rendered upon a cause of action of a penal nature.

*Story*, Conf. L. p. 620; *Piggott, Foreign Judgm. p. 209; Bar, Internat. L. 574, 575; Westlake, Internat. L. § 468; 2 Kames, Eq. 826, 866; Wisconsin v. Pelican Ins. Co. 127 U. S. 239-291 (32 L. ed. 239).*

*Messrs. John K. Cowen and E. J. D. Cross* for appellees.

**Bryan, J.**, delivered the opinion of the court:

Collis P. Huntington filed a bill in equity to set aside certain transfers of stock made by Henry Y. Attrill. They were made to himself as trustee for his wife and daughters. The present appeal involves the stock transferred for the benefit of Elizabeth Attrill, the appellant, who is one of his daughters.

It is alleged in the bill of complaint that Attrill made these transfers of stock without valuable consideration, and with intent to delay, hinder and defraud his creditors, and especially the complainant, who is alleged to be a creditor. The bill is filed by the complainant in his own behalf to procure the payment of his own debt. No other creditor has been made a party to the suit, and no claims against this stock are presented for adjudication except those asserted by the complainant in his own interest.

The bill shows that the complainant in June, 1886, recovered against Attrill and one Souter a judgment for nearly \$100,000 in the Supreme

the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. Whart. Conf. L. § 883; Westlake, Internat. L. 1st ed. § 388; Piggott, Foreign Judgm. 209, 210.

The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the Act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered. Const. art. 4, § 1; Act May 26, 1790, chap. 11, § 1 Stat. at L. 122; Rev. Stat. § 905.

*Foreign judgments; force and effect of.*

Judgments recovered in one State of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, or impeachable for fraud in obtaining them, if rendered by a court having jurisdiction. 2 L. R. A.

radiation of the cause and of the parties. *Hanley v. Donoghue*, 116 U. S. 4 (29 L. ed. 535, 536).

The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. They enjoy, not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments. *Story*, Conf. L. § 609; *Thompson v. Whitman*, 35 U. S. 18 Wall. 457, 462, 463 (21 L. ed. 397, 399).

The technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it. *La. v. N. O. 109 U. S. 285, 288, 291 (27 L. ed. 936-938); La. v. St. Martin's Parish*, 111 U. S. 716 (28 L. ed. 574); *Chase v. Curtis*, 113 U. S. 452, 464, 28 L. ed. 1038, 1042; *Boytan v. Ball*, 121 U. S. 457, 466 (30 L. ed. 985, 986).

To give it the force of a judgment in another State, it must be made a judgment there and can only be executed in the latter as its laws may permit. *McElmoy v. Cohen*, 38 U. S. 13 Pet. 312, 325 (10 L. ed. 177, 189).

Court of New York for the County of Kings. And it is alleged that the cause of action on which the judgment was rendered arose in June, 1880, and was in this wise: that a certain corporation had been formed under the laws of New York, entitled "The Rockaway Beach Improvement Company, Limited," of which the said Attrill was an incorporator and director; that the complainant loaned the said corporation \$100,000 to be repaid on demand; that only \$982 of this sum has been repaid; that the amount of the capital stock of the corporation was \$700,000; that Attrill, as director of the corporation, signed and verified by his oath a certain certificate under the Statutes of New York, stating that the full amount of the capital stock of the corporation, to wit: the sum of \$700,000, had been paid in; that said Attrill when he signed and swore to said certificate knew that it was false; and that the law of New York made Attrill liable to pay the debts of the corporation by reason of his making under oath said false certificate.

An exemplification of the judgment was filed with the bill of complaint. It showed that judgment was demanded and obtained against Attrill and Soutter on the ground that they had made the false certificate under oath. We were informed at the argument that, by agreement of counsel, the New York Statute was to be considered as set forth in the bill. A demurrer was filed by the defendant, which was overruled by the court below.

The 21st section of the statute is in these words: "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof." Act 1875, chap. 611, N. Y.

For doing any of these forbidden acts the officers of a corporation are made liable for its debts. No inquiry is to be made whether the creditor has been deceived, and induced by deception to lend his money or to give credit, or whether he has incurred loss to any extent by the inability of the corporation to pay; nor is the recovery limited to the amount of the loss sustained. All that is necessary to show is that the act has been committed, and thereupon any creditor is entitled to recover the full amount of his debt.

In an action for an injury to the person or property of an individual, it must be first shown that his rights have been invaded, and then the extent of the damage must be shown. It is true that in some cases the law allows a recovery far beyond the amount of actual damage, as where the injury was inflicted from fraudulent or malicious motives; but in these cases the recovery is founded on the injury to rights of person or property, and the circumstances which justify an exceptional measure of damages must be proved in evidence. There is a very marked and obvious difference between these cases and a case where a statute enacts that because of the commission of a certain act, without reference to any other circumstance, a party shall incur a liability. Because thou hast done this thing, thou shalt pay the debts of another.

It is extremely difficult to conceive that the

statute was not intended to provide a punishment for the obnoxious acts. The payment of a sum of money which a party would not otherwise be obliged to pay is no less a punishment because it is inflicted through the medium of a civil suit instead of criminal prosecution. And such has been the uniform opinion of the courts of the State where this statute was enacted.

In *Merchants Bank v. Bliss*, 85 N. Y. 412, an action was brought against the defendants, as trustees of a corporation created under the General Act of 1848, to recover a debt due to the plaintiffs from the corporation; and the question was whether the action was barred by limitations. The Code prescribed six years as the period of limitations where the action was upon a liability created by statute other than a penalty or forfeiture, and three years for "an action upon a statute for a penalty or forfeiture where action is given to the party aggrieved."

The defendants were alleged to be liable under the 12th and 18th sections of the Act. The 12th section required every corporation organized under the Act to make a report annually within twenty days from the first of January, stating the amount of capital and the proportion actually paid in, and the amount of existing debts; and provided that "If any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." The 18th section enacted that "If the trustees of any such company shall declare and pay any dividend, the payment of which would render it insolvent, or which would diminish the amount of its capital stock, they shall be jointly and severally liable for all the debts of the company then existing, and for all that shall thereafter be contracted while they shall respectively continue in office." We will quote somewhat freely from the opinion of the court:

"Under these sections the trustees are declared to be jointly and severally liable for all the debts of the company in case of a violation of their provisions. The liability, it must be observed, is not limited to the injury or damage sustained by the creditors in consequence of the violation; but upon failure to file the report, or upon making a prohibited dividend, however small or trifling the amount, the trustees are subjected to the payment of the whole amount of the debts of the company then existing, and for all that shall be contracted, in the one case before the report shall be made, and in the other while they shall respectively continue in office. These provisions appear to be severely punitive, inflicted on grounds of public policy, for the protection of creditors and the prevention of frauds upon the public in respect to the financial condition of such corporations. It is clear that the liability of the trustees is not imposed as an indemnity, because it has no relation to the actual loss or injury sustained by the party in whose favor the action is given. The action depends wholly upon the statute. There never was any such remedy, or cause of action, in whole or in part, at common law. If any action could have been maintained at common law for either of the causes mentioned in sections 12 and 18 of

the General Act in relation to manufacturing corporations, it could extend only to the actual damages or injury sustained. But those elements have nothing to do with the actions given by these sections. Nor, indeed, is it necessary that the creditor should have sustained any injury or damage by reason of a violation of these sections. It is sufficient that the party prosecuting the action should be a creditor when the violation of the law takes place. The right of action is given to the creditors, and they must be held to be the parties aggrieved.

"For these reasons I am satisfied that the sections 12 and 13 impose a penalty, or a disability in that nature, to which the shorter limitation of three years applies."

In *Stokes v. Stickney*, 96 N. Y. 823, this decision was fully approved. Referring to what was said in reference to the 12th section, the court said: "Since that decision, the subject of actions under that section of the statute has frequently been under the consideration of this court, with the uniform conclusion that the actions therein provided for are penal in their character, and are not in any respect based upon the theory of affording compensation to the injured party for damages sustained by reason of the omission complained of." And they quote a number of decisions of their own court.

In this State, in construing a similar provision in a statute, it was held "that the liability of the director was not one arising upon contract, but one imposed upon him by the statute as a wrong doer, and therefore in the nature of a penalty." *First Nat. Bank v. Price*, 33 Md. 496.

Section 10 of the New York Act of 1848 makes the stockholders of every company incorporated under its provisions individually liable to the creditors of the company in a sum equal to the amount of their stock, until the whole of the capital stock is paid in and a certificate thereof is made and recorded. A distinction is well established by the decisions between this liability and that imposed by the 12th section of the Act. In the former case the statute withdraws from the stockholders the protection of the corporate character, and leaves them liable as copartners to the amount of their stock. In the latter case the liability is created by statute, and is in the nature of a penalty imposed for neglect of duty. *Wiles v. Suydam*, 64 N. Y. 176.

The distinction is mentioned in the *Plymouth Bank Case*, 33 Md. 492, and many cases are there cited which maintain it. It is also approved by the Supreme Court of the United States in *Flash v. Conn.*, 109 U. S. 376 [27 L. ed. 968], and *Chase v. Curtis*, 118 U. S. 452 [28 L. ed. 1038], and in *Norris v. Wrenschall*, 84 Md. 492, but in the last case all the reasoning and illustrations of the *New York Cases* are not adopted.

We think that we must hold that the liability imposed by the 21st section of the New York Act of 1875 is a penalty. If this be so, it cannot be enforced in this State. Upon this point the authorities agree with great harmony. In the case of the Plymouth Bank this court said: "It is well settled that no State will enforce penalties imposed by the laws of other States; such laws are universally considered as having no extraterritorial operation."

2 L. R. A.

The same doctrine has recently been declared by the Supreme Court of the United States. *Flash v. Conn.*, 109 U. S. 376 [27 L. ed. 968]; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 290 [32 L. ed. 239].

We must, however, notice the fact that a judgment has been obtained for this penalty. A judgment merges the original cause of action, so that a suit cannot be again maintained upon it; it is also conclusive evidence of its existence in the form, and under the circumstances stated in the pleadings. In the classification of legal subjects it is called a debt of record, because of the obligation to pay it, which is imposed on the party against whom it is rendered. But the nature of a transaction is not changed by the reduction of it to a judgment. If we could suppose that a judgment was obtained on a contract to commit murder, would anyone maintain that the judgment had removed the turpitude of the contract? Or that the law would mitigate its condemnation of a grievous crime because of a change in the form with which it was clothed? It is unnecessary to pursue this subject, because the Supreme Court of the United States has recently decided the question here presented.

In *Wisconsin v. Pelican Insurance Company*, 127 U. S. 292, 298 [32 L. ed. 239], a suit was brought on a judgment for a penalty, and it was decided that the judgment, in its essential nature and real foundation, was the same as the original cause of action, and that a suit could not be maintained upon it beyond the limits of the State in which it was rendered.

It is alleged in the bill of complaint that the above mentioned corporation was dissolved in March, 1882, by a judgment of a court in New York; that at the time of its dissolution it "was indebted to the plaintiff and to other creditors to an amount far in excess of its assets; that by the law of the State of New York, all the stockholders of the company were liable to pay all the debts, each to the amount of the stock held by him; and the defendant Henry Y. Atrill was liable at said date, and on the 14th day of April, 1882, as such stockholder and to the amount of \$340,000, the amount of stock held by him, and was on both said dates also severally and directly liable as a director, having signed the false report above mentioned, for all the debts of said company, contracted between the 26th day of February, 1880, and the 29th day of January, 1881, which debts aggregate to more than the whole value of the property owned by Atrill."

This liability is asserted to exist independently of the judgment. It cannot be maintained on the New York Statute already mentioned, because by the 25th section, a stockholder is not personally liable for a debt of the corporation, except in cases where an action to recover it has been brought against the corporation within two years after it became due; and here no such action has been brought. The judgment against Atrill for having made the false report certainly merges all right of action against him on this account. But let us assume that Atrill was liable at the times mentioned in this clause of the bill of complaint and on the grounds therein stated. This liability is barred by the Maryland Statute of Limitations; and this defense properly arises

under the demurrer filed in this case. *Belt v. Bowie*, 65 Md. 355, 3 Cent. Rep. 727.

Upon the whole, it appears to us that the complainant has no cause of action which he can maintain in this State.

*Order reversed and bill dismissed.*

**Stone, J.** (with whom concurs **McSherry, J.**), dissenting:

It is with some diffidence that I venture to differ in this case from the majority of the court. I look upon the principal point as a federal question, and am governed in my views more by my understanding of the decisions of the Supreme Court of the United States than by the decisions of the state courts.

The Act of Congress made in pursuance of the Constitution provides that the judgments rendered by the state courts "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence said records are or shall be taken."

Notwithstanding the comprehensive language here used, several limitations have been made by the decisions of the supreme court to the effect of such judgments.

The only one necessary to mention, and which affects this case, is that stated by *Judge Marshall* in the case of *The Antelope*, that "The courts of no country execute the penal laws of another."

I concede to the fullest extent that rule; but the question remains, What are the penal laws of a State, and does this case come properly within that rule?

In the case of *Wisconsin v. Pelican Insurance Company*, 127 U. S. 265 [82 L. ed. 239], the State of Wisconsin instituted a suit in the Supreme Court of the United States upon a judgment recovered in one of her own courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by a Wisconsin Statute for not making the returns to the insurance commissioner as required by law. By the Wisconsin Statute every foreign insurance company doing business in that State was required to deposit in January of each year in the office of the insurance commissioner a statement of the business of the corporation, and in default thereof it should forfeit \$500 a month, for every month it should continue to do business after such default; and it was made the duty of the insurance commissioner to institute suit for such forfeiture in the name of the State, and one half of the sum recovered by such suit was to be paid into the state treasury, and the other half to the insurance commissioner to pay the costs.

Under this Act a judgment was recovered by the State of Wisconsin against the Pelican Insurance Company, which the State attempted to enforce in the supreme court by action brought there.

This the supreme court decided could not be done, and says, in the decision:

"The Statute of Wisconsin under which the State recovered in one of her own courts the judgment now here sued on was in the strictest sense a penal statute imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin, without having deposited with the proper officer of the

State a full statement of its property and business during the previous year."

"The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty when recovered would accrue to the State, and to be paid, one half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeiture." "It is immaterial whether by the law of Wisconsin the prosecution must be by indictment or by action." "In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end: the compelling the offender to pay a pecuniary fine by way of punishment for the offense."

The court in the same case also says: "The rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

It will be readily seen from these extracts that the supreme court in this opinion, so much relied on, does not extend the rule (that no country will execute the penal laws of another) beyond suits brought in the name of the State for the recovery of penalties for an infraction of its revenue or municipal laws, and was careful to state in the paragraph just quoted that the cause of action was not any private injury but solely the offense committed against the State.

I think the cause of this careful definition of what actions come within the rule can easily be found in the previous decisions of the same court.

By a statute of Connecticut it was provided that the president and secretary of each corporation organized under their law should annually, in January and July, make a statement of its affairs and deposit it with the town clerk; and if that duty was intentionally neglected, or refused to be performed, the officer so neglecting should be liable for all debts of the corporation contracted during the period of such neglect. A creditor of the corporation sued the president under this Act for a debt due to him by the corporation, in the Circuit Court of the United States, and the case, *Providence Steam Engine Company v. Hubbard*, 101 U. S. 188 [25 L. ed. 786], went eventually to the Supreme Court of the United States. In deciding the case the supreme court said that the statute was penal and must be strictly construed, but affirmed the judgment of the circuit court upon the ground of insufficient proof against the president.

So in *Chase v. Courtis*, 118 U. S. 452 [28 L. ed. 1038], the action was brought in the Circuit Court of the United States upon a judgment recovered by the creditor of a corporation against the trustees of a corporation, and the facts are somewhat similar to those in the *Connecticut Case*. By a statute of New York the trustees of certain corporations were required to file reports of the condition of such

corporations, and upon failure to do so the trustees were made liable for the debts of the corporation. Suit was brought against trustees and judgment was recovered. Action was brought on that judgment and the case went to the supreme court.

That court decided that the action was penal and must be construed strictly, and decided that the judgment itself was not in that case sufficient evidence of the debt; and the judgment was given for defendants.

One purpose for which I have cited these cases is to show the different meaning that the supreme court has given to the word *penal*. In the two last cited cases the supreme court declared in unmistakable terms that the statutes under which the cases were brought were penal statutes, and must be construed strictly, and yet they entertained jurisdiction and decided the cases upon their merits.

In the case just cited (127 U. S.) the court said that the statute was penal and refused to entertain jurisdiction. That court evidently used the term *penal* in two different senses. The term *penal* seems to be applied rather indiscriminately to both criminal and civil laws; but I think that the court has given us a rule by which we can determine what cases come within the rule that no country will execute the penal laws of another. It says in the quotation from 127 U. S., heretofore given, that the rule covers crimes and misdemeanors and actions brought by the State for an infraction of its laws. But where the state law gives an individual the right to recover damages or claims for the nonobservance by other individuals or corporations of its laws, such infractions do not come within the rule.

But it is argued that the case of *First Nat. Bank v. Price*, 38 Md. 487, is decisive of this; and although this suit is upon a judgment and *Price's Case* was not, the essential nature of a case is not changed by a judgment. I think the determination in *Price's Case* was correct, although I think the reasons assigned are not in accord with the decisions of the supreme court. I think the decision in *Price's*

*Case* was correct, because no State is bound by the rules of comity or convenience to try cases *ex delicto* arising under purely local statutes of another State, and unknown to the common law; and that was *Price's Case*.

I think the Supreme Court, in 127 U. S., meant to confine the operation of the rule that no country will execute the penal laws of another, to such laws as are properly classed as criminal. It is not very easy to give any brief definition of a criminal law; it may perhaps be enough to say that in general all breaches of duty that confer no rights upon an individual or person and which the State alone can take cognizance of, are in their nature criminal, and that all such come within the rule. But laws which, while imposing a duty, at the same time confer a right upon the citizens, to claim damages for its nonperformance, are not criminal. If all the laws of the latter description are held penal, in the sense of criminal, that clause in the Constitution which relates to records and judgments is of comparatively little value.

There is a large and constantly increasing number of cases that may in one sense be termed penal, but can in no sense be classed as criminal. Examples of these may be found in suits for damages for negligence in causing death, for double damages for the injury to stock, where railroads have neglected the state laws for fencing in their tracts, and the liability of officers of corporations for the debts of the company by reason of their neglect of a plain duty imposed by statute.

I cannot think that judgments on such claims are not within the protection given by the Constitution of the United States.

I therefore think the order in this case should be affirmed. I have merely ventured to state my conclusions without any attempt even at an elaborate argument or citation of authorities. These views have been, I think, sustained by several of the state courts, but I have only thought it necessary to refer to the decisions of the supreme court, as I think the question a federal one.

## MINNESOTA SUPREME COURT.

Mary BENTZ, Resp't.,

v.

NORTH WESTERN AID ASSOCIATION,  
App't.

(....Minn....)

1. When a mutual benefit life insurance association incorporated under the laws of this State, and dependent upon securing such amounts as may be required to meet and liquidate death claims through assessments upon its members, refuses to make an assessment in a proper case, the remedy is by an action for a breach of contract.

2. Measure of damages. Unless the defendant association alleges in its answer and, on trial,

\*Head notes by COLLINS, J.

NOTE.—See Jackson v N. W. Mut. Relief Assn. 780; Burdon v. Mass. Safety Fund Assn. (Mass.) 1 L. R. A. 146 and nota.

2 L. R. A.

establishes that the amount should be less, because all members do not respond to assessments, the measure of damages in such cases is the amount assessable upon all insured.

3. In an action to recover the amount claimed to be due upon a policy or certificate issued by such an association, it answered, by way of defense, that the assured had used alcoholic liquor to such an extent, subsequent to the issuance of the certificate, as to induce delirium tremens, and that such disease was the cause of death. On the trial it offered little or no evidence to sustain the allegations, but relied upon two affidavits made by physicians as to the cause of the death, in one of which the cause was stated as delirium tremens, in the other as hemorrhages induced by an excessive use of intoxicants. These affidavits were made by the physicians on blanks furnished by the association, and were forwarded to it by plaintiff with other proofs of the death of the assured. Held, that the plaintiff beneficiary was neither concluded nor estopped upon the trial by



the statements of the physicians and that the issue made by the pleadings as to the real cause of the death was triable as any other issue of fact.

(March 6, 1890.)

**A** PPEAL by defendant, from an order of the Special Term of the Hennepin County District Court (Rea, J.), refusing to grant a new trial in an action brought to recover the amount alleged to be due upon a certificate of membership in a mutual aid association in which judgment had been rendered for plaintiff. *Affirmed.*

The facts are sufficiently stated in the opinion.

**Messrs. Keith, Evans, Thompson & Fairchild**, for appellant:

On appellant's wrongful failure or refusal to levy an assessment, the proper remedy was an action for specific performance, to compel that to be done which the appellant had agreed to do. Such an action is not one at law in those States where the distinction between law and equity cases is recognized, and is not an action for the recovery of money only.

*Smith v. Covenant Mut. Ben. Assn.* 24 Fed. Rep. 685; *Bailey v. Mut. Ben. Assn.* 71 Iowa, 689; *Bull v. Granite State Mut. Aid Assn.* (N. H.) 4 New Eng. Rep. 289; *Re Appeal of La Solitaire*, 15 Ins. L. J. 399; *Newman v. Covenant Mut. Ben. Assn.* 72 Iowa, 242; *Tobin v. Western Mut. Aid Assn.* 72 Iowa, 261; *Rainsbarger v. Union Mut. Aid Assn.* 73 Iowa, 191; *Garretson v. Equitable Mut. L. & El. Assn.* (Iowa), 88 N. W. Rep. 127.

**Mr. Charles A. Ebert** for respondent.

**Collins, J.**, delivered the opinion of the court:

October 2, 1886, one William Bentz became a member of the defendant association and so continued until his death, June 21, 1887.

The plaintiff, his widow, is named as the beneficiary in the certificate or policy of insurance issued to the deceased when he joined the association.

1. If plaintiff has chosen the proper remedy, an issue of fact is presented by the pleadings in an action for the recovery of money only, and the defendant is in error when insisting that upon its failure or refusal to levy an assessment with the proceeds of which it could meet and liquidate plaintiff's claim, she could only resort to equity and compel an assessment. This position is based upon the provision in the certificate that "upon receipt at the principal office of this association of satisfactory proofs on blanks furnished from said office, of the death . . . of said William Bentz this association will pay the said Mary Bentz or to the legal heirs of said William Bentz, 75 per cent of the net proceeds of one full assessment at schedule rates upon all the certificate holders in good standing in this association at the date of said death . . . not, however, to exceed \$2,000, to be paid within ten (10) days after the closing of the assessment for the same."

In holding that appellant's contention is not well grounded and must be rejected, that an action at law may be maintained in case of the refusal of an association to make an assessment for reasons of the character alleged in the answer herein, we are conscious of the diversity of opinion upon the question and that a num-

ber of very respectable courts have held to the contrary—many in which it is determined that when the officers of an association of this nature refuse to make an assessment to meet a death claim, appropriate proceedings must first be taken to compel a performance of this duty; and that a judgment for money without regard to an assessment, or to the amount which might be collected on an assessment, cannot be sustained.

But, upon the other hand, the authorities are numerous, and of high character, that such an association is liable to suit for a breach of contract when it refuses to make the required assessment, the measure of damages being the amount assessable upon all insured, unless the defendant alleges in its answer and by proof establishes the fact that it should be less (*Freeman v. Nat. Ben. Society*, 42 Hun, 253; *Lueders v. Hartford L. & A. Ins. Co.* 4 McCrary, 149; *Elkhart Mut. Aid Ben. & Relief Assn. v. Houghton*, 108 Ind. 286, 1 West. Rep. 284; *Taylor v. Nat. Temperance Relief Union*, 94 Mo. 35, 12 West. Rep. 92; *Burland v. Northwestern Mut. Ben. Assn.* 47 Mich. 424); and we think this view very clearly foreshadowed in *Kerr v. Minnesota Mutual Benefit Association*, 89 N. W. Rep. 812.

In this State these associations are incorporated. We see no reason why a corporation of this character should be exempt from a common-law liability for a breach of its contract—as would a natural person and other kinds of corporation—when it refuses to assess its members to meet a proper claim. In many of the adjudicated cases in which it has been held that the remedy for such refusal is in equity, the insuperable objection to an action at law seems to have been in the difficulty of establishing a proper measure of damages when the contract is not absolute to pay a certain sum, but only the amount realized by an assessment of the living members, none of whom may answer to the call. There is force in the objection; but to give it much weight it must first be assumed that some members will not respond to assessments as they have customarily done, and will ignore the demand in particular instances. Such delinquencies should not be presumed, and if they really exist—if any number of members are habitually in default—the percentage can easily be shown by the defendant association upon the trial.

The adoption of this rule will do no injustice, and the amounts recovered in this class of actions come quite as near just compensation—approach as closely to what a beneficiary should recover and an association pay—as the sums ordinarily recovered as damages for failure to observe the terms of contract.

2. To defend plaintiff's claim, the defendant set up in its answer that, when making application for a certificate of membership, the deceased falsely answered certain questions propounded to him as to the state of his health and as to his habit regarding the use of intoxicants, which were material, and which, had they been truthfully answered, would have prevented his becoming a member of the association; and that subsequently to the issuance of his certificate, he used alcoholic liquors to such an extent as to induce delirium tremens, from which disease, it is averred, he died.

Issue was taken upon this defensive matter found in the answer; and it might reasonably be expected that defendant would be prepared with testimony to sustain the charges, if available. But it offered very little testimony relating to such a defense, resting and relying upon statements as to the cause of death found in the proofs made out by attending physicians, duly verified by their oaths, and forwarded by the plaintiff soon after her husband's decease.

These proofs were made out upon blanks furnished by defendant in accordance with a clause found in the certificate, which provides for an assessment to meet a claim on being furnished "satisfactory proofs, on blanks, furnished from the principal office of the association, of the death" of the assured. In one of these, the cause of death was stated as delirium tremens, in another that when the affiant was called professionally the deceased "was on the verge of delirium tremens," while from the third it appeared that death was attributable to hemorrhage from the lungs.

These affidavits of the physicians were put in evidence by the plaintiff to substantiate an allegation of the complaint denied in the answer—that satisfactory proofs of death had been made to the association. Defendant now insists that by them, or rather by those which stated directly and by inference that death was caused by delirium tremens, the plaintiff is concluded; that not only had she no right to demand an assessment upon the members, but that she cannot maintain this action without first procuring the amendment of the proofs as to the cause of death. If this be so, the beneficiary's right to prosecute in any case wholly depends upon the ability to first obtain proofs which will bear the inspection of the officers of the association, or, failing in this, to secure a change or amendment when objection is made, without regard to the facts. The impracticability of this claim is evident from the condition of the proofs in the case at bar. There is a pronounced disagreement between the physicians, one stating the cause of death to be hemorrhage from the lungs, another as delirium tremens, while the third asserts it to have been a hemorrhage indirectly caused by intemperance. Such dissent between medical men is not unusual, and by what rule for weighing testimony should the real cause of death be determined when "doctors disagree"?

This certificate or policy simply provided for

and required satisfactory proofs of death; it did not prescribe the particular kind of proof. The fact of death should be established upon blanks to be furnished by the association and to its satisfaction. It could not arbitrarily determine what would or would not be satisfactory proofs; that is for the court in case of disagreement. *Taylor v. Etina L. Ins. Co.* 18 Gray, 484.

When a policy provides that satisfactory proofs of death shall be furnished, it is not essential that the facts and circumstances of the death be set forth in said proofs. *Cluff v. Mut. Ben. L. Ins. Co.* 99 Mass. 317.

A company cannot arbitrarily object to the sufficiency of proofs. If, however, they disclose a cause of death which excepts the company from liability, it does not derogate from their sufficiency as proofs of death. And while such a disclosure might suggest to the company the propriety of refusing payment, it could be no bar to the bringing of a suit. *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232 [24 L. ed. 433].

The cause of death of the assured is for the jury, to be determined as any other question of fact, by the evidence produced upon the trial.

8. The plaintiff was not estopped by the mere fact that she had forwarded these affidavits. The physicians were not her agents, nor had she referred the company to them for information. In reply to a question propounded to her, she had given their names as those in attendance during the last sickness of her husband. The affidavits were made *ex parte*, by persons over whom plaintiff had no control, at defendant's request. They were forwarded upon the advice of its agent, and if plaintiff is to be believed, on his assurance that they were "all right." In this case the plaintiff could show that death was from another cause than that stated in the proofs. The statements therein did not work an estoppel. *Keels v. Mutual Reserve Fund L. Assn.* 29 Fed. Rep. 198; *Sargent v. Home Benefit Assn.* 35 Fed. Rep. 711; *Parmelee v. Hoffman F. Ins. Co.* 54 N. Y. 193.

The court did not err in its refusal to charge, as requested by the defendant, upon the weight the proofs were entitled to in the deliberations of the jurors, and also that they must be considered as admissions of the cause of death. Had occasion required, and for impeaching purposes, they could have been used as the admissions of those who made them.

*The order refusing a new trial is affirmed.*

## WISCONSIN SUPREME COURT.

William T. JACKSON, Appt.,  
v.  
NORTHWESTERN MUTUAL RELIEF  
ASSOCIATION.

(...Wis....)

### 1. The question whether or not the beneficiary in a policy issued by a mutual benefit

NOTE.—Mutual benefit associations; remedy for refusal to levy assessment to meet death claims.

An action at law can be maintained against the society for a refusal or neglect to make the assessment. And the declaration, among other averments, must

association has mistaken his remedy in bringing an action at law to compel an assessment to pay his claim may be raised by demurror.

### 2. For a substantial breach of the contract contained in a policy issued by a mutual benefit association to pay to a certain person a percentage of an assessment upon its members upon the happening of a certain event, the beneficiary may recover substantial damages in an action at law.

charge a failure or refusal to make the assessment, that if such assessment had been duly made it would have resulted in the collection of the full amount called for by the certificate, and claim that sum for damages for such failure or refusal. If

2. Upon demurrer to a complaint alleging the refusal of a mutual benefit association to make an assessment in accordance with the terms of its contract, and also that plaintiff's share of the assessment would be at least a certain amount in case the assessment was made, the court cannot say, as matter of law, that plaintiff has only sustained nominal damages by reason of such refusal, merely because it may be difficult, in advance of a levy and attempted collection of the assessment, to ascertain the precise damages to which plaintiff is entitled.

(February 19, 1889.)

**A**PPEAL by plaintiff, from an order of the Iowa County Circuit Court, sustaining a demurrer to the complaint in an action to recover the amount alleged to be due upon a policy issued by a mutual benefit association. *Reversed.*

Defendant issued to Cordelia Jackson a certificate of membership with her husband, William T. Jackson, the present plaintiff, as beneficiary, which contained the following provision:

"In consideration of the payment of an assessment not to exceed ninety cents on the maturity of the certificate of any other member at the office of the association, within thirty days after due notice thereof, the association upon maturity of this certificate, and within sixty days after the proof and allowance of such claim, upon presentation hereof, will pay the above named member, or in case of death, the beneficiary if living, otherwise the heirs of such member, a benefit in case of . . . maturity by death or by limitation on the 23d day of September A. D. 1926, 80 per cent of an assessment levied and collected therefor, not exceeding \$4,000, less any payment before made on ac-

count of disability, or any indebtedness due or accrued to the association from such member."

The complaint alleged that Cordelia Jackson died February 13, 1888, having so kept, performed and complied with all the terms and conditions, and paid the assessments made and demanded of her as to keep the certificate of membership in effect up to the time of her death; that defendant was notified of such death; that defendant denied liability and refused to levy an assessment for the benefit of plaintiff as provided for in the policy, and also refused to pay plaintiff any sum whatever on account of the same; that 80 per cent of an assessment upon the members would have amounted to at least \$4,000, for which sum defendant became indebted to plaintiff, and it demanded judgment for that amount.

Defendant demurred to this complaint, and the court below sustained the demurrer; whereupon plaintiff appealed.

Further facts appear in the opinion.

*Messrs. Spensley & McIlhenn* and *H. W. Chynoweth*, for appellant:

The policy amounts to a contract to pay a certain sum of money.

*Nesken v. Northwestern Endowment & L. Assn.* 80 Minn. 406; *Burland v. Northwestern Mut. Ben. Assn.* 47 Mich. 424; *Curtis v. Mutual Ben. Life Co.* 48 Conn. 98; *Kansas Protective Union v. Whitt*, 86 Kan. 760.

An action at law can be maintained upon it where defendant denies its liability *in toto* and refuses to make an assessment.

*Lueders v. Hartford L. & A. Ins. Co.* 12 Fed. Rep. 465; *Suppiger v. Covenant Mut. Ben. Assn.* 20 Ill. App. 596; *Abbe Lincoln Mut. L. Assn. v. Miller*, 28 Ill. App. 841; *Earnshaw v. Sun Mut. Aid Society*, 11 Cent. Rep. 508, 68 Md. 465; *Taylor v. National Temperance Relief*

either of these averments is omitted, the declaration or petition is fatally defective. *Earnshaw v. Sun Mut. Aid Society*, 11 Cent. Rep. 508, 68 Md. 465; *Elkhart Mut. Aid Ben. & Relief Assn. v. Houghton*, 1 West. Rep. 284, 103 Ind. 286; *Taylor v. Nat. Temperance Relief Union*, 12 West. Rep. 92, 94 Mo. 35; *Curtis v. Mut. Ben. L. Co.* 48 Conn. 98; *Suppiger v. Covenant Mut. Ben. Assn.* 20 Bradw. 595; *Nesken v. Northwestern E. & L. Assn.* 30 Minn. 406; *O'Brien v. Home Ben. Society*, 46 Hun, 423; *Darrow v. Family Fund Society*, 42 Hun, 245; *Freeman v. Nat. Ben. Society* 1d. 252; *Burland v. Northwestern Mut. Ben. Assn.* 47 Mich. 424; *Excelsior Mut. Aid Assn. v. Riddle*, 91 Ind. 84; *Bali v. Granite State Mut. Aid Assn.* (N. H.) 4 New Eng. Rep. 289; *Kansas Protective Union v. Whitt*, 86 Kan. 761; *Bacon, Benefit Societies*, § 453.

A court of equity might properly be resorted to as being capable of affording a more adequate remedy by directing a specific performance of the contract of the defendant by the levying of the proper assessments. *Van Houten v. Pine*, 36 N. J. Eq. 133; *Bacon, Benefit Societies*, § 453. See *Bentz v. Northwestern Aid Assn.* *ante*, 784.

#### Damages recoverable in action.

It has been questioned whether, if a benefit association can be sued at law for failure to levy an assessment as provided in its certificates, recovery can be for more than nominal damages. And in Iowa the supreme court has been positive in its rulings to the effect that only nominal damages can be recovered in such actions. *Bailey v. Mut. Ben. Assn.* 71 Iowa, 689; *Rainsbarger v. Union Mut. Aid Assn.* 72 Iowa, 191; *Garretson v. Equitable Mut. L. & E. Assn.* (Iowa) 38 N. W. Rep. 127. See also *Curtis v. Mut. Ben. L. Co.* 48 Conn. 98; *Van Houten v. Pine*, 36 N. J. Eq. 133; *Tobin v. Western Mut. Aid Society*, 72 Iowa, 231; *Bacon, Benefit Societies*, § 453.

The beneficiary cannot, in an action at law against the association on the certificate, recover

more than nominal damages, even though the association has refused to make the assessment on the ground that the certificate had been forfeited. *Newman v. Covenant Mut. Ben. Assn.* 72 Iowa, 242.

In Missouri a different rule has been laid down; and in an action on a certificate of a company it was held that recovery should be for the full amount, unless defendant proved that an assessment would not produce the full sum. *Lueders v. Hartford L. & A. Ins. Co.* 12 Fed. Rep. 465. See also *Supreme Council A. L. of H. v. Anderson*, 61 Tex. 296; *Elkhart Mut. Aid. Ben. & Relief Assn. v. Houghton*, 1 West. Rep. 284, 103 Ind. 286.

If the petition alleged that the society had collected the assessment and refused to pay it over, then recovery would certainly be for the full amount. *Smith v. Covenant Mut. Ben. Assn.* 24 Fed. Rep. 685.

When suit is brought the recovery should be for the maximum amount insured, unless defendant shows that the sum should be reduced. *Elkhart Mut. Aid. Ben. & Relief Assn. v. Houghton*, *supra*.

#### Actions on certificate.

An action at law is the proper remedy upon a certificate of a beneficiary association. *O'Brien v. Home Ben. Society*, 46 Hun, 423, 11 N. Y. S. R. 810.

Where a policy contains an undertaking on the part of the insurance company to pay the beneficiary therein named a certain sum upon the death of the insured, and not to exceed 75 per cent of the assessments collected, the beneficiary may recover on said policy without proving demand on the company to make assessments, or show that assessments have been made, or, if made, the amount collected thereon. *Kan. Protective Union v. Whitt*, 80 Kan. 760.

An order restricting a general judgment for insurance money against a life insurance company operating on the assessment plan, to assessments

*Union*, 12 West. Rep. 92, 94 Mo. 35; *Freeman v. National Ben. Society*, 42 Hun, 252; *Hankinson v. Page*, 81 Fed. Rep. 189; *Elkhart v. Mut. Aid Ben. & R. Assn. v. Houghton*, 1 West. Rep. 234, 108 Ind. 286; *Supreme Council A. L. of H. v. Anderson*, 61 Tex. 300; *Niblack, Mutual Benefit Societies*, § 392.

*Messrs. BurrW. Jones and F. E. Parkinson*, for appellee:

The parties to these contracts are bound by the terms of the contract.

*Bauer v. Samson Lodge*, 103 Ind. 262; *Coles v. Iowa State Mut. Ins. Co.* 18 Iowa, 425.

By the terms of this contract the plaintiff is bound to look to the mode of payment provided for therein.

The legal effect of these is that no action except in equity to compel an assessment shall be brought.

*Bailey v. Mut. Ben. Assn.* 71 Iowa, 639; *Neuman v. Covenant Mut. Ben. Assn.* 72 Iowa, 242, 1 L. R. A. 659; *Rainsbarger v. Union Mut. Aid Assn.* 73 Iowa, 191.

**Cassoday, A. J.**, delivered the opinion of the court:

This is an action at law to recover damages for an alleged breach of contract of insurance. There is no claim that the facts alleged do not constitute a binding contract of insurance; nor that they do not show a breach of such contract. The theory of the defendant is that, conceding the validity of the contract and the breach of it, yet that the plaintiff has mistaken his remedy by bringing his action at law instead of proceeding in equity to enforce the assessment mentioned in the contract. If such is the fact, then under the earlier decisions of this court, and since adhered to, the question may be properly raised by demurrer.

The only question presented is, therefore,

to be levied, is erroneous. *Seitzinger v. New Era L. Assn.* 2 Cent. Rep. 307, 111 Pa. 537.

An action brought for the benefit of the beneficiary, not permitted to take under the statute, will not defeat an action by the administrator of the member. *Rice v. New England Mut. Aid Society*, 5 New Eng. Rep. 815, 146 Mass. 248. See *Burdon v. Mass. Safety Fund Assn. (Mass.)* 1 L. R. A. 146 note; *Bentz v. Northwestern Aid Assn. (Minn.) ante*, 784.

#### Separate actions.

If the interest and cause of action of each of the covenantees appears on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an action for his particular damage. *Lane v. Drinkwater*, 1 Cramp. M. & R. 612; *James v. Emery*, 8 Taunt. 245; *Bacon, Benefit Societies*, § 452.

But if the amount of the insurance be payable to certain persons equally, there may be a different rule. *Covenant Mut. Ben. Assn. v. Hoffman*, 110 Ill. 603; *Bacon, Benefit Societies*, § 452.

If a policy provide for the payment of different sums to different parties, it is improper for the beneficiaries to join in one action to recover the several sums due, but each must bring a separate action his share. *Campbell v. National Life Assur. Co.* 34 U. C. Q. B. 35; *Fraser v. Phoenix Mut. L. Ins. Co.* 36 U. C. Q. B. 422; *Keary v. Mutual Reserve Fund L. Assn.* 30 Fed. Rep. 359; *Bacon, Benefit Societies*, § 452.

#### Policies to action.

Where the policy is payable to the assured, "his executors, administrators or assigns," for the express benefit of the wife of the assured and their children, the executrix is the proper person to sue. *Mass. Mut. L. Ins. Co. v. Robinson*, 98 Ill. 324; *Grattan v. National L. Ins. Co.* 15 Hun, 74; *Fairchild v. Northeastern Mut. L. Assn.* 51 Vt. 618; *Stowe v. ? L. R. A.*

whether upon the showing made, an action at law for damages by reason of the breach of contract alleged, can be maintained. The question, it will be observed, is not as to the true amount, or the true measure of damages, but only whether the plaintiff is entitled to substantial damages for such breach. There are certainly authorities to the effect that a bill in equity may be maintained to enforce payment of such certificates by compelling a specific performance of similar contracts through assessments, as stipulated. *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108; *Smith v. Covenant Mut. Ben. Assn.* 24 Fed. Rep. 689; *Rainsbarger v. Union Mut. Aid Assn.* 73 Iowa, 191, 33 N. W. Rep. 626; *Tobin v. Western Mut. Aid Society*, 73 Iowa, 261.

It has also been held that mandamus is not an appropriate remedy to compel such assessment. *Burland v. Northwestern Mut. Ben. Assn.* 47 Mich. 424; *Excelsior Mut. Aid Assn. v. Riddle*, 91 Ind. 84.

The decided weight of authority, however, seems to be to the effect that an action at law to recover damages may be maintained upon such contract for a refusal or neglect to make such assessment. *Earnshaw v. Sun Mut. Aid Society*, 11 Cent. Rep. 508, 68 Md. 465; *Suppiger v. Covenant Mut. Ben. Assn.* 20 Bradw. 595; *Meakern v. Northwestern Endowment & L. Assn.* 30 Minn. 406; *Lueders v. Hartford L. & A. Ins. Co.* 12 Fed. Rep. 465; *Kansas Protective Union v. Whitt*, 86 Kan. 760; *Kaw Valley Life Assn. v. Lemke*, 19 Pac. Rep. 337; *Freeman v. National Ben. Society*, 42 Hun, 252; *Reynolds v. Equitable Accident Assn.* 49 Hun, 605, 17 N. Y. S. R. 337, 1 N. Y. Suppl't 788; *Elkhart Mut. Aid, Ben. & Relief Assn. v. Houghton*, 108 Ind. 286, 1 West. Rep. 284; *Burland v. Northwestern Mut. Ben. Assn. supra*; *Bacon, Benefit Societies*, § 453.

*Phinney*, 2 New Eng. Rep. 74, 78 Maine, 244; *Catland v. Hoyt*, 2 New Eng. Rep. 586, 78 Maine, 355; *Connecticut Mut. L. Ins. Co. v. Lucha*, 108 U. S. 498 (21 L. ed. 800); *Bacon, Benefit Societies*, § 452.

In an action by a beneficiary on a life insurance policy, whose claim is to hold the policy as an equitable security, the executor or administrator of the estate, as well as the legatee of the policy, is a necessary party. *Shove v. Shove*, 69 Wis. 425.

One for whose benefit a promise is made may sue upon it, though he is not privy to it. *Barbaro v. Occidental Grove*, No. 16, 4 Mo. App. 429; *Beardslee v. Morgner*, Id. 136; *Bacon, Benefit Societies*, § 452.

If a certificate of membership issued by a mutual association expressly covenants to pay to a person named in it, the beneficiary may be considered the covenantee, and is entitled to sue the company in covenant for the amount specified in the certificate. *York County, etc. Assn. v. Myers*, 11 W. N. C. 541; *Bacon, Benefit Societies*, § 452.

#### Rules of pleading.

Where the certificate is issued by the supreme authority, it is in legal effect a policy of life insurance, governed by the rules of pleading applicable to ordinary actions on policies. *Elkhart Mut. Aid, Ben. & Relief Assn. v. Houghton*, 98 Ind. 146; *Bacon, Benefit Societies*, § 453.

In an action on a certificate which entitles the beneficiary to the proceeds of an assessment on its members, where it appears that special assessment must be made to obtain funds to pay a loss, plaintiff must aver and prove that such assessment has been made and the amount thereof. *Bailey v. Mutual Ben. Assn.* 71 Iowa, 689.

In an action by the wife upon a contract of insurance made by her husband, plaintiff need not allege that insured had not directed the money to be paid to any other person, as that is a matter of defense. *Laudenschlager v. Northwestern Endowment & L. Assn.* 36 Minn. 131.

But to maintain such action at law, such breach must be alleged and proved. *Curtis v. Mutual Ben. Life Co.* 48 Conn. 98; *Taylor v. National Temperance Relief Union*, 12 West. Rep. 92, 94 Mo. 85, 6 S. W. Rep. 71.

The principal difference in these two classes of adjudications turns upon the question whether such recovery for such breach of contract is limited to mere nominal damages, or extends to substantial damages. In some of these cases which allow substantial damages, the courts have gone so far as to hold that the beneficiaries may recover the maximum amount named in the contract, unless the defendant shows by pleadings and proof that such sum should be reduced. But, as indicated in some of the other cases cited, the recovery cannot exceed the amount stipulated in the contract.

We make no attempt to analyze the cases, nor to point out any supposed fallacies. We agree with that class of cases which holds, in effect, that for a substantial breach of such contract the beneficiary may recover substantial damages in an action at law.

As indicated in *Earnshaw v. Sun Mut. Aid Society*, *supra*, there may be some difficulty as to the true measure of damages and the enforcement of the judgment in case of recovery. So there may be difficulty in obtaining the requisite proof to establish the plaintiff's claim. But these considerations are not before us on this demurrer which concedes the truthfulness

of all the allegations of the complaint. The question is one of pleading upon contract.

Under the contract in question the plaintiff was entitled, upon the death of his wife, to 80 per cent of an assessment to be thereupon levied and collected therefor, not exceeding \$4,000 less any payment, etc. Upon such death it became the duty of the defendant under the contract to make such levy and collection. According to the allegations of the complaint, it not only neglected and refused to do so, but denied all liability.

It is also alleged, in effect, and of course admitted by the demurrer, that 80 per cent of such assessment "would have amounted to at least \$4,000." With this confession before us we cannot hold, as a matter of law, that the plaintiff has only sustained nominal damages by reason of such breach, merely because there may be a total or partial failure of proof, or that it may be difficult, in advance of such levy and attempted collection of such assessment, to ascertain the precise amount of damages which the plaintiff may be entitled to recover. Several of the authorities cited sustain these views. The breach of an agreement to make such levy and collection of such assessment seems to be somewhat similar to the breach of an agreement to insure, upon which actions at law have frequently been sustained.

*The order of the Circuit Court is reversed, and the cause is remanded for further proceedings according to law.*

## NEW YORK COURT OF APPEALS.

John Jacob ASTOR *et al.*, *Respts.*,

v.

NEW YORK ARCADE R. CO., *Appt.*

(.....N. Y.....)

1. Under the New York Constitution, art. 3, § 10, providing that no private or local bill shall embrace more than one subject, which shall be expressed in the title, the New York Act of 1873, chap. 105, the title to which indicates but one sub-

ject, and that the amendment of prior statutes relating to the transportation of passengers and property through pneumatic tubes by atmospheric pressure, but the provisions of which enlarge the power of a corporation formed for such purposes by giving authority to operate a grand underground railway not less than fifteen miles long with two or more tracks through passageways eighteen feet in height and thirty-one feet in width, which could not be operated by atmospheric pressure, and with authority, by the con-

**NOTE.**—Title of statute must fairly suggest subjects dealt with in the Act.

The constitutional provision as to the title of a statute does not require that provisions of the Act which are all germane to the subject expressed in the title should be specified or detailed in the title. *Minn. Loan & T. Co. v. Beebe* (Minn.) *ante*, 418.

The title of an Act to amend an Act dividing the State into judicial districts need not show the particulars of the amendment. *State v. Algood* (Tenn.) 10 S. W. Rep. 310.

The title of an Act, as "An Act to Amend Certain Statutes Mentioned Relating to the Practice of Pharmacy," sufficiently states the substance of the Act, which provides that liquors shall be sold by pharmacists only. *State v. Aulman* (Iowa) 41 N. W. Rep. 379.

Under Michigan Constitution, art. 4, § 20, providing that no law shall embrace more than one object, which shall be expressed in its title, a new section making it an offense to have burglar's tools in possession, etc., is properly enacted by an Act entitled "An Act to Amend Chapter 154 of the Revised Statutes of 1846," being chapter 180 of the Compiled Laws, entitled "Of Offenses Against the Lives and Property of Individuals." *People v. Howard* (Mich.) 40 N. W. Rep. 789.

The titles of statutes, as "An Act to Charter" a railroad company, and "An Act to Amend an Act 2 L. R. A.,

entitled 'An Act to Charter' such company are sufficient, under a constitutional provision that statutes shall relate to but one subject, which must be expressed in the title, to sustain a provision in the body of the Act giving authority to counties, townships, etc., to subscribe to the stock of such company, and declaring that such townships, etc., shall be bodies politic and corporate, invested with the necessary powers to carry out the statutory provisions. *Floyd v. Perrin* (S. C.) *ante*, 242.

An Act entitled "An Act to Regulate the Sale of Swamp Lands Donated by the United States to the State of Indiana, and to provide for the Draining," etc., is broad enough in its title to cover provisions requiring the patents for such land to be recorded. *Nitche v. Earle* (Ind.) 19 N. East. 749.

An Act Relating to the Ridge Avenue Passenger Railway Company, which, after reciting the consolidation of other companies under that name, declares that the new body shall be released from liability for keeping pavements in repair, and to the city regulations in relation thereto, to which one of the other companies was subject, is unconstitutional, because the subject is not sufficiently expressed in the title. *Ridge Ave. Pass. R. Co. v. Phila.* 23 W. N. C. 324. See, as to constitutional provision requiring that an Act shall embrace but one subject, which shall be expressed in its title, *Titusville Iron Works v. Keystone Oil Co.* 1 L. R. A. 302 and note.

sent of a board of engineer commissioners, to use horses, steam or any other motive power, is unconstitutional and void.

2. The title to a statute must be such at least as fairly to suggest or give a clue to the subject dealt with in the Act, in order to comply with the constitutional provision that it shall embrace no more than one subject, which shall be expressed in the title.

3. Under the New York Constitutional Amendment which went into effect January 1, 1875, prohibiting the passage of a private or local bill giving to any corporation any exclusive privilege or franchise, the New York Act of 1868, which gives to a corporation the right to a complete occupation of a street for railway purposes, providing a roof over the excavation is left to take the place of the street surface, and to use any motive power which would not permit of the emission of smoke, gas or cinders, is unconstitutional and cannot be supported as an amendment of the Act of 1873 giving the corporation the right to construct a railway in tubes not more than thirty-one feet in width, by eighteen feet in height, exterior measurement, and which should not approach within two feet of the curb line or eighteen feet of the building line of the street. (Per Gray, J.)

4. When the enlargement of corporate powers becomes indistinguishable from a granting of new, substantive rights, a statute attempting to give such powers is within the purview of the New York Constitutional Amendment taking effect January 1, 1875, prohibiting any private or local statute granting any exclusive privileges or franchises to a corporation. (Per Gray, J.)

(March —, 1889.)

**A** PPEAL by defendant, from a judgment of the General Term of the Supreme Court, First Department, reversing a judgment of the Special Term sustaining a demurrer to the complaint in an action to restrain defendant from creating a public nuisance by the construction and operation of an underground railway in the streets of New York City without authority of law. *Affirmed.*

The question at issue fully appears in the opinion.

*Messrs. Edward B. Thomas, Charles P. Daly, James C. Carter and Delos McCurdy*, for appellant:

The title of the Act of 1873 expressed the subject of that Act.

All matters fairly and reasonably connected with the Act, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the Act, and are germane to the title.

*Re Knaust*, 2 Cent. Rep. 97, 101 N. Y. 188.

The object of the constitutional provision is to give a clue to the contents of a statute.

*Walker v. Caldwell*, 4 La. Ann. 297.

Provisions relating directly or indirectly to the subject expressed in the title are proper.

*Johnson v. Higgins*, 3 Met. (Ky.) 566.

The title should be suggestive of the subject.

*Tuttle v. Strout*, 7 Minn. 465.

The object of the constitutional provision is to exclude foreign and disconnected matters, so that unsuspecting members will not be imposed upon.

*Simpson v. Bailey*, 3 Oreg. 515.

It is sufficient if the title indicate powers  
2 L. R. A.

given by reasonable implication so that the public will not be misled.

*Pelham v. The B. F. Woolsey*, 16 Fed. Rep. 418.

It is not necessary that the most perfect expression should be adopted. The object of the requirement of the Constitution is that the legislators and the public may be informed by the title of the general nature of provisions proposed to be enacted and to prevent deception.

*Re New York & B. Bridge*, 73 N. Y. 533.

The object of that provision is fairly answered by a title giving notice to whomsoever reads, that legislation is in pending, which, by amending the Act referred to, might touch upon the subject matter of any of its provisions.

*People v. Whitlock*, 93 N. Y. 197.

The means necessary or proper to accomplish the general design indicated in the title of the bill may be adopted.

*People v. Briggs*, 50 N. Y. 562.

The Constitution only requires that the title convey to the mind an indication of the subject to which it relates.

*Re Department of Public Parks*, 86 N. Y. 440.

It was competent to provide any mode of effecting the end in view that fairly pertains to the subject.

*Snipe v. Shriner*, 44 N. J. L. 208.

The title should fairly indicate the general subject of the statute, but need not give an abstract of its contents; nor need it mention the means, methods or instruments by which this general purpose is to be accomplished.

*Sedgwick, Stat. & Const. L. Pomeroy's Note*, 2d ed. 520.

Tested by any view the title was sufficient.

It may be suggested that the provision allowing the engineer commissioners to authorize the use of some other means of propulsion than pneumatic power is not stated in the title.

The title purported to add something to the Act of 1868, and adding the provision named would not be inappropriate. "The machinery it should use, the power it should adopt, were but incidents of the right."

*People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 92.

Therefore there was no necessity that it be expressed in the title. The whole subject of motive power was lawfully reconsidered and arranged by the Legislature of 1868.

*Re N. Y. Elevated R. Co.* 70 N. Y. 838.

*Messrs. John F. Dillon, Noah Davis, A. P. & W. Man and Joseph S. Auerbach* for respondents.

*Earl, J.*, delivered the opinion of the court:

The sole question for our determination is whether the defendant has legal authority to construct and operate a railway under Broadway and Madison Avenue, in the City of New York.

The defendant traces its corporate existence to the Act, chapter 842 of the Laws of 1868, entitled "An Act to Provide for the Transmission of Letters, Packages and Merchandise in the Cities of New York and Brooklyn and across the North and East Rivers by Means of Pneumatic Tubes, to be Constructed Beneath the

Surface of the Streets and Public Places in Said Cities and Under the Waters of Said Rivers."

The first section of the Act authorized and empowered Alfred E. Beach and other persons named, and their assigns, "to lay down, construct and maintain one or more pneumatic tubes in the soil beneath the surface, squares, avenues and public places in the Cities of New York and Brooklyn, and under the bed of the waters of the East River between said cities, and also under the bed of the waters of the North River from the City of New York to the shore of New Jersey, but at such depth as not to interfere with navigation; and to convey letters, parcels, packages, mails, merchandise and property in and through said tubes for compensation by means of vehicles to be run and operated therein by the pneumatic system of propulsion; and to the end that the public convenience may be promoted in the operation of the said vehicles, the said persons and their assigns are also hereby authorized and required to erect upon the sidewalks of the said streets, squares, avenues and public places suitable ornamental lamp-posts, boxes, pillars or receptacles, not exceeding thirty inches in diameter, connected with said pneumatic tubes, for the deposit of letters, packages and property to be transmitted therein;" and it provided that the tubes should not extend through any vault nor under any sidewalk fronting on private property without the consent of the owners of such private property and compensation to them, which should be ascertained and determined in case the parties could not agree in the manner provided by the General Railroad Act of 1850.

Section 2 provided that the pneumatic tubes should be so constructed as to have a mean interior diameter of not exceeding fifty-four inches.

Section 5 authorized the persons named in the Act to hold a meeting and determine the terms and conditions upon which the powers, privileges and franchises conferred by the Act might be transferred to a corporation to be organized as provided in the next section; and section 6 provided that in case the persons attending the meeting named in the prior section should so determine, they might organize themselves into a corporation in the manner specified in the General Manufacturing Act of 1848 and the Acts amendatory thereof "for the purpose of constructing and maintaining the pneumatic tubes aforesaid and using and operating the same as hereinbefore authorized;" and that the corporation so organized shall "possess all the powers and privileges conferred by said Acts, and be subject to all the duties and obligations imposed therein, not inconsistent with the provisions of this Act."

In August, 1868, in pursuance of the powers conferred by the Act, the persons therein named organized themselves into a corporation by the name of "The Beach Pneumatic Transit Company;" and in the certificate executed and filed by them they declare that the object of the corporation was "to construct and operate pneumatic railroads in the Cities of New York and Brooklyn, and under the waters of the North and East Rivers, and to exercise all the powers, privileges and franchises conferred upon said corporation by the Act" of 1868; that the capital stock should be \$5,000,000, and

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that the corporation should continue in existence for the term of fifty years.

The certificate could give the corporation no greater powers than was conferred by the Act of 1868, and to that Act we must look for the scope and measure of its powers.

The Act did not confer railroad powers upon the corporation, and did not subject it to any of the Railroad Acts, except for the purpose of ascertaining the compensation to be paid to the owners of property interests in the streets. It authorized the formation of a manufacturing corporation, with the incidents, powers and duties of such a corporation, so far as they were consistent with the purposes of the Act. The corporation formed was in fact a manufacturing corporation, not, however, with the general power to engage in any manufacturing business, but for the sole purpose of constructing, maintaining, using and operating the pneumatic tubes.

The formation of such a corporation was a matter fairly embraced within the title of the Act. It was an appropriate instrumentality to accomplish the purposes of the Act, and in no sense a new and independent subject. The Legislature having authorized the construction and operation of the pneumatic tubes could in the Act itself have created the corporation or could have authorized its organization under any of the general laws of the State adapted to the formation of any business corporation; and the formation of such a corporation would be germane to the main purpose of the Act as indicated by its title.

While the general manufacturing laws regulated the corporation as to its mode of existence, its manner of action and its corporate life and being generally, yet all its powers and duties related and were confined to the construction, maintenance, use and operation of the pneumatic tubes; and, therefore, section 16 of article 8 of the Constitution, which provides that "No private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title," was not, as contended on behalf of the plaintiffs, violated.

What do the words *pneumatic tubes* mean? They convey to our minds no other meaning than that of tubes for the transmission of parcels operated by atmospheric pressure applied within the tubes. The parcels may be transmitted outside the tubes upon vehicles attached to a piston operated within the tubes by atmospheric pressure, or they may be transmitted within the tubes by atmospheric pressure applied behind them. But they are in no sense railways. Such a tube may contain vehicles placed upon wheels, and the wheels may run upon rails or in grooves, and yet the structure could not, according to the popular sense, or any legal sense, be what is generally known as a railway. The tubes may be so constructed that in a technical or scientific sense the structure might be called a railway; and so, too, any structure upon which vehicles may be moved upon rails, however peculiar or small, may in some limited sense be called a railway, and yet it may not be a railway within the meaning of the Constitution and the general laws of the State. When they speak of railways they always mean railways either for the



general carriage of property or of passengers, or of both, and a railway which may be operated in small pneumatic tubes by atmospheric pressure for the transmission of small packages is not within such meaning.

Such was the character and status of the corporation organized under the Act of 1868. That Act was amended by the Act, chapter 512 of the Laws of 1869, entitled "An Act Supplementary to Chapter 842 of the Laws of 1868, in Relation to Carrying Letters, Packages and Merchandise by Means of Pneumatic Tubes in New York and Brooklyn," but there is nothing in that Act pertinent to the present discussion.

From 1868 to the commencement of this action in 1896, so far as this record disclosed, nothing whatever was done by the corporation except to change its name several times and to procure Acts of the Legislature purporting to enlarge its powers and extend its corporate life. No pneumatic tubes have been constructed; and it is a fair inference, from the admitted facts, that the system for the pneumatic transmission of property was before the year 1873 found to be impracticable. It had been tried in various parts of Europe, but had proved a failure, and for the general transmission of property or passengers was, in the year 1873, nowhere in use. Chambers' Encyclopedia, title, "Atmospheric Railway" and "Pneumatic Dispatch;" Encyclopedia Britannica, title, "Atmospheric Railway;" Appleton's Cyclopaedia, title, "Atmospheric Railway;" Johnson's Cyclopaedia, title, "Pneumatic Transmissions."

In 1878 the persons interested in the corporation, as we may infer, being aware of its insufficiency for any practical purpose, concluded to procure an enlargement of its powers and a radical change in its character and purposes, and, therefore, they obtained the passage of the Act, chapter 105, entitled "An Act Supplemental to and Amending Chapter 842 of the Laws of 1868: an Act entitled 'An Act to Provide for the Transmission of Letters, Packages and Merchandise in the Cities of New York and Brooklyn, and across the North and East Rivers, by Means of Pneumatic Tubes, to be Constructed beneath the Surface of the Streets, Squares, Avenues and Public Places in Said Cities, and under the Waters of Said Rivers,'" passed June 1, 1868; and of chapter 512 of the Laws of 1869, entitled "An Act Supplementary to Chapter 842 of the Laws of 1868, in Relation to Carrying Letters, Packages and Merchandise by Means of Pneumatic Tubes, in New York and Brooklyn, and to Provide for the Transportation of Passengers in Said Tube." The last phrase of this title, "and to Provide for the Transportation of Passengers in Said Tubes," did not appear in the title of the Act of 1869, and yet in the Act, in all its stages through the Legislature, as approved by the Governor, filed in the office of the Secretary of State, and printed in the Session Laws, the quotation marks are so placed as to make the phrase appear to be part of the title.

The title of the Act, therefore, was well calculated to deceive any persons to whose attention it came while the Act was under consideration in the Legislature. But we will assume that this title is to have the same force and effect as if that of the Act of 1869 had been properly

quoted, and then the only addition to the title of the prior Acts is the final phrase above quoted, and the only subject expressed in the title is the transportation of property and passengers in pneumatic tubes. This title is assailed by the plaintiffs as not in compliance with section 16 of article 8 of the Constitution above quoted. A particular examination of the provisions of the Act is therefore necessary.

The first section provides that it shall be lawful for the Beach Pneumatic Transit Company "to construct, maintain and operate an underground railway for the transportation of passengers and property" under Broadway and Madison Avenue, by means of tubes of enlarged interior diameter sufficient for the construction of a railway or railways therein, and for the running of cars and the carrying of passengers therein; and also to construct, in connection with said tubes, two or more tracks of railway, with the necessary turnouts and stations for the ingress and egress and accommodation of passengers, and for the receipt and discharge of packages and freight; and said company shall have the right and privilege, subject to the approval of the board of engineer commissioners, hereinafter provided for, to make connection with the Harlem and connecting railroads at any point deemed best at or above Forty Second Street, and also to make connection with the Hudson River Railroad at any point north-erly of Fifty-Ninth Street.

Section 2 provides that the passenger tubes shall, as far as practicable, follow the center line of the streets, and shall not occupy in the aggregate a greater space than thirty one feet in width by eighteen feet in height, exterior measurement; and that they shall be laid and constructed under the supervision of a board of three engineer commissioners, whose duty it is to see that the "passenger tubes and railways" are constructed in a thorough and workmanlike manner, and that they shall constitute a board of commissioners, a majority of whom "shall determine whether the pneumatic system or other motive power shall be adopted by said corporation for the propulsion of the cars running within said passenger tubes."

Section 4 authorizes the corporation to acquire the title to such real estate or interest therein as may be necessary to enable it to construct, operate and maintain "said tubes and railways," and to construct and maintain the proper platforms, stations and buildings at such points along the route of its tubes as may be convenient and suitable for the ingress and egress of its passengers, and for the receipt and discharge of freight and packages and necessary for the successful operation of "said tubes and railway and for the proper connections between said tubes and railway, platform, stations and buildings;" and in case the corporation is unable to agree with the owners of real estate for the purchase and use thereof, it is authorized to acquire the title to the same in the manner provided in the General Railroad Act of 1850; and in all cases the use of the streets, avenues, squares, grounds and public places, and the right of way under the same for the purpose of "said tubes and railway or railways therein," shall be considered and is declared to be a public use.

Section 5 provides that "It shall be lawful

for said corporation to convey passengers on said railway or railways through said tubes for hire," and regulates the rate of fare that may be charged.

Section 6 provides that the corporation shall commence active operations in the construction of its works within six months after the passage of the Act, and shall complete the section of passenger tubes with two railway tracks from Bowling Green to Fourteenth Street within three years, and shall complete the remainder of the passenger tubes as authorized within five years thereafter.

Section 7 provides that the corporation shall not construct any station, depot or other building or work above the surface of any land belonging to the City of New York, either in its own right or as trustee, without the consent of the mayor and aldermen; but that nothing in the Act shall be construed to authorize the mayor and aldermen to donate, lease or sell any portion of any of the ground surface of any public park in the city beyond what may be absolutely necessary for the exit from and entrance to the railroad.

Section 9 provides that the corporation shall possess "all the powers and be subject to all the duties and liabilities imposed on railroad corporations by the laws of this State, not inconsistent with the charter of this company or the purposes of its incorporation."

Here we read nothing of pneumatic tubes or of propulsion by atmospheric pressure, nor even of pneumatic railways. We read of passenger tubes, but we must not be deceived by the juggle of words. We find authorized a grand underground railway, not less than fifteen miles long, with two or more tracks, turnouts, platforms, stations, buildings and other appurtenances, with power to connect with surface steam railroads, to be operated through passageways called tubes, eighteen feet in height and thirty-one feet in width, exterior measurements; in fact, tunnels which could not be operated by atmospheric pressure. What was before a manufacturing corporation was converted into a railroad corporation, or at least had superadded the powers, privileges, duties and liabilities of railroad corporations under the general laws of the State with authority, by the consent of the engineer commissioners, to use, for the movement of its cars, horses, steam or any other motive power.

The construction of such a railway by such a corporation is certainly a subject not expressed in the title of the Act. The only subject there indicated is the transportation of passengers and property through pneumatic tubes by atmospheric pressure. A title, purporting that an Act provides for pneumatic transportation, would not be sufficient for an Act authorizing the construction and operation of a horse railway or a steam railway, as a title purporting that an Act authorizes a line of omnibuses for the transportation of passengers would not be sufficient for an Act authorizing the construction of a railway for the same purpose.

The constitutional provision referred to has been deemed by statesmen and jurists—*conditores legum*—of so much importance that it is found in the fundamental law of most of the States. Its purpose is to prevent fraud and deception by concealment in the body of Acts

of subjects not by their titles disclosed to the general public, and to legislators who may rely upon them for information as to pending legislation. When the subject is expressed, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the Act and are germane to the title. The title must be such at least as fairly to suggest or give a clew to the subject dealt with in the Act; and unless it comes up to this standard it falls below the constitutional requirement. *N. Y. v. Colegate*, 12 N. Y. 146; *People v. Hills*, 85 N. Y. 449, 452; *Re N. Y. & B. Bridge*, 72 N. Y. 527; *Re Department of Public Parks*, 86 N. Y. 489; *People v. Whitlock*, 92 N. Y. 191; *Re Knaust*, 101 N. Y. 188, 2 Cent. Rep. 97; *Cooley*, Const. Lim. 141.

Here the only subject suggested by the title is the transportation of passengers and property through pneumatic tubes by atmospheric pressure, and everything appropriate and germane to that subject could be provided for in the Act. But a person reading the title alone would have no clew whatever to the great railway scheme actually authorized by the Act; and so the corporations themselves evidently regarded the Act, for finding that the corporation had outgrown its name, "The Beach Pneumatic Transit Company," they by the Act 508 of the Laws of 1874, had it changed to the "Broadway Underground Railway Company;" and in the Act ahead these before called "tubes" are called "tunnels;" and ten years later, by an order of the proper court, the name was again changed to the "New York Arcade Railway Company," while by the Acts of 1874, chapter 454 of 1881 and chapter 812 of 1886, the charter of the corporation was amended and its powers greatly enlarged, pneumatic tubes, propulsion by atmospheric pressure and pneumatic railways are nowhere mentioned; and all that is left as a result of all the legislation is a grand scheme for underground railways operated by any motive power except such as shall emit "smoke, gas or cinders," which, if carried into effect, would doubtless be one of the marvels of the world. But if it is as desirable and safe as it is marvelous it should be placed upon a constitutional basis, and make an undisguised appeal upon its merits for the public sanction.

Our conclusion, therefore, is that the Act of 1873 for the insufficiency of its title is unconstitutional and void, and hence all subsequent legislation based upon that Act must fall with it.

When the Act of 1886 was passed, under which the defendant proposes to lay down its tracks and to construct its underground railways, it had no power to construct an underground railway for the transportation of passengers and general freight through tunnels; and, therefore, that Act is in conflict with section 17 of article 8 of the Constitution, which forbids the Legislature to pass a private or local bill granting to any corporation the right to lay down railroad tracks or to construct a street railroad except upon conditions mentioned in that section. *Re N. Y. District R. Co.* 107 N. Y. 42, 9 Cent. Rep. 824.

We need go no further. The conclusion already reached renders it unnecessary to solve the various other questions argued with much

ability and learning by the able counsel who appeared before us.

*The judgment should be affirmed, with costs. All concur.*

**Gray, J.**, concurring:

I concur with Earl, *J.*, in his opinion that the Act of 1878 was unconstitutional and void, in that it failed to comply with section 16 of article 3 of the Constitution. But I am further of the opinion, assuming that the Act of 1878 was valid, and that there was an acceptance of and a valid compliance with the conditions of the Act of 1878, and that there was a waiver of causes of forfeiture by the passage of the Act of 1886, that the latter Act was in violation of the provisions of the Constitutional Amendment, which went into effect on January 1, 1875. By that Amendment the Legislature was inhibited from passing a private or local bill granting to any corporation the right to lay down railroad tracks or any exclusive privilege, immunity or franchise whatever.

The Act of 1886, under which the appellant claims to have acquired its present rights, cannot, in my view of what it grants, be upheld as legislation which merely regulates the exercise of powers formerly granted to and possessed by an existing corporation. It went far beyond that. It was in fact a new grant of substantive rights in addition to and differing from what might have been claimed under the Act of 1878.

By the Act of 1878 the company would have had the right to construct a railway in tubes, which should not occupy a greater space than thirty-one feet in width by eighteen feet in height, exterior measurement. The company could not have approached within two feet of the curb line, nor within eighteen feet of the building line. These restrictions must be deemed to be important limitations and wholesome provisions, designed for the protection of the rights of the abutting property owners, and to secure to the public the rightful enjoyment of the streets as such.

By the Act of 1886 they would possess the right to excavate for their railways a space of forty-four feet, inside measurements, in width, and without any limitation as to depth. They might construct railways without the use of tubes or tunnels, and use any motive power which would not permit of the emission of smoke, gas or cinders.

I think that we have here a pretty wide departure from the rights and powers to be enjoyed under the Act of 1878. The pneumatic tube, of a diameter of fifty-four inches, for the transportation of packages and merchandise, authorized under the original charter of 1868, and which was transmuted by the Act of 1873 into a tubular passenger and freight railway, has now wholly disappeared, and in its place appears a scheme for what amounts to a complete occupation of the street for railway purposes, except so far as it leaves a roof over the excavation to take the place of the street surface.

This grant of a right to excavate the street to an extent practically unlimited, and the permission to abandon tubes, and to construct railways in the excavation, are matters of grant too serious in their nature and consequences, under the circumstances of the case, to be

passed over as in mere regulation of an existing franchise. To allow such legislation is, in my opinion, to nullify the beneficial and protective objects aimed at by the Constitutional Amendment of 1875.

Under the guise of an amendment, there was a legislative grant to this company of franchises and privileges beyond any naturally following upon or flowing from those granted under the Act of 1878, not in harmony with the spirit of that grant, and of necessity, exclusive in their nature. It therefore fell within the prohibition of the Constitutional Amendment.

When the people have by amending the Constitution, restricted the powers of their representatives in the Legislature to pass private or local bills which grant the right to lay down railroad tracks, or any exclusive privileges or franchises to a corporation, the courts should see to it that the Constitutional Amendment is not evaded under the pretense of an amendment of the charter. They should scrutinize the legislative Act complained of; not with the idea of seeking a way to a construction adverse to its constitutionality; but rather to uphold it, if possible. But if the scrutiny reveals a real and serious violation of the constitutional provisions, they must condemn the Act as invalid.

It is said, however, that a scope of action is offered for the Legislature with respect to corporations already in the possession of corporate rights acquired under statutes passed before the adoption of the Constitutional Amendment. As a general proposition this is true.

Conceding to the Legislature its full measure of authority to legislate, under the general grant of power by the Constitution of the State, we hold that such authority, when now exercised by a private bill in behalf of a corporation, cannot under the guise of measures for the regulation of the exercise of the corporate powers and franchises, be upheld by the court, when, by a practical construction, the Act permits what the amendment of the Constitution prohibits. The regulation of these powers and franchises, when the Act touches them so as to alter them, means their restriction rather than their enlargement.

If enlargement of powers may be sometimes consistent with the constitutional limitations, it may not go to the extent of trenching on the territory of private and public rights over which the Constitution was plainly intended to operate in its limitations. When enlargement of corporate powers becomes indistinguishable from a grant of new substantive rights within the purview of the section in question, then the mischief is accomplished to prevent which the Constitutional Amendment was designed.

In *Re Gilbert Elevated Railway Company*, 70 N. Y. 381, *Ch. J.*, in discussing the changes of structure, etc., made by the commissioners under the provisions of the Rapid Transit Act, said the changes were restrictive in their character. "By the charter the whole street was to be covered by the structure; by the conditions imposed, only a portion of some streets could be occupied." And he says, in that connection: "I cannot accede to the proposition that any change in the structure and in the manner of occupying the streets, however restrictive upon the company or beneficial to

the public in the use of the streets, constitutes a fresh grant of the right to lay down railroad tracks. It is a misnomer to call such restrictions grants of any right whatever. As well might the cutting down of a fee to a life estate be termed a grant of land." Again he says: "No exclusive right or franchise was granted to the respondent corporation upon any construction of the clause. Every substantial right existed before the passage of the Act, and the conditions imposed, embracing changes of structure and manner of occupying streets, should be regarded as restrictive of existing rights, and not grants of rights or franchises within the constitutional sense. . . . This series of amendments designed to restrict the powers of the Legislature in matters of detail, under general phrases and undefined words, is experimental in this State. They must be sustained and applied by a rational and practical construction, so as to subserve the purposes intended, and prevent the evils designed to be remedied; but not by an artificial and technical construction to extend their application to cases never contemplated."

I think the meaning of the decision is clear. If the legislative Act operates upon a charter in the direction of a regulation, an adjustment or a restriction of powers possessed, it could not be objectionable.

Within its reserved powers the Legislature may at all times amend or alter the charter; but the Constitutional Amendment will not permit it by a private bill to make any new grant of rights comprehended within those specified by the amendment. I do not think that it can be said in the present case that every substantial right given by the Act of 1886 existed previously.

For the reasons I have briefly given I think the Act of 1886 practically gave to this corporation a right to lay down railroad tracks, which it could not have exercised under the Act of 1873, and also gave what are practically exclusive privileges. I think it contravened the Constitution, in the letter and in the spirit, and is therefore void.

**Ruger, Ch. J.; Danforth and Peckham, JJ., concur.**

John LIBBEY, Appt.,

v.

Emma J. MASON, Respnt.

(.....N. Y.....)

1. An appeal from an order of the general term is not premature although no judgment

**NOTE.**—Probate; grant of letters; citation; effect of renunciation.

The provisions of section 27 of the Revised Statutes apply to every application for letters of administration, and leave it discretionary with the surrogate whether persons out of the jurisdiction of the court shall receive notice of the application, or not. *Re Williams*, 51 H. & B. 66.

Where there are two sisters, one unmarried and one married, letters issued to the unmarried one without notice to the other are valid. *Re Curser*, 89 N. Y. 401; 2 Civ. Proc. Rep. 411, reversing 25 Hun. 579.

The provision of the Code of Civil Procedure, § 2683, requiring notice to every person having a prior or equal right, did not apply, and the appointment was valid, overruling *West v. Mapes*, 4 Redf. 426. *Re Curser*, 89 N. Y. 401.

Under the law it was not incumbent upon the  
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has been entered thereon, where the order is in a special proceeding appealed from the surrogate which could only terminate in an order.

2. Upon a petition for letters of administration, although it is not necessary to cite a citizen of the United States having a right to letters prior or equal to that of the petitioner, but residing in another State, yet if such person appears before the surrogate, and presents his claim before the issue of letters, his claim cannot be disregarded.

(March 5, 1890.)

**A** PPEAL from an order of the General Term of the Supreme Court, Second Department, affirming an order of the surrogate granting letters of administration. *Reversed.*

The facts and questions presented fully appear in the opinion.

*Mr. Chauncey B. Ripley* for appellant.  
*Mr. Nathaniel B. Cooke* for respondent.

**Finch, J.**, delivered the opinion of the court.

On the 14th day of February, 1886, Lydia C. Libbey, a resident of Brooklyn, in this State, died leaving her surviving her husband, John Libbey, who resided in the State of Maine, and her daughter by a former husband who is the respondent, Emma J. Mason. On the 11th of March following she presented to the Surrogate of Kings County, a petition asking to be appointed administratrix of her mother's estate.

No citation to the nonresident husband was directed to be issued, but on the 15th of March, 1886, and while the prior proceeding was pending and undetermined, he appeared before the surrogate and presented his petition to be appointed administrator, and claiming priority of right. The two proceedings were then practically consolidated and heard together, and resulted in an order or decree granting letters to the daughter and denying them to the husband. From that order he appealed to the general term, where it was affirmed, with costs against the husband. That affirmance occurred in December of 1886, and the order was entered by the successful party, and notice of that entry served upon the husband's attorney.

Notice of taxation of costs was given for January 6, and adjourned from time to time until January 27, on which day the attorney for Mrs. Mason failed to appear before the clerk, and notice of appeal from the order and decree of the surrogate was served by Libbey. Thereafter the costs were taxed, but under an order made by the special term requiring it to be done *nunc pro tunc*, and as of January 27, the date

surrogate to issue a citation to the husband; it was entirely within his competence and discretion to issue letters to the daughter immediately upon the presentation of her petition. The failure to issue letters to the daughter previous to the presentation of the petition of the husband did not divest the surrogate of his discretion, and he could exercise the same thereafter as well as theretofore. *Libbey v. Mason*, 42 Hun. 472.

An administrator who has been removed for failure to give sureties is entitled to citation on an application of one having inferior right. *Barber v. Converse*, 1 Redf. 820.

A failure to cite the widow of the deceased is an irregularity, for which the letters might be revoked, but does not render them absolutely void. *Kelly v. West*, 80 N. Y. 139. See *Peters v. Public Admr.* 1 Bradf. 200; *Cobb v. Beardley*, 37 Barb. 132.

of the appeal, and without prejudice to that appeal.

The appellant is now met by a motion to dismiss his appeal, on the ground that it was prematurely taken. It is said that upon the decision of the general term, a judgment must be entered, and since this appeal was from its order it was premature; and section 2685 of the Code is relied upon. The contest before the surrogate was in a special proceeding which was brought to the general term by an appeal, and could only terminate in an order. The section referred to speaks of the judgment or order, and, perhaps, is somewhat confused, but does not alter the explicit definitions of the Code. There was no room for mistake as to the decision appealed from, and the appeal was not premature.

The court below has sustained the appointment of Mrs. Mason in reliance upon section 2662 of the Code. We have already twice decided that no repeal of the priority of right dictated by the Revised Statutes was intended or effected by that section, and that such priority of right was not lost by the fact of residence in another State if the petitioner was a citizen of the United States. *Re Page*, 107 N. Y. 266, 9 Cent. Rep. 723; *Re Williams*, 111 N. Y. 680.

A very excellent statement of the reasons for denying such repeal was given in the general term opinion in the latter case. Section 27 of the Revised Statutes, which designates the order of administration and fixes the priority of right, imposes no condition of residence within the State.

So much is conceded; but an effort has been made to argue out such a condition as inferentially imposed by other terms and provisions of the statute, and especially by those which relate to ancillary letters. That inference, however, is effectually rebutted by the terms of section 32, which dictates the persons to whom letters shall be refused whatever may be their relation to the deceased. Among these is enumerated "a person not a citizen of the United States unless such person reside within this State." The plain inference and obvious meaning is that nonresidence excludes only when the claimant is not a citizen of the United States, but where that citizenship exists the nonresidence is immaterial, and has no effect upon the priority of right. The rule is not changed by section 2662 of the Code, which does not repeal by implication the right of priority given by the Revised Statutes. We so held in *Re Page*, *supra*.

That section gives to the surrogate a discretion to omit a citation to nonresidents, although

having a prior right. The only reason assigned is that "in general the delay which a citation in such a case would produce is unnecessary." Nevertheless, a judicious surrogate, armed with this destructive discretion, will rarely shut out the prior right of an American citizen living in a sister State because some time is essential to give it recognition and protection.

But it is upon the final clause of the section that the argument for repeal is mainly founded. That reads: "Where it is not necessary to cite any person, a decree granting to the petitioner letters may be made upon presentation of the petition." Doubtless this clause was only intended to mean that where the applicant had the first and paramount right, and none existed prior or equal to his, the surrogate might act at once, because citation to anyone would be needless. But this innocent meaning is carried beyond its purpose by the phraseology employed, and has led to the logic that since it is not necessary to cite a nonresident, whatever his priority of right, the surrogate may disregard that right, and it is thereby lost. That he may disregard it seems to be true; that it is thereby lost or ceases to exist or has suffered a repeal does not at all follow. It remains unchanged. The remedy for its enforcement has been modified, but the right itself has not been destroyed.

The surrogate may act without a citation to the nonresident citizen, and disregard his right because he is not present to assert it. Whether the letters so issued, although regular under the Code, would stand against an application for their revocation by the nonresident citizen having the prior right, it is not necessary now to determine. But where, although not cited, the nonresident appears, before the issue of letters, and presents his claim and stands upon his right, the surrogate may not deny it.

In this case the omission to cite Libbey was immaterial, for he appeared and was heard in opposition to the claim of Mrs. Mason before any appointment whatever was made, and the question of priority of right was directly involved. The order appealed from both grants the application of the daughter and denies that of the husband. The surrogate was required to decide between the two. No statutory reasons for rejecting the husband's administration were given, and letters should have been awarded to him.

The order of the General Term and of the Surrogate should be reversed, and the case remitted to the surrogate, that letters may be issued to the husband, John Libbey, with costs personally against the petitioner, Mrs. Mason.

All concur.

## PENNSYLVANIA SUPREME COURT.

J. Henry TILGE *et al.*, Trading as Henry Tilge & Co., *Plffs. in Err.*,  
v.

Matthew BROOKS, Copartner of W. Howard Brooks and A. May Stevenson, Trading as W. Howard Brooks & Stevenson.

(....Pa.....)

Notice of dissolution, as in the case of a general partnership, is not necessary where a person  
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attempting to become a special partner has, by virtue of the Pennsylvania Act of March 21, 1836 (Pub. Laws, 143), become liable as a general partner by reason of noncompliance with the provisions of that statute.

(February 11, 1893.)

**E**RROR to the Common Pleas No. 4 of Philadelphia County, to review a judgment of nonsuit in an action against an alleged mem-

ber of a partnership concern to recover debts due by the firm. *Affirmed.*

The action was assumed to recover from an alleged individual partner the amount due upon firm notes and book accounts. At the trial in the court below Thayer, P. J., entered a nonsuit which the court in bank refused to take off; and plaintiffs took this writ assigning for error the refusal to take off the nonsuit entered by the trial judge.

The facts are fully stated in the opinion.

**Messrs. Joseph Mellors and R. P. White**, for plaintiffs in error:

The provisions of the laws which authorize the creation of special partnerships, must be strictly complied with. If they are not, the partnerships thus sought to be created simply fail to become special and remain general.

*Conrow v. Gravenstein*, 17 W. N. C. 204; *Vandike v. Roskam*, 67 Pa. 330-333; *Haddock v. Grinnell Mfg. Co.* 1 Cent. Rep. 360, 109 Pa. 372.

In such case the liability of all for the acts of each continues until proper notice to dealers and to the public.

*Haviland v. Chace*, 39 Barb. 233. See *Andrews v. Schott*, 10 Pa. 50; *Smith v. Argall*, 6 Hill, 479, 3 Denio, 435; *Bowen v. Argall*, 24 Wend. 504; *Madison Co. Bank v. Gould*, 5 Hill, 311; *Sharp v. Hutchinson*, 1 Cent. Rep. 717, 100 N. Y. 533; *Re Merrill*, 12 Blatchf. 224; *Van Ingen v. Whitman*, 62 N. Y. 513, 523; *Buckley v. Bramhall*, 24 How. Pr. 455; *Patterson v. Holland*, 7 Grant, Ch. U. C. 1.

All idea of a special partnership should be eliminated and the defendant treated as a general partner from the beginning; and having retired without giving notice, he is liable for after contracted debts, under the following authorities:

*Watkinson v. Bank of Pa.* 4 Whart. 432; *Brown v. Clark*, 14 Pa. 476; *Deford v. Reynolds*, 86 Pa. 325; *Shamburg v. Ruggles*, 88 Pa. 143; *Clark v. Fletcher*, 96 Pa. 416; *Elkinton v. Booth*, 3 New Eng. Rep. 699, 143 Mass. 479.

**Messrs. N. H. Sharpless and R. C. McMurtrie**, for defendant in error:

The Legislature never intended to make men partners where they themselves did not so agree, or, indeed, to vary the contract *inter se* for any cause.

*Badeley v. Consolidated Bank*, L. R. 84 Ch. Div. 552; *Molhuo v. Court of Wards*, L. R. 4 Priv. C. 419.

One who was not known to be a partner need not give notice upon dissolution of the firm.

Lindley, Partn. 418, 420, 429.

There must be actual belief in the existence of the agency. It is not sufficient that there is an apparent agency if the fact be known that there is none.

*Searf v. Jardine*, L. R. 7 App. Cas. 357.

The holding ones sell out as a partner is unimportant, except as to creditors who dealt with the firm on the faith of such holding out.

*Thompson v. First Nat. Bank of Toledo*, 111 U. S. 586 (28 L. ed. 509); *Deford v. Reynolds*, 86 Pa. 332.

**Paxson, Ch. J.**, delivered the opinion of the court:

The defendant below, Matthew Brooks, was 2 L. R. A.

sued as a copartner with W. Howard Brooks and A. May Stevenson, for a debt admittedly due by the firm of W. Howard Brooks & Stevenson. The grounds upon which this claim rested are these: Matthew Brooks had intended and attempted to form a partnership with William H. Brooks and A. May Stevenson in 1871 as a special partner. This special partnership was in fact a renewal of one made in 1866. The renewed partnership expired in 1876, when Matthew Brooks retired from the firm. The sales, for which it is sought to make him liable, were made in 1881, or about five years after dissolution of the firm of which he had been a member. When he retired no notice was given of the dissolution.

It was claimed, and I do not understand it to be disputed, that there were such irregularities in the formation of the special partnership, as to make the special partner liable to the penalties provided by the Act of Assembly in such cases. The eighth section of the Act of the 21st of March, 1886 (Pub. Laws, 143), in regard to limited partnerships, provides that "If any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners."

There can be no doubt that during the time the defendant Brooks was a member of this firm he was liable for its engagements, by reason of his noncompliance with the statute. The plaintiffs below claim that he was in point of fact a general partner, and was liable after he left the firm to creditors by reason of his failure to give notice of his withdrawal; and a number of authorities are cited in support of this proposition, amongst others *Andrews v. Schott*, 10 Pa. 47, where it was said by this court:

"For unless the conditions of the Act are substantially observed, all the defendants are general partners."

The language quoted from *Andrews v. Schott* would seem to be justified by the phraseology of the Act of 1886, as, for instance, if the special partner transact any business on account of the partnership, or be employed for that purpose as agent, attorney or otherwise, he shall be deemed a general partner. Like instances might be given from other sections of the Act. But when the Act declares that under certain circumstances a special partner shall be deemed a general partner, it certainly does not mean that he is in fact a general partner; indeed, there is in the language an implication that he is not, nor do I see how the Legislature can make a man a member of the firm without his consent and the consent of the firm. It may, indeed, make him liable for the debts of a firm as though he were a general partner, and this is all the legislators probably intended to do.

The confusion upon this subject may be occasioned by the inaccurate language sometimes employed in referring to it. A man who is not a member of a firm may yet make himself liable to its creditors by holding himself out to such creditors as a partner. Yet in fact he does not become a partner; he is merely liable as a partner.

There being no general partnership so far as Brooks was concerned, only a liability on his

part for the debts of the limited partnership because of its irregularities, we see no reason why he should have given notice of the dissolution of a partnership which never existed.

*Haviland v. Chase*, 89 Barb. 283, was decided upon the New York Statute and is not consistent with our own Act of 1836. Nor are authorities elsewhere of much service to us in construing it. Under our statute no general partnership was formed. It does not say that an omission to comply with its requirements shall have the effect of creating a partnership not intended by the parties.

*Judgment affirmed.*

## COMMONWEALTH OF PENNSYLVANIA, *Plff. in Err.*,

### DELAWARE DIVISION CANAL CO.

#### STATE TAX ON CORPORATE LOANS.

(...Pa....)

1. A corporation may be compelled by statute to act as collector of a tax on its securities, by deducting it from the interest which has become due thereon and returning it into the state treasury, instead of paying it to the holders of the securities.
2. The constitutional provision requiring taxation to be uniform upon the same class of subjects is not violated by a statute, one section of which makes any scrip, bond or certificate of

indebtedness, issued by a private corporation to the residents of the State in which interest is paid, taxable upon its nominal value; while a prior section provides that "All mortgages, money paid by solvent debtors, etc.," shall be taxable at a certain rate on their value. All interest bearing indebtedness of private corporations is thus made a separate class for the purpose of taxation; and such classification is justified by the peculiar nature of corporate securities, the great fluctuations in their value, and the difficulty of reaching them by the general system of taxation.

3. The use of the word "of" in a statute, which is a manifest blunder, being intended for "off," will not be permitted to affect the plain meaning of the Legislature.

4. A corporation has a legal standing in court to contest the constitutionality of a law requiring it to deduct from the interest due on its obligations the amount of the tax on them, and pay it into the state treasury instead of to the holders of the securities.

(February 4, 1889.)

**ERROR** to the Court of Common Pleas of Dauphin County (Simonton, *P. J.*), to review a judgment in favor of defendant in an action to compel defendant to deduct the taxes upon its bonded indebtedness from the interest, under the provisions of the Act of June 30, 1885. *Reversed.*

The facts sufficiently appear in the opinion of the court.

*Messrs. William S. Kirkpatrick, Atty-Gen., and John F. Sanderson, Deputy Atty-Gen., for plaintiff in error:*

**NOTE.**—*Taxes; corporations may be compelled to act as collectors.*

In collecting taxes from corporations, the corporations themselves may be made collectors by being required to deduct the tax from the interests of the several shareholders and pay it over to the government. *Haight v. Pittsburgh, Ft. W. & C. R. Co.* 78 U. S. 6 Wall. 15 (18 L. ed. 818); *First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353 (19 L. ed. 701); *U. S. v. Baltimore & O. R. Co.* 84 U. S. 17 Wall. 222 (21 L. ed. 597); *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 18 Wall. 230 (21 L. ed. 898); *Maltby v. Reading & C. B. Co.* 52 Pa. 140; *Desty, Taxn.* 768.

The tax may be then enforced through the corporation by requiring it to withhold the amount from the dividends payable thereon. *Delaware Railroad Tax (case)*, 85 U. S. 18 Wall. 230 (21 L. ed. 898); *First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353 (19 L. ed. 701); *Van Allen v. Assessors*, 70 U. S. 3 Wall. 583 (18 L. ed. 284); *Union Bank v. State*, 9 Yerg. 501; *Richmond v. Daniel*, 14 Gratt. 365; *Nashua Sav. Bank v. Nashua*, 46 N. H. 348; *Dwight v. Boston*, 12 Allen, 822; *Desty, Taxn.* 335.

#### *Corporation to pay tax out of corporate funds.*

The corporation may be required to pay the tax out of its corporate fund or be authorized to deduct the amount paid for each stockholder out of his dividends (Ang. & A. Corp. §§ 556, 557; *Bradley v. Illinois*, 71 U. S. 4 Wall. 459 (18 L. ed. 433); *Reg. v. Arnaut*, 9 Ad. & E. N. S. 896; *First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353 (19 L. ed. 701); *State v. Brantin*, 23 N. J. L. 484; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316 (4 L. ed. 579); *Haight v. Pittsburgh, Ft. W. & C. R. Co.* 78 U. S. 6 Wall. 15 (18 L. ed. 818); *Cummings v. Merchants Nat. Bank*, 101 U. S. 156 (25 L. ed. 904); *Maltby v. Reading & C. R. Co.* 52 Pa. 140; *Ottawa Glass Co. v. McCulloch*, 81 Ill. 556; *N. O. v. La. Sav. Bank & S. D. Co.* 31 La. Ann. 826; *Baltimore v. Baltimore City Pass. R. Co.* 57 Md. 31; *St. Albans v. Nat. Car. Co.* 57 Vt. 69; and they may, it seems, be compelled to do so by mandamus. *State v. Mayhew*, 2 Gill, 487; *Barney v. State*, 42 Md. 480; *McVeagh v. Chicago*, 49 Ill. 818; *Desty, Taxn.* 768; *Cooley, Taxn.* 433.

But it cannot be enforced against its assets after it becomes insolvent. *Lionberger v. Rowse*, 43 Mo. 2 L. R. A.

57; *Relfe v. Columbia I. Ins. Co.* 11 Mo. App. 374; *Cooley, Taxn.* 433.

So, it is not payable by the receiver of an insolvent company. *Relfe v. Columbia I. Ins. Co.* 11 Mo. App. 374.

#### *Mode of collection.*

The mode of collecting the tax on the shares of a corporation, by requiring its officers to pay the tax directly into the treasury of the State, is a valid mode, even in the case of the national banks. *First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353 (19 L. ed. 701); *McVeagh v. Chicago*, 49 Ill. 818; *State v. Mayhew*, 2 Gill, 487; *New Orleans v. La. Sav. Bank & S. D. Co.* 31 La. Ann. 826; *Lionberger v. Rowse*, 76 U. S. 9 Wall. 468 (19 L. ed. 721).

In Maryland an action lies directly against the corporation to collect the tax. *American Coal Co. v. Allegany Co.* 59 Md. 135.

When the shares of a corporation are sold for nonpayment of taxes, new certificates may be issued to purchasers at the tax sale. *Smith v. Northampton Bank*, 4 Cush. 1; *Desty, Taxn.* 768.

#### *Collection of tax on dividends.*

Where a tax is imposed on the dividends or other receipts of shareholders from the profits of corporations, or upon their shares, corporations, in some States, are required to make the payment, which they then deduct from the payments to be made to shareholders. *Maltby v. Reading & C. R. Co.* 52 Pa. 140; *Haight v. Pittsburgh, Ft. W. & C. R. Co.* 78 U. S. 6 Wall. 15 (18 L. ed. 818); *First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353 (19 L. ed. 701); *U. S. v. Baltimore & O. R. Co.* 84 U. S. 17 Wall. 222 (21 L. ed. 597); *Minot v. Philadelphia, W. & B. R. Co.* 85 U. S. 18 Wall. 206 (21 L. ed. 888); *Ottawa Glass Co. v. McCulloch*, 81 Ill. 556; *New Orleans v. La. Sav. Bank & S. D. Co.* 31 La. Ann. 826; *Baltimore v. Baltimore City Pass. R. Co.* 57 Md. 31; *St. Albans v. Nat. Car. Co.* 57 Vt. 69; *Cooley, Taxn.* 433.

#### *Capital stock and shares distinguished.*

The capital stock of a corporation, and the shares of the capital stock, are distinct things. So a tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself or its stock, and may be laid irrespective of any



1. The tax in question was properly settled against the corporation defendant.

*Maltby v. Reading & C. R. Co.* 52 Pa. 140; *Com. v. Reading & W. R. Co.* 2 Pearson, 394; *Delaware, L. & W. R. Co. v. Com.* 66 Pa. 64.

The tax is settled against the corporation as tax collector, and not as a person liable as a taxable subject.

*Com. v. Reading & W. R. Co.* 2 Pearson, 395; *Com. v. Lehigh Valley R. Co.* 104 Pa. 89.

If the corporation may be lawfully required to collect the tax, and if the legislative rule of assessment at par is sufficient to enable the corporation to ascertain the tax, it must act under the law; and having refused to act no defense based upon alleged constitutional or other rights of the taxable person can be set up to justify it, or excuse it from liability on such refusal.

*Moore v. Allegheny City*, 18 Pa. 55; *Com. v. Philadelphia*, 27 Pa. 497; *State v. McNally*, 84 Maine, 210; *Sandford v. Nichols*, 18 Mass. 286; *Wellington v. Petitioners*, 16 Pick. 87; *State v. Carroll*, 38 Conn. 449; *Baker v. Brame*, 6 Hill, 47; *Com. v. McCombs*, 56 Pa. 486; *Clark v. Com.* 29 Pa. 129; *Cocks v. Halsey*, 41 U. S. 16 Pet. 71 (10 L. ed. 891); *People v. White*, 24 Wend. 520; *Henke v. McCord*, 55 Iowa, 378; *Taylor v. Skrine*, 3 Brev. 516; *Lee v. Tillotson*, 24 Wend. 387; *People v. Rensselaer & S. R. Co.* 15 Wend. 113; *People v. Lawrence*, 41 N. Y. 189; *People v. Salomon*, 54 Ill. 39; *Ressums v. Botts*, 34 Tex. 335; *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614.

If the corporation may deny the validity of the statute in question and avail itself of such defenses as are peculiar and appropriate to the taxable himself, such defenses can only be upon the ground that the statute is obnoxious to some clear prohibition in the Constitution.

*Kirby v. Shaw*, 19 Pa. 260; *People v. Draper*, 15 N. Y. 549; *People v. Flagg*, 46 N. Y. 401; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 117; *Com. v. Hartman*, 17 Pa. 119; *Sharpless v. Phila.* 21 Pa. 160, 164; *Weister v. Hade*, 52 Pa. 474; *Com. v. Butler*, 99 Pa. 540.

The requirement of uniformity is limited in its application. It does not simply say "All taxes shall be uniform," but confines the rule of uniformity to a class of subjects only. The inherent power to tax or not to tax all subjects still remains. The principle of classification is recognized and the rule of uniformity is made applicable and confined to the classes which the Legislature may select.

*Banger's App.* 109 Pa. 79; *Kittanning Coal Co. v. Com.* 79 Pa. 104; *Kirby v. Shaw*, 19 Pa. 258; *Durack's App.* 62 Pa. 491; *Hammett v. Phila.* 65 Pa. 146; *Re Washington Ave.* 69 Pa. 352; *Weber v. Reinhard*, 73 Pa. 870; *Butler's App.* Id. 448; *Northampton County v. Lehigh Coal & Nav. Co.* 75 Pa. 461; *Lehigh Iron Co. v. Lower Macungie Twp.* 81 Pa. 482; *Kelly v. Pittsburgh*, 85 Pa. 170; *Germania L. Ins. Co. v. Com.* 85 Pa. 515.

As long as there is substantial uniformity the same kind of property may be taxed in the hands of different kinds of persons by different methods.

*Fox's App.* 8 Cent. Rep. 561, 112 Pa. 337. See *Hunter's App.* 42 Legal Int. 394, and *Laughlin's App.* 19 W. N. C. 517.

The uniformity required is not absolute in favor of taxation.

*State Railroad Tax Cases*, 92 U. S. 612 (28 L. ed. 673); *Stanley v. Albany*, 121 U. S. 548 (30 L. ed. 1003); *Com. v. Martin*, 107 Pa. 194.

Wherever taxes are assessed upon valuation, to be made by the assessor or other agency, there, as a part of the process of assessment,

taxation of the corporation when no contract relations exist. *Glenn v. Dodge*, (D. C.) 3 Cent. Rep. 257; *Tremont Bank v. Boston*, 1 Cush. 142; *State v. Petway*, 2 Jones, Eq. 393; *State v. Thomas*, 26 N. J. L. 181; *Lycorning Co. v. Gamble*, 47 Pa. 106; *Whitesell v. Northampton Co.* 49 Pa. 523; *Union Bank v. State*, 9 Yerg. 480; *Oswego Starch Factory v. Dello-way*, 21 N. Y. 449; *People v. Bradley*, 39 Ill. 130, 141; *Conwell v. Connersville*, 15 Ind. 150; *Van Allen v. Assessors*, 70 U. S. 3 Wall. 573, 584 (18 L. ed. 229, 234); *State Tax on Foreign-Held Bonds*, 52 U. S. 15 Wall. 303, 32; (21 L. ed. 179, 188); *Cumberland M. R. Co. v. Portland*, 37 Maine, 444; *Salt Lake City Nat. Bank v. Golding*, 2 Utah, 1; *Nashville Gaslight Co. v. Nashville*, 5 Lea, 406; *Memphis v. Enslay*, 6 Baxt. 554; *New Orleans v. Canal & Bkz. Co.* 32 La. Ann. 157; *New Orleans v. Houston*, 119 U. S. 265 (30 L. ed. 411); *Cook v. Burlington*, 59 Iowa, 251; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 232; *Cooley*, Taxn. 231.

A tax upon the shares, laid upon the owners, and a tax upon the corporate property is not double taxation. *South Nashville Street R. Co. v. Morrow*, (Tenn. U. S. C. C.) not reported; *Union Bank v. State*, 9 Yerg. 490; *McLaughlin v. Chadwell*, 7 Heisk. 389; *Memphis v. Enslay*, 6 Baxt. 555; *Nashville Gaslight Co. v. Nashville*, 5 Lea, 406; *South Nashville St. R. Co. v. Nashville*, MSS., Nashville, 1880.

*Shares of stock; where taxable.*

Shares in a corporation are also the shares of its stockholder, wherever he may have his domicile; and if taxed to him as his personal estate can only be so taxed by the jurisdiction to which his person is subject, whether the corporation be foreign or domestic. *Great Barrington v. Berkshire Co.* 16 Pick. 572; *State v. Brantin*, 23 N. J. L. 484; *Newark City Bank v. Assessor*, 30 N. J. L. 13; *State v. Bentley*, 33 N. J. L. 532; *Whitesell v. Northampton Co.* 49 Pa. 526; *Griffith v. Watson*, 19 Kan. 20; *Griffith v. Carter*, 8 Kan. 565, 571; *Seward v. Rising Sun*, 79 Ind. 351; *Conwell v. Connersville*, 15 Ind. 150.

They can be separated from the person of the

owner by statute, and may be given a *situs* of their own. *Tappan v. Merchants Nat. Bank*, 86 U. S. 19 Wall. 490 (22 L. ed. 189); *Bradley v. Bauder*, 36 Ohio St. 33.

It is competent to provide by law for taxing shares in a corporation at the place where the business is carried on (*Tappan v. Merchants Nat. Bank*, 86 U. S. 19 Wall. 490, 22 L. ed. 189); and legislation fixing the place of taxation is a valid exercise of power. *McLaughlin v. Chadwell*, 7 Heisk. 389; *Nashville v. Thomas*, 5 Coldw. 600; *Bedford v. Nashville*, 7 Heisk. 409; *First Nat. Bank of Mendota v. Smith*, 65 Ill. 44.

The corporation is taxable on its corporate property, and the stockholders, if taxed on their shares, are to be taxed where they respectively reside. *Conwell v. Connersville*, 15 Ind. 150; *Madison v. Whitney*, 21 Ind. 261. See *Cumberland M. R. Co. v. Portland*, 37 Maine, 444; *Whitney v. Madison*, 23 Ind. 331.

Where not separated by statute from the owner, the *situs* of shares of stock in a corporation follows and adheres to the domicile of the owner. *Bradley v. Bauder*, 36 Ohio St. 33; *State v. Brantin*, 23 N. J. L. 484; *Newark City Bank v. Assessors*, 30 N. J. L. 13; *Great Barrington v. Berkshire Co.* 16 Pick. 572; *Oilver v. Washington Mills*, 11 Allen, 268; *Whitesell v. Northampton Co.* 49 Pa. 526; *Desty*, Taxn. 330.

*Taxation of corporate property.*

A corporation, in law, dwells only in the State where it was created. *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286 (17 L. ed. 130); *Young v. South Tredegar Iron Co.* 85 Tenn. 189.

The stock and bonds of an interstate railway are liable to taxation by any State in which it is situated in proportion to the length of the road in such State. *Pittsburg, Ft. W. & C. R. Co. v. Com.* 66 Pa. 73.

*Valuation.*

The capital stock of a railroad company may be taxed by a prior Act as to amount, and by a subse-

such valuation should be made. No assessment is required when the statute itself prescribes the amount to be paid, and this can be recovered by suit.

*U. S. v. Holloran*, 14 Blatchf. 1; *U. S. v. Pa. Co.* 27 Fed. Rep. 589; *Weber v. Reinhard*, 73 Pa. 370; *Dollar Sav. Bank v. U. S.* 86 U. S. 19 Wall. 227 (22 L. ed. 80); *King v. U. S.* 99 U. S. 233 (25 L. ed. 874); *Com. v. Lehigh Valley R. Co.* 104 Pa. 106.

It is no objection to the tax in question that no notice to the taxpayer is provided for. This is for the reason that the amount of the tax, as well as the amount of valuation, which elements constitute the entire case upon which the tax is claimed, are both fixed by the statute, and no hearing could change these elements or affect their application.

*Ilagar v. Reclamation District*, 111 U. S. 701 (23 L. ed. 569); *Santa Clara Co. v. Southern Pac. R. Co.* 18 Fed. Rep. 426; *McMillen v. Anderson*, 95 U. S. 37 (24 L. ed. 385); *Arrow-smith v. Harmoning*, 118 U. S. 194 (30 L. ed. 248); *Banger's App.* 109 Pa. 79; *Davidson v. New Orleans*, 96 U. S. 97 (24 L. ed. 616).

*Mr. M. E. Olmsted*, for defendant in error:

Uniformity of taxation means more than uniformity in the rate.

*Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1; *Cameron v. Cappeller*, 41 Ohio St. 533; *Re Washington Ave.* 69 Pa. 363; *Atlantic & N. C. R. Co. v. Currier Co.* 75 N. C. 475; *Wood-bridge v. Detroit*, 8 Mich. 301; *Dundas Mortgage & Trust Investment Co. v. Charlton*, 32 Fed. Rep. 192.

Uniformity of taxation means equality of taxation.

*For's App.* 3 Cent. Rep. 561, 112 Pa. 337.

Taxation in this case is neither like nor equal. Even the rate is not uniform in a legal sense.

quent Act as to the rate, and the latter is not a repeal of the former. *Com. v. Erie R. Co.* 96 Pa. 127; *Desty*, Taxn. 401.

For the purposes of assessment by state officers, the "actual value in cash" of the stock is to be ascertained by the prices at which it is sold between the first and 15th of November, and not by the average sales during the year. *Pennsylvania R. Co. v. Com.* 94 Pa. 474.

#### Taxation of credits.

The Legislature has the right, under the Constitution, to impose a tax upon all credits, whether for land sold, not paid for, or otherwise. *People v. Worthington*, 21 Ill. 171.

All credits in excess of the debts of the person taxed are taxable. *First Nat. Bank v. St. Joseph*, 46 Mich. 523; *Desty*, Taxn. 323.

Debts due are "credits," within the meaning of the Revenue Law, and are to be assessed as property. *Jones v. Seward Co.* 10 Neb. 154; *N. O. Can. & Bkg. Co. v. N. O.* 99 U. S. 97 (25 L. ed. 409).

The taxing property of the State may be made to embrace all equitable credits, of whatever description they may be. *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. T. 75, 158; *Carroll v. Perry*, 4 McLean, 25.

Funds invested in private debts or securities are liable to taxation. *Buchanan v. Talbot Co.* 47 Md. 236.

All moneys loaned and solvent credits, or credits of value, comprise subjects under the head of "moneyed capital." *Pollard v. State*, 65 Ala. 634; *Hepburn v. Carlisle School Directors*, 90 U. S. 23 Wall. 430 (23 L. ed. 112); *McIver v. Robinson*, 53 Ala. 456; *Sumter Co. v. Gainesville Nat. Bank*, 62 Ala. 464.

A tax on the interest paid by a corporation on its indebtedness, though collected from the corporation, is still a tax on the creditor; the corporation being only made use of as a convenient means of collecting the tax. *Haight v. Pittsburgh, Ft. W. & C. R. Co.* 73 U. S. 6 Wall. 15 (13 L. ed. 818); *Northern* 3 L. R. A.

*People v. Weaver*, 100 U. S. 539, 544 (25 L. ed. 705).

Section 4 of the Act of 1885 fails to provide for a valid assessment of corporate loans, and is substantially the same as the Acts of 1879 and 1881, which, for the same reason, were declared inoperative by this court. The tax imposed by the first section of the Act of 1885, upon all mortgages, is a tax upon their actual value. The very foundation of taxation by value is a valid assessment.

*Cooley*, Taxn. 259; *Blackw. Tax Titles*, 114, 115; *Hilliard*, Taxn. 290; *Thurston v. Little*, 3 Mass. 422, 433; *Abbott v. Lindenbower*, 42 Mo. 163; *Bratton v. Mitchell*, 1 Watts & S. 810; *Miller v. Hale*, 26 Pa. 482; *Com. v. Blair County*, 2 Pearson, 416, 419; *San Mateo Co. v. Southern Pac. R. Co.* 13 Fed. Rep. 722; *Sutton v. Louisville*, 5 Dana, 81; *People v. Brooklyn*, 4 N. Y. 426; *People v. Waterman*, 81 Cal. 412; *McReynolds v. Longenberger*, 57 Pa. 13; *Philadelphia v. Mackey*, 2 Pearson, 406; *Molz v. Detroit*, 18 Mich. 495, 525; *People v. Kings Co.* 52 N. Y. 557, 567; *Morton v. Comptroller Gen.* 4 S. C. 453, 454; *State v. Readington Twp.* 36 N. J. L. 70; *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1; *Stuart v. Palmer*, 74 N. Y. 188-195; *Weber v. Reinhard*, 73 Pa. 376, 377; *Com. v. Phoenix Iron Co.* 1 Pearson, 333.

A mere ascertainment of the nominal value of corporate loans is no assessment of the actual value, which alone is made taxable by the first section of the Act of 1885.

See *Fox v. Phelps*, 17 Wend. 399; 1 Whart. Ev. § 449; *Washington Ice Co. v. Webster*, 68 Maine, 463; *State v. La. Sav. Bank & S. D. Co.* 32 La. Ann. 1183; *People v. Albany Assessors*, 2 Hun, 585; *People v. Tax Commrs.* 4 Hun, 595; *Com. v. Lehigh Valley R. Co.* 104 Pa. 89.

*Cent. R. Co. v. Jackson*, 74 U. S. 7 Wall. 202 (19 L. ed. 88); *U. S. v. Baltimore & O. R. Co.* 84 U. S. 17 Wall. 322 (21 L. ed. 597); *Cooley*, Taxn. 231.

The interest coupons of railroad bonds are not subject to taxation under the General Laws of Pennsylvania. *Jackson v. Northern Cent. R. Co.* Chase, 268.

#### Creditor not taxable when without jurisdiction.

The creditor cannot be taxed when he is not within the jurisdiction; nor can his property, when out of the jurisdiction. *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 800 (21 L. ed. 179); *St. Louis v. Wiggins Ferry Co.* 73 U. S. 11 Wall. 430 (20 L. ed. 194); *People v. Tax Commrs.* 23 N. Y. 224; *Goldgart v. People*, 103 Ill. 25; *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 344.

Where the debt is not evidenced by negotiable paper, it should be taxed at the residence of the creditor; it is not property in the State of the debtor. *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300 (21 L. ed. 179); *Northern Cent. R. Co. v. Jackson*, 74 U. S. 7 Wall. 202 (19 L. ed. 88); *Com. v. Hays*, 8 B. Mon. 1; *Johnson v. Oregon City*, 3 Oreg. 18; *Johnson v. Lexington*, 14 B. Mon. 648; *Collins v. Miller*, 43 Ga. 336; *Augusta v. Dunbar*, 50 Ga. 387; *Davenport v. Mississippi & M. R. Co.* 12 Iowa, 532; *Tappan v. Merchants Nat. Bank*, 86 U. S. 19 Wall. 600 (22 L. ed. 194); *Arapahoe Co. v. Cutler*, 3 Colo. 350.

Debts due to persons not having a domicile in this State, unless in the hands of an agent doing business in this State, have no *situs* within the State (*Foressman v. Byrns*, 63 Ind. 247); but a loan of money by a nonresident, secured by a mortgage on real estate, is not subject to taxation, although the securities are in the hands of a resident agent. *Myers v. Seaberger*, 10 West. Rep. 474, 45 Ohio St. 223.

#### Choses in action follow the person having the right.

A chose in action follows the person of him having the right; and when he resides out of the State the State has no jurisdiction over the person or

"Due process of law" and "equal protection of the law" are denied to owners of the property taxed.

*Phila. Contributionship v. Yard*, 17 Pa. 388; *Phila. v. Miller*, 49 Pa. 448; *Thomas v. Gain*, 35 Mich. 155; *Stuart v. Palmer*, 74 N. Y. 186; *Mulligan v. Smith*, 59 Cal. 206; 8 Pac. Coast L. J. 499; *Cooper v. Board of Works*, 14 C. B. N. S. (168 Eng. C. L.) 181; *Ervin's App.* 16 Pa. 256; *Davidson v. N. O.* 96 U. S. 97 (24 L. ed. 616); *Dundee Mortgage & Trust Investment Co. v. Parrish*, 24 Fed. Rep. 197; *State v. Read-ington Twp.* 36 N. J. L. 70; *San Mateo Co. v. Southern Pac. R. Co.* 13 Fed. Rep. 722; *Hutson v. Woodbridge Protection Dist.* 16 Pac. Rep. 549.

No tax is due until it is assessed.

*Miller v. Hale*, 26 Pa. 432; *Com. v. Blair Co.* 3 Pearson, 416, 419; *Abbott v. Lindenbouer*, 42 Mo. 168; *Thurston v. Little*, 3 Mass. 432; *Hilliard, Taxn.* 290, 291; *Blackw. Tax Titles*, 114-120; *Cooley, Taxn.* 259, and cases cited; *State Tax on Foreign-Held Bonds*, 89 U. S. 15 Wall. 300 (21 L. ed. 179); *Com. v. Lehigh Valley R. Co.* 104 Pa. 89.

The corporation has the legal right to interpose the defense of the unconstitutionality of the Act and the invalidity of the settlement made under it.

If an assessment of taxes be made in violation of law it is a void Act, and the collector in enforcing its collection is a trespasser.

See *Cooley, Taxn.* 562; *Tuttle v. Everett*, 51 Miss. 27; *Moore v. Allegheny City*, 18 Pa. 53; *Ruth's App.* 10 W. N. C. 498; *People v. Chango Co.* 11 N. Y. 563; *Newman v. Livingston Co.* 45 N. Y. 676; *Union Nat. Bank v. N. Y.* 61 N. Y. 639; *Bank of Commonwealth v. N. Y.* 43 N. Y. 184; *Seasums v. Botta*, 84 Tex. 385;

over the thing, and can tax neither. *State v. Earl*, 1 Nev. 304.

All bonds or stocks, whether of bodies politic or corporate, are personal property, taxable under the laws of the State where their owner resides. *Seward v. Rising Sun*, 79 Ind. 363; *Murray v. Charleston*, 96 U. S. 432 (24 L. ed. 760).

#### Properties of mortgagor and mortgages distinguished.

Except between the immediate parties, the mortgagor before the foreclosure is owner of the property; his interest is real estate, to be conveyed, attached, taxed and inherited only as such, while the interest of the mortgagee is mere personal property. *Waterbury Sav. Bank v. Lawler*, 46 Conn. 245; *Lacon v. Davenport*, 16 Conn. 311; *Punderson v. Brown*, 1 Day, 98; *Gunn v. Scovill*, 4 Day, 242; *Toby v. Reed*, 9 Conn. 224.

Mortgages upon real estate should be held to be taxable unless this should lead to double taxation. *Cook v. Burlington*, 59 Iowa, 251; *McGregor v. Vanel*, 24 Iowa, 436.

The Maryland Declaration of Rights does not prohibit the Legislature from taxing to the mortgagees investments on mortgages, notwithstanding the property mortgaged may be taxable and be taxed to the mortgagors. *Baltimore Appeal Tax Ct. v. Elie*, 60 Md. 302.

A mortgage, given to secure the purchase money of the premises mortgaged, is not exempt from taxation. *Cook v. Burlington*, 59 Iowa, 251; *McGregor v. Vanel*, 24 Iowa, 436; *Finley v. Philadelphia*, 32 Pa. 381.

An Act which subjects all mortgage interests to taxation in common with other property at the place where the mortgaged premises are situated is not a violation of the uniformity clause of the Constitution; nor, as respects prior mortgages, is it an impairment of the obligation of contracts. *State v. Runyon*, 41 N. J. L. 98; *Desty, Taxn.* 331.

A mortgage in the hands of the mortgagee is liable to be taxed at the domicile of the creditor.

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*People v. Halsey*, 53 Barb. 547; *Norton v. Shelby Co.* 118 U. S. 425 (30 L. ed. 178).

**Clark, J.**, delivered the opinion of the court:

This case comes here upon an appeal, under the Act of 1811, from the settlement by the auditor-general and state treasurer, against the Delaware Division Canal Company, for state taxes on the bonded indebtedness of the company under the Act of June 30, 1885.

The claim of the Commonwealth is for taxes upon that portion of said indebtedness held by resident owners, at the rate of three mills on the nominal value thereof, for the year ending on the first Monday in November, 1886.

The Delaware Division Canal Company, the defendant, as we learn from the findings in the court below, is a corporation of the State of Pennsylvania, chartered in 1858, and having authority to borrow money, issue bonds, and to secure the same by mortgage. During the year ending as aforesaid, the defendant's bonds, secured by mortgage, were outstanding to the amount of \$800,000; of these \$700,000 were held by residents, and \$100,000 by nonresidents of the State. The company denies the authority of the Legislature to require an assessment to be made by the treasurer; and, although it made a return of the amount of the outstanding indebtedness, it refused to assess the tax or deduct it from the interest as required by the 4th section of the Act referred to.

The company further contends that by the first section of the Act of 1885, all mortgages, money in the hands of solvent debtors, etc., are made taxable at the rate of three mills "on the dollar of the value thereof, annually," which is the actual value; and, therefore, to create a

*Baltimore Appeal Tax Ct. v. Patterson*, 30 Md. 368; *Latrobe v. Baltimore*, 19 Md. 13; *Desty, Taxn.* 330.

A nonresident loaning on a mortgage in this State is subject to a personal tax herein. *Re Jefferson*, 35 Minn. 215.

A tax on money at interest, secured by mortgage on land, is a tax neither on the coin, the land on which the security is taken, nor upon the paper upon which the promise to pay is written, but on the chose in action or right to collect the debt. *State v. Earl*, 1 Nev. 304; *Desty, Taxn.* 330.

#### Property in notes; where taxable.

Property in notes must be at the place where the owner resides, and not at the place of deposit of the evidence of the debt. *Hunter v. Page County*, 83 Iowa, 379; *Desty, Taxn.* 66.

So a resident of Iowa was held liable to taxation on notes deposited by him in Illinois, and which were never in fact brought into Iowa. *Wilcox v. Ellis*, 14 Kan. 568; *Desty, Taxn.* 63.

A note payable at a specified place in the State is an "indebtedness within the State" within the meaning of the Revenue Law, notwithstanding the owner of the note may be a nonresident, and absent. *Ankeny v. Multnomah Co.* 3 Oreg. 386. Compare *Johnson v. Oregon City*, 2 Oreg. 87.

Where land is sold and conveyed, and notes given for the purchase money, the vendee may be taxed for the land, and the vendor for the notes received for the purchase money. *Wilcox v. Ellis*, 14 Kan. 603; *People v. Ogdenburgh*, 48 N. Y. 390; *Poppleton v. Yamhill Co.* 5 Oreg. 337.

#### Property of nonresident held by resident trustee.

Property held by a resident trustee for a nonresident beneficiary is subject to state taxation. *Price v. Hunter*, 34 Fed. Rep. 365.

"Property," as used in the Constitution, excludes "money," credits, investments in bonds, etc. *Fullen v. Raleigh*, 68 N. C. 451.

valid tax on corporate loans the rate must be applied to the actual, and not the nominal, value thereof, and that the actual value can be ascertained only by assessment in due form of law, upon notice to the holder and with the right of appeal. Its contention is that, in view of the provisions of the first section of the Act, the system of taxation provided for in the 4th section, as to corporate loans, is repugnant to that clause of the Constitution which provides that "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax."

The argument is that the taxing section of the Act subjects all the taxable subjects therein designated, including corporate loans, to a tax of three mills on the dollar of their value; that all the other subjects are valued and taxed according to such value by the local assessors, while corporate loans are, without being valued and assessed, taxed at their nominal value; that nominal value is not a certain measure of actual value, which is often much greater and often much less; so that, in many instances, the tax upon corporate obligations is much more, and, in many others, much less, than it would be if imposed upon the actual value.

The case of *Com. v. Lehigh Valley Railroad Company*, 104 Pa. 89, which has been much referred to in the argument of counsel, on the subject of assessment, presented a wholly different question from that involved in this controversy. The taxation there complained of was of corporate bonds, under the Act of June 7, 1879 (P. L. 112), and its Supplement of June 10, 1881 (P. L. 99).

By the express words of these Acts, such securities were made taxable at the rate of four mills "on every dollar of the value thereof," which was the precise basis for assessment of individual property and securities, under the general revenue system of the State, by the local assessors; only the rate was different. The phrase "every dollar of the value thereof" was held to be the actual value; and as neither the Act of 1879 nor 1881 made any provision for the ascertainment of the actual value, it was held that they did not constitute an independent scheme for the taxation of corporate loans, but were to be aided by the machinery of the Act of 1844; for as the loans were taxable in the hands of resident owners, at their actual value, a legal ascertainment of that value was essential to the assessments. The tax of a citizen, as we there said, is the result of the rate applied to the value of the property he owns, and he is not taxed until the rate is thus applied by some legal mode of adjustment. It was held, further, that neither the return of the amount of the indebtedness, nor the account settled by the auditor-general thereon, could be taken as an assessment, for neither the corporation nor the accounting officer of the Commonwealth had any authority to make it. That could not be regarded as an assessment of an *ad valorem* tax, made by a person whose interests were adverse, who was charged with no duty, and was under no oath or obligation; where the real party in interest had no notice, no right to interfere if he had notice, and no appeal.

As there was no other means of assessment provided by law, it was the duty of the local

assessors, in making the general assessment in 1880 and in 1881, to value and assess corporate bonds wherever found in the hands of resident owners; and it was presumed in law that these officers had performed their full duty in the premises.

But, by the Act of June 30, 1885 (P. L. 193), the Legislature has attempted to supply the machinery, which was found to be wanting in the Acts of 1879 and 1881, for taxation of corporate loans, and, in so doing, has adopted substantially the system suggested by the 42d section of the Act of April 29, 1844, relating to the taxation of municipal loans, in the hands of resident holders.

By the first section of the Act of 1885, all mortgages, money owing by solvent debtors, etc., are made "taxable for state purposes, at the rate of three mills on the dollar of the value thereof, annually."

By the 4th section, however, it is provided, "that hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond or certificate of indebtedness issued by said corporation, to residents of this Commonwealth, and held by them, to assess the tax, imposed and provided for state purposes, upon the nominal value of each and every said evidence of debt, and to report, on oath, annually on the first Monday of November, to the auditor-general, the amount of indebtedness of the corporation owned by the residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar, of the interest paid as aforesaid, and return the same into the state treasury," etc.

By the 6th section the obligations of public or private corporations, the tax upon which is required by law to be collected by the corporation from the holder, and paid into the state treasury, are wholly withdrawn from the general and ordinary processes of assessment by the local assessors.

We are clear in our convictions that if there is any constitutional authority to impose the tax under the 4th section of the Act, the settlement by the accounting officer was rightly made against the company; the Act constitutes the company, or its treasurer as such, the collector of the tax; and, upon failure to discharge the duty imposed by law, the settlement is properly made against the company, whose servant he is, as in case of default of any other officer of the government, upon whom a like duty is imposed.

The obligation rests upon the company; but as the company can only act through its officers, the default of the officers is esteemed the default of the company, and the penalty is visited upon them. The treasurer is designated, in order that there may be no evasion; he has exceptional opportunities to know, and has the power in his own hands to perform, the several matters required. The system of collecting state taxes was first introduced under the 42d section of the Act of April 29, 1844, where it is applied to municipal loans, and by the Act of April 30, 1864 (P. L. 218), was first extended to the loans of private corporations.

In a number of cases, both before and since the adoption of the present Constitution, this court has affirmed the right of the Commonwealth to impose this duty upon corporations, both public and private. *Maltby v. Reading & C. R. Co.* 52 Pa. 140; *Com. v. Phœnix Iron Co.* 1 Pearson, 383; *Delaware, L. & W. R. Co. v. Com.* 66 Pa. 69; *Com. v. Martin*, 107 Pa. 185; *Com. v. Lehigh Valley R. Co.* 104 Pa. 89.

In the last case cited we said: "We can see no constitutional or other difficulty in the way of obliging the officers of corporations, municipal or private, by appropriate legislation, to assess and collect taxes upon their corporate loans or stocks. This method of reaching subjects capable of successful concealment, and liable to escape the notice of the most vigilant assessor, has for many years been recognized as a valid exercise of legislative power . . . The tax is imposed indiscriminately upon all mortgages, etc., in the hands of the owner or possessor, but the corporation is made the collector of the tax upon the corporate loan. This was the construction put upon the Act of April 80, 1864, by this court, in the case of *Maltby v. Reading & C. R. Co.* 52 Pa. 140, and the reasons there assigned are generally applicable here.

The case of *Maltby v. Reading & C. R. Co.*, *supra*, it is true, was overruled in the Supreme Court of the United States [in the case of *State Tax on Foreign Held Bonds*, 82 U. S.] 15 Wall. 300 [21 L. ed. 179], in so far as it recognized the taxation of bonds in the hands of nonresident owners; but to the extent stated, it is still of undoubted authority.

But assuming the power of the Legislature to enforce this method of collecting, it is contended that the tax is not uniform on the same class of subjects, and is therefore illegal and void; that whilst all mortgages, money in the hands of solvent debtors, etc., are by the Act of 1885 made taxable for state purposes annually, at the rate of three mills "on the dollar of the value thereof," the like obligations of private corporations are to be assessed, at the same rate, upon "the nominal value."

The actual value of private or individual obligations for money in the hands of solvent debtors is, as a general rule, equivalent to their nominal value. Such obligations are not ordinarily put upon or quoted in the market, and therefore have no variable market value as other securities have; on the contrary, the actual value of corporate securities is dependent upon a variety of conditions, independent of the value of the debtor's estate—the fluctuations of trade, the date of maturity, the rate of interest, the amount of competition, and generally upon the stringency of the market and the financial condition of the country. Some of these securities, it is said, upon which interest is regularly paid, sell in the market as low as fifty cents, and others, perhaps, as high as one hundred and fifty cents, on the dollar. And it is argued that as by the first section of the Act of 1885 individual and corporate obligations constitute a single class for taxation the Act unjustly discriminates between them in the fourth section, and that therefore the taxes imposed cannot be said to be uniform upon the same class of subjects.

The first section of the Act does indicate certain subjects for taxation at a certain rate, and these may in some sense be said to constitute a general class; but the classification of these subjects is extended by the fourth section—one class, consisting of the securities of private corporations, is to be taxed at their nominal value, and the residue (excepting the securities of municipal corporations, which are still taxable under the 42d section of the Act of April 29, 1844) constitute another class, taxable at the same rate, but upon their value, to be ascertained under the ordinary processes of assessment by the local assessor.

The new Constitution does not withdraw the power of classification from the Legislature (*Kitty Roup's Case*, 81\* Pa. 211; *Kittanning Coal Co. v. Com.* 79 Pa. 100); indeed, the power is necessarily implied in the constitutional provision to which the 4th section of the Act of 1885 is supposed to be obnoxious.

The power to impose taxes for the support of the government, subject to the limitations of the Constitution, still belongs to the Legislature; the selection of the subjects, their classification and the methods of collection are purely legislative matters. When the action of the Legislature, with respect to these matters, is not repugnant to the Constitution, it would certainly be a case of the grossest inequality, which would call for the intervention of the courts. *Kelly v. Pittsburgh*, 85 Pa. 170.

It may be conceded, however, that classification should be made according to some reasonable, practical rule, drawn from experience, which would prevent a gross inequality in the burdens of taxation. "It must," in the language of *Mr. Justice Agnew*, "visit all alike in a reasonably practical way, of which the Legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns; but still it must be public in its purpose and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment; and falls within the clearly implied restriction in the Bill of Rights." *Re Washington Ave.* 69 Pa. 352.

Absolute equality is of course unattainable; a mere approximate equality is all that can reasonably be expected. A mere diversity in the methods of assessment and collection, however, if these methods are provided by general laws, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, however different the procedure, there is a compliance with the constitutional provisions (*Fox's Appeal*, 112 Pa. 353, 3 Cent. Rep. 561); even when there may be some disparity of results, if uniformity is the purpose of the Legislature, there is a substantial compliance. *Hunter's App.* 42 Legal Int. 894; *Loughlin's App.* 19 W. N. C. 517.

Nor is classification necessarily based upon any essential differences in the nature or, indeed, the condition of the various subjects; it may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and reasonably uniform results; or it may be based upon well grounded considerations of public policy.

Hence it is that some classes of corporations are taxed upon net earnings, or income; others upon capital stock, the value thereof to be ascertained by their annual dividends, or in a certain event upon the actual value of the shares; others upon their gross receipts; insurance companies upon the gross amount of their premiums; coal and mining companies at a specific sum for every ton of coal mined, etc.

Real estate, for taxation, has been classified as seated and unseated, and for municipal purposes may, perhaps, admit of further classification. *Kitty Roup's Case, supra.*

Collateral inheritances are distinguished from those that are direct, the former being subject to taxation, the latter not. Foreign insurance companies have been distinguished from domestic companies, and taxed independently and differently. *Germania L. Ins. Co. v. Com.* 85 Pa. 515.

So trades, professions, callings, and even single men, have been taxed by classification, and it has been said that professional men may be classified as physicians, lawyers, clergymen, etc.; tradesmen as merchants, mechanics, etc.; and other persons as bankers, manufacturers, etc., and a uniform tax assessed upon each class. *Hanger's App.* 109 Pa. 79.

Not only have taxes been laid in all these various forms, rated on values, on dividends or profits, on premiums, on net earnings, and on gross receipts, but also by specific sums on specific articles. The roadbed, station houses, rolling stock and equipments of a railroad company; the canal bed, and berm banks, the locks, lock houses, etc., of a canal company; the banking house or place of business of a banking company, etc., are withdrawn from the ordinary process of general taxation and are reached in a tax upon capital stock, which has always been regarded as a tax upon the property and assets.

These several classifications and departures from uniformity in methods, were intended simply to bring about a just uniformity in results. So places of amusement and the luxuries of life may be taxed in relief of the necessities; household and kitchen furniture, gold and silver plate, exceeding a certain value, pleasure carriages, and gold and silver watches, kept for use, prior to the Act of May 13, 1887 (P. L. 114), were selected from the like articles in trade, and from other articles of personal property, and with money at interest, were subjected to a special tax. Illustrations might be multiplied to show that classification does not depend upon differences in the physical nature or condition of the subjects selected, but upon a variety of considerations.

Corporate obligations by the fourth section of the Act of 1885 are taken out of the general designation of subjects contained in the first, and as a distinct class are subject to a different standard of valuation, and the tax to a different method of collection. There are several reasons why corporate and individual obligations should be distinguished, in classification, not arising wholly out of any essential difference in their physical nature, perhaps, but out of want of adaptation in our general tax laws to reach them, in the ordinary methods of taxation. They are, as a class, transferable by delivery,

and therefore capable of concealment. The transactions out of which individual securities originate in the ordinary course of business for the loan of money, have more or less publicity.

Experience has shown that the ordinary methods of valuation, as to these, do not fail of enforcement; but in the case of corporate loans, whilst corporate mortgages may be recorded in one city or county, the bonds may be found in the pocket of the holder in another city or county of the Commonwealth. Experience has taught us that, in the ordinary processes of valuation, they are not found; the law, generally applicable, lacks adaptation to the discovery of this quality of obligations. Moreover, their negotiability gives them a commercial quality; a vast brood of bonds is covered by a single mortgage, and as they are issued they fly from hand to hand throughout the whole commercial world; it is only upon their annual return at the interest periods that their ownership can be ascertained.

These securities constitute one of the commodities on sale in the market; they are sensitive in many instances to the conditions which affect the price of stocks. They are subject to great fluctuations, caused by the condition of the money market or the condition of the country, and sometimes by artificial or even accidental means. Well informed men must differ greatly in their estimate of the value of such property. The stock market exhibits changes in the quotations daily, sometimes hourly. Presumptively, however, the nominal value is the true value of securities yielding and paying interest; and the Legislature has therefore fixed the nominal value, or the par value, for the purpose of taxation. These peculiarities of corporate securities, with others, perhaps, that might be mentioned, arising partly from their nature and properties, and partly from a want of adaptation in our general system to reach this quality of subjects, gives rise to their distinct classification.

The moment we concede the power to classify we have disposed of the question of uniformity, for then all that is required by the Constitution is that the taxes shall be uniform upon the members of a class. *Kitty Roup's Case, supra.*

Classification for purposes of taxation, as a general rule, is a matter for the Legislature; it is the uniformity of taxation, according to that classification, which is for the courts; and it is plain that the Act of 1885, having constituted corporate loans in the hands of resident holders a distinct class, does not discriminate against any member of that class. The tax is not upon the corporation, it is upon the holder of the corporate bonds; and the holder may be an individual, a partnership, a banker or broker, or a private corporation; the law is general, and applies to all holders.

Whether the tax is paid or not is a matter of indifference to the corporation, for if they pay it, they may defalk it from the interest. The tax being paid by the debtor, out of the interest he pays to the creditor, we cannot see that there is any ground of complaint, that the obligations are taxed at their face value; the tax is to be deducted from the interest, and the payment of

the interest, by the debtor himself, is presumptive evidence of his solvency. *Com. v. Phoenix Iron Co. supra.*

As to the power of the Legislature, under such circumstances, to fix the face value of the obligation as the value for taxing purposes, we think there can be no doubt.

"The right of the financial officers of the corporation," says *Chief Justice Thompson*, in *Delaware Railroad Company v. Commonwealth*, 66 Pa. 66, "to retain the three mill tax, under the Act of 1844, out of the interest payable to loan or bondholders of the company, under the Act of April 30, 1864, without an assessment of the county commissioners, or assessing officers, was maintained to be undoubted in *Maltby v. Reading Railroad Company*, 52 Pa. 140, and reasserted in *Commonwealth v. Phoenix Iron Company* [1 Pearson, 333]. The question is therefore settled." To the same effect are *Susquehanna Canal Co. v. Com.* 72 Pa. 72; *Buffalo & E. R. Co. v. Com.* 8 Brewst. 374, and *Com. v. Martin*, 107 Pa. 185.

The Act of 1844 was the beginning of our present revenue system; that Act repealed all laws theretofore passed for levying taxes for State purposes; the methods provided by the 42d section of that Act for assessment and collection of state taxes on municipal bonds has met the approval of the profession, and has in all cases been recognized as valid by the courts. A reference to the cases already cited will abundantly verify this statement.

The 4th section of the Act of 1885 is a substantial copy of the 42d section of the Act of 1844; its purpose was simply to apply the same system to the taxation of corporate loans. It has proved to be an efficient and just method of collecting taxes upon this class of securities; it is easy of enforcement and precludes the escape of large amounts of taxable property which would evade collection in the ordinary methods, and we are of opinion that it is in no way repugnant to the provisions of the Constitution.

Although there is some diversity in the methods of procedure, as well as in the standard of valuation in the taxation of individual and corporate obligations, there is, in fact, no great disparity in result; the difference is more apparent than real. Individual mortgages, money in the hands of solvent debtors, etc., are ordinarily—indeed, we think universally—valued at their face.

The actual value of an individual mortgage, or of an obligation for money in the hands of a solvent debtor, is presumptively its face value. If the mortgage is bad, or the obligor is not solvent, the debt is not taxable; if, on the contrary, they are good, the common experience

of business men is that the face value is the actual value, ascertained in the ordinary modes of assessment.

But in *Poor's Appeal*, 112 Pa. 337, 3 Cent. Rep. 561, it was held that the tax on mortgages, etc., imposed by the first section of the Act of 1885, does not extend to such securities, held by private corporations; that these are reached by the tax on capital stock, under the Act of 1879. The fourth section of the Act of 1885 only requires the treasurer of the corporation to assess the tax imposed by the first section; and as there is no tax imposed by that section, on mortgages, etc., in the hands of private corporations, it follows, of course, that they are not to be assessed or any deduction made for taxes from the interest thereon.

Foreign corporations exercising their franchises under the laws of other States and countries are beyond the reach of our processes of taxation. We could not require them ordinarily to comply with any such regulation of our law, and therefore they are necessarily excluded from the provisions of the Act. Such foreign corporations as are engaged in business in the State might, doubtless, be required to comply as a condition of their right so to do; but this could only embarrass the action of the local assessor, and upon this ground doubtless they were wisely excluded from the operation of the Act.

We are of the opinion, therefore, for the reasons given, that the treasurer of the Delaware Division Canal Company was bound to make this assessment and to deduct the tax off the interest paid; the word "of" in the 4th section was doubtless intended for "off;" this is a manifest blunder, and cannot be permitted to change the plain meaning of the Legislature.

According to the findings of the learned Judge of the court below, \$800,000 of the bonds of the Delaware Division Canal Company were outstanding at the time specified in the return: of these \$100,000 were held by nonresidents of the State, and \$415,000 by corporations of the State of Pennsylvania; the residue being \$285,000 therefore, is all that would appear to be subject to the tax imposed by the first and fourth sections of the Act of 1885.

That the defendants have a legal standing to contest the constitutionality of the law, and the validity of the settlement, we have no doubt; if the tax were illegal the company would have been under no obligation to retain it, or to pay it to the State.

*The judgment is therefore reversed*, and judgment is now entered against the defendant, and in favor of the Commonwealth, in the sum of \$940.50 with interest at the rate of 12 per cent per annum from June 27, 1887, and costs.

## UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

### UNITED STATES

v.

Mary P. HUTCHESON *et al.*

(....Fed. Rep.....)

\*1. Where the quarterly returns of a

\*Head notes by SPENCER, J.

2 L. R. A.

postmaster, in which are reported receipts for sale of stamps, etc., and amount of commissions claimed for cancellation of stamps, have been regularly rendered to the department and have been passed upon by the auditor, and the balances therein found to be due the Government have been each quarter carried into a general account—held, that such action by the auditor is a



complete allowance of the commissions claimed and adjustment of such quarterly returns.

2. **Where the credits in the general account kept by the auditor against the postmaster, and made up as above stated, show that the postmaster has fully paid all balances so charged, so that a complete balance could be struck upon such general account held, that in such case there is a complete settlement of the account, and that thereafter the commissions covered by such adjusted accounts were not withheld in the power of allowance by the Postmaster General so as to give him the right to "withhold" the same within the meaning of the Act of Congress of June 17, 1878 (20 U. S. Stat. at L. 141). There was nothing to "withhold."**
3. **If the Postmaster General, in the exercise of the power conferred upon him by the Act of June 17, 1878, before the allowance of credit for commissions is made, directs that it shall not be made, and it is not made, but in lieu thereof credit is given on the account kept with the postmaster for the amount of the allowance deemed reasonable by the Postmaster General, the balance shown due the Government by such an account would be *prima facie* sufficient, but not conclusive, evidence against the postmaster.**
4. **Where an account of a postmaster, regular on its face, has been adjusted and allowed by the proper accounting officers and fully paid, such officers cannot, after the term of office of the postmaster has expired, evolve *ex parte* a balance in favor of the Government, founded solely upon a general and vague allegation of fraud in accounts formerly passed upon, so as to make such balance *prima facie* evidence against the postmaster and his sureties. Such allegations must be specific, and sustained by competent evidence.**

(February, 1886.)

**A**CTION against principal and sureties in a postmaster's bond, to recover the amount alleged to be due from the principal as postmaster to the United States Government. *Judgment for defendants.*

The facts are fully stated in the opinion *Mr. Du Pont Guerry, Dist. Atty.*, for the United States.

*Messrs. Lester & Ravenel* for defendants.

*Speer, J.*, delivered the following opinion:

The District Attorney has brought suit in behalf of the Government against the defendants on a postmaster's bond. The Government has offered in evidence a certified copy of the bond, a certified copy of a demand for \$1,296.26, and what purports to be a transcript of the account kept by the postoffice department with the defendant Mary P. Hutcheson as postmaster at Marysville, Georgia; and appended thereto are copies of the quarterly returns or accounts current of the said postmaster, rendered to the postoffice department during her incumbency of the office.

This account and the returns are under one certificate from the department, the language of which is that the writing annexed to the certificate is "a true and correct statement of the account, from October 1, 1878, to June 30, 1885, of Mrs. Mary P. Hutcheson, late postmaster at Marysville in the State of Georgia, and that the papers thereto appended are copies of papers pertaining to his accounts in the office of the sixth auditor."

2 L. R. A.

The Government has also offered in evidence a certified copy of an order made by the Postmaster General, which is in the following words:

Post Office Department,  
Office of the Postmaster General,  
Washington, D. C., Oct. 30, 1886

Ordered No. 230.

Being satisfied that Mary P. Hutcheson, late P. M. Marysville, Johnson Co., Ga., has made a false return of business at the postoffice at said place during the period from Oct. 1, 1878, to June 30, 1885, in order to increase her compensation beyond the amount she would justly have been entitled to have by law; *Now*, in the exercise of the discretion conferred by the Act of Congress entitled "An Act Making Appropriations for the Service of the Postoffice Department for the Fiscal Year ended June 30, 1879, and for Other Purposes," approved June 17, 1878 (section 1, chapter 259, Supplement to Revised Statutes), I hereby withhold commissions on the returns aforesaid and allow as compensation (in place of such commissions and in addition to box-rents) deemed by me under the circumstances to be reasonable, during the period aforesaid, the rate of \$10 per quarter, and the auditor is requested to adjust her accounts accordingly.

Wm. F. Vilas,  
Postmaster General.

An inspection of the certified copies of the accounts current, or quarterly returns of the postmaster, shows that they are made upon the forms prescribed by the department, and that there are parallel columns provided for the figures stating the amount of the different items of the account as rendered by the postmaster and as found by the auditor upon adjustment. It further appears from the figures entered in red ink in the column provided for the entries by the auditor, that the findings of the auditor as to the items of the accounts agreed with the statement of the accounts as rendered by the postmaster. It further appears from inspection that the general account kept by the department with the postmaster was made up in the following manner: On the debit side the postmaster is charged quarterly with the balances found due by the auditor on adjustment of the quarterly returns of the postmaster, the aggregate of which up to and including the quarter ending June 30, 1885, is \$771.83. On the credit side the postmaster is given credit for his payments or deposits made to the credit of the Government, the aggregate of which amounts to \$771.96. On the debit side of the account, however, there are additional entries which appear under date of "December, 1886"—long after she had ceased to be postmaster, and long after the last entry on the credit side, showing an amount more than sufficient to offset the debit items—these are stated to be for "amount of commissions illegally retained" during the quarters stated from 1878 to June 30, 1885. These items aggregate \$1,296.39.

A general balance is struck upon the account below these items, leaving the defendant in debt to the Government, according to the account, in the sum of \$1,296.26. And for this amount the Government now brings suit.

It is contended by the district attorney that

the provision in the Act of June 17, 1878 (20 U. S. Stat. at L. 141), "That in any case where the Postmaster General shall be satisfied that a postmaster has made a false return of business, it shall be in his discretion to withhold commissions on such returns, and to allow any compensation that under the circumstances he may deem reasonable," gave to that officer the power to make the order which he did make on October 30, 1886, and under it to reopen the entire account from 1878 and charge back upon the postmaster the excess of the commissions which had been retained in excess of the \$10 per quarter deemed reasonable by the Postmaster General; and that the balance shown on the account after such recharges were made is to be taken as *prima facie* correct in this proceeding.

The court does not so construe the law, nor does it think the statute referred to applicable to the facts of this case.

The action of the auditor in passing upon each quarterly return which covered the charges for commissions, and in carrying the balance therein found to be due the Government into the general account of the postmaster, was a complete adjustment of such quarterly returns; and since the Government account shows that such adjusted balances were fully paid and that there was no balance due in February, 1886, we do not think there was anything for the Postmaster General to "withhold." The postmaster had already been given credit for the commissions claimed, and had been paid in full.

We think the meaning and scope of the statute is simply this: If the Postmaster General shall be satisfied that a postmaster has made a false return of business, it shall be in his discretion not to give the postmaster credit for the amount of commissions claimed in such returns, but to allow any compensation that under the circumstances he may deem reasonable.

If the Postmaster General had made the order fixing the compensation deemed reasonable by him before giving the postmaster credit for the commissions, and had given the postmaster credit on his account for the \$10 per quarter instead, and had withheld the credit of commissions claimed in excess of that amount, the Government's account would have shown the balance now sued for, and would have been *prima facie* sufficient; but that is not the case at bar.

But even such an account would not be conclusive upon a postmaster. He has the legal right to the commission fixed by the statute for the service, if actually performed, and may plead that right when sued upon his bond, or may assert it in an independent suit against the Government, brought in the court of claims or in a circuit or district court since the Act of March 3, 1887. 24 Stat. at L. 505.

It is not questioned that even after the adjustment and allowance of an account, the department ought to withhold payment of a balance found due a postmaster or other officer, if it be discovered that the account is fraudulent; or even where the account has been fully adjusted and paid, there can be no doubt of

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the right of the Government to recover the money so fraudulently obtained upon proper proof of fraud. But where an account regular on its face has been adjusted by the proper accounting officers and fully paid, such officers cannot, after the term of office of the postmaster has expired, evolve *ex parte* a balance in favor of the Government, founded solely upon a general and vague allegation of fraud in accounts formerly passed upon, so as to make such balance *prima facie* evidence against the postmaster and his sureties.

Such a re-statement of the account is proper enough as a guide to the district attorney in making out his case; but the postmaster and his bondsmen have the constitutional right to a trial by jury, and to have the allegations of fraud plainly specified. Moreover, these specifications, if not self-evident, must be proven by competent evidence, before a judgment can be rendered against the citizen which would deprive him of his property.

To condense in a few words the conclusions of the court:

The postmaster is presumed to have done his duty until the contrary is made to appear by the proof. The accounts of the postmaster, in the absence of the incriminatory letter of the Postmaster General, are fairly and honestly kept and balance to a cent. That letter charges simply that the postmaster "made a false return of business during the period from October 1, 1878, to June 30, 1885," without other notice to the postmaster or other specification of fraud. In consequence the Postmaster General arbitrarily assesses and adjudges a balance against the postmaster of \$1,296.26. The district attorney offers no proof to show that the Postmaster General was right in his conclusions, and admits that there is nothing he can submit either upon the face of the accounts or proof *alimdo* to show the falsity and the fraud. He closes his case. To allow a verdict upon such a presentation, in the opinion of the court, would be to substitute assertion for proof in a judicial proceeding, to hold the plaintiff entitled to recover because the suit is brought, to adjudge the defendant guilty of fraud because she is accused, and, in other words, to presume fraud in violation of the settled rule that it is never presumed, and to avoid that sovereign and beneficent principle of the Constitution conferring upon the defendants in such cases the right to trial by jury, with due process of law, and to accept in lieu thereof the novel and dangerous formula condemned for centuries among all English speaking races, that the assertions of power are all sufficient to bereave the citizen of his property and good name, even though there is not a syllable of testimony submitted to the jury to assess the one or assail the other. It is to be hoped that the day will never come when a citizen of these United States can be adjudged guilty of malfeasance in office, mulcted in pecuniary penalties, upon the evidence of the unsworn and unsupported statement of an official, howsoever elevated in station or great in power.

*The jury is directed to return a verdict for the defendants.*

## ALABAMA SUPREME COURT.

Joseph WHEELER  
v.  
McGUIRE, Scroggins & Co.

( .... Ala. .... )

1. An agent placed in charge of a retail store to conduct the business, with express authority to use money especially deposited for that purpose, and the cash receipts of the business, in purchasing goods, is a general agent in conducting the business of the store with special powers to purchase, and cannot bind the principal by a purchase on credit.
2. In order to bind a principal by ratification, assent or acquiescence in prior acts of his agent in excess of authority actually given, a knowledge of the material facts must be brought home to him.
3. Any evidence is relevant, on an issue as to

the implied authority of an agent to exercise powers in excess of those expressly given him, which shows prior, similar acts and tends to prove or disprove the knowledge of the principal, and the reliance on the part of those dealing with the agent upon the principal's recognition of such acts.

4. Where a man gave an agent in charge of a retail store authority to purchase goods, when he was on the eve of leaving home to be absent for some months, which he revoked on his return, it is a question for the jury whether the parties dealing with the agent, after such revocation, had notice thereof.
5. The principal is not estopped to deny the authority of his agent to do acts in excess of the authority expressly given him, because he might have known that the agent was exercising such power if he had exercised ordinary diligence; he is not required to distrust his agent.

*NOTE.—General and special agents defined.*

A general agent is one appointed to do all acts connected with a particular business or employment. A special agent is one appointed to do a single act. *Keith v. Herschberg Optical Co.* 48 Ark. 138.

Power to sell and collect constitutes a special agency. *Robinson v. Anderson*, 3 West. Rep. 677, 106 Ind. 152.

Power to act generally, in a particular business, or a particular course of trade in a business, however limited, would constitute a general agency, if the agent is so held out to the world, however restricted his private instructions may be. *Doan v. Duncan*, 17 Ill. 272; *Crain v. First Nat. Bank*, 1 West. Rep. 603, 114 Ill. 518; *Story*, Ag. § 17.

That the authority of an agent is limited to a particular business does not make the agency special; it may be as general in regard to that as if the range of it were unlimited. *Bell v. Offutt*, 10 Bush. 632; *Crain v. First Nat. Bank*, 1 West. Rep. 632, 114 Ill. 516; *Anderson v. Conoley*, 21 Wend. 279; *Jeffrey v. Bigelow*, 13 Wend. 518; *Rountree v. Denson*, 59 Wis. 522.

A general agent is one who has unlimited power in the transaction of all kinds of business; yet an agent to transact business of a particular kind is, as to that business, a general agent. *Wilcox v. Routh*, 9 Smodes & M. 476.

"A general authority," says Mr. Bouvier (Inst. Vol. 2, p. 14), "is one which extends to all acts connected with a particular employment embracing an intermediate power. A man may be a general, without being a universal, agent; and general language, giving the most extensive agency, will be confined within such bounds as to make the agent a general, and not a universal, agent. A special agent is one whose authority is confined to a special or an individual instance." 2 Bouv. Inst. 14. And see *Walker v. Skipwith*, Meigs, 502; *Tomlinson v. Collett*, 3 Blackf. 436; *Dunlap's Paley* Ag. 201.

*General and special agents distinguished.*

There is an important distinction between a general agent and a particular agent. *Jacques v. Todd*, 3 Wend. 83; *Anderson v. Conoley*, 21 Wend. 279; *Savage v. Rix*, 9 N. H. 233; *Whitehead v. Tuckett*, 15 East. 400; 1 Parsons, Cont. 39.

Those who deal with an agent whose authority is limited to special purposes are bound at their peril to know the extent of his authority. *Bohart v. Obern*, 36 Kan. 284; *Robinson v. Anderson*, 3 West. Rep. 677, 106 Ind. 152; *Bond v. Pontiac*, O. & P. A. R. Co. 5 West. Rep. 581, 62 Mich. 613.

If a particular agent exceed his authority, the principal is not bound. *Parsons v. Armor*, 28 U. S. 8 Pet. 413 (7 L. ed. 724); *Fleming v. Hector*, 2 Mees. & W. 178; *Todd v. Emly*, 7 Mees. & W. 427; 8 Mees. & W. 506; *East India Co. v. Hensley*, 1 Esp. 111; *Woodin v. Burford*, 2 Cramp. & M. 301; *Jordan v. Norton*, 4 Mees. & W. 155; *Sykes v. Giles*, 5 Mees. & W. 645; *Watson v. Brogden*, 1 Youngs & J. 457; *Daniel v. Adams*, Amb. 496. And see *Reaney v. Culbertson*, 21 Pa. 507.

But if a general agent exceed his authority the principal is bound. *Duke of Beaufort v. Neeld*, 12 Clark & F. 248, 73; *Nickson v. Brohan*, 10 Mod. 100. 3 L. R. A.

Where an agent is supplied by his principal with money to buy goods, and the agent buys the goods on credit, the principal is not liable to the seller of the goods, notwithstanding the goods have come to his use, unless he had authorized the vendor to trust him by previously allowing the agent to purchase on credit. *Boston Iron Co. v. Hale*, 8 N. H. 383; *Dunlap's Paley*, Ag. 23; *Malyne*, 82; *Beawes*, 43; 13 Vin. Abr. 6.

A master is not responsible for a contract entered into by a servant to whom he had always given cash for making purchases (*Rusby v. Scarlett*, 5 Esp. 75; 1 Parsons, Cont. 48); so with any particular agent who obtains on credit goods which the principal gave him money to purchase. *Fleming v. Hector*, 2 Mees. & W. 181.

*Authority of agent.*

An agent with power to conduct a business has authority to do everything necessary or proper and usual in the ordinary course of the business. *Minor v. Mechanics Bank*, 26 U. S. 1 Pet. 46 (7 L. ed. 47); *Sentell v. Kennedy*, 29 La. Ann. 679; *German F. Ins. Co. v. Grunert*, 112 Ill. 68; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459; *Cummings v. Sargent*, 9 Met. 172; *Taylor v. Labcaume*, 14 Mo. 572, 17 Mo. 338; *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. 77; *Bailey v. Rawley*, 1 Swan (Tenn.) 295; *Shepherd v. Milwaukee Gas-light Co.* 11 Wis. 24; *Bridenbecker v. Lowell*, 32 Barb. 9.

If the purchase made by the agent was a part of the business, the principal is liable; otherwise not. *Sulman v. Byles* (Mich.) 9 West. Rep. 314.

One can be bound only by the authorized acts of another. He cannot be charged because another holds a commission from him, and falsely asserts that his acts are within it. *Mechanics Bank v. New York & N. H. R. Co.* 13 N. Y. 599; *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; 1 Parsons, Cont. 42.

No person has the right to rely on the statements of an agent concerning his own agency. *Bond v. Pontiac, O. & P. A. R. Co.* 5 West. Rep. 581, 62 Mich. 613; *Credit Co. v. Howe Machine Co.* 3 New Eng. Rep. 565, 54 Conn. 367; *Farmers & M. Bank v. Butchers & D. Bank*, 16 N. Y. 125.

*Principal estopped to deny authority of agent.*

When one holds another out to the world and accredits him as his agent in determining the liability of the principal the question is, not what authority was intended to be given to the agent, but what authority was a third person dealing with him justified, from the acts of the principal, in believing was given to him. *Griggs v. Selden*, 2 New Eng. Rep. 786, 53 Vt. 561.

Suffering another to represent himself as agent with power to make a particular contract estops the principal from denying his liability thereunder. *Fanning v. Cobb*, 2 West. Rep. 611, 20 Mo. App. 577.

If one, with notice that his agent assumes to have and to exercise a power he really does not possess as agent, permits the agent to hold himself out as clothed with such power, then the principal will be as fully bound by the acts of the agent as though the latter possessed the power. *Collins v. Cooper*, 65 Tex. 400.

Though an agent exceeded his authority in making

but may act on the presumption that third parties dealing with the agent will not be negligent in ascertaining the extent of his authority.

1. **The knowledge of an agent, to operate as constructive notice** to the principal in Alabama, must have been acquired after the relation of principal and agent was formed.

2. **Where a jury finds** that the evidence as to any fact, essential to plaintiff's right of recovery, and as to which the burden of proof rests upon him, is evenly balanced, or in equilibrium, the verdict must be for defendant.

(December 19, 1888.)

**APPEAL** by defendant, from a judgment of the Lawrence County Circuit Court in favor of plaintiffs in an action to recover for goods sold and delivered. *Reversed.*

The points presented sufficiently appear from the opinion.

*Mr. Joseph Wheeler* for appellant.

a certain contract, yet if he had previously made contracts of a similar character which had been approved by the principal, the latter would be bound by the contract in question, if he permitted it to be performed by the other party without notice that the agent exceeded his authority in making it. *Gallinger v. Lake Shore Traffic Co.* 67 Wis. 529.

Where the agent acting, as he supposed, for the best interest of his distant principal, had gone beyond his instructions, if the principal did not choose to affirm the act, it was his duty, when informed of the agent's act, to give immediate information of his repudiation. *Law v. Cross*, 66 U. S. 1 Black, 683 (17 L. ed. 185).

A principal who does not use the means within his reach, which for his own protection prudence would suggest, to ascertain how his agent clothed with general powers in a particular business conducts that business, should not be heard to deny notice of the authority which the agent has assumed to exercise, or to deny the existence of such authority, when to do so would operate to the injury of a person who, on the faith of an open and long continued exercise of such apparent power, has dealt with the agent in the belief of its real existence. *Collins v. Cooper*, 65 Tex. 400.

A principal is estopped from denying his agent's representation, as against a third person, where he has clothed the agent with power to do an act upon the existence of some extrinsic fact. *Bank of Batavia v. New York, L. & W. R. Co.* 7 Cent. Rep. 823, 106 N. Y. 105.

When a principal, with knowledge of the facts, adopts and takes the benefit of the acts of his agent, he cannot afterwards impeach the agent's acts in that particular. *French v. Barre*, 2 New Eng. Rep. 809, 57 Vt. 667; *Hakes v. Myrick*, 69 Iowa, 189.

#### *Ratification of acts of agent.*

If a principal, with knowledge of the facts, ratify a contract with reference to his property made by another, he is bound by the contract. *Drakely v. Gregg*, 76 U. S. 8 Wall. 242 (19 L. ed. 400); *Stark v. Starr*, 84 U. S. 477 (24 L. ed. 278).

If an agent, without authority, sells the property of another, assuming to act for him, and the latter waives the tort, and ratifies the contract, in an action against the purchaser, he must ratify it as the agent made it. *Rogers v. Holden*, 2 New Eng. Rep. 659, 142 Mass. 196.

Ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and ratification. *Cook v. Tullis*, 85 U. S. 18 Wall. 332 (21 L. ed. 933).

A subsequent assent by a principal is equivalent to an original authority. *Clark v. Van Riemdyk*, 123 U. S. 9 Cranch, 153 (3 L. ed. 638).

If a principal ratifies that part of a transaction which favors him, he ratifies the whole. *Gaines v. Miller*, 111 U. S. 8, 35 (28 L. ed. 460).

Principals adopt and ratify an agent's acts by accepting a settlement by him, and bringing an action upon a covenant in a submission to arbitration signed by him. *Smith v. Morse*, 76 U. S. 9 Wall. 78 (19 L. ed. 567).

2 L. R. A.

*Messrs. Simpson & Jones and T. N. McClellan* for appellees.

*Clopton, J.*, delivered the opinion of the court:

Appellees seek to recover the price of certain goods, which they allege were sold and delivered to appellant through T. A. Tatham, as his agent. The agency was not disputed, but defendant contends that Tatham was in his employ merely as a clerk, and was not authorized to purchase goods on a credit and bind him.

The plaintiffs contend that Tatham was a general agent, having authority to transact all of defendant's mercantile business, or was held out by defendant, or permitted to hold himself out, as such, so as to justify the belief that he was clothed with the powers of a general agent. The question mainly controverted by the parties relates to the character of the agency and the extent of his authority.

#### *Principal may repudiate or ratify unauthorized acts.*

A principal having the right to disaffirm acts of an agent must do it promptly; and if not done within a reasonable time ratification will be presumed. *Indianapolis Rolling Mill Co. v. St. Louis, F. S. & W. R. Co.* 120 U. S. 256 (30 L. ed. 639).

A ratification, by a principal, of the unauthorized acts of an agent, in order to be effectual, must be made with a knowledge on the part of the principal of all the material facts (*Murray v. Nelson Lumber Co.* 3 New Eng. Rep. 419, 143 Mass. 250; *Hurley v. Watson* (Mich.) 13 West. Rep. 543; *Merrick Thread Co. v. Philadelphia Shoe Mfg. Co.* 7 Cent. Rep. 574, 115 Pa. 314); and an instruction which adds a new element—namely, that the principal must have known, not only all the facts, but also the legal effect of the facts, and then, with a knowledge of both law and facts, ratified the contract—is erroneous. *Kelley v. Newburyport & A. Horse R. Co.* 2 New Eng. Rep. 383, 141 Mass. 496.

If the facts be either suppressed or unknown, the ratification is treated as invalid. *Owings v. Hull*, 34 U. S. 9 Pet. 607 (9 L. ed. 248); *Bennecke v. Connecticut Mut. L. Ins. Co.* 105 U. S. 355 (26 L. ed. 990).

Notice of facts to an agent is constructive notice to the principal himself when it arises from, or is at the time connected with, the subject matter of the agency. *Higgins v. Armstrong*, 9 Colo. 38.

That knowledge of agent is knowledge of principal, see *Smith v. Niagara F. Ins. Co.* 1 L. R. A. 217; and notice to agent is notice to principal, see *McGurk v. Metropolitan L. Ins. Co.* 1 L. R. A. 563.

Upon being informed, the principal must exercise his election. *Fry v. U. S.* ("The Sally Mace") 70 U. S. 3 Wall. 451 (18 L. ed. 197); *Law v. Cross*, 66 U. S. 1 Black, 533 (17 L. ed. 185).

If the principal, after a knowledge that his orders have been violated by his agent, receives merchandise purchased for him contrary to orders, and sells the same, without signifying any intention of disaffirming the acts of the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury. *Bell v. Cunningham*, 28 U. S. 3 Pet. 69 (7 L. ed. 606).

A principal cannot be held to ratify an unauthorized act of an agent, by delay in repudiating it, if he repudiates it with reasonable promptness after he is informed of it. *Hakes v. Myrick*, 69 Iowa, 189.

#### *Effect of mere silence.*

Though the agent is not actually authorized to perform the act, the principal's silence for a long time after his knowledge thereof amounts to a ratification. *Norie v. North Chicago C. & I. Co.* 32 Fed. Rep. 270.

An intention to ratify will be presumed from the silence of the principal, after knowledge of what has been done. *Field v. Farrington*, 77 U. S. 10 Wall. 141 (19 L. ed. 923); *Southern L. Ins. Co. v. McCain*, 96 U. S. 84 (24 L. ed. 653).

#### *Ratification by receiving and retaining benefits of transaction.*

A principal ratifying his agent's action, and receiving benefits from his false representations, is



The general rule is that one who deals with an agent is bound to ascertain the nature and extent of his authority, but in the application of the rule a distinction is observed between general and special agencies. The power to do everything necessary to its accomplishment may be included in a particular agency, so that private instructions as to the particular mode of execution, which are not intended to be communicated and are not communicated to the party with whom the agent may deal, will not be regarded as limitations on his power. But with this qualification a special authority must be strictly pursued.

A general agent may exceed his express authority, and the principal, nevertheless, be bound. The scope and character of the business which he is empowered to transact is, as to third persons, the extent and measure of his authority. By his appointment the principal is regarded as saying to the public that he has

the authority to transact the business in the usual and customary modes. Secret limitations on his power, or private instructions as to the mode of transacting the business, will not affect the rights of third persons who have no notice of such limitations or instructions. When a general agent transacts the business entrusted to him within the usual and ordinary scope of such business, he acts within the extent of his authority, and the principal is bound, provided the party dealing with the agent acts in good faith, and is not guilty of negligence which proximately contributes to the loss. *Louisville Coffin Co. v. Stokes*, 78 Ala. 372.

Third persons, dealing with a person as a general agent are not acquitted of all duty to inquire and ascertain the character and extent of his agency; but if on inquiry ascertained to be general, actually or apparently, they are not bound to inquire whether there are secret limitations or private instructions, unless they have

bound thereby. *Du Souchet v. Dutcher*, 12 West. Rep. 802, 113 Ind. 249.

Where an agent makes a contract outside of his actual and apparent power, and the fruits of his contract are received by his principals in ignorance of the material facts, such receipt and retention will not amount to an adoption and ratification of the unauthorized contract. *Bohart v. Oberne*, 38 Kan. 284.

One cannot be permitted to repudiate a contract made in his name by an assumed agent, on the ground of want of authority in the agent to make it, without restoring all the money which he received under the contract. *Las Vegas First Nat. Bank v. Oberne*, 8 West. Rep. 558, 121 Ill. 25.

#### *Ratification operates retroactively.*

A ratification of an unauthorized act of an agent is retroactive and equivalent to original authority. *Hoosac Min. & Milling Co. v. Donat*, 10 Colo. 529.

Subsequent ratification of the acts of an agent is as effective to bind the principal as previous authority, provided the principal has knowledge of the action which he ratifies. *Levick's App. (Pa.)* 2 Cent. Rep. 61; *Camden & A. R. Co. v. Cox* (Pa.) 2 Cent. Rep. 343.

The ratification of an agent's acts, with knowledge of the circumstances, relates back to the time when such acts were performed, and binds the principal the same as if authority had been given in advance. *U. S. Express Co. v. Rawson*, 8 West. Rep. 665, 106 Ind. 215.

There must be some mutuality between the ratifying principal and the third party who is to be affected by his ratification, else the ratification will not have a retrospective effect as against the interests of such third party (*Johnson v. Johnson*, 81 Fed. Rep. 700); but no new or additional consideration is necessary to support the ratification. *Drake v. Griggs*, 75 U. S. 8 Wall. 242 (19 L. ed. 409).

#### *Principal; liability for acts of agent.*

The general rule is that the principal is responsible civilly for the acts of his agent, but not criminally, unless done under his express authority. The principal is responsible for the negligent, but not in general for the criminal, conduct of his agent. *Mitchell v. Mims*, 8 Tex. 6; *Johnson v. Barber*, 10 Ill. 425; *Dunlap's Paley*, Ag. 294.

The principal is liable for any injury to a third person resulting from the negligent or unskillful manner in which an act is done by the agent, but not for an act done outside of the scope of his authority, unless he commanded it, participated in it, or ratified it with knowledge of the facts. *Lilley v. Fletcher*, 31 Ala. 224.

What an agent does within the scope of his authority binds his principal; and this applies, not only to his acts, but to all the representations made by him in that business. *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 230; *Byne v. Hatcher*, 75 Ga. 289; *Lilley v. Fletcher*, 31 Ala. 224; *Hakes v. Myrick*, 69 Iowa, 189; *Higgins v. Armstrong*, 9 Colo. 83.

It is a general rule that where the acts of the agent will bind his principal, representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time and constituting a part of the *res gesta*. *Lindblom v. L. R. A.*

*v. Ramsey*, 75 Ill. 246; *Prickett v. Madison County*, 14 Ill. App. 454. See *Grimsbury v. Paul*, 76 Ill. 169; *Gifford v. Landrine*, 37 N. J. Eq. 127; *Lane v. Boston & A. R. Co.* 112 Mass. 455; *Dickman v. Williams*, 50 Miss. 500; 2 Evans, Prin. & Ag. 511.

The receipt of an authorized agent is the receipt of the principal. *Mackery v. Ramsays*, 9 Clark & F. 818, 850; 1 Parsons, Cont. 43.

When an agent acts beyond his authority, the principal is not bound unless he has held the agent out to the party dealt with, or to the public generally, as having authority to do the act. *Crain v. First Nat. Bank*, 1 West. Rep. 602, 114 Ill. 516; *Bail v. Sykes*, 70 Iowa, 525; *Michigan Panning Mach. & Mfg. Co. v. Parsell*, 38 Mich. 475; *Doyle v. Mizner*, 40 Mich. 160. See *Frady v. Hyland*, ante, 749; *Hubbard v. Tenbrook*, post, 823.

#### *Principle as to liability; when applied.*

The rule that a principal is liable for the acts of his agent, within the apparent scope of his authority, only applies where a third person has acted believing and having a right to believe that the agent was acting upon his authority, and where such person would sustain loss if the act of the agent was not considered that of the principal. *Bickford v. Menier*, 9 Cent. Rep. 893, 107 N. Y. 490; 2 Evans, Prin. & Ag. 512.

The scope of an agent's employment is to be determined, not only from what the principal may have told the agent to do, but from what he knows, or in the exercise of ordinary care and prudence ought to know, the agent is doing in the transaction. *Kingsley v. Fitts*, 51 Vt. 414.

When a person deals with an agent within the scope of his own authority he may safely presume that he is dealing with the principal; and the principal will be bound by the contract, unless he shows affirmatively that the person dealing with the agent knew that the agent in that instance was contracting for himself alone. *Brett v. Bassett*, 63 Iowa, 340.

The question is not, What authority was intended to be given to the agent? but, What authority was a third person dealing with him justified, from the acts of the principal, in believing was given to him? *Griggs v. Selden*, 2 New Eng. Rep. 795, 58 Vt. 561; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 5.

Where goods were ordered under such circumstances as authorized the seller to believe they were ordered for the principal, he was liable therefor. *Foellinger v. Leh*, 9 West. Rep. 75, 110 Ind. 238.

Even where a written contract is entered into by an agent in his own name, it is competent to be shown by parol evidence that the agent was acting for an undisclosed principal. *Barker v. Garvey*, 33 Ill. 184; 2 Evans, Prin. & Ag. 614.

The responsibility of an undisclosed principal, when discovered, cannot be defeated by a private contract between the principal and the agent that the agent alone will be liable. *Richardson v. Farmer*, 36 Mo. 35; *Mitchell v. Dall*, 2 Harris & G. 159.

Private instructions not known to persons dealing with a general agent cannot affect them. *Byne v. Hatcher*, 75 Ga. 289.

The doctrine that the public is not always bound by private instructions to an agent applies where the agent is held out as such and allowed to exer-

knowledge of facts which should put them on such inquiry. As to these issues, the burden is on the plaintiffs to establish by proof that Tatham was the general agent of defendant, or that the latter, by acts, conduct or negligence, justified the belief that he had authority to purchase goods on credit for the store. If these issues be found in favor of plaintiffs, no subsequent misconduct of the agent, misappropriating the goods or otherwise, will affect their rights.

After having given a general charge, which in the main is in accord with the foregoing principles, the court instructed the jury, at the instance of the plaintiffs, that if defendant employed Tatham, and put him in charge of his retail store at Wheeler's Station, to conduct his mercantile business, and placed money to his credit in Louisville, Ky., and Nashville, Tenn., and authorized him to use this money, and also that taken in from cash sales, to replenish the stock, and instructed him not to purchase on credit, he was, as to innocent third persons, the general agent of defendant in that business, and had authority to do whatever was usual or customary in conducting the same; and if plaintiffs sold to Tatham, as such agent, the goods for the price of which this suit is brought, their verdict must be for plaintiffs, unless they had notice that Tatham's authority was limited to purchases for cash.

In considering the correctness of the instruction, any evidence, if there be such, tending to show that Tatham was apparently clothed with the powers of a general agent, cannot be taken into consideration. The proposition of the charge is that as to third persons the facts recited therein, of themselves, without the aid of extrinsic facts and circumstances, constituted Tatham a general agent, possessing authority to purchase goods on credit. In other words, he was a general agent as to plaintiffs, though they may have known the terms of his employment, including the deposit of money with which to purchase goods, except the instruction not to purchase on credit. The most general powers that may be conferred on an agent are necessarily limited to the business or purpose for which the agency is created.

The terms of the employment of Tatham—"in charge of his retail store at Wheeler's Station to conduct his mercantile business"—in connection with the limitations on his authority to purchase, limit his powers as a general agent to the transaction of the local mercantile business of defendant. In the matter of buying goods, his power was expressly restricted to the use of money specially deposited for that purpose, and to cash receipts. In appointing Tatham his agent, defendant withheld power to buy and pledge his credit under any circumstances. By the terms of his commission, Tatham may be regarded a general agent to

else enlarged powers which have been ratified. Central Pa. Teleph. & S. Co. v. Thompson, 2 Cent. Rep. 545, 112 Pa. 118. See Fradley v. Hyland, ante, 749; Hubbard v. Tenbrook, post, 823.

#### *Liability of principal; on what depends.*

The liability of the principal of a general agent depends upon the facts whether the act was done in the exercise and within the limits of the powers delegated; and these facts are inquireable into by a court and jury, and the inquiry is not confined to written instruments. Mechanics Bank v. Bank of Columbia, 18 U. S. 5 Wheat. 326 (5 L. ed. 100).

He is liable for whatever negligence the agent is guilty of, and whatever fraud or wrong he commits, where the agent acts within the scope of his apparent authority; provided a liability would attach to the principal if he was in the place of the agent (Morton v. Scull, 23 Ark. 289; Gasway v. Atlanta & W. P. R. Co. 58 Ga. 216; City Bank v. Kent, 57 Ga. 283; Forrester v. State, 63 Ga. 349; N. Y. L. Ins. Co. v. McGowan, 18 Kan. 300; Gifford v. Landrine, 37 N. J. Eq. 127; Borchering v. Katz, 37 N. J. Eq. 150; Powers v. Harlow, 53 Mich. 507; Davis v. Danforth, 65 Iowa, 601; Massachusetts L. Ins. Co. v. Eschelman, 30 Ohio St. 647; Fatman v. Leet, 41 Ind. 133; and for acts necessary to be done by agent to accomplish the object of his employment (Borchering v. Katz, 37 N. J. Eq. 150); and for acts within the scope of his authority yet beyond his instructions. Lake Shore & M. S. R. Co. v. Foster, 2 West. Rep. 209, 104 Ind. 203; Pennsylvania Co. v. Weddle, 100 Ind. 138; Louisville, E. & St. L. R. Co. v. McVay, 98 Ind. 591; 2 Evans, Prin. & Ag. 512.

He is liable for the fraudulent conduct of his agent. May v. Gates, 137 Mass. 389.

The fact that the representations made by the agent are false will not relieve the principal (Lamm v. Port Deposit Homestead Assn., 49 Md. 233; Planters Ins. Co. v. Sorrels, 1 Baxt. 352); nor that they are fraudulent. Lindmeier v. Monahan, 64 Iowa, 24.

A principal or master is liable for the acts and negligence of his agent or servant in the course of his employment, although he did not authorize or know of the acts complained of. New Orleans, M. & C. R. Co. v. Hanning, 82 U. S. 15 Wall. 649 (21 L. ed. 230); U. S. v. The Burdett, 34 U. S. 9 Pet. 682 (9 L. ed. 273); Sundry Goods v. U. S., 27 U. S. 2 Pet. 358 (7 L. ed. 450).

#### *Principal liable on contract of his agent.*

Where an agent contracts in his own name and does not disclose his principal, the principal, having

ing a right to sue, is also, when discovered, liable to a third party on the contract. The third party may elect whom he will sue. Clark v. Van Riemsdyk, 13 U. S. 9 Cranch, 153 (3 L. ed. 688); Ford v. Williams, 62 U. S. 21 How. 288 (16 L. ed. 36); Pope v. Meadow Spring Distilling Co., 20 Fed. Rep. 35; Jones v. Aetna Ins. Co., 14 Conn. 501; Merrill v. Kenyon, 48 Conn. 814; Barker v. Garvey, 83 Ill. 184; Wheeler v. Reed, 36 Ill. 81; Thomas v. Atkinson, 38 Ind. 248; Upton v. Gray, 2 Maine, 373; York County Bank v. Stein, 24 Md. 447; Lovell v. Williams, 125 Mass. 439; Carroll v. St. John's C. T. A. & Mut. Relief Society, 125 Mass. 565; Gilmore v. Pope, 5 Mass. 491; James v. Bixby, 11 Mass. 34; Southard v. Sturtevant, 109 Mass. 390; Chandler v. Coe, 54 N. H. 561; Borchering v. Katz, 37 N. J. Eq. 150; McGraw v. Godfrey, 14 Abb. Pr. N. S. 397, 56 N. Y. 610; Meeker v. Claghorn, 44 N. Y. 849; Duval v. Wood, 3 Lans. 489; Ingelhart v. Thousand Island Hotel Co., 7 Hun, 547; Allen v. Colt, 6 Hill, 318; Kerchner v. Reilly, 72 N. C. 171; Parker v. Donaldson, 2 Watts & S. 9; Youghiogheny Iron & Coal Co. v. Smith, 66 Pa. 340; Beymer v. Bonsall, 79 Pa. 298; Vermont Cent. R. Co. v. Claves, 21 Vt. 30; Baldwin v. Leonard, 39 Vt. 220; Poole v. Rice, 9 W. Va. 73.

Where a contract is made by an agent, and the principal is disclosed, the agent cannot be made personally liable unless he agreed to be so. Whitnev v. Wyman, 101 U. S. 392 (25 L. ed. 1050).

The principal is liable for a promise made by an agent within the scope of his authority (Tanner v. Oil Creek R. Co. 53 Pa. 411); and by an agreement, Adams Express Co. v. Schlusser, 75 Pa. 246; 2 Evans, Prin. & Ag. 512.

If a vendor sells goods to an agent for his principal, and takes the promissory note of the agent for the amount of the purchase price, on failure of payment by the agent, the principal will be liable to an action founded on the original consideration. Taylor v. Conner, 41 Miss. 728; Keller v. Singleton, 60 Ga. 708.

#### *Liability of agent on his contracts.*

An agent may become liable upon contracts made by him in that capacity: first, where the principal is not known; secondly where there is no responsible principal (except in the case of public agents); thirdly, where he becomes liable by an undertaking of his own. Degelder v. Savory, 3 Keb. 812; Dunlap's Paley, Ag. 371.

Where an agent pledges his own credit, either expressly or impliedly, he will be bound thereby. Hovey v. Magill, 2 Conn. 680; Reed v. Latham, 40



conduct the local business of the store, with special powers to purchase. To construe it otherwise would be to establish the rule that a merchant who furnishes his clerk with funds to purchase goods and make immediate payment clothes him with power to buy on his principal's credit, and that persons dealing with him are relieved of the obligation to ascertain the nature and extent of his warrant of authority. This would press too far the application of the doctrine of general agency. *Jaques v. Todd*, 8 Wend. 88; *Clealand v. Walker*, 11 Ala. 1058; 1 Am. Lead. Cas. 679; 1 Pars. Cont. 43.

When an express authority is given, the extent thereof must be ascertained from its terms, and another or different authority cannot be implied, unless facts are shown from which such other authority may be presumed, or arises by implication of law. Therefore proof of facts or circumstances from which the authority is presumed or arises, by implication of law—an appearance of authority, caused, not by the agent himself, but by the defendant—is essential to his liability for Tatham's acts not within the scope of his commission. In such case it is incumbent upon the plaintiff to prove that defendant by ratification, assent or acquiescence in previous acts, held out Tatham as clothed in the character in which he assumed

to act, which fairly led the plaintiffs to believe that more extensive powers had in fact been given than were conferred by the terms of the appointment.

On this question, all the circumstances of the transaction, the previous conduct of the defendant, and the usages of the business, may be properly considered. It should, however, be remarked that, in order to bind the defendant by ratification, assent or acquiescence in prior acts of his agent in excess of the authority actually given, knowledge of the material facts must be brought home to the defendant; and if, in the absence of express authority to bind defendant in the manner in which he is sought to be charged, his liability is rested on previous recognition of similar acts of Tatham as his agent, it is requisite to show that plaintiffs sold the goods to Tatham on the faith of such previous recognition. *St. John v. Redmond*, 9 Port. (Ala.) 428; *Blevins v. Pope*, 7 Ala. 371.

In this aspect of the case, any evidence is relevant which shows prior similar acts of Tatham, and tends to prove or disprove defendant's knowledge, and plaintiffs' reliance on his recognition of them.

The charge under consideration is objectionable in another respect. The authority, as hypothetically stated therein, was conferred in

Conn. 459; *Hall v. Bradbury*, 40 Conn. 32; *Fisher v. Haggerty*, 36 Ill. 123; *Deming v. Bullitt*, 1 Blackf. 241; *Fleming v. Hill*, 62 Ga. 751; *Scoby v. Woods*, 3 Boat. 66; *Gay v. Bates*, 99 Mass. 263; *Wilder v. Cowles*, 109 Mass. 487; *Southard v. Sturtevant*, 109 Mass. 346; *Evans v. Dunbar*, 117 Mass. 546; *Silver v. Jordan*, 136 Mass. 319; *Simonds v. Heard*, 21 Pick. 139; *Bailou v. Talbot*, 16 Mass. 461; *Central Bridge Corp. v. Butler*, 2 Gray, 130; *Savage v. Rix*, 9 N. H. 253; *Despatch Packet Line v. Bellamy Mfg. Co.* 12 N. H. 205; *Towler v. Hatch*, 45 N. H. 270; *Atma Ins. Co. v. Church*, 21 Ohio St. 492; *Harper v. Hampton*, 1 Harr. & J. 622; *York County Bank v. Stein*, 24 Md. 447; *Rosenthal v. Myer*, 25 La. Ann. 463; *McClellan v. Parker*, 27 Mo. 162; *McCurdy v. Rogers*, 21 Wis. 197; *Saveland v. Green*, 30 Wis. 612; *Strider v. Winchester & P. R. Co.* 21 Gratt. 440; *Meyer v. Barker*, 6 Binn. 238; *Campbell v. Baker*, 2 Waits, 83; *M. C. at Co. v. Edwards*, 4 Hun. 432; *Pentz v. Stanton*, 10 Wend. 271; *Fellows v. Northrup*, 30 N. Y. 117; *Goodwin v. Bowden*, 54 Maine, 424; *Bell v. Mason*, 10 Vt. 509.

A person who assumes to contract as an agent must see to it that his principal is legally bound by his act; for if he does not give a right of action against his principal, the law holds him personally responsible. *Randall v. VanVechten*, 19 Johns. 63; *Mauri v. Heffernan*, 13 Johns. 58; *Skinner v. Dayton*, 19 Johns. 558; *Mott v. Hick*, 1 Cow. 536; *Stone v. Wood*, 7 Cow. 454; *Arfridson v. Ladd*, 12 Mass. 174, 2 Liv. Prin. & Ag. 247; *Dunlap's Paley*, Ag. 370.

#### Agent of undisclosed principal personally liable.

Where an agent in his dealings with third parties does not disclose his principal he will be personally liable on the contract. *Furrell v. Campbell*, 3 Ben. 8; *Tiernan v. Andrews*, 4 Wash. C. C. 567; *Jones v. Etina Ins. Co.* 14 Conn. 591; *Hall v. Bradbury*, 40 Conn. 32; *Wheeler v. Reed*, 36 Ill. 81; *Wolfe v. Rising*, 8 Kan. 297; *Rushing v. Sebree*, 12 Rush. 198; *Bedford v. Jacobs*, 4 Mart. N. S. 530; *Seré v. Faures*, 15 La. Ann. 189; *Baldwin v. Leonard*, 39 Vt. 206; *Upson v. Gray*, 2 Maine, 373; *Keen v. Sprague*, 3 Maine, 77; *York County Bank v. Stein*, 24 Md. 447; *Southard v. Sturtevant*, 109 Mass. 390; *Stackpole v. Arnold*, 11 Mass. 27; *Welch v. Goodwin*, 122 Mass. 71; *James v. Dabry*, 11 Mass. 34; *Raymond v. Crown & E. Mills*, 2 Met. 319; *Paige v. Stone*, 10 Met. 160; *French v. Price*, 24 Pick. 13; *Einstein v. Holt*, 52 Mo. 340; *McClellan v. Parker*, 27 Mo. 162; *McGraw v. Godfrey*, 14 Abb. Pr. N. S. 397; *Corlies v. Cumming*, 6 Cow. 181; *Bathbun v. Badlong*, 15 Johns. 1; *Mauri v. Heffernan*, 13 Johns. 58; *Taintor v. Prendergast*, 3 Hill, 72; *Newman v. Greeff*, 2 Cent. Rep. 421, 101 N. Y. 663; *Baltzen v. Nicolay*, 53 N. Y. 407; *Brockway v. Allen*, 17 Wend. 40; *Warine v. Mason*, 18 Wend. 423; *Mills v. Hunt*, 20 Wend. 431; *Parker v. Donaldson*, 2 2 L. R. A.

*Watts & S. v. Meyer v. Barker*, 6 Binn. 228; *Youghiogheny Iron & Coal Co. v. Smith*, 60 Pa. 340.

#### Liability on contract.

The agent will be liable on a contract entered into for an undisclosed principal, even if it is well known to the third party that he acts only as an agent. *Merrill v. Wilson*, 6 Ind. 436; *Scott v. Messick*, 4 T. B. Mon. 535; *Wilkins v. Duncun*, 2 Litt. 168; *Keen v. Sprague*, 3 Maine, 77; *Sumner v. Williams*, 8 Mass. 162; *Cabot Bank v. Morton*, 4 Gray, 156; *Raymond v. Crown & E. Mills*, 2 Met. 319; *Wilder v. Cowles*, 10 Mass. 487; *Winsor v. Griegs*, 5 Cush. 210; *Cunningham v. Soules*, 7 Wend. 106; *Beebe v. Robert*, 12 Wend. 413; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Taintor v. Prendergast*, 3 Hill, 72; *Allen v. Roetulin*, 11 Serg. & R. 362; *Bacon v. Sondley*, 8 Strobb. L. 452; *Royce v. Allen*, 28 Vt. 234.

#### Election, to proceed against principal or agent.

When a party deals with the agent, without any disclosure of his agency, he may elect to treat the after discovered principal as the person with whom he contracted. *Ford v. Williams*, 62 U. S. 21 How. 237 (16 L. ed. 36); *Jones v. New York Guaranty & Co.* 101 U. S. 622 (25 L. ed. 1030).

He has a right, within a reasonable time, to elect to proceed against the principal, unless in the mean time, with full knowledge as to who was the principal, and with the power of choosing between him and the agent, he had elected to treat the agent alone as his debtor. *Armstrong v. Stokes*, L. R. 7 Q. B. 598; *Smethurst v. Mite*, 11 L. J. Ex. & El. 622; 23 L. J. N. S. (Q. B.) 241; *Thomson v. Davenport*, 9 Barn. & C. 78, 86; *Addison v. Gandasequi*, 4 Taunt. 574; *Piterson v. Gandasequi*, 15 East, 62; 2 Evans, Prin. & Ag. 524.

After a third party has elected whom to sue, and has sued either the agent or the principal to judgment, he cannot after that sue the other, whether the suit has been successful or not. *Garnari v. Moody*, 48 Ga. 98; *Cobb v. Knapp*, 71 N. Y. 318; *McGraw v. Godfrey*, 14 Abb. Pr. N. S. 397, 56 N. Y. 610; *Jones v. Etina Ins. Co.* 14 Conn. 591; *Kingley v. Davis*, 104 Mass. 178; *Pricestly v. Fernie*, 3 Hurl. & C. 977.

If, at the time of the sale, the seller knows, not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him alone, the seller cannot charge the principal, having once elected to sue the agent. *A. dison v. Gandasequi*, 4 Taunt. 574; *Piterson v. Gandasequi*, 15 East, 62; *Wilmot v. Richardson*, 4 Abb. App. Dec. 614; 2 Evans, Prin. & Ag. 523.



November, 1881, when the defendant was on the eve of leaving home to be absent for months. There is evidence tending to show that on his return in June, 1882, the authority to purchase was revoked. The transactions with the plaintiffs were in January, February and March, 1883, and were the first transactions which Tatham had with plaintiffs as agent of defendant.

An authority conferred is always revocable, unless coupled with an interest, or founded on a valuable consideration, and may be revoked expressly, or by act clearly inconsistent with its continuance. When third parties have dealt with an agent clothed with general powers the agency continues as to them, after revocation, until they have notice thereof. Also the principal may be liable for the acts of the agent, after revocation, to third persons, who never dealt with him previously, if they, in common with the public at large, are justified in believing that such agency existed, and have no notice of its revocation. *Claffin v. Lenheim*, 66 N. Y. 301; 1 Pars. Cont. 70.

On the case as presented by the record, these questions should have been submitted to the jury. They were withdrawn from their consideration by the instruction to find a verdict for the plaintiffs, independent of the evidence in regard to the revocation of the authority of Tatham and notice to plaintiffs.

The court also charged the jury that if the defendant placed Tatham in charge of his retail store with instructions to buy for cash only, it was the duty of defendant to keep himself posted as to the manner in which his agent conducted his business, and to see that his instructions were obeyed; and if he knew the agent was buying on credit, or could have known it by the exercise of ordinary diligence, he is estopped to deny the authority of Tatham to purchase on credit. The rule is stated by Mr. Wharton as follows:

"Where a principal conducts his affairs so negligently as to lead third parties to reasonably suppose that his agent has full powers, then, if the agent exceeds his authority, the principal must bear the loss. It is true that the principal is not chargeable with *culpa levissima*. He is not chargeable, in other words, with the consequences of those slight negligences into which good business men are liable to fall. But if he is negligent to an extent beyond what is usual with good business men in his department, and if, in consequence of this negligence, third parties repose trust on the supposed agent, then the loss, if loss accrue, must fall on the principal." Whart. Ag. § 123.

Though mere negligence—mere want of ordinary diligence—may furnish the agent an opportunity of undue assumption of authority, it

does not of itself work an estoppel. A principal is not required to distrust his agent, nor to keep a vigilant watch over the manner in which he exercises his authority, and to see that his instructions are obeyed. He may act on the presumption that third parties, dealing with his agent, will not be negligent in ascertaining the extent of his authority as well as the existence of his agency; and negligence, to constitute a ground of liability, must have caused the plaintiffs to repose trust on the authority of Tatham, and the negligence of plaintiffs must not have proximately contributed to the loss. The charge exacts of the principal a degree of diligence not required by the law.

Many cases hold that notice to an agent is notice to his principal, though acquired before the relation is created, if present in his mind at the time of the particular transaction, and he can communicate it or act upon it without violating a legal or moral duty. It was, however, early settled in this State, that knowledge of an agent, to operate as constructive notice to the principal, must have been acquired after the relation of principal and agent was formed. This rule having been followed ever since, whatever might be our opinion were it an open question, it would not be prudent to disturb it now. *Mundine v. Pitts*, 14 Ala. 84; *McCormick v. Joseph*, 38 Ala. 401; *Frenkel v. Hudson*, 82 Ala. 158.

If the jury should find that the evidence as to any fact essential to plaintiffs' right of recovery, and as to which the burden of proof rests on them, is evenly balanced, or in equilibrium, their verdict must be for the defendant. *Vandewater v. Ford*, 60 Ala. 610.

We have not deemed it necessary to specifically consider the numerous exceptions to the rulings of the court on the evidence, and in instructing the jury, each of which is assigned for error. We have endeavored to select such as related to the issues properly made by the evidence in its different aspects, and involved the principles on which the rights of the parties must ultimately depend, and which should govern the court in putting the case before the jury.

Evidence which proximately tends to prove or disprove these principal issues should be received, and that excluded which is incapable of affording a reasonable presumption of their truth or falsity; and charges based on partial facts, ignoring other material facts, such as a bare shipment of goods to defendant, and the appropriation of them to his use by him or his authorized agent, omitting reference to the fact of a prior purchase, and Tatham's authority, are calculated to mislead and confuse the jury, and should not be given.

*Reversed and remanded.*

## MONTANA SUPREME COURT.

Charles P. H. BIELENBERG, *Respt.*,

*v.*

MONTANA UNION R. CO., *Appt.*

(....Mont....)

1. *Montana Compiled Statutes*, p. 820, § 713, making every railroad corporation L. R. A.

tion liable to the owner for damages sustained by injuring or killing an animal by running trains, is unconstitutional as attempting to create the liability without reference to any violation of law or omission of duty.

2. A statute attempting to make a railroad liable for all damages to animals by running trains cannot, in order to prevent its

condemnation as being unconstitutional, be construed to mean that the killing shall be *prima facie* evidence of negligence.

(February 2, 1899.)

**A** PPEAL by defendant from an order of the Silver Bow County District Court denying a new trial in an action to recover damages for the killing of a horse, in which judgment had been rendered for plaintiff. *Reversed.*

The facts are fully stated in the opinion.

**Mr. William H. DeWitt**, for appellant:

If the defendant railroad company exercised due care, was guilty of no negligence, and the accident was unavoidable, then the plaintiff cannot recover.

*Walsh v. Va. & T. R. Co.* 8 Nev. 110; *Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 481; *Wabash, St. L. & P. R. Co. v. Locks*, 11 West. Rep. 877, 112 Ind. 404; *Kansas City, L. & S. K. R. Co. v. Bolton*, 36 Kan. 584; *Atchison, T. & S. F. R. Co. v. Walton*, 9 Pac. Rep. 351; *Volkman v. Chicago, St. P. M. & O. R. Co.* 87 N. W. Rep. 731; *Williams v. Southern Pac. R. Co.* 73 Cal. 120, 13 Pac. Rep. 219; *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1, 13 Pac. Rep. 910; *Denver & R. G. R. Co. v. Chandler*, 8 Colo. 871, 8 Pac. Rep. 571; *Brentner v. Chicago, M. & St. P. R. Co.* 7 Am. & Eng. R. Cas. 577, notes 2, 8; *P. C. & St. L. R. Co. v. McMillan*, 7 Am. & Eng. R. Cas. 538; *Pittsburgh, C. & St. L. R. Co. v. McMillan*, 37 Ohio St. 554; *McKissock v. St. Louis, K. C. & N. R. Co.* 78 Mo. 456; *Macon & A. R. Co. v. Vaughn*, 48 Ga. 464; *Mobile & O. R. Co. v. Williams*, 53 Ala. 595; *Fisher v. Farmers Loan & T. Co.* 21 Wis. 73; *Jeffersonville, M. & I. R. Co. v. Underhill*, 48 Ind. 889; *Darling v. Boston & A. R. Co.* 121 Mass. 118; *Drake v. Phila. & E. R. Co.* 51 Pa. 240; *Munger v. Tonawanda R. Co.* 4 N. Y. 349; *Spinner v. N. Y. Cent. & H. R. R. Co.* 67 N. Y. 158; *Jebell v. N. Y. & N. H. R. Co.* 27 Conn. 898; *Needham v. San Francisco & S. J. R. Co.* 87 Cal. 409; *Toledo, W. & W. R. Co. v. McGinnis*, 71 Ill. 846; *Witherell v. Milwaukee & St. P. R. Co.* 24 Minn. 410; *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227; *Jackson v. Rutland & B. R. Co.* 25 Vt. 150; *Kentucky Cent. R. Co. v. Talbot*, 78 Ky. 621; *Chicago St. L. & N. O. R. Co. v. Packwood*, 59 Miss. 280.

The law of Montana, 12th Session, p. 68, is invalid in its attempt to create an absolute liability upon a railroad company for killing stock. It deprives the defendant company of any defense. It makes the railroad company insurers of the safety of all stock trespassing on its track. It prescribes a rule of conclusive evidence.

See *Cairo & F. R. Co. v. Parks*, 32 Ark. 181; *Little Rock & F. S. R. Co. v. Payne*, 33 Ark. 816; *Macon & A. R. Co. v. Vaughn*, 48 Ga. 464; *Mobile & O. R. Co. v. Williams*, 53 Ala. 595; *Graves v. Northern Pac. R. Co.* 5 Mont. 556.

It is not the law that, the killing being proved, negligence is presumed, and that the burden of proving due care is thereby cast upon the defendant. Such is not the law in the absence of a positive and direct statute creating such rule of evidence, although, where such rule is established by statute, it may be good.

*Little Rock & F. S. R. Co. v. Payne*, *supra*; *Walsh v. Virginia & T. R. Co.* 8 Nev. 110, *supra*; 2 J. R. A.

*Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 481; *Atchison, T. & S. F. R. Co. v. Walton*, 9 Pac. Rep. 351, 355; 8 Wood, *Railway Law*, p. 1565, § 422, and cases in note; *Kentucky Cent. R. Co. v. Talbot*, 78 Ky. 621; *Brentner v. Chicago, M. & St. P. R. Co.* 7 Am. & Eng. R. Cas. p. 581, citations par. 8.

Such is not the law in jurisdictions where the statute does not compel railroad companies to fence their tracks, although such rule of evidence may be good where the companies are required to erect and maintain fences along their right of way.

*Walsh v. Virginia & T. R. Co.* 8 Nev. 110; *Bethje v. Houston & C. T. R. Co.* 26 Tex. 604; *Pittsburgh, C. & St. L. R. Co. v. McMillan*, 37 Ohio St. 554; *McKissock v. St. Louis, K. C. & N. R. Co.* 78 Mo. 456; *Mobile & O. R. Co. v. Hudson*, 50 Miss. 572; *Denver & R. G. R. Co. v. Chandler*, 8 Colo. 871, 8 Pac. Rep. 571; *Brentner v. Chicago, M. & St. P. R. Co.* *supra*, citations par. 5.

If section 1, Laws of the 12th Session, p. 68, is void for the purpose of its creation, it is not valid for a totally different purpose, and one not even implied in its language.

*Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 481; *Cooley*, Const. Lim. 177, 178, 188.

**Messrs. Knowles & Forbis**, for respondent:

Section 718, p. 826, Comp. Laws of Montana, does not make the railroad company absolutely liable, but only shifts the burden of proof. Under it, the killing being proven, the burden is upon the railroad company to show due care or want of negligence.

A statute which, by giving an exact meaning or effect to its words, would make certain acts conclusive evidence of a fact has been construed to be only *prima facie* evidence of the fact.

Endlich, Interpretation of Statutes, § 178, p. 246; *Kip v. Hirsch*, 18 Abb. N. O. 167. See *Lathrop v. Dunlop*, 4 Hun, 218, 68 N. Y. 610; *Walker v. Hall*, 84 Pa. 488-486; *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Mobile & O. R. Co. v. Williams*, 53 Ala. 595; *Macon & A. R. Co. v. Vaughn*, 48 Ga. 464.

The legislative body can create or change the rules of evidence and enact that the killing of cattle by a railway train shall be *prima facie* evidence of negligence.

*Cooley*, Const. Lim. 288, 367-369, marg.

In some States the courts have adopted the rule as the proper one, that, the killing being proven, the railway company should show that it exercised due care.

*Danner v. S. C. R. Co.* 4 Rich. L. 329, 55 Am. Dec. 678; *Wilson v. Wilmington & M. R. Co.* 10 Rich. L. 52; *Murray v. South Carolina R. Co.* Id. 227; *Galpin v. Chicago & N. W. R. Co.* 19 Wis. 609.

In Montana, cattle are what are termed free commoners. No one can recover for the trespass of an animal unless his premises are inclosed by a lawful fence.

Comp. Laws Mont. p. 958, § 1119; *Smith v. Williams*, 2 Mont. 195; *Waters v. Moss*, 12 Cal. 535; *Chase v. Chase*, 15 Nev. 259.

The fact that the plaintiff placed his horse in his own field would not change the rule and make the horse unlawfully upon track of defendant.

*Richmond v. Sacramento Valley R. Co.* 18 Cal. 351; *Housatonic R. Co. v. Waterbury*, 23 Conn. 101; *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. (N.) 264; *McCoy v. California Pac. R. Co.* 40 Cal. 532.

**Bach, J.**, delivered the opinion of the court:

This action is for damages for the alleged negligent killing of plaintiff's horse by defendant, upon its railroad. The defendant appeals from the order denying a new trial.

One of the alleged errors relied upon by appellant is the following instruction, given by the court at the request of respondent: "Under the laws of this Territory, the killing being proved, or being admitted, as in this case, the negligence of the defendant must be presumed, and the burden of proving the exercise of due care devolves upon the defendant; and unless the defendant shows that it exercised reasonable care and caution to avoid the killing, then you will find for the plaintiff."

Section 718, p. 826, Comp. Stat. provides as follows: "Every railroad corporation or company operating any line of railroad or railway, or any branch thereof, within the limits of this Territory, which shall damage or kill any horse . . . by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof."

It is conceded by counsel for respondent that this section, literally construed, is unconstitutional; and we would not pass upon the question if we were not of the opinion that the instruction complained of is erroneous, unless it can be held good under the statute, thus stating a rule more favorable to the appellant than the law requires.

There is an apparent conflict of authorities upon this question; but upon a careful investigation of the cases the conflict disappears, and few authorities can be found sustaining a statute similar to that which we are now considering. The leading case upon the subject is *Thorpe v. Rutland Railroad Company*, 27 Vt. 140, and this case has been followed in the case of *Rodemacher v. Milwaukee Railroad Company*, 41 Iowa, 802, which also cites *Ohio Railroad Company v. McClelland*, 25 Ill. 148.

These cases will serve to show the distinction which we think is to be made between the case under consideration and the majority of those cases which are usually cited as sustaining a doctrine contrary to the conclusion which we have reached upon this question. The statutes of Illinois and Vermont, which the courts of those States were considering, enacted that all railroads should erect and maintain sufficient fences along their tracks, and declared that all railroads failing to comply with that law should be liable for all damages accruing to the owners of live stock killed or injured by such railroads.

The Supreme Court of the United States, in a recent case, has decided that a law compelling railroads to fence their lands is not unconstitutional, holding that it is a police regulation. *R. Co. v. Beckwith*, 129 U. S. 26 [Bk. 32 L. ed. 58].

This doctrine had already been announced by many state courts. Bearing this in mind, we find that the Vermont and Illinois cases establish the rule that where a railroad company

conducts its business in violation of the law, it shall be liable for all damages to stock, which damage is the result of such violation. Such statutes, therefore, merely affix a penalty to the violation of a duty imposed by a valid law of the land. That this distinction is recognized by the courts of Illinois is apparent from a later case in the supreme court of that State (*Ohio & M. Railroad Company v. Lackey*), hereafter referred to in this opinion.

There is no law in this Territory which compels railroads to fence their lands; and in order to hold the literal provisions of this section constitutional, we must lay down the doctrine that the Legislature can inflict a penalty upon one who is doing a lawful act in a lawful manner. We think such a construction violates the principles of the Constitution.

After a careful consideration of all the cases, we firmly believe that the case from the Iowa Supreme Court is the only case which sustains a statute similar to ours. It would be almost impossible to add aught to what has been said upon this subject by other courts, and we content ourselves with stating the conclusion already announced; citing as authorities the following cases: *Cairo & F. R. Co. v. Parks*, 32 Ark. 181; *Zeigler v. South & N. Ala. R. Co.* 56 Ala. 595; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55.

In Illinois the statute required railroads to defray the expenses of burial of all persons dying on or killed by their trains. In the case last cited, the court says: "On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred? An examination of the section will show that no default or negligence of any kind need be established against the railroad company; but they are mulcted in bearing charges if, notwithstanding all their care and caution, a death should occur in one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of a great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty, or the want of proper care and skill in running their trains . . . The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional prohibition against imposing penalties where no law has been violated or duty neglected."

As we have already stated, counsel for appellant concedes that the statute, when literally construed, is unconstitutional, because it lays down a rule of conclusive evidence; but he claims that the statute should be construed so that it may establish a rule of *prima facie* evidence of negligence; that is to say, when it appears in evidence that one of the animals mentioned in the statute has been killed by a railroad, a *prima facie* case of negligence shall be deemed to have been established. Counsel cites as authority section 178 of Endlich on the Interpretation of Statutes.

We apprehend the rule to be as follows: Courts will not set aside a declaration of the legislative will, unless it is plainly in violation of a constitutional provision; that where a stat-

ute upon its face is capable of two interpretations, one void, as being contrary to the Constitution, the other valid, the courts will adopt the latter; but (citing from the learned author, Mr. Endlich, § 180) "The rule stated does not warrant the avoidance of unconstitutionality in a statute by forcing upon its language under construction a meaning which, upon a fair test, is repugnant to its terms. Where the language will not fairly bear a construction consistent with the Constitution, the courts can only refuse to enforce the Act."

The statute under consideration was evidently enacted to create a conclusive presumption. It is not susceptible of two interpretations. If the court could force upon it such a meaning as is sought to be established, we could with equal propriety declare it to be but a statement of the common law that a railroad should be liable for damages to stock resulting from the negligence of such railroad; and such an interpretation would have a twofold authority—one that, thus construed, it is a declaration of the common law, and not in conflict with it, which is a general rule of interpretation; the other that, when thus construed, it violates no principle of common justice; for to say that the owner of live stock may permit it to go upon the lands purchased by a railroad company, and may recover damages for any injury inflicted upon it by such company, irrespective of actual negligence upon its part, seems to present a case of great injustice, and this violates the rule of statutory construction contained in section 638, p. 226, Comp. Stat.

Counsel for respondent has cited upon this point a case from 58 Ala. 595—*Mobile & O. R. Co. v. Williams*.

In a later case from the same State the court refused to give such a construction to the statute, and held that a rule of positive and conclusive proof was contained in the statute, which was therefore unconstitutional. See *Zeigler v. South & N. Ala. R. Co.* 58 Ala. 594.

We are of the opinion that the instruction cannot be sustained, either as a statutory rule of law or as a correct interpretation of the general law upon the subject of negligence.

There are cases cited in the brief of respondent which declare the rule to be as stated in the instruction under review. But the great weight of authority is against such a proposition, and we consider it to be contrary to the true principle governing the case. The gist of the action is negligence, and until some negligence is shown there cannot be said to be any liability. Much has been said in argument in this case for and against this rule, as applied to railroads. It is not for us to declare what the law should or should not be, or to declare that what is law for one is not law for all. The Legislature is now in session, and may adopt such law as to it seems wise.

This decision does not conflict with the rule established in *Diamond v. Northern Pacific Railroad Company*, 6 Mont. 580. That case was decided upon a statute expressly declaring that railroad companies shall keep their right of way free from dead grass, and that a failure so to do shall be *prima facie* evidence of negligence. Section 719, p. 380, Comp. Stat.

And in the opinion in that case the learned judge further fortified the decision upon the ground that there are accidents arising from certain causes, the very existence of which show a *prima facie* case of negligence, the cause of the accident in that case being sparks from a locomotive. Mr. Bailey, in his work upon the Conflict of Judicial Decisions, has collected the cases upon either side of this question; and a reference to page 250 of his work will show an extensive line of authorities sustaining the rule as stated in the *Diamond Case*.

*The order appealed from is reversed, with costs, and the cause remanded to the court below for a new trial.*

McConnell, Ch. J., and Liddell, J., concur.

## WEST VIRGINIA SUPREME COURT OF APPEALS.

Matilda McCLINTOCK *et al.*, Appts.,

v.

Eugene LOISSEAU *et al.*

(... W. Va. ....)

"1. Where a father purchases land, and has it conveyed to his son, the presumption is that the

\*Head notes by SNYDER, J.

NOTE.—Trusts between family relatives; presumptions.

In trusts between family relatives, a presumption arises on the face of the transaction that a gift was intended and that no trust results. So a feoffment by a father to a son, without other consideration, raises no use by implication in the father; for the consideration of blood settles the use in the son, and makes it an advancement (Dray v. Grey, 2 Swanst. 598; so if a grandparent purchases in the name of his grandchild, *Ebbrand v. Dancer*, 2 Ch. Cas. 26; *Loyd v. Read*, 1 P. Wms. 427; *Current v. Jugo*, 1 Coll. 265, n.; *Tucker v. Burrow*, 2 Hem. & M. 525).

This result, however, is merely a presumption, and may be overcome. 2 Pom. Eq. Jur. § 1041.

Extrinsic evidence, either written or parol, is admissible on behalf of the parent to rebut the presumption of an advancement or gift, and to show

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purchase was intended to be an advancement or gift to the son, and no trust results in favor of the father. But extrinsic evidence, either written or parol, is admissible on behalf of the father to rebut this presumption, and to show that a trust results in his favor.

2. Where a contract has been made to accomplish a fraudulent purpose, a court of equity will not, at the suit of a party to the

that a trust results; and, conversely, such evidence may be used to fortify and support the presumption. *Kilpin v. Kilpin*, 1 Myl. & K. 530; *Lamplugh v. Lamplugh*, 1 P. Wms. 111, 113; *Hall v. Hill*, 1 Dr. & War. 94, 114; *Murless v. Franklin*, 1 Swanst. 13; *Tucker v. Burrow*, 2 Hem. & M. 515, 524; *Sidmouth v. Sidmouth*, 2 Beav. 447, 456; *Williams v. Williams*, 82 Beav. 370; *Dumper v. Dumper*, 3 Giff. 583; *Devoy v. Devoy*, 3 Smale & G. 408; *Stevens v. Stevens*, 70 Maine, 32.

The presumption that a purchase by the parent in the name of a child is an advancement and not a trust may be rebutted by evidence or circumstances (*Binion v. Stone*, *Freem. Ch.* 169, *Nels.* 68; *Rumboll v. Rumboll*, 2 Eden, 17; *Finch v. Finch*, 15 Ves. Jr. 43; *Murless v. Franklin*, 1 Swanst. 13; so where a child was already provided for. *Elliot v. Elliot*, 2 Ch. Cas. 231; *Pole v. Pole*, 1 Ves. Sr. 76;

fraud—a *particeps delicti*—if the contract is executory, either compel its execution, or decree its cancellation; nor, after it has been executed, set it aside, and thus restore to the plaintiff the property or other interest which he has fraudulently transferred. It will leave the parties in the position in which they have placed themselves.

2. This rule applies not only to the original parties to the fraudulent transaction, but to their heirs, and to all parties claiming under or by title derived from them, where no equitable rights intervene to protect such parties.

4. Evidence. A father purchased real estate, and had it conveyed to his son by an absolute deed. In a suit in equity by the heirs, after the father's death, to set up a resulting trust in their favor, they cannot be permitted to show that the conveyance to the son was made for a fraudulent purpose by the father, in order to rebut the presumption that it was an advancement or gift to the son.

(December 8, 1888.)

**APPEAL** by plaintiffs, from a decree of the Wood County Circuit Court dismissing their bill filed to obtain partition of certain real estate. *Affirmed.*

The facts are fully stated in the opinion.

**Mr. Barna Powell** for appellants.

**Snyder, J.**, delivered the opinion of the court:

Louis J. Loisseau died intestate, in Wood County, this State, on February 12, 1879, leav-

ing a widow, Henrietta Loisseau, and five children, viz.: Eugene, Matilda, August O., Louis N. and Alfred Loisseau, as his heirs at law. Eugene was the son by a former marriage. He was born in France and always resided there. The father removed to and became a resident of the United States many years before his death. After his immigration to this country he married the aforesaid Henrietta, who is the mother of the four children last above named.

The decedent and his family, except the said Eugene, resided in the City of Parkersburg for several years before and at the time of his death. The said Matilda having become the wife of W. N. McClintock, she and her husband, in December, 1879, filed their bill in the Circuit Court of Wood County against the widow and the other children of said Louis J. Loisseau, deceased, and the S. P. Wells Oil Company, a domestic corporation.

The material allegations in the bill are that prior to the year 1874 the said Louis J. Loisseau had purchased in the name of his son Eugene, from one B. H. Latrobe, certain real estate, consisting of several lots of land situate in the City of Parkersburg, which was afterwards, by deed dated May 13, 1877, conveyed by said Latrobe to said Eugene; that, acting under a power of attorney executed by said Eugene and wife in the City of Paris, France, the said Louis J., in his own right, and as attorney in fact for said Eugene and wife, executed to S. P. Wells

Redington v. Redington, 3 Ridg. Parl. Cas. 190. Or if a father purchased in the name of an adult son and kept the actual possession of the estate, the presumption of a trust is created. Gilbert, Lex Pract. 271.

Any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption. Taylor v. Taylor, 9 Ill. 333; Slack v. Slack, 26 Miss. 290; Johnson v. Matsdorf, 11 Johns. 91; Butler v. Merchants Ins. Co. 14 Ala. 777; Dudley v. Bosworth, 10 Humph. 12; Peer v. Peer, 11 N. J. Eq. 432; Christy v. Courtenay, 13 Beav. 56; Williams v. Williams, 32 Beav. 370; Redington v. Redington, 3 Ridg. Parl. Cas. 177; Swift v. Davis, 8 East, 354, note.

*Contracts entered into through fraud are not enforceable.*

Wherever a contract or other transaction is illegal, and the parties thereto are, in contemplation of law, *in part delicto*, subject only to a few special exceptions depending upon other considerations of policy, the rule is that a court of equity will not aid a *particeps criminis*, either by enforcing a contract or obligation while it is yet executory, or by relieving him against it, by setting it aside, or by enabling him to recover the title to property which he has parted with by its means (Atwood v. Fisk, 101 Mass. 323; Swartz v. Gillett, 1 Chand. (Wes.) 207, 209, 210; Davies v. London & P. M. Ins. Co. L. R. 8 Ch. Div. 469; Harrington v. Bigelow, 11 Paige 343; Reynell v. Sprye, 1 DeG. M. & G. 660, 688, 692; Wheeler v. Sage, 68 U. S. 1 Wall. 518 (17 L. ed. 646); Paine v. Lake Erie & L. R. Co. 31 Ind. 233; Creeth v. Sims, 46 U. S. 5 How. 192 (12 L. ed. 110); White v. Crew, 16 Ga. 416, 420; 1 Pom. Eq. Jur. § 401, 438); but will leave such parties in exactly the position in which they have placed themselves, refusing all affirmative aid to either of the fraudulent participants. Bolt v. Rogers, 3 Paige, 156; Johns v. Norris, 22 N. J. Eq. 102; Walker v. Hill, 415; Bleakley's App. 66 Pa. 187; Musselman v. Kent, 83 Ind. 452; Hunt v. Rowland, 23 Iowa, 349; Hibernia Sav. & L. Society v. Ordway, 38 Cal. 679.

*Parties in part delicto can obtain no relief.*

Where the parties are *in part delicto*, no affirmative relief of any kind will be given to one against the other. Worcester v. Eaton, 11 Mass. 368; Wells v. Smith, 13 Gray, 207; Harvey v. Varney, 98 Mass. 118; Sweet v. Tinslar, 52 Barb. 271; Solinger v. Earle, 2 L. R. A.

82 N. Y. 333; Marlatt v. Warwick, 19 N. J. Eq. 439; Cutler v. Tuttle, Id. 549; Ownes v. Ownes, 23 N. J. Eq. 60; Roman v. Mah, 42 Md. 513; Jones v. Gorman, 7 Ired. Eq. 21; York v. Merritt, 77 N. C. 213; Shaw v. Carille, 9 Heisk. 594; Logan v. Gigley, 11 Ga. 243; Galt v. Jackson, 9 Ga. 151; Adams v. Harrett, 5 Ga. 404; DeWolf v. Pratt, 43 Ill. 198; 2 Pom. Eq. Jur. 457.

*Neither law nor equity will afford relief.*

Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interpose to relieve either of those persons, as against the other, from the consequences of his own misconduct. Nellis v. Clark, 4 Hill, 433; Palmito v. Doudrick, 59 Cal. 167; Freeman v. Sedwick, 6 Gill, 28; Sweet v. Tinslar, 52 Barb. 273; Gale v. Gale, 19 Barb. 251; Hunter v. Marlboro, 2 Woodb. & M. 179; Stewart v. Aokley, 52 Barb. 256; McClure v. Purcell, 3 A. K. Marsh. 61; Niver v. Best, 10 Barb. 399; Osborne v. Moss, 7 Johns. 161; St. John v. Benedict, 6 Johns. Ch. 111; Clapp v. Tirrell, 20 Pick. 247; Munro v. Allair, 2 Cal. Cas. 133; Saltmarsh v. Beene, 4 Port. (Ala.) 259; Malin v. Garnsey, 16 Johns. 139; Reichart v. Castator, 5 Binn. 108; Montefiori v. Montefiori, 1 W. Bl. 364; Babcock v. Booth, 2 Hill, 181.

It is against the policy of the law to enable either party in controversies between themselves to enforce an agreement in fraud of the law or which was made to injure another. Randall v. Howard, 67 U. S. 2 Black, 539 (17 L. ed. 271); 1 Story, Eq. § 298.

*Instance.*

If the illegal contract be executed and both parties are *in part delicto*, no action lies to recover money paid under it. Williamson v. Chicago, R. I. & P. R. Co. 63 Iowa, 123, 35 Am. Rep. 211; Stokes v. Twitchee, 3 Taunt. 492; Thistlewood v. Cragoott, 1 Maule & S. 500, 751; Burt v. Place, 8 Cow. 432; Spence v. Harvey, 22 Cal. 337; Holladay v. Patterson, 5 Oreg. 177.

Contracts executed or executory, given upon the consideration of, or stipulating for, the compounding of a felony, the forbearance to prosecute for crime or the abandonment of a pending criminal prosecution are contrary to good morals and are illegal and void. Shaw v. Reed, 30 Maine, 105; Atwood v. Fisk, 101 Mass. 323; Swartz v. Gillett, 1 Chand. 207; Averbek v. Hall, 14 Bush, 508; Lindsay v. Smith, 78 N. C. 323; Laing v. McCall, 50 Vt. 637; Wight v. Rindskopf, 43 Wis. 344; 2 Pom. Eq. Jur. 452.



and others a deed of lease for a part or all of said real estate for the term of ten years from the 28d day of January, 1874, for \$500, and the annual payment of \$300 during the term of the lease; that after the death of the father, Louis J., the said Eugene and wife, by deed with special warranty, dated September 22, 1879, conveyed the whole of said real estate to the defendant the S. P. Wells Oil Company, in consideration of \$1,200; that the widow, the said Henrietta Loisseau, had, at the September Rules, 1879, instituted in this court a suit to have her dower assigned in said real estate, but that afterwards, on October 18, 1879, she sold and conveyed all her interest in said real estate to the said S. P. Wells Oil Company, in consideration of \$600, whereby the said oil company became entitled to the said dower interest in said real estate.

The plaintiffs then aver that the said Louis J. for many years previous to his death was disagreeable and abusive to his wife and the children of his family; that, although he continued to occupy apartments in the same house—a house owned by his wife—his habit was to supply, cook and eat his own food by himself, and leave his wife and children to shift and provide for themselves—his ultimate purpose being to leave this country, desert his wife and children here, go to France, and make that his home as soon as he could make a satisfactory sale of the real estate aforesaid; that said Louis J. purchased and paid his own money for said real estate, without the knowledge of his son Eugene, or any aid from him, but for the purpose of evading his legal responsibility to his wife and family, and, to enable him to sell and convey said real estate away from his wife without her consent, the said Louis J. made the purchase of said real estate in the name of, and had the same conveyed to, said Eugene; that the said Eugene never paid any consideration for said real estate; that it was never intended by his father that he should have any interest therein, nor did he ever claim to have any until after his father's death, but, on the contrary, admitted that it belonged to his father; that the said Eugene held the title to said real estate simply as trustee for his father; and the sole purpose the father had in making the purchase in his son's name, and having the title conveyed to him, was to enable the father, through his said son and trustee, to sell and convey the said real estate without the consent of his wife, and thus to facilitate his scheme to desert her and his family, and to defraud her of her right to dower therein, as also of any means to charge said real estate for the support of herself and children.

The bill further avers and charges that the defendant, the S. P. Wells Oil Company, its officers and agents, were fully advised that Louis J. Loisseau was the real owner of said real estate long before his death, and that they were specially informed that the plaintiffs and the other children of the said Louis J. claimed to own said real estate long before the said company purchased the same from the said Eugene Loisseau, and that the said purchase was made with full notice of the rights and interest of the plaintiffs in said real estate.

The prayer of the bill is for an account of  
2 L. R. A.

rents and profits of said real estate, partition of the same, and for general relief.

The defendants, August C. and Louis N. Loisseau, answered, admitting the truth of the allegations of the bill, and joining in its prayer for relief.

On March 22, 1880, the cause was heard on the bill taken for confessed as to the defendant, the S. P. Wells Oil Company, and the court entered a decree granting the relief prayed for in the bill. This decree was, however, on April 2, 1881, that being a subsequent day of the same term, upon the motion of the said S. P. Wells Oil Company, suspended, and leave given to said company to file its answer, which it did on the following day.

By its answer said company denies that the said Eugene Loisseau held said real estate in trust for his father, or that the company at the time of its purchase from said Eugene had any notice of any such trust, or of any claim of the heirs of said Louis J. Loisseau, deceased, to the said real estate.

Depositions were taken and filed by both the plaintiffs and defendants; and on December 3, 1887, the cause was finally heard on its merits, and the court, being of the opinion that the plaintiffs were not entitled to any relief, entered its decree dismissing the plaintiffs' bill, with costs. From this decree the plaintiffs have appealed.

It is claimed for the appellants that inasmuch as the court, by its decree of April 2, 1881, simply suspended its former decree of March 22, 1881, it erred in dismissing the bill by its final decree without having set aside said decree of March 22, 1881. This decree, as well as the one suspending it, was made at the same term. This court has decided that the court may at any time during the same term modify or set aside any decree entered by it. *Kerry v. High*, 29 W. Va. 381.

The court, therefore, had the legal right to suspend said decree of March 22, 1881, at the time it did; and as the final decree did, in effect, set aside and annul that decree, the appellants were not prejudiced.

It is further contended for the appellants that the facts alleged in the bill show that Louis J. Loisseau had, by resulting trust, an equitable title or right to the real estate therein mentioned, which upon his death descended to his legal heirs. It is well settled that where land is paid for by a stranger, and the conveyance made to another, a resulting trust will in equity arise in favor of the person thus paying the purchase money. *Murry v. Sell*, 23 W. Va. 475; *Shaffer v. Petty*, 30 W. Va. 248.

But where the consideration is paid by a husband or father, and the deed is made to his wife or son, the presumption is that the purchase was intended to be an advancement or gift to the grantee, and no trust results. *Lockhard v. Beckley*, 10 W. Va. 87.

As this rule is based on presumptions of fact, extrinsic evidence, either written or parol, is admissible, on behalf of the husband or father paying the consideration, to rebut the presumption of an advancement or gift, and to show that a trust results, and conversely such evidence may be used to fortify and support the presumption. In general this extrinsic evi-

dence to defeat an advancement and establish a trust, as against the grantee and those holding under him, must consist of matters substantially contemporaneous with the purchase or conveyance, so as to be fairly connected with the transaction. 2 Pom. Eq. Jur. § 1041; *Jackson v. Matsdorf*, 11 Johns. 91.

It has been held that possession of the estate and the receipt of its rents by the father during his life, after conveyance to his child, or a devise or lease of the property by the father after the purchase, will not be sufficient to rebut the presumption of an advancement or gift, and to establish a resulting trust in favor of the father. *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Orabb v. Orabb*, 1 Myl. & K. 511; *Jeans v. Cooke*, 24 Beav. 518.

According to these authorities, it seems to me the allegations of the bill are insufficient to rebut the legal presumption that the purchase and conveyance of the real estate in controversy by the father, Louis J. Loisseau, in the name of his son Eugene, was intended to be an advancement or gift to the son. On the contrary, they tend to show that the reverse was intended.

It is alleged that the purpose of the father was to deprive the wife of her dower, and the children by her of any claim upon this property for their support. If a resulting trust had existed in favor of the father, then his purpose in respect to both his wife and children would be defeated; because his wife would be entitled to dower in this equitable estate, and his children by this wife would, in part, at least, inherit it upon his death. These are the two things which the bill alleges it was the purpose of the father to prevent. In order to give this purpose the effect which the bill avers the father intended it should have, the conveyance to Eugene must be treated as an advancement or gift by the father. But, be this as it may, there is another view of the case made by the bill which concludes the right of the plaintiffs to any relief.

It is a maxim in equity that where a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties, a *particeps doli*, while the agreement is still executory, either compel its execution or decree its cancellation, nor, after it has been executed, set it aside, and thus restore the plaintiff to the property or other interest which he had fraudulently transferred. Equity will leave such parties exactly in the position in which they have placed themselves, refusing all affirmative aid to either of the fraudulent participants. The only equitable remedies which they can obtain are purely defensive.

Upon the same principle, wherever one party, in pursuance of a prior arrangement, has fraudulently obtained property for the benefit of another, equity will not aid the fraudulent beneficiary by compelling a conveyance or transfer thereof to him; and generally, where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will  
2 L. R. A.

leave the parties in the position where they have placed themselves. 1 Pom. Eq. Jur. § 401; *James v. Bird*, 8 Leigh, 510; *Johns v. Norris*, 22 N. J. Eq. 102; *Horn v. Star Foundry Co.* 28 W. Va. 522.

A voluntary or fraudulent conveyance, though made to defraud creditors, is binding upon the parties thereto. *Chamberlayne v. Temple*, 2 Rand. (Va.) 384; *Core v. Cunningham*, 27 W. Va. 206.

This rule applies not only to the original parties to the fraudulent transaction, but to the heirs and representatives of those parties, and, generally, to any parties claiming under or through or by title derived from such fraudulent parties, where no equity, such as a *bona fide* purchase, intervenes to protect them.

Thus in *Owen v. Sharp*, 12 Leigh, 427, it was decided that, where one makes a fraudulent bill of sale of a female slave, absolute on its face, in order to protect the property from his creditors, but with a secret trust that the grantee shall hold the property for the benefit of the grantor's daughters, the daughters cannot, in equity, establish the secret trust, and have a decree for the slave, her increase and profits. The court in that case says: "The deed being absolute, the plaintiffs attempt to establish the secret trust, and in doing so show the intent with which it was created. If the facts were reversed, if the trust had been expressed on the face of the deed, and the grantee had refused to execute it on the ground of fraud, he would then be compelled to allege his own fraud to protect himself, and could not be heard."

Thus, whenever a party, whether plaintiff or defendant, is compelled to allege his own fraud to protect himself, equity will refuse to hear him or grant any relief. *Starke v. Littlepage*, 4 Rand. (Va.) 868.

If the widow, Henrietta Loisseau, had prosecuted her suit, this rule would not apply in her case, for the reason that she neither claims under the husband, nor was she a party to the fraudulent transaction. Her right to dower arises out of the marital relation, and is fixed by law, regardless of the acts of the husband; but she is not a plaintiff in this suit, and, moreover, having conveyed all her right and title in the subject in controversy, she has no interest in this suit, and therefore any consideration of what might have been her rights, under other circumstances, may be dismissed.

But the female plaintiff and the other children of Louis J. Loisseau, who ask relief in this suit, come clearly within the equity rule above announced. They stand in the place of their father. They are his heirs at law, and the only claim they have or assert is derived as such heirs from their father. They are simply volunteers, claiming the benefit of his act, and seeking it through his fraud.

The defendant Eugene Loisseau, at the time his father died, had an absolute conveyance of the property, which vested in him a complete title. Proof that the father paid the full consideration would not of itself, as we have shown, raise a resulting trust in favor of the father or his heirs. In order to establish such trust, proof must be offered to rebut the presumption that the conveyance to the son was intended as an advancement or gift. This the plaintiffs at-



tempt to do by alleging that the conveyance was fraudulent. The bill alleges that the sole purpose of the father in having the property conveyed to the son was to defraud his wife of her right of dower, and to enable him to desert his family, and avoid the responsibility of their support.

Certainly the father would not be permitted to succeed in a court of equity by alleging his own fraud; and the plaintiffs who stand in his place, and derive title from him, if they have any, cannot, for the same reason, be heard to allege the father's fraud. They must accept the whole situation. They cannot claim the benefit of the fraudulent act of the father, and escape the consequences of his fraud. If they claim under him, and upon the consideration paid by him, and none other, they can only obtain what he had. If his claim was of a nature

that he could not enforce it in a court of equity, neither can the plaintiffs, claiming as his heirs, do so. What he had they got, and nothing more; and, as he had no demand which he could enforce in a court of equity, neither have they.

It necessarily follows, therefore, that if neither the father nor the plaintiffs could obtain any relief against Eugene Loisseau, the grantee of the real estate in controversy, the plaintiffs are not entitled to any relief against the S. P. Wells Oil Company, the purchaser from Eugene, whether said purchase was made with or without notice of the pretended rights of the plaintiffs.

*The decree of the Circuit Court must, therefore, be affirmed.*

**Johnson, P., and Green and Woods, JJ., concurred.**

## PENNSYLVANIA SUPREME COURT.

PENNSYLVANIA R. CO., *Plff. in Err.*,  
v.

Herbert G. MACKINNEY.

(....Pa.....)

1. **An injury to a passenger on a railroad train sitting next to an open window, by a blow on his eye by some hard substance, probably a piece of coal, hurled with considerable force, while the engine of another train was directly opposite the window, passing in another direction, where there is nothing to explain the cause of the accident, does not create a presumption of negligence against the carrier.**
2. **No presumption of negligence on the part of a carrier arises from the naked fact that an injury has been inflicted upon a passenger, unless it appears that it did not result from something entirely disconnected with the operation of the road and with which neither the company nor its employés had anything whatever to do. Such presumption must arise, if at all, from the cause of injury or from other circumstances attending it.**

(March 4, 1890.)

**ERROR** to the Common Pleas No. 3, of Philadelphia County (Finletter, P. J.), to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The case is fully stated in the opinion.

**Messrs. George Tucker Bispham and John Hampton Barnes**, for plaintiff in error:

Under the evidence in this case no presumption of negligence arose against the carrier, and the plaintiff below was not entitled to recover.

Although the action be by a passenger, the mere fact of injury is not sufficient to raise a presumption of negligence against the carrier; but the evidence upon the part of the plaintiff must show a positive act, occurrence or omission upon the part of the defendant, contributing to the injury, which may be reasonably referred to the negligence of the defendant.

*Federal St. & P. V. R. Co. v. Gibson*, 96 Pa. 83; *Loring v. Colder*, 8 Pa. 481; *Sullivan v. Philadelphia & R. R. Co.* 80 Pa. 234; *Pittsburg & O. R. Co. v. Pillow*, 76 Pa. 513; *Philadelphia*

### **NOTE.—Burden of proof on charge of negligence.**

Where negligence is the gravamen of the action, the law does not impute it, and it lies on the party alleging it to prove it. *Shoeler v. Chesapeake & O. R. Co.* 81 Va. 188; *Doyle v. Boston & A. R. Co.* 5 New Eng. Rep. 454, 145 Mass. 386.

A party relying upon negligence, either as a cause of action or defense, must prove it. *O'Connor v. Mo. Pac. R. Co.* 13 West. Rep. 588, 94 Mo. 150; *Thompson v. North Mo. R. Co.* 51 Mo. 190; *Loyd v. Hannibal & St. J. R. Co.* 63 Mo. 508; *Petty v. Hannibal & St. J. R. Co.* 8 West. Rep. 297, 88 Mo. 320.

The defendant, charging contributory negligence, must establish it by preponderance of evidence. *Tolson v. Inland & S. E. Coasting Co. (D. C.)* 8 Cent. Rep. 733; *Northern Pac. R. Co. v. Mares*, 123 U. S. 719 (31 L. ed. 206).

Where a plaintiff establishes negligence on the part of the defendant without showing any negligence on his own part, the burden of proof as to his contributory negligence is on the defendant. *Gulf, C. & S. F. R. Co. v. Redeker*, 37 Tex. 181; *Washington & G. R. Co. v. Gladmon*, 63 U. S. 15 Wall. 401 (21 L. ed. 114).

### **Presumption of negligence; how established.**

To establish "presumption of negligence" the accident must first be connected with the defendant by direct evidence, either that the act was his

or was under his control. *Higgs v. Maynard*, 12 Jur. N. S. 705; *Smith, Neg. Whit. ed.* 421; *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 693; *Wright v. Midland R. Co.* L. R. 8 Exch. 137; 42 L. J. N. S. (Exch.) 89.

The phrase cannot apply to cases where it is open to doubt whether plaintiff was not himself negligent, where there are reciprocal duties. *Cotton v. Wood*, 23 L. J. N. S. C. P. 353.

Where the injury arises from circumstances over which defendant has no control and he has exercised proper care, he is not liable in an action for negligence. *Hammack v. White*, 11 C. B. N. S. 588, 31 L. J. N. S. C. P. 129; *Latch v. Rumer R. Co.* 27 L. J. N. S. (Exch.) 155; *Wakeman v. Robinson*, 1 Bing. 213; *Gibbons v. Pepper*, 1 Ld. Raym. 38; *Manzoni v. Douglas*, L. R. 6 Q. B. Div. 145.

### **Mere happening of accident does not establish.**

The mere fact of an accident happening is not evidence of negligence. *Hammack v. White*, 11 C. B. N. S. 588; *Bird v. Great Northern R. Co.* 23 L. J. N. S. (Exch.) 3; *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 693; *Smith v. Great Eastern R. Co.* L. R. 2 C. P. 10.

Where an accident happens from a breach of duty it must not only appear that it happened, but the surrounding circumstances must be such as to raise the presumption that it happened in conse-

& *B. R. Co. v. Anderson*, 94 Pa. 357; *South Side Pass. R. Co. v. Trich*, 10 Cent. Rep. 367, 117 Pa. 890.

*Mr. Mayer Sulsberger*, for defendant in error:

The mere happening of an injurious accident raises *prima facie* a presumption of neglect and throws upon the carrier the *onus* of showing that it did not exist.

*Laing v. Colder*, 8 Pa. 488; *Spear v. Phila. W. & B. R. Co.* 11 Cent. Rep. 643, 119 Pa. 61; *Pennsylvania R. Co. v. Raiordon*, 12 Cent. Rep. 177, 119 Pa. 577.

The rule of *Laing v. Colder* is subject only to the modification that when the cause of the injurious accident is known to result from the act of a stranger, the *onus* is shifted.

*Sterrett, J.*, delivered the opinion of the court:

In May, 1887, plaintiff below was a passenger on one of defendant's cars, bound for Philadelphia. While he was occupying the third or fourth seat from the front end of the car, left side, next to an open window, and the train was running rapidly, some distance south of Trenton, he received a violent blow on the left eye, causing the severe and painful injury of which he complains. The nature of the injury indicated that he was struck by some hard substance, hurled with considerable force. Surgical examination of the eye, made on arrival at Philadelphia, showed that it was probably a piece of coal. Small particles of some hard substance resembling coal were found and removed from the injured organ.

Plaintiff testified that the blow was so severe that it almost stunned him, and threw him back into his seat. He further said: "As I recovered, to an extent, from the shock, I covered the right eye to see if the sight was entirely lost, as I presumed the blow had burst the left eye. I found I could see a little, but I was suffering excruciating agony."

The character of the injury and circumstances attending it were such that plaintiff had no opportunity for successful investigation, and of course, he was unable to explain how it occurred. All he knew was that, at

the time he was struck, he saw, through the open window at which he was sitting, one of the company's trains passing in the opposite direction, immediately on the left of the train on which he was carried; that simultaneously with receiving the blow, the engine of that train was directly opposite the window, and was thus interposed between him and that side of the railroad and land adjacent thereto. That fact, it was claimed by him, negatived any inference that the injury resulted from the act of a stranger, or anyone not connected with the operation of the road. His theory was, that a piece of slate or coal was negligently thrown by the fireman or other employé on the passing engine, either in an effort to get rid of it, or in drawing or working at his fire, etc.; but, of course, that could not be assumed by the court as an admitted or established fact.

While the circumstances in evidence tended to sustain the plaintiff's theory, the cause of the accident was not satisfactorily explained by either party. The company's employés in charge of the train on which plaintiff was testified that they knew nothing of the occurrence, and had done nothing to bring it about. Other employés, in charge of passing trains, testified that they had not drawn or worked at their fires, or thrown off any slate, coal or any other substance from their engines or tenders, and that none had fallen therefrom.

Evidence was also introduced to prove that all the appliances, machinery, etc., of the road, including the engines, were in good order, and that the latter were properly provided with spark arresters, etc. There was no derailment of the train, no collision with any train or other objects on the road, no breaking of any machinery connected with the south bound train, nor any evidence of anything wrong with the passing trains or cars.

In view of the evidence tending to prove a state of facts such as that above indicated, the defendant company presented four points for charge, in the first and fourth of which binding instructions to find for defendant were asked on the ground that there was no evidence of negligence proper for the consideration of the jury. These points, we think, were rightly

quence of a failure of duty on the part of the defendant towards the plaintiff. *Articles, Res. 1888* *Loguitur*, 10 Chic. L. J. 261; 2 *Thomp. Neg.* 1220; *Whart. Neg.* § 421, 422.

The fact of killing or injury, in the absence of any statutory provision to that effect, does not constitute of itself any presumption of negligence. *Little Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413; *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 336; *Chicago & M. R. Co. v. Patchin*, 16 Ill. 138; *Great Western R. Co. v. Northland*, 30 Ill. 451; *Indianapolis & C. R. Co. v. Means*, 14 Ind. 30; *Schneir v. Chicago, R. I. & P. R. Co.* 40 Iowa, 337; *Flattus v. Chicago, R. I. & P. R. Co.* 35 Iowa, 121; *Ky. Cent. R. Co. v. Talbot*, 73 Ky. 621; *Whittier v. Chicago, M. & St. P. R. Co.* 23 Minn. 484; *New Orleans, J. & G. N. R. Co. v. Enoch*, 42 Miss. 603; *Mobile & O. R. Co. v. Hudson*, 50 Miss. 572; *Brown v. Hannibal & St. J. R. Co.* 33 Mo. 309; *Walsh v. Virginia & T. R. Co.* 8 Nev. 111; *Scott v. Wilmington & R. R. Co.* 4 Jones, L. 432; *Lyndsay v. Connecticut & P. R. Co.* 27 Vt. 463; *See, however, Roberts v. Johnson*, 58 N. Y. 613; *Memphis & O. R. Packet Co. v. McCool*, 89 Ind. 332; *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. 135; *Quinn v. South Carolina R. Co.* 1 L. R. A. 682.

An accident may, however, be of such a character as to raise a presumption of negligence. *Edgerton v. New York & H. R. Co.* 59 N. Y. 237; *Mullen v. St. John*, 37 N. Y. 567; *Lyons v. Rosenthal*, 11 Hun, 46; *Breen v. N. Y. Cent. & H. R. R. Co.* 11 Cent. Rep.

821, 109 N. Y. 297; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236; *Kirst v. Milwaukee, L. S. & W. R. Co.* 46 Wis. 459; *Byrne v. Roadie*, 2 Hurl. & C. 722; *Scott v. London & St. K. Docks Co.* 3 Hurl. & C. 586; *Briggs v. Olson*, 4 Hurl. & C. 438; *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411, L. R. 6 Q. B. 759.

#### Rule in action based on contract.

But in actions resting on contract, when an accident happens to a passenger on a railroad by reason of the defective condition of appliances, it is *prima facie* evidence, from which the jury may infer negligence. *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Sawyer v. Hannibal & St. J. R. Co.* 37 Mo. 240; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 574.

Other examples cited in *Smith on Negligence* (Whit. ed.) 424, are: where injury is caused by car being thrown off the track (*Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462; *Cleveland, C. C. & L. R. Co. v. Newell*, 1 West. Rep. 590, 104 Ind. 264); by a collision of trains (*New Orleans, J. & G. N. R. Co. v. Albritton*, 38 Miss. 242); by explosion of a boiler (*The Reliance*, 4 Woods, C. C. 426; *Robinson v. N. Y. Cent. & H. R. R. Co.* 20 Blatchf. 338); by the breaking down of a coach (*Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 60); by the upsetting of a stage coach (*Wall v. Livezey*, 6 Colo. 465; *Boyce v. California Stage Co.* 25 Cal. 460); or of a sleigh (*Ryan v. Gilmer*, 2 Mont. 517).

refused. The other two points were as follows:

2. "Under the circumstances of the present case, no presumption of negligence arises against the defendant from the mere fact that the plaintiff was a passenger, and was injured while riding in the defendant's cars."

3. "The burden of proof is on the plaintiff to show that the injury, for which he sues, was occasioned by the defendant; and, under the circumstances of the present case, the burden resting on the plaintiff is not satisfied by the mere presumption of negligence which sometimes arises against the carrying company when a passenger is injured."

The learned president of the common pleas also declined to affirm either of these points, and emphasized his refusal by charging, *inter alia*, as complained of in the first specification of error, viz.: "The rule of law, as applicable to this case, is that the mere happening of an injurious accident to a passenger while in the hands of the carrier will raise *prima facie* a presumption of negligence, and throws the *onus* that it did not exist on the carrier."

"Under this principle and the facts in this case, the jury will begin their consideration with the fact established that the injuries were the result of negligence of the defendant. This fact must be rebutted or answered by evidence. In other words, the defendant must show by evidence that it was not negligent. If it has not done this the verdict must be for the plaintiff."

In immediate connection therewith, he said to the jury: "It is your duty, of course, to consider all the evidence in the case and to come to a conclusion on this question of negligence. If you find that the defendant was negligent, then the question of damages must be considered by you."

The rule clearly stated by the learned Judge in the foregoing excerpt from his general charge, is not only an old and well settled principle of law, but one of very general application in cases of injury to passengers while in the course of transportation. The only question is whether it is of such universal application that it can be invoked without proof of something more than the mere fact of an injurious accident to a passenger while in the hands of the carrier, and in the absence of any admission or evidence tending to connect the latter, or his servants, or any of the appliances of transportation, with the happening of the injury.

The rule in question has been frequently recognized, and the presumption of negligence applied in a variety of cases, among which are stage-coach accidents, resulting from breaking an axle, etc., railroad accidents, including derailment of cars, collisions, breaking of machinery, falling of berth of sleeping-car, violent outbreak among other passengers on train, explosion on passenger vessel, etc. *Christie v. Griggs*, 2 Camp. 79; *Stokes v. Saltonstall*, 38 U. S. 18 Pet. 181 [10 L. ed. 115]; *Ware v. Gay*, 11 Pick. 109; *Hipsley v. Kansas City, St. J. & O. B. R. Co.* 88 Mo. 348, 27 Am. & Eng. R. R. Cas. 287; *Feital v. Middlesex R. Co.* 109 Mass. 398; *Edgerton v. New York & H. R. Co.* 39 N. Y. 329; *Sullivan v. Philadelphia & R. R. Co.* 80 Pa. 284; *Cleveland, C. C. & I. R. Co. v. Wal-*

*rath*, 38 Ohio St. 461, 8 Am. & Eng. R. R. Cas. 371; *Pittsburg & C. R. Co. v. Pillow*, 76 Pa. 510, 513; *Spear v. Philadelphia, W. & B. R. Co.* 119 Pa. 61, 11 Cent. Rep. 643; *Memphis & O. R. Packet Co. v. McCool*, 83 Ind. 392, 8 Am. & Eng. R. R. Cas. 390; *Laing v. Colder*, 8 Pa. 481; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 351; *Story, Bailments*, 592, 601; *Shearm. & Redf. Neg.* §§ 280, 280 *a*, and notes.

In nearly every case in which the rule under consideration has been applied, it will be found that the injury complained of was shown to have resulted from breaking of machinery, collision, derailment of cars, or something improper and unsafe in the appliances of transportation or in the conduct of the business, and not from any cause wholly disconnected therewith.

In *Laing v. Colder* the plaintiff's arm was broken because the side of the bridge was dangerously close to the side of the track; but in that case there was evidence of contributory negligence, etc. The injury in *Sullivan v. Philadelphia Railroad Company* resulted from collision of the train with an obstruction on the track. In *Pittsburg Railroad Company v. Pillow* the injury was caused by an outbreak of violence among other passengers in the car; and in *Spear v. Philadelphia Railroad Company* the injury resulted from an unexplained explosion on board a crowded steamer.

In the latter case our Brother Williams summarized the controlling facts and applied the rule thus:

"The person injured was a passenger; the injury occurred after the carriage had begun, and the cause of the injury was an explosion on the boat, which was the vehicle or instrument of carriage, and which was under the exclusive care and control of the defendant's servants. The rule of law is that the mere happening of an injurious accident to a passenger while in the hands of the carrier will raise *prima facie* a presumption of negligence, and throw the *onus* of showing that it did not exist on the carrier."

Of course, the rule, as thus broadly stated, must be considered in connection with the facts which warranted its application; and this is so in regard to all the cases. The facts and circumstances connected with the injury complained of in each furnished the basis for a presumption of negligence.

As was said in *Delaware Railroad Company v. Napheys*, 90 Pa. 141, the general rule undoubtedly is that the party who alleges negligence as the basis of a claim for damages must prove the fact alleged, and the extent of the injury if more than nominal damages are claimed; but, in some cases, slight proof only is required to justify a presumption of negligence. The mere circumstance attending the injury when put in proof may be enough to cast the burden of exculpation on defendant. If a passenger seated in a railroad car is injured in a collision, or by the upsetting of the car, breaking of a wheel, axle, or other part of the machinery, he is not required to do more, in the first instance, than prove the fact and show the nature and extent of the injury.

A *prima facie* case for plaintiff is thus made out and the *onus* is cast on the carrier to dis-

prove negligence. It is reasonable that it should be so, because the company has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury, and of explaining how it occurred, while as a general rule the passenger is destitute of all knowledge that would enable him to present the facts and fasten the negligence on the company, in case it really existed. The contract to carry implies that the company is provided with a safe and sufficient road; that its cars are stanch and road worthy; that every precaution which human skill, prudence and foresight could suggest has been taken to guard against every apparent danger that may beset the passenger, and that the servants in charge are tried, sober and competent men.

When a passenger is injured by any accident connected with the means or appliances of transportation, there naturally arises a presumption that it must have resulted from some negligent act of omission or commission of the company or some of its employes; because, without some such negligence, it is very improbable that the accident would have occurred. That is the basis on which the presumption rests, and it stands as proof of negligence until it is successfully rebutted. It arises, not from the naked fact that an injury has been inflicted, but from the cause of the injury, or from other circumstances attending it. As a rule of evidence the principle was approvingly recognized and applied in *Philadelphia Railroad Company v. Anderson*, 94 Pa. 351, and other cases.

In *Holbrook v. Utica Railroad Company*, *supra*, a case in some respects similar to the one before us, it appeared that at the moment plaintiff's arm was broken, the passenger car, in which he sat, was opposite a boarding car which had been placed on the adjoining track for the accommodation of the company's workmen. A long horizontal mark on the passenger car and other circumstances indicated that plaintiff's arm, as well as the car, had come in contact with some object of considerable size and strength firmly fixed in its position and probably connected in some way with the boarding car, and at the same time tended to negative any inference that the injury could have been caused by a stone or other missile thrown by any person outside. The immediate cause of the injury, however, was not explained. The case having been submitted to the jury with instructions to ascertain from the evidence whether the injury resulted from anything disconnected with the company or not, etc., a verdict in favor of the plaintiff was rendered. After stating the general rule as to the burden of proof, etc., the court of appeals said:

"It generally happens, however, in cases of this kind, that the same evidence which proves the injury done, proves also the defendant's negligence; or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it. For example, a passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption 2 L. R. A.

of negligence immediately arises; not, however, from the fact that the leg was broken, but from the circumstances attending the fact. On the other hand, if the witness who proves the injury swears that at the moment when it happened he heard the report of a gun outside of the car, and found a bullet in the fractured limb, the presumption would be against the negligence of the carrier. It is incorrect therefore to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. The presumption arises from the cause of the injury or from other circumstances attending it and from the injury itself."

It follows from what has been said that the learned Judge of the common pleas erred in directing the jury to begin their consideration of the case "with the fact established that the injuries were the result of negligence of the defendant."

If the case had been submitted to the jury on the evidence and they had found therefrom that the plaintiff's injury resulted from something connected with the operation of the railroad, and not from something entirely disconnected therewith, and with which neither the company nor its employes had anything whatever to do, that would have raised *prima facie* a presumption of negligence on the part of the company and thrown upon it the burden of proving that it did not exist.

Judgment reversed, and a venire facias de novo awarded.

George K. HUBBARD *et al.*, Trading as  
George K. Hubbard & Co., *Piffs. in Err.*,  
v.

William H. TENBROOK *et al.*, Trading as  
Tenbrook & Bro.

(....Pa....)

**1. If an agent is put forward to conduct a separate business in his own name, but**

**NOTE.—Private restrictions on agent's authority not to affect third persons.**

Where the principal puts the agent forward as a general agent or places him in a position where others are justified in the belief that his powers are general, the restrictions that may be imposed privately on the agent will be immaterial as to the rights or remedies of third persons who have no knowledge thereof. *Baker v. Kansas City, St. J. & C. B. R. Co.* 8 West. Rep. 326, 91 Mo. 152; *Byne v. Hatcher*, 75 Ga. 289; *Johnson v. Jones*, 4 Barb. 369.

So no secret arrangements between the principal and agent can affect third persons who purchase from the agent, where the agent was held out to the world as the legal owner. *Calais Steamboat Co. v. Scudder*, 67 U. S. 2 Black, 372 (17 L. ed. 282).

Secret instructions can in no wise affect third parties dealing with the agent. *Allen v. Ogden*, 1 Wash. C. C. 174; *U. S. v. Howard*, 7 Bliss. 56; *Louisville Coffin Co. v. Stokes*, 73 Ala. 372; *St. John v. Redmond*, 9 Port. (Ala.) 428; *Eagle Bank v. Smith*, 5 Conn. 71; *Swazey v. Union Mfg. Co.* 42 Conn. 556; *Woodbury v. Sav. Bank & Bldg. Assn. v. Charter Oak F. & M. Ins. Co.* 31 Conn. 529; *Nesbaum v. Heilbron*, 63 Ga. 312; *Thompson v. Douglas*, 61 Ga. 57; *City Bank v. Kent*, 57 Ga. 233; *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427; *Sterling Bridge Co. v. Baker*, 75 Ill. 139; *Aetna Ins. Co. v. Maguire*, 51 Ill. 342; *Hartford F. Ins. Co. v. Farris*, 73 Ill. 106; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Union Mut. L. Ins. Co. v. White*, 106 Ill. 67; *Talmage v. Bierhaus*, 1 West. Rep. 298, 103 Ind. 270; *Robbins v. Magee*, 76 Ind. 381; *Palmer v. Cheney*, 35 Iowa, 281; *Bryant v. Moore*, 26 Maine, 84; *Lobdell v. Baker*, 1 Met.



with the property and for the benefit of his principal, the latter cannot escape liability for the purchase price of goods by a secret limitation upon the agent's authority to purchase.

3. **One clothing an agent with apparent authority** is, as to parties dealing on the faith of such authority, conclusively estopped from denying it.

(February 25, 1889.)

**ERROR** to the Common Pleas No 8, of Philadelphia County, to review a judgment in favor of plaintiffs in an action to recover the value of certain goods sold to the alleged agents of defendants. *Affirmed.*

The facts sufficiently appear from the opinion.

**Mr. Joseph L. Tull**, for plaintiffs in error:

It was specially stated by the defense that Sides' employment was as salesman only, and it was equally denied that he had any authority or power to make purchases on credit of the firm with which he was employed. This being the extent and limitation of his authority to act for the firm, when it is attempted to show that he had the right to do more—the right to bind the firm by purchases on credit—the plaintiff below should definitely state what the

authority of the agent was and not leave the power to bind the firm in this way to a mere inference. The burden of proving the authority in making the purchase from the plaintiffs below by Sides rests upon them.

See *Hays v. Lynn*, 7 Watts, 524; *Am. Underwriter's Assn. v. George*, 97 Pa. 241; *Pa. R. Co. v. Irvine*, 85 Legal Int. 411.

It is always competent for a principal to show the scope and extent of his agent's authority.

*Central Pa. Teleph. & S. Co. v. Thompson*, 2 Cent. Rep. 544, 112 Pa. 183.

The extent of an agent's powers depends upon the authority under which he acts.

*Am. L. Ins. & T. Co. v. Shultz*, 83 Pa. 46.

An agent who has no authority to purchase for his principal without express directions for that purpose, and then only with funds which have been furnished by such principal, cannot bind his principal by a purchase on credit. Such purchase being made renders the agent alone responsible.

*Komorowski v. Krumdick*, 56 Wis. 23; *Laing v. Butler*, 37 Hun, 144.

**Mr. Joseph De F. Junkin**, for defendants in error:

If an agent duly authorized makes a contract in his own name without disclosing his prin-

193; *Williams v. Mitchell*, 17 Mass. 98; *Lyell v. Sanbourn*, 2 Mich. 109; *Wilkins v. Commercial Bank*, 6 How. (Miss.) 217; *Planters Bank v. Cameron*, 3 Smedes & M. 609; *Kinealy v. Burd*, 9 Mo. App. 359; *Stothard v. Aull*, 7 Mo. 318; *Minter v. Pacific R. Co.* 41 Mo. 503; *Hatch v. Taylor*, 10 N. H. 538; *Towle v. Leavitt*, 23 N. H. 360; *State v. Foster*, 23 N. H. 343; *Commercial Bank v. Kortright*, 22 Wend. 348; *Johnson v. Jones*, 4 Barb. 369; *Dows v. Greene*, 16 Barb. 72; *Angell v. Hartford F. Ins. Co.* 59 N. Y. 171; *Chouteau v. Leech*, 18 Pa. 234; *Carmichael v. Buck*, 10 Rich. L. 332; *Walker v. Skipwith*, Meigs (Tenn.) 502; *Planters Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *Walsh v. Pierce*, 12 Vt. 130; *Barber v. Britton*, 26 Vt. 112; *Continental Ins. Co. v. Kasey*, 25 Gratt. 238; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Houghton v. First Nat. Bank*, 26 Wis. 663. See *Wheeler v. McGuire*, ante, 308; *Fradley v. Hyland*, ante, 749.

*Special instructions, limiting authority, must be communicated to be effectual.*

Special instructions limiting the authority of a general agent must be communicated to the party with whom he deals, or the principal will be bound as though such special instructions were not given. *Southern L. Ins. Co. v. McCain*, 96 U. S. 84 (24 L. ed. 653); *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 13 Wall. 222 (20 L. ed. 617); *Minor v. Mechanics Bank*, 26 U. S. 1 Pet. 46, 70 (7 L. ed. 47); *Fleckner v. Bank of U. S.* 21 U. S. 8 Wheat. 338 (5 L. ed. 631); *Merchant's Nat. Bank v. State Nat. Bank*, 77 U. S. 10 Wall. 604 (19 L. ed. 1008); *Arthur v. The Cassius*, 2 Story, 81; *Wilkins v. Commercial Bank*, 6 How. (Miss.) 217; *St. John v. Redmond*, 9 Port. (Ala.) 428; *Fisher v. Campbell*, Id. 210; *Eagle Bank v. Smith*, 5 Conn. 71; *Longworth v. Conwell*, 2 Blackf. 469; *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427; *Frankfort Bank v. Johnson*, 24 Maine, 490; *Williams v. Mitchell*, 17 Mass. 98; *Lobdell v. Baker*, 1 Met. 193; *Odierne v. Maxcy*, 13 Mass. 181; *Lyell v. Sanbourn*, 2 Mich. 109; *Landsdale v. Shackelford*, Walk. (Miss.) 149; *Wilcox v. Routh*, 9 Smedes & M. 476; *Planters Bank v. Cameron*, 3 Smedes & M. 609; *Stothard v. Aull*, 7 Mo. 318; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116; *Hatch v. Taylor*, 10 N. H. 528; *Cameron v. Durkheim*, 55 N. Y. 425; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Commercial Bank v. Kortright*, 22 Wend. 348; *Arnold v. Halenbake*, 5 Wend. 33; *Jaques v. Todd*, 3 Wend. 83; *Commercial Bank v. Norton*, 1 Hill, 501; *McEwen v. Montgomery County Mut. Ins. Co.* 5 Hill, 101; *Dows v. Greene*, 16 Barb. 72; *Rapp v. Palmer*, 3 Watts, 178; *Laussatt v. Lippincott*, 6 Serg. & R. 386; *Walsh v. Pierce*, 12 Vt. 130; *Davis v. Waterman*, 10 Vt. 526; *Gibbs v. Linsley*, 13 Vt. 208; *Cross v. Huskins*, 13 Vt. 526.

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Where a third party has notice of such instructions, the principal will of course not be bound. *Stainer v. Tysen*, 3 Hill, 279; *Barnard v. Wheeler*, 24 Maine, 413; *Bryant v. Moore*, 26 Maine, 84; *Longworth v. Conwell*, 2 Blackf. 469; *Leathers v. Springfield*, 65 Mo. 507.

*Estoppel of principal to deny agent's authority.*

If a principal holds out an agent as possessing authority to control a shop or place of business, and a third person acts upon the faith of appearances so created, the principal may be bound by the acts of such agent within the scope of such ostensible authority, although, as between the agent and his employer, no such authority in fact existed (*Over v. Schiffing*, 102 Ind. 191; *Banks v. Everest*, 35 Kan. 687; if the party dealing with the agent did not know that he exceeded his authority. *Forman v. Walker*, 4 La. Ann. 409; *Robertson v. Ketchum*, 11 Barb. 652; 1 Parsons, Cont. 41.

Belief of the authority of an agent may be such as to estop the principal from denying his authority in the particular transaction; but if not, then persons treating with him have no remedy, unless against the agent himself who misled them. *Schimmelpennich v. Bayard*, 26 U. S. 1 Pet. 264 (7 L. ed. 138); *Parsons v. Armor*, 28 U. S. 3 Pet. 413 (7 L. ed. 724); *Blane v. Prouditt*, 3 Call, 207; *Kilgour v. Finlyson*, 1 H. Bl. 155; *Pourie v. Fraser*, 2 Bay, 309; 1 Parsons, Cont. 44.

If A has so acted as to induce third persons to believe that B is his agent, he is liable for all his acts in the same manner as if he were actually his agent, and is estopped from denying the existence of the agency. *Rice v. Groffmann*, 50 Mo. 434; *Chouteau v. Goddin*, 39 Mo. 229. See also, on the liability of principal for acts of agent, *Thomas v. Cummingskey*, 108 Pa. 354; *Eskridge v. Farrar*, 34 La. Ann. 709; *Forrester v. State*, 63 Ga. 349; *Bronson v. Coffin*, 118 Mass. 156; *Caswell v. Cross*, 120 Mass. 545; *Tozier v. Crafts*, 123 Mass. 480; *Putnam v. Home Ins. Co.* 123 Mass. 324; *Knox v. Barnett*, 18 Fla. 594; *Massachusetts L. Ins. Co. v. Eselman*, 30 Ohio St. 647; *Alabama G. S. R. Co. v. Hill*, 76 Ala. 303; *Katzenstein v. Raleigh & G. R. Co.* 84 N. C. 688; *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan. 55; *Plummer v. Buck*, 16 Neb. 322; *Bass v. Chicago & N. W. R. Co.* 42 Wis. 654. See *Silliman v. Fredericksburg, O. & C. R. Co.* 27 Gratt. 119; *Kline v. Central Pac. R. Co.* 37 Cal. 400; *Stephenson v. Grim*, 100 Pa. 70; *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 529; *Hughes v. First Nat. Bank*, 1 Cent. Rep. 349, 116 Pa. 423; *Cake v. Pottsville Bank*, 8 Cent. Rep. 322, 116 Pa. 204.

cipal, and even when such principal is entirely unknown to the other contracting parties, he is nevertheless bound.

*Youghiogheny Iron Co. v. Smith*, 66 Pa. 343; *Baymer v. Bonsall*, 79 Pa. 298.

The only exceptions to this rule appear to be where, (1) the principal, in good faith, has paid the agent at a time when the creditors still gave credit to the agent and knew of no one else as principal; and (2), where the creditor has settled up with the agent, and the principal is put in a worse position by the creditor than he otherwise would have been in.

Wharton, Ag. § 469.

**Mitchell, J.**, delivered the opinion of the court:

This case affords one among many examples of the failure of the so called reformed procedure to accomplish anything towards the brevity, the clearness, the accuracy or the convenience of legal forms. So long as the fundamental principle of our remedial jurisprudence shall be that upon conflicting evidence the jury shall ascertain the facts, and upon ascertained facts the judges shall pronounce the law, so long will it be a cardinal rule of pleading, by whatever name pleading shall be called, that the line of distinction between facts and the evidence to prove them, shall be kept clear and well defined.

The notion of the reforming enthusiast that the average litigant or his average lawyer can make a shorter, clearer or less redundant statement of his case if left to his own head, than if directed and restrained by the settled forms, sifted, tested and condensed as they have been by generations of the acutest intellects ever devoted to a logical profession, is as vain as that of any other compounder of panaceas.

The plaintiffs' statement is at least three times as long as a declaration in the established forms need to have been; and about one half of it is occupied, not with the averment of facts, but with a recital of evidence. Indeed, the strongest argument for the defendants is that the statement fails to aver two essential facts, to wit: the delivery of the goods to Sides, and the agency of Sides for the defendants as his undisclosed principals.

Fortunately for the plaintiffs their statement is helped out, as to the first fact, by the bill of particulars—which, being sworn to be a copy, of their book of original entry, imports delivery as well as sale.

The agency though stated in the objectionable form of an inference from the previously recited evidence, is clearly intended to be averred and may fairly be so treated.

Taking the statement, therefore, in its plain intent, it sets out that plaintiffs sold and delivered a quantity of hams to one Sides, who was conducting a grocery business in his own name, but with the property and as the agent of defendants. The defendants filed an affidavit of defense, and a supplementary one, the substance of which is that "Sides was not the agent of defendants to purchase from plaintiffs or anyone else," and that he "was employed as salesman only, by said defendants, without any authority whatever to act for or bind defendants for the purchase of any goods or merchandise upon credit of the said defendants."

We have thus the question presented whether an agent may be put forward to conduct a separate business in his own name, and the principal escape liability by a secret limitation upon the agent's authority to purchase.

The answer is not at all doubtful. A man conducting an apparently prosperous and profitable business obtains credit thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavorable turn in the business. To allow an undisclosed principal to absorb the profits, and then when the pinch comes to escape responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public.

No exact precedent has been cited. None is needed. The rule so vigorously contended for by the plaintiffs in error, that those dealing with an agent are bound to look to his authority, is freely conceded; but this case falls within the equally established rule that those clothing an agent with apparent authority are, as to parties dealing on the faith of such authority, conclusively estopped from denying it.

The affidavits set up no available defense, and the judgment is affirmed.

## NEW YORK COURT OF APPEALS.

### RE ESTATE OF Mary HOWE, Deceased.

(....N. Y.....)

#### 1. The New York Act of June 10, 1885, taxing certain property given by will

**NOTE.**—*Collateral inheritance tax, a tax on privilege.*

A tax on collateral inheritances is not a tax on property, but on the privilege of succeeding to the inheritance. *Miller v. Com.*, 27 Gratt. 117; *Eyre v. Jacob*, 14 Gratt. 422. See *Williams' Case*, 3 Bland, Ch. 136; *Tyson v. State*, 28 Md. 577, 1 Desty, Taxn. 316. The privilege may be taxed although the property is also taxed. *Eyre v. Jacob*, 14 Gratt. 422.

*Legislative power to impose tax.*

The power of the Legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the 2 L. R. A.

"after the passage of this Act," is not an exception to the general provision of the New York Revised Statutes declaring that "Every law, unless a different time shall be prescribed therein, shall begin to take effect only on the twentieth day after its final passage as certified by the Secretary of State."

exercise of its discretion, to select the objects of taxation. *Re McPherson*, 6 Cent. Rep. 789, 104 N. Y. 306.

It may raise revenue by capitation taxes, by special taxes upon carriages, horses, servants, dogs, franchises, and upon every species of property, and upon all kinds of business and trades. *People v. Brooklyn*, 4 N. Y. 419; *Stuart v. Palmer*, 74 N. Y. 183; *People v. Equitable Trust Co.*, 96 N. Y. 387; *Portland Bank v. Apthorp*, 12 Mass. 232; *Cooley*, Taxn. 7; *Re McPherson*, 6 Cent. Rep. 789, 104 N. Y. 306.

It may restrict the succession to a decedent's es-

2. **The provision of the New York Act** of June 10, 1885, that an estate valued at less than \$500 shall not be subject to the collateral inheritance tax applies, not to the whole estate left by a testator, but to the portion of property passing to the legatee or devisee.

(January 15, 1889.)

**A** PPEAL by the District Attorney of Tompkins County, on behalf of the People, from an order of the General Term of the Supreme Court, Fourth Department, reversing an order of the surrogate adjudging that certain legacies given by the will of Mary Howe, deceased, were subject to the collateral inheritance tax, imposed by chapter 483 of the Laws of 1885. *Affirmed.*

The facts of the case and points in controversy are sufficiently stated in the opinion.

*Mr. Chas. F. Tabor, Atty-Gen.,* for appellant.

*Messrs. Newman & McLachlan,* for respondents.

**Danforth, J.,** delivered the opinion of the court:

The record shows that Mary Howe died on the 16th day of June, 1885, leaving property

tate to a particular class, as to either descendants or ascendants. *Eyre v. Jacob*, 14 Gratt. 422; 1 Desty, Taxn. 316.

In the New York Laws of 1885, chap. 483, § 1, relating to the taxation of gifts, legacies, and collateral inheritances in certain cases, the term "lineal descendants" is limited to the children of the deceased and to their children and children's children, and does not include the children of brothers and sisters of deceased. *Re Miller*, 45 Hun, 244, 10 N. Y. S. R. 341.

*Statute providing for collateral inheritance tax is valid.*

Chapter 483 of the Laws of 1885, imposing a collateral inheritance tax, is constitutional and valid. *Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306. See *Scholey v. Hew*, 90 U. S. 23 Wall. 331 (23 L. ed. 99).

Statutes imposing such taxes have frequently come before the courts, and have uniformly been upheld. *Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306; *Carpenter v. Pa.*, 38 U. S. 17 How. 456 (15 L. ed. 127); *Scholey v. Hew*, 90 U. S. 23 Wall. 331 (23 L. ed. 99); *Clapp v. Mason*, 94 U. S. 589 (24 L. ed. 212); *Wright v. Blakeslee*, 101 U. S. 174 (25 L. ed. 1048); *Mason v. Sargent*, 104 U. S. 689 (26 L. ed. 894); *Re Short's Estate*, 16 Pa. 63; *Stinger v. Com.*, 36 Pa. 422; *Com. v. Freckley*, 21 Pa. 33; *Strode v. Com.*, 52 Pa. 181; *Miller v. Com.*, 27 Gratt. 110; *Tyson v. State*, 28 Md. 578; *State v. Dorsey*, 6 Gill, 388; *Williams' Case*, 3 Bland, Ch. 183.

The section of the Constitution which requires that a law which imposes a tax shall state its object is not applicable to the statute providing for a collateral inheritance tax, but applies to annually recurring taxes imposed upon the entire property of the State. *Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306.

The statute is not unconstitutional and void for the reason that it does not give the taxpayer notice of the proceeding against him and a hearing; for there is sufficient provision therein for notice and hearing for all parties interested, and the Act secures to every taxpayer due process of law. *Id.*

A tax on legacies to aliens is not a tax on commerce, nor is it an infringement of the constitutional powers of Congress. *Mager v. Grima*, 49 U. S. 8 How. 490 (12 L. ed. 1168); 1 Desty, Taxn. 316.

It does not confer powers upon surrogates' courts not authorized by or contrary to the Constitution. *Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306.

No Act of the Legislature may be condemned as unconstitutional if by fair implication or any just construction of its language it can be upheld. *Id.*

*When imposed.*

The tax is imposed on the disposition of real estate. *L. R. A.*

of more than \$20,000 in value, and a will by which she devised it in different proportions to various persons; giving, among others, to Myra Taylor a legacy of less than \$500. So far as is material to this appeal, two questions were presented to the surrogate:

(1) Whether any of the property which passed by the will was subject to the tax imposed by the "Act to Tax Gifts, Legacies and Collateral Inheritances in Certain Cases," Chap. 483, Laws 1885. (2) And, if any, whether the legacy to Myra Taylor was liable to taxation under that Act.

The surrogate answered both questions in the affirmative. Upon appeal, the general term were of a different opinion upon the first point, and found it unnecessary to pass upon the other.

The Act was passed June 10, 1885, and declared that, "After the passage of this Act, all property which shall pass by will," etc., to any person, etc., other than the father or certain other excepted persons, "shall be and is subject to a tax of \$5 on every \$100 of the clear market value of such property . . . *Provided*, That an estate which may be valued at a less sum than \$500 shall not be subject to said duty or tax."

tate past or future by deed, will, or the laws of descent, whereby any person becomes beneficially entitled in possession or in expectancy to real estate or the income thereof, upon the death of another person. 2 Bright, Dig. 367, 368.

It cannot be defeated by reciting a nominal consideration which would be deemed valuable in the technical sense of that term, for the consideration must not only be valuable but adequate. *U. S. v. Hart*, 4 Fed. Rep. 293; *Lynn v. Lynn*, 29 Pa. 369; *Keeler v. Baker*, 1 Heisk. 639.

No tax is imposed until the beneficiaries under the will or under the intestate come into possession or enjoyment of the property. *Clapp v. Mason*, 94 U. S. 589 (24 L. ed. 212); *U. S. v. Hazard*, 8 Fed. Rep. 381.

*Taxation in proportion to value of benefit.*

It is in accordance with the principles of natural justice and the spirit of the Constitution that the tax upon such a subject should be regulated in strict proportion to the value of the benefit which it secures. *Eyre v. Jacob*, 14 Gratt. 429. See *Mager v. Grima*, 49 U. S. 8 How. 490 (12 L. ed. 1168); *Williams' Case*, 3 Bland, Ch. 183; *Tyson v. State*, 28 Md. 577; 1 Desty, Taxn. 317.

A deed of gift to a son, though made as an advancement, is a "succession," under the Act of 1884, as a conveyance without "valuable and adequate consideration," and is taxable at one per cent on the value of the property conveyed. *U. S. v. Banks*, 17 Fed. Rep. 322; *U. S. v. Hart*, 4 Fed. Rep. 293.

No one can be compelled to pay a share of the succession tax due on land, greater than his share in the land. *Wilhelm v. Wade*, 65 Mo. 32.

*Persons subject to the tax.*

Corporations are included in the Acts imposing a tax on inheritances under the term "persons." *Miller v. Com.*, 27 Gratt. 110.

Bequests to colleges, etc., are taxable under the general statute taxing bequests. *Barranger v. Cowan*, 2 Jones, Eq. 436.

By the law of Louisiana every person, not being domiciled in that State, and not being a citizen of any State or Territory, who shall be entitled, whether as heir, legatee or donee, to the whole or any part of the succession of a person deceased, shall pay a tax to the State of 10 per cent of the value of the same. *Mager v. Grima*, 49 U. S. 8 How. 490 (12 L. ed. 1168).

Where a widow refused to take under the will, but arranged with the executors to take less than her share of the estate, she was not subject to the collateral inheritance tax. *Commonwealth's App.* 34 Pa. 204.

Money received in virtue of a compromise with



In the absence of any other provision, this Act would have taken effect from its date; that being the time when, according to the certificate of the Secretary of State, the bill became a law (1 Rev. Stat. p. 157, tit. 4, pt. 1, chap. 7, § 11; 7th ed. p. 433); but the words, "after the passage of this Act," are no more significant than the word "hereafter," and the general provision of the Revised Statutes (Id. § 12), "of the enactment and promulgation of statutes, and of the time from which they take effect," declares that "Every law, unless a different time shall be prescribed therein, shall commence and take effect, throughout the State, on and not before the twentieth day after the day of its final passage, as certified by the Secretary of State."

The provisions of this section governed the statute in question. It follows that as the Act itself could not take effect within twenty days

after its passage, or until the 30th day of June, the clause relied upon by the appellant was necessarily inoperative until that time. It commenced, therefore, on the twentieth day after its passage; and, as the property in question passed by the will before that day, no tax was payable upon it.

The remaining inquiry is as to its meaning as respects the \$500 limitation. We think that applies to the portion of property passing to the legatee or devisee, and not to the whole estate left by the testator. The tax is not imposed upon the estate of which she was seised or possessed, but only upon so much of it as passes to certain persons—not all persons or any person; and, although the executor is required to pay the tax, he is to deduct it from the particular legacy, and cannot "deliver, or be compelled to deliver, any specific legacy or property, subject to tax, to any person, until

the executors is not liable to the tax. Page v. Rives, 1 Hughes, 297.

#### *Adopted children.*

The collateral inheritance of adopted children is not taxable. New York Laws 1885, chap. 453, as amended by New York Laws 1887, chap. 713. *Re Cayuga Co. Surrogate*, 46 Hun, 667, 18 N. Y. S. R. 45. In Pennsylvania an adopted child is not exempted by statute from paying the collateral inheritance tax. *Com. v. Nancrede*, 32 Pa. 339; 1 Desty, Taxn. 316.

An estate held under an adopting act changing the name of the heir, and making her capable of taking, etc., is subject to the collateral inheritance tax. *Tharp v. Com.* 55 Pa. 500.

That the laws of another State exempting religious corporate bodies from taxation created by the laws of such State cannot operate to exempt such corporations existing in this State from a collateral inheritance tax, see *Catlen v. Trinity College*, Daily Register (N. Y.) April 1, 1889.

#### *Estate subject to the tax.*

Collateral inheritance tax accrues at the decease of the person whose estate, passing to collateral heirs or strangers, is subject to the tax; and this is so whether the estate passes in actual enjoyment, directly or remotely upon the termination of an intervening life estate, or term of years. *Mellon's App.* 5 Cent. Rep. 439, 114 Pa. 564.

A died, leaving all his estate by will to an illegitimate and only child, who was legitimized after A's death by an Act of the Legislature. There were numerous collateral heirs. It was held that the State was entitled to a collateral inheritance tax out of the estate, as this right had vested on A's death, and before his child's rights were established. *Galbraith v. Com.* 14 Pa. 253.

The word "estate" is synonymous with "succession." *N. O. v. Stewart's Estate*, 28 La. Ann. 180.

The tax is not payable on an annuity in Maryland. *Citizens Nat. Bank v. Sharp*, 53 Md. 521.

The tax is due when settlement is made with the legatees, although the estate is not fully settled. *Atty-Gen. v. Pierce*, 6 Jones, Eq. 240.

Where a deed to the grantor's sister is not delivered until after the grantor's death, the real estate conveyed by it is subject to collateral inheritance tax. *Davenport's App.* (Pa.) 13 Cent. Rep. 67.

An estate passing to a grandmother, as next of kin, is subject to the collateral inheritance tax. *McDowell v. Addams*, 45 Pa. 430.

#### *Property subject to the tax.*

In Great Britain it has been determined upon much consideration by the highest authority that an Act imposing a legacy duty does not apply to property of a person whose domicile at the time of his death is not within the realm. *Thomson v. Advocate Gen.* 12 Clark & F. 1, 9 Jur. 217.

In the courts of North Carolina and of Missouri, on the other hand, it is held that all personal property within the State is liable to such a duty, whether the owner's domicile at the time of his death is within or without the State. *Alvany v. Powell*, 2 Jones, Eq. 51; *State v. St. Louis Co. Ct.* 47 Mo. 504.

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The general rule is that wherever the owner of the property is domiciled, there a tax may be imposed on the succession, although the property may be situated in another State. *Re Short's Estate*, 16 Pa. 63.

Where ancillary administration is granted, the State may impose a collateral inheritance tax on all property situated within the State. *Alvany v. Powell*, 2 Jones, Eq. 51; *State v. St. Louis Co. Ct.* 47 Mo. 504.

Property, in New York State, belonging to a person residing and dying in another State is subject to the collateral inheritance tax imposed by New York Laws 1885, chap. 453. *Re Enston*, 46 Hun, 508, 10 N. Y. S. R. 330.

But where the State has control over neither the domicile of the decedent nor the property, it can impose no succession tax. *Hood's Estate*, 21 Pa. 103.

Personality received by a distributee in the State from the estate of one residing abroad is taxable in the State under a statute taxing property distributed "to or among the next of kin" of an intestate. *Alvany v. Powell*, 2 Jones, Eq. 51.

#### *Property within the State.*

Where property was given by will by a wife to her husband, a succession tax is due, notwithstanding the property was bought and paid for by the husband and deeded to the wife under an understanding that she was to devise the same at her death to her husband. *Ransom v. U. S. S. Reporter*, 164.

Where in a conveyance or transfer of property during the lifetime of the owner, the manifest effect of conditions, covenants and stipulations in the deed are such as to clothe the grantee with a naked legal title, the right of the State to the collateral inheritance tax or duty is not defeated thereby. *Reish v. Com.* 103 Pa. 521; *Selbert's App.* 1 Cent. Rep. 342, 110 Pa. 323; *Dubois App.* 121 Pa. 368.

Property devised by a daughter to her brothers and sisters, under a power to appoint by will, is not liable to taxation in Pennsylvania. *Com. v. Williams*, 13 Pa. 29.

Property devised to trustees, to pay out the income and after a certain number of years to pay over the trust funds and profits to testator's heirs, is taxable only to the heirs at law, and not to the trustees, under the Massachusetts Statute. *Hathaway v. Fish*, 13 Allen, 237; *Sohler v. Eldredge*, 103 Mass. 345.

#### *Succession tax under United States Revenue Laws.*

On the first day of October, 1870, the legacy and succession tax was repealed, saying, by a proviso, all provisions for levying and collecting taxes properly assessed, or liable to be assessed, the right to which had already accrued, or which thereafter might accrue, or where the right had become absolute. *U. S. Rev. Stat.* §§ 3438, 3439; *Mason v. Clapp*, 1 Holmes, 417; 94 U. S. 589 (24 L. ed. 212); *U. S. v. N. Y. L. Ins. & T. Co.* 9 Ben. 413; *Wright v. Blakeslee*, 101 U. S. 174 (25 L. ed. 1048); *Blake v. McCartney*, 4 Cliff. 101; *Mason v. Sargent*, 104 U. S. 689 (25 L. ed. 504); *Hellman v. U. S.* 15 Blatchf. 18; *Jay v. Slack*, 16 Int. Rev. Rec. 134.

he shall have collected the tax thereon." Sec. 6.

There are many other provisions of the Act requiring the same construction, all tending to show that in the matter of taxation it is simply the "estate" or share of the beneficiary acquired through the will or the Statute of Distributions which is to be valued, and the duty estimated according to its value.

*The order appealed from should be affirmed, with costs.*

All concur.

William S. JOHNSTON *et al.*, *Respts.*,

Hamilton WALLIS *et al.*, *Exrs., etc., Appts.*

(.....N.Y.....)

1. **The general rule, that executors and administrators can be sued only in the State where they are appointed, is confined, at least in the State of New York, to claims and liabilities resting wholly upon their representative character.**
2. **Foreign executors who, by virtue of their appointment, have become owners of a judgment, and have made a contract to assign it, may be sued on such contract outside of the State of their appointment.**

(January 15, 1890.)

**A**PPEAL by defendants, from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Dutchess Special Term in favor of plaintiffs in an action to compel specific performance of a contract. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. William G. Wilson* for appellants.

*Messrs. Thompson, Weeks & Lown* for respondents.

*Finch, J.*, delivered the opinion of the court:

This is an action in equity to compel the specific performance by the vendors of a contract to sell and assign a judgment recovered by John McAnerney and others in the Supreme Court of this State against a corporation known as the Hudson River Iron Company. The judgment was assigned to one Alexander H. Wallis, who was a resident of New Jersey, and who died leaving a last will and testament, which has been duly proved in that State, and by which the defendants were appointed ex-

ecutors. They have qualified and entered upon the performance of their trust. They thereafter made a written contract with one Jacob Russell, all whose rights have passed to the present plaintiffs to sell and assign to him such judgment for a price to be fixed as follows.

The judgment was a lien or supposed to be a lien upon certain lands under the waters of the Hudson River near Poughkeepsie in this State, and had no value beyond such lien. Arbitrators were chosen to fix the value of one acre of the upland and that value multiplied by the number of acres subject to the lien was to be the purchase price of the judgment. That value was ascertained, the price tendered and a deed duly demanded, which was refused, and thereupon this action was brought. The plaintiffs had judgment which the general term affirmed, and the defendants appealed to this court.

They rely mainly upon the proposition that as foreign executors they could not sue or be sued in this State, and acquire all their rights from and owe their responsibilities to another jurisdiction. That is the general rule; but in this State at least is confined to claims and liabilities resting wholly upon their representative character.

In *Lawrence v. Lawrence*, 3 Barb. Ch. 74, the rule was declared to be applicable only to suits brought upon debts due to the testator in his lifetime or based upon some transaction with him, and does not prevent a foreign executor from suing in our courts upon a contract made with him as such executor. Of course where he can sue upon such a contract, he may be sued upon it. The remedy must run to each party or neither.

In the present case the action is not founded upon any transaction with the deceased but upon a contract which the defendants themselves made. By force of the will and their appointment they became owners of the judgment. Their title, although acquired under the foreign law, was good.

In *Peterson v. Chemical Bank*, 82 N. Y. 21, the foreign executor sold an obligation of the estate and his assignee sued upon it. The action was sustained on the grounds that the title of the foreign executor was good and he could transfer it; and while he could not have sued upon it his assignee was not prevented.

In this case, therefore, the defendants were owners of the judgment and could lawfully

#### NOTE.—Foreign executor; incapacity to sue.

Although a foreign executor cannot sue or be sued in an action here by virtue of his appointment abroad (*Metcalf v. Clark*, 41 Barb. 48; *Smith v. Webb*, 1 Barb. 230); yet he may sue in one State in his individual capacity on a judgment recovered by him in another State as administrator. *Bright v. Currie*, 5 Sandf. 437; *Nichols v. Smith*, 7 Hun. 561.

A foreign executor or administrator cannot sue or be sued in his representative character in the courts of this State; but where claims by a rightful assignment have become transferred to another, or to the administrator in his private capacity, where the obligor resides, the rule that a foreign executor or administrator cannot obtain recognition in our courts does not apply. *Lucas v. Byrne*, 85 Md. 494.

So a party deriving title to a chose in action by transfer from such an executor or administrator, can prosecute the debtor residing here in our courts. *Middlebrook v. Merchants Bank*, 27 How. Fr. 474; *Peterson v. Chemical Bank*, 82 N. Y. 41.

2 L. R. A.

#### In courts of equitable cognizance.

The court of chancery will assume jurisdiction over foreign executors and administrators at the instance of creditors, legatees or next of kin; yet these must be special cases and where, but for the interference of this court, there would be manifestly a failure of justice of only a hopeless remedy elsewhere. *Brown v. Brown*, 4 Edw. 345, 359, 1 Barb. Ch. 196; *Price v. Brown*, 60 How. Fr. 514; 10 Alb. N. C. 70; *Ordonaux v. Helie*, 3 Sandf. Ch. 518; *Field v. Gibson*, 23 Hun. 274, 50 How. Fr. 233; *Lockwood v. Brantly*, 31 Hun. 157; *Gulick v. Gulick*, 21 How. Fr. 33, 33 Barb. 102.

Jurisdiction will be assumed over a foreign administrator who had left his own country and come to this, bringing with him the property of which he was administrator, and wrongfully applying it to his own use. *Brown v. Brown*, 1 Barb. Ch. 196; *Black v. Woodman*, 5 Redf. 304; *Marshall v. Bresler*, 1 How. Fr. N. S. 223; *McNamara v. Dwyer*, 7 Paige, 239.

contract for its sale. Having done so they were liable upon that contract which could be enforced against them because they made it, and it did not derive its existence from any act or dealing of their testator. We agree, therefore, with the courts below that the action could be maintained.

Objection is made that the arbitrators valued the land under water and not the upland. The arbitrators certify that they valued the land per acre lying between the railroad and the river. That was upland and not land under water. While they describe it as eleven and eight tenths acres, that may be rejected as an immaterial element of the description, and does not establish that their valuation extended to anything but the upland. Taking their whole report together its fair meaning is that they valued one acre of upland at \$25, and so the value of the eleven and eight tenths was \$295.

*The judgment should be affirmed, with costs.*  
All concur.

Philip DIEFFENBACH, *Respt.*,

v.

Jacob ROCH, *Appt.*

(....N. Y....)

1. An action upon a judgment rendered in a justice's court is barred in six years from its rendition, although the judgment has been docketed in the county clerk's office under the provisions of the Code of Civil Procedure, § 8017.
2. An action to compel defendant to allow plaintiff's judgment to be set off against one held by defendant is an action upon a judgment, within the provisions of the Code of Civil Procedure, § 882, that an action upon a judg-

**NORM.—Code of Civil Procedure construed; § 882, subdivision 1.**

Where the action is founded on an implied contract, obligation or liability, and not on the ground of fraud, and no facts were stated from which fraud on the part of the defendant might be implied, the limitation of six years provided for by section 882, subd. 1, applies. *Price v. Mulford*, 9 Cent. Rep. 866, 107 N. Y. 309; *Carr v. Thompson*, 87 N. Y. 160, 9 Daly, 231; *Eltinge v. Hull*, 22 Dem. 564.

An action upon the express or implied promise of a grantee is barred in six years, although the transfer was made by a sealed instrument, if it contained no obligation to pay. *Coleman v. Second Ave. R. Co.* 38 N. Y. 201, 6 Trans. App. 146, 48 Barb. 871.

A debt from an administrator, for which a judgment has been recovered, is a simple contract debt. *Ball v. Miller*, 17 How. Pr. 300.

Any liability which could be enforced in an action at law is barred in six years under this section. *Pierson v. McCurdy*, 33 Hun, 634.

Where the only causes of action were causes of action at law for destruction of the equitable lien by sale of the bonds, they were barred by this section, in six years. *Hovey v. Elliot*, 21 Jones & S. 847.

Where bills are rendered for goods sold from time to time, and payments are made and applied specifically, it is not a running account, and sales not made within six years are barred. *Albro v. Figueroa*, 60 N. Y. 630.

A purchasing broker of undisclosed principal must bring his suit within six years after vendor's claim accrues. *Knapp v. Simon*, 14 Jones & S. 225.

The statute bars a recovery for the use of goods for any period antecedent to six years before action (*Wilder v. Union India Rubber Co.* 23 N. Y. 579; 5 Bosw. 89); so of a claim for the amount of a check on the bank. *Brush v. Barrett*, 22 N. Y. 400, 16 Hun, 406.

An action on a note payable on demand is barred 2 L. R. A.

ment rendered in a court not of record shall be commenced within six years.

(March 5, 1889.)

**A**PPEAL by defendant, from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings Special Term in favor of plaintiff in an action brought to compel defendant to allow the set-off of a certain judgment. *Reversed.*

The facts fully appear in the opinion.

*Mr. Edward P. Wilder* for appellant.

*Mr. Ira Leo Bamberger* for respondent.

*Earl, J.*, delivered the opinion of the court:

Early in February, 1885, the plaintiff held against the defendant a judgment for \$221.79, recovered in a justice's court on the 27th day of May, 1875; and later in the same month the defendant recovered a judgment against the plaintiff in the supreme court for \$913.09.

A transcript of plaintiff's judgment was filed in the office of the clerk of the County of Kings on the second day of June, 1875, and the judgment was docketed in that office on that day. The plaintiff commenced this action on the 28th day of February, 1885, to procure an adjudication that his judgment be set off against that of the defendant, and that the defendant be required to receive from him the balance of his judgment, and to satisfy and discharge the same.

The defendant alleged in his answer, among other things, that the plaintiff's judgment was barred by the six years' Statute of Limitations; and the sole question we deem it important now to consider is whether the plaintiff's judgment, notwithstanding the filing of the transcript and the docketing in the office of the county clerk, was barred in six years from the

if not brought within six years after its date (*Wheeler v. Warner*, 47 N. Y. 519); but demand is necessary to charge the indorser. *Merritt v. Todd*, 23 N. Y. 28.

It is a bar though the payee, after six years from the time the note became payable, paid it to his indorsee, and became repossessed of it. *Woodruff v. Moore*, 8 Barb. 171.

#### *Equitable causes of action.*

The provision of subdivision 5 includes all cases formerly cognizable by a court of chancery, and in which a court of law could not give relief although, as part of the relief sought, a money judgment is also demanded. *Carr v. Thompson*, 87 N. Y. 160.

An action by the receiver of an insolvent corporation against those who were its trustees or directors *de facto*, to compel them to account for alleged fraudulent mismanagement and diversion of funds, and make good the damage occasioned thereby, is an equitable action, and not an action of a legal nature. Hence the ten years' limitation (Code Civ. Proc. § 888), and not the six years' limitation (Code Civ. Proc. § 882), applies. *Pierson v. Morgan*, 20 Abb. N. C. 423.

An action for the recovery of license fees and for an accounting of royalties for the use of a patented invention is within this section. *Keller v. West, Jr. & C. Mfg. Co.* 39 Hun, 866.

Other equitable actions must be brought within six years, as: an action to cancel municipal bonds (*Venice v. Breed*, 1 Thomp. & C. 190, 65 Barb. 697); an action to enforce the equitable lien for the purchase money of land (*Borst v. Corey*, 15 N. Y. 505); a creditors' bill, after return of execution unsatisfied (*Eyre v. Beebe*, 28 How. Fr. 333; *Gates v. Andrews*, 37 N. Y. 657, 5 Trans. App. 176); or an action to set aside a conveyance made in fraud of judgment creditors. *Taft v. Wright*, 2 Thomp. & C. 614, 59 N. Y. 656.

The provision in subdivision 5 of § 882 does not apply to an action to remove a cloud upon the title to

rendition thereof in the justice's court. The contention of the plaintiff is that it became a judgment of the county court to all intents and purposes, and that, therefore, the limitation claimed by the defendant was not applicable.

It was provided in the Revised Statutes that a transcript of a justice's judgment for above \$25, exclusive of costs, could be filed and the judgment docketed in the clerk's office of the county, and that the judgment, from and after the filing and docketing by the clerk, "shall be a lien on the real estate of the defendant within the county in the same manner and with like effect as if such judgment had been rendered in the court of common pleas; and may, in the same manner, be discharged and canceled." 2 Rev. Stat. 247, §§ 127, 128.

And it was also provided that all actions on judgments rendered in any court, not being a court of record, should be commenced within six years next after the cause of action accrued. 2 Rev. Stat. 295, § 18.

land. This right is never barred by the Statute of Limitations so long as the cloud continues to exist. *Schoener v. Lissauer*, 9 Cent. Rep. 443, 107 N. Y. 116, citing *Miner v. Beckman*, 50 N. Y. 337, 343.

One who is not actually a trustee, but upon whom that character is forced only for the purpose of a remedy, may avail himself of the statute. *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Baxter v. Moses*, 77 Maine, 431; *Baker v. Atlas Bank*, 9 Met. 182; *Peabody v. Flint*, 6 Allen, 52; *Farnam v. Brooks*, 9 Pick. 212; *Stringer's Case*, L. R. 4 Ch. App. 475; *Re Alexandra Palace Co.*, L. R. 21 Ch. Div. 149; *Carroll v. Green*, 92 U. S. 509 (23 L. ed. 738); 2 Pom. Eq. Jur. 616.

#### *Actions upon liabilities created by statute.*

A stockholder's liability is a liability for debts created by statute, and in case of his death an additional period of a year is allowed. *Chase v. Lord*, 16 Hun, 369.

The statute runs from the time his liability is incurred. *Knox v. Baldwin*, 50 N. Y. 610.

The right of action under a manufacturing company's Act, against a stockholder for a debt of the company, does not accrue till action brought against the company, judgment issued thereon and execution returned unsatisfied. *Merritt v. Reid*, 10 Daly, 313.

A claim against stockholders for nonpayment of stock must be brought within six years after the two years allowed to pay up the stock. *Phillips v. Therasson*, 11 Hun, 141.

The time within which a mandamus must be resorted to is the same as that within which an action must be brought to obtain a remedy for the same injury (Code Civ. Proc. § 414); and therefore, a mandamus to compel payment of a liability created by statute—e. g., the salary of a municipal police officer—must be limited to sums which became due within six years prior to the application. *People v. French*, 13 Abb. N. C. 412, 12 Abb. N. C. 156, 31 Hun, 619.

#### *Action of damages for injury to property.*

An action to recover damages for an injury to property is controlled by this section. *Groth v. Washburn*, 34 Hun, 510.

"Injury to property" is "an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract" (§ 3343); and an action for damages therefor is within the six years' limitation of this section 332, subd. 3. *Miller v. Wood*, 41 Hun, 601.

An action to recover damages for the loss of services of a wife and for moneys expended for necessary medical aid and attendance upon her is within this section (*Groth v. Washburn*, 34 Hun, 510, followed in *Maxon v. Delaware*, L. & W. R. Co. 43 Hun, 173); while an action brought for the loss of comfort or society must be brought within three years (*Craig v. Brooklyn Croce-Town R. Co.* 33 N. Y. 595, also followed); so an action for personal injuries is barred in three years. *Dickinson v. New York*, 23 Hun, 254, 62 How. Pr. 235.

Where the source of the injury complained of is 2 J. P. A.

By section 68 of the old Code of Procedure, it was provided that where a judgment was recovered in a justice's court for any amount, a transcript thereof could be filed and the same could be docketed in the county clerk's office; and that from that time "The judgment shall be a judgment of the county court," but that no such judgment "for a sum less than \$25, exclusive of costs, shall be a lien on or enforced against real property."

In section 90 it was provided that an action upon a judgment or decree of any court of the United States, or any State or Territory within the United States, should be commenced within twenty years. Thus it is seen that some change was made by the Code in the provisions of the prior law. It was no longer requisite that the justice's judgment should be for \$25, before a transcript could be filed and the judgment docketed; the six years' limitation was abrogated, and the twenty years' limitation was made applicable to all judgments whether of courts of record or not.

negligence, the action is barred if not commenced within three years (Code Civ. Proc. § 333, subd. 5); and it is immaterial whether the action is in form *ex contractu* or *ex delicto*. A different period being expressly prescribed, such action does not come within the provisions of section 332. *Webber v. Herkimer & M. Street R. Co.* 12 Cent. Rep. 225, 109 N. Y. 315.

The third subdivision of section 332 applies to all cases where the personal injury results from acts other than those constituting negligence in the defendant. *Id.*; *Disher v. N. Y. Cent. & H. R. R. Co.* 12 N. Y. Week. Dig. 271.

#### *Action for recovery of chattel.*

In an action for conversion of personal property the statute commences to run from the time of the conversion (*Kelsey v. Griswold*, 6 Barb. 436; and the case cannot thereafter be taken out of the statute by a demand and refusal to return the property. *Id.*; *Bruce v. Tilson*, 25 N. Y. 194.

The action to recover back money paid under duress is within this section and is barred within six years. *Brundage v. Portchester*, 31 Hun, 131.

An action brought by an administrator appointed against the residuary legatees as wrong doers in converting the personal property would be barred by the Statute of Limitations. *Quackenbush v. Quackenbush*, 42 Hun, 332; *Brown v. Brown*, 1 Barb. Ch. 195; *Muir v. Leake & W. Orphan House*, 8 Barb. Ch. 477.

#### *Transaction grounded on fraud.*

Where a transaction could only be avoided on the ground of fraud it could only be barred by the lapse of six years after discovery of the fraud. *Decker v. Decker*, 11 Cent. Rep. 509, 108 N. Y. 136; *Piper v. Hoard*, 9 Cent. Rep. 445, 107 N. Y. 72; *Morehouse v. Morehouse*, 17 Abb. N. C. 430.

So an action to recover damages for fraud in the sale of land is barred in six years from the purchase, and an action brought more than six years after discovery of the fraud is too late. *Northrop v. Hill*, 57 N. Y. 351, 61 Barb. 126.

#### *Time runs from discovery of the fraud.*

Knowledge of fraud must be brought to plaintiff before the statute begins to run. *Gates v. Andrews*, 37 N. Y. 657, 5 Trans. App. 176; *Mayne v. Griswold*, 3 Sandf. 463; *Taft v. Wright*, 47 How. 1; *Kent v. Kent*, 62 N. Y. 560.

An answer setting up the statute casts upon plaintiff the burden of proof that the fraud was not discovered until within six years from commencement of the suit. *Baldwin v. Martin*, 14 Abb. N. S. 9; *Venice v. Breed*, 65 Barb. 597, 1 Thomp. & C. 120.

#### *Action upon judgment or decree.*

Under section 332 an action must be commenced within six years upon a judgment or decree rendered in a court not a court of record. The Marine Court of the City of New York is classed as a court of record. *Camp v. Hallanan*, 42 Hun, 629.

The statute furnishes the right to bar a recovery

Section 3017 of the Code of Civil Procedure provides that a transcript of any judgment rendered in a justice's court for any amount may be filed in the county clerk's office, and that "Thenceforth the judgment is deemed a judgment of the county court of that county, and must be enforced accordingly; except that an execution can be issued thereupon only by the county clerk, as prescribed in section 3043 of this Act, and that the judgment is not a lien upon and cannot be enforced against real property unless it is for \$25, or more, exclusive of costs."

And by section 382 of the Code of Civil Procedure it is provided, as it was in the Revised Statutes, that an action upon a judgment or decree rendered in a court not of record shall be commenced within six years and that the cause of action in such a case is deemed to have accrued "when final judgment was rendered."

upon a justice's judgment before the transcript is filed with the county clerk. Code Civ. Proc. § 382, subd. 7.

The right of a judgment debtor to avail himself of the Statute of Limitations may become perfect before the transcript is filed with the clerk; and such right is a vested right which cannot be defeated even by subsequent legislation. *Davidson v. Horn*, 47 Hun. 58; *Ryder v. Wilson*, 41 N. J. L. 9; *Girdner v. Stephens*, 1 Helsk. 280; *Yancy v. Yancy*, 5 Helsk. 363; *Bradford v. Shine*, 13 Fla. 333; *Rockport v. Walden*, 54 N. H. 157; *Shriver v. Shriver*, 86 N. Y. 560.

#### When statute begins to run.

In computing the time when an action may be brought, the first day upon which it might have been brought is excluded. *Cornell v. Moulton*, 3 Denio, 12; *McGraw v. Walker*, 2 Hilt. 404.

When the right to sue on a note did not accrue till a certain date, and summons and complaint were served within six years from the day when the right accrued, it prevented the bar of the statute. *Davidson v. Budlong*, 40 Hun. 247; *Osborn v. Moncure*, 8 Wend. 170; *Edw. Hills*, 2d ed. 673, 953.

The statute begins to run on a note given as part of the guaranty fund of an insurance company, from the time of notice of assessment. *Hope Mut. L. Ins. Co. v. Taylor*, 2 Robt. 273.

That demand must be made to set the statute running, see *Sands v. Annesley*, 56 Barb. 573.

A guaranty note is due and payable when made. *Bartholomew v. Seaman*, 25 Hun. 619.

The law will not imply that payment for services shall be postponed until the termination of the employment, but will regard the hiring as from year to year. *Davis v. Gorton*, 16 N. Y. 255.

The statute begins to run on the claim of an attorney for costs from the time his services are so ended that he could sue therefor. *Adams v. Fort Plain Bank*, 86 N. Y. 255, 2 Trans. App. 234; *Mygatt v. Wilcox*, 45 N. Y. 303, 1 Lans. 55; *Richardson v. Brooklyn City & N. R. Co.* 7 Hun. 69; *Bathgate v. Haskin*, 59 N. Y. 553.

#### Transcript of justice's judgment, filed with county clerk.

The transcript must be filed within six years (*Kincald v. Richardson*, 9 Abb. N. C. 315); and by order of court it may be filed *nunc pro tunc*. *Both v. Schless*, 5 Barb. 303.

The case of *Belgard v. McLaughlin*, 44 Hun. 537, refers to this section of the Code, on the point that the transcript of a judgment of a justice docketed in the county clerk's office, is evidence of the jurisdiction of the justice's court over the defendant in the original suit. It need not show jurisdiction on its face. *Jackson v. Rowland*, 6 Wend. 633; *Jackson v. Jones*, 9 Cow. 132; *Dickinson v. Smith*, 25 Barb. 102.

It is *prima facie* evidence of the judgment, but not conclusive (*Stephens v. Santee*, 49 N. Y. 35); but is conclusive of the facts stated therein. *Hard v. Shipman*, 6 Barb. 621.

#### Effect of filing transcript.

Filing the transcript deprives the justice of any further control over the judgment (*Sholts*, Judges of Yates Co. 2 Cow. 503); but the transcript 2 L. R. A.

To sustain the contention of the plaintiff it must be held that his judgment was rendered, within the meaning of the statute, in the county court, when it was docketed there. Such a meaning of the word *rendered* is certainly not according to the common understanding. Ordinarily, no one would understand that a judgment which had been recovered in a justice's court, and subsequently docketed in the county court, was in any sense rendered in the county court; and there is no countenance for such a meaning to be found in any statute.

The word *rendered*, as applied to judgments, is many times used in the Code and other statutes, and always in the sense of judgments given by judicial action. Judgments by default are no exception, as they are supposed to be rendered in the presence of the court, and by its authority and direction.

Section 3017 has this language: "A justice

falls with the judgment legally set aside by the justice for default. *McGloin v. Lackey*, 7 Alb. L. J. 416.

After filing the transcript the county has such control over the judgment as enables it to order set-off between judgments (*Hayden v. McDermott*, 9 Abb. Pr. 14; *Lyon v. Manly*, 18 How. Pr. 267, 10 Abb. Pr. 337, 32 Barb. 51); but it cannot vacate the judgment on motion. *Martin v. N. Y.* 12 Abb. Pr. 243. Although there is no express statutory limitation of time within which such transcript may be filed and judgment be docketed, the statute provides that when that is done, it becomes a judgment of the county court (Id. § 3017; *Davidson v. Horn*, 47 Hun. 58); and with like effect as if rendered by a justice of the peace of that county, except as to leave to issue execution thereon in that county. *Vedder v. Lansing*, 44 Hun. 561; Code Civ. Proc. §§ 3022, 3043.

Where the original action was brought in the justice's court and judgment by confession was entered therein, and the transcript was filed in the county court, it is deemed a judgment of the county court, where filed (*Ithaca Agricultural Works v. Eggleston*, 9 Cent. Rep. 340, 107 N. Y. 275); and it becomes subject to all the rules applicable to the enforcement of judgments in county courts. *Bergman v. Noble*, 19 Abb. N. C. 83; *McIntyre v. Allen*, 43 Hun. 123. The cases of *Spencer v. Wait*, 22 Week. Dig. 214; 2 How. Fr. N. S. 117; *Baldwin v. Roberts*, 30 Hun. 163; *Kincald v. Richardson*, 9 Abb. N. C. 315; as to the extent to which justice's judgments become on their transcripts being filed, judgments of a court of record under section 382, subd. 7, seem to be overruled in the principal case.

#### Lien created by filing transcript.

The filing of the transcript after death of the judgment debtor does not create a lien on real estate. *Henderson v. Brooks*, 8 Thomp. & C. 445. See, as to filing transcript for less than \$25, *Vulto v. Whitehead*, 2 Hilt. 553; *Butts v. Dickinson*, 12 Abb. Pr. 60; 20 How. Pr. 230; *Anonymous*, 32 Barb. 201.

The lien by the transcript of the judgment continues for twenty years. *Waltermire v. Westover*, 14 N. Y. 18. See *Nicholls v. Atwood*, 16 How. Pr. 475; *Young v. Remer*, 4 Barb. 442; *Geller v. Hoyt*, 7 How. Pr. 235.

The lien is not affected by errors in the transcript (*Sears v. Burnham*, 17 N. Y. 445); as by errors in misspelling. *Jackson v. Browner*, 7 Wend. 383.

#### Execution may be issued by leave of court.

Execution may be issued thereon by leave of court in the same manner as an execution issued on a judgment of the county court. *Kincald v. Richardson*, 9 Abb. N. C. 315; *McIntyre v. Allen*, 43 Hun. 123.

The court should adhere to the literal expression of the statute, and every construction derived from a consideration of its reason and spirit should be discarded. *Demarest v. Wynkoop*, 3 Johns. Ch. 120; *Bennett v. Worthington*, 24 Ark. 492; *Adams v. Davis*, 47 Ga. 341; *McDonald v. Underhill*, 10 Bush. 500; *Sacia v. DeGraaf*, 1 Cow. 356; *Bank of Alabama v. Dalton*, 50 U. S. 9 How. 522 (18 L. ed. 242); *Troup v. Smith*, 20 Johns. 33.

of the peace who renders a judgment except in an action to recover a chattel, must upon the application of the party in whose favor the judgment was rendered, and payment of the fee therefor, deliver to him a transcript of the judgment. The county clerk of the county in which the judgment was rendered must, upon the presentation of the transcript and payment of the fees therefor, indorse thereupon the date of its receipt, file it in his office, and docket the judgment, as of the time of the receipt of the transcript; for in section 882 prescribing the limitation for commencing an action upon a judgment not of a court of record, the language is that, except in a decree heretofore rendered in a surrogate's court, "The cause of action in such a case is deemed to have accrued when final judgment was rendered."

In the Revised Statutes providing for the limitation of actions upon judgments in any court, not a court of record, the judgments are spoken of as judgments rendered in any court not a court of record; and in the same statutes, in reference to procuring and filing transcripts and docketing judgments of justices' courts, it is provided that on the demand of any person in whose favor the justice shall have rendered a judgment, if above \$25, the justice shall deliver a transcript of the same, and such a judgment, after it is docketed, shall be a lien upon real estate as if the judgment "had been rendered in the court of common pleas."

By chapter 470 of the Laws of 1847, section 89, it was provided that transcripts of judgments "rendered in this State or any court of the United States, duly certified by the clerk of such court, may be filed and docketed in the same manner as judgments rendered in the supreme court of this State." There the word *rendered* has plain reference to the original judgment, and clearly under that statute the docketing of such a judgment in the county clerk's office was not the rendition of the judgment in the supreme court. The word *rendered* has the same meaning in section 1918 of the present Code, where provision is made in reference to actions upon judgments rendered in courts of record.

After a justice's judgment has been docketed in the county clerk's office, it becomes a mere statutory judgment of the county court. It is not in fact a judgment of that court. There has been no judicial action there and no judgment has been in fact entered or rendered. It is simply to be deemed a judgment of that court. Such a judgment has not been twice rendered, once in the justice's court and once in the county court; and as it may be docketed in all the counties of the State it certainly cannot be deemed to have been rendered in every county where it has been docketed.

Therefore, plaintiff's judgment is a statutory judgment of the county court, but it was not rendered there. It was rendered in a justice's court, and therefore an action upon it is barred within six years from the time of its rendition by the express language of section 882 of the Code.

! By this construction full force is given to all the language contained in subdivision 7 of that section, and in section 8017, and what is believed to have been the intention of the law-makers is given effect. If the six years' lim-

itation does not apply to such a judgment as this, then there is no limitation to an action upon such a judgment, as section 876 of the Code, providing that judgments shall be presumed to be paid and satisfied after the expiration of twenty years, applies only to judgments rendered in courts of record. And then, too, subdivision 7 of section 882 could be practically nullified in all cases, as the judgments of justices' and other courts not of record could, even after the lapse of six years from their rendition, be docketed in the county clerk's office; and if they are to be regarded as judgments then rendered in a court of record, there would be no statutory bar to an action upon them for twenty years more, and thus the judgments rendered in courts not of record would, as to the lapse of time, have a better position in the law than judgments rendered in actions commenced in courts of record—a result certainly not within the contemplation of the lawmakers.

It cannot be doubted that this is an action upon plaintiff's judgment. It is, in a certain sense, an action to enforce the judgment against the defendant by compelling him to allow the same in satisfaction *pro tanto* of his judgment. The judgment is the sole basis of the action, and in a real sense the action is to recover thereon.

We are therefore of opinion that the judgments of the General and Special Terms should be reversed, and a new trial granted, costs to abide event.

All concur.

Delora M. HUNTER *et al.*, Admsrs. etc.,  
*Respts.*,

COOPERSTOWN & SUSQUEHANNA  
VALLEY R. CO., *Appts.*

(...N. Y....)

**Endeavoring to board a train moving at the rate of six miles an hour is an act of such danger as to prevent any recovery from the railroad company for the death of the person attempting it, even though the train was evidently about to pass the station where it was advertised to stop, and where he was waiting for it, without stopping.**

**NOTE.—Getting on and off a car while in motion.**

Generally it is not *per se* contributory negligence for a person to get on or off a railroad train in the ordinary manner, while the train is only slightly in motion; but to attempt to jump upon a stock car of a freight train while in motion, which car has no conveniences for getting upon it, is such contributory negligence *per se* as will exempt the company from liability. *Warren v. Southern Kan. R. Co.* 87 Kan. 408.

Jumping off or on a rapidly moving train is negligence *per se*. *Stager v. Ridge Ave. Pass. R. Co.* 11 Cent. Rep. 423, 119 Pa. 70.

But where plaintiff jumps from a car at the time of a wreck, under a well grounded fear of danger to his life or limbs, and is thereby injured, he is not liable for contributory negligence, although the injury could have been avoided in fact if he had not jumped. *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71.

In an action to recover damages for injuries received in alighting from a train of cars, an instruction that plaintiff could not recover, if her negligence caused or contributed to the injury is proper, although the word "proximately" was omitted. *Craven v. Central Pac. R. Co.* 73 Cal. 845. See N. Y. P. & N. R. Co. v. Coulbourn, 1 L. R. A. 541 note.

and the conductor called to him to jump on if he was going.

(February 8, 1899.)

**A**PPEAL by defendant, from a judgment of the General Term of the Supreme Court, Fourth Department affirming a judgment of the Otsego Circuit in favor of plaintiffs in an action to recover damages for the death of their intestate, alleged to have been caused by defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.

**Mr. E. M. Harris**, for appellant:

The attempt of plaintiff's intestate to get on the train while in motion, under the circumstances proven in this case, was an act of negligence which in fact contributed to the injury he received; and for this reason the plaintiffs were not entitled to recover.

*Phillips v. Kesselaer & S. R. Co.* 49 N. Y. 177; *Burrows v. Erie R. Co.* 63 N. Y. 556; *Gavett v. Manchester & L. R. Co.* 16 Gray, 501; *Harvey v. Eastern R. Co.* 116 Mass. 269; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64; *Solomon v. Manhattan R. Co.* 4 Cent. Rep. 775; 103 N. Y. 437.

The boarding or alighting from a moving train is presumably and generally a negligent act, *per se*.

The deceased knew that the train was in motion when he attempted to board it, and he took the risk of the attempt.

*Solomon v. Manhattan R. Co.* 4 Cent. Rep. 775, 103 N. Y. 437; *Shannon v. Boston & A. R. Co.* 1 New Eng. Rep. 681, 73 Maine, 52.

If he was in fact guilty of contributory negligence, although the company was also negligent, no recovery can be had.

3 Wood, Railway Law, 1155; *Poultack v. N. Y. Cent. & H. R. R. Co.* 3 Cent. Rep. 336, 103 N. Y. 290.

Where the facts are controverted, the question of negligence is a question of law for the court.

*Wilds v. Hudson River R. Co.* 24 N. Y. 430; *Owen v. Hudson River R. Co.* 35 N. Y. 516; *Gonzales v. N. Y. & H. R. Co.* 33 N. Y. 440; *Dwight v. Germania L. Ins. Co.* 4 Cent. Rep. 529, 103 N. Y. 841, 3 N. Y. S. R. 115; *Crafts v. Boston*, 109 Mass. 519; *Lancaster v. Kissinger*, 11 W. N. C. 151; *Powell v. N. Y. Cent. & H. R. R. Co.* 11 Cent. Rep. 906, 109 N. Y. 613, 14 N. Y. S. R. 74. See *Reynolds v. N. Y. Cent. & H. R. R. Co.* 58 N. Y. 248; *Cordell v. N. Y. Cent. & H. R. R. Co.* 75 N. Y. 330; *Deyo v. N. Y. Cent. R. Co.* 84 N. Y. 9; *Morrison v. Erie R. Co.* 56 N. Y. 303.

A passenger must not do that which is obviously dangerous, although he is advised to do it by the company's agents.

*Chicago, B. & Q. R. Co. v. Hazard*, 26 Ill. 378; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439 (24 L. ed. 506); *Ginnon v. N. Y. & H. R. Co.* 3 Robt. 25.

Whether the train was going to stop or not, or whether the deceased could or could not have known that it would stop at the station is unimportant; or whether there was only one brakeman on the train and he was not able to stop the train, is also unimportant. These conditions did not relieve the deceased from the necessity of taking ordinary precautions for his safety.

*Chicago, R. I. & P. R. Co. v. Houston*, 95 3 L. R. A.

U. S. 697 (24 L. ed. 542), 5 N. Y. Week. Dig. 523; *Prkalinsky v. N. Y. Cent. & H. R. R. Co.* 83 N. Y. 424.

**Mr. James A. Lynes**, for respondents:

The defendant was guilty of negligence in inviting the plaintiffs' intestate to get on a moving train.

1 Rorer, Railroads, 476-479; 2 Rorer, Railroads, 1130; *Weston v. N. Y. Elevated R. Co.* 73 N. Y. 595; *Brassell v. N. Y. Cent. & H. R. R. Co.* 84 N. Y. 241. See also 27 Alb. L. J. 83; *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494; *Beach, Contrib. Neg.* 171-176; *Bucher v. N. Y. Cent. & H. R. R. Co.* 94 N. Y. 128.

Under the circumstances and the evidence, the jury had a right to find that plaintiffs' intestate was not guilty of contributory negligence.

See *Filer v. N. Y. Cent. R. Co.* 49 N. Y. 47; *McIntyre v. N. Y. Cent. R. Co.* 37 N. Y. 287; *Abbey v. N. Y. Cent. & H. R. R. Co.* 20 N. Y. Weekly Dig. 87; *Bucher v. N. Y. Cent. & H. R. R. Co.* 94 N. Y. 128; *Western & A. R. Co. v. Wilson*, 71 Ga. 22; *Fitzgerald v. Long Island R. Co.* 10 N. Y. S. R. 433; *Wharton, Neg.* 2d ed. § 369; *Harvey v. Eastern R. Co.* 116 Mass. 269; *Solomon v. Manhattan R. Co.* 4 Cent. Rep. 775, 103 N. Y. 437; *Glushing v. Sharp*, 96 N. Y. 676.

It is not contributory negligence, as matter of law, to attempt to get on a moving railroad train.

*Beach, Contrib. Neg.* 155, 156; *Johnson v. West Chester & P. R. Co.* 70 Pa. 357.

**Peckham, J.**, delivered the opinion of the court:

Accepting the facts as testified to on the part of the plaintiffs in this action, it appears that on the 25th day of September, 1894, the plaintiffs' decedent came to the station of the defendant, called "Phoenix Mills," in the early morning, for the purpose of taking a train to the neighboring village of Oneonta.

There was a platform in front of the station, the northern end of which was used for freight, and was two or three feet higher than the southern end, which was used more especially for passengers. The passenger portion of the platform was only about one foot above the ground, and communication between the upper and lower platforms was had by steps leading from one to the other. The top of the freight platform was four and one half feet higher than the rails of the defendant's road. At the north end of the freight platform the distance between it and a car, as it would pass along the track, would be six inches. At the center of the freight platform it would be four inches, and the same distance at the south end.

The plaintiffs' decedent, upon hearing the whistle of a train approaching from the north on its way toward Oneonta, got up and stood on the passenger portion of the platform, awaiting its arrival; and, when it had got within a short distance of the station, the conductor came out on to the platform of the rear passenger car and asked plaintiffs' decedent if he was going, and added: "If you are, jump on."

There were but two witnesses sworn on the part of the plaintiffs in regard to the rate at which the train was moving when this direction was given by the conductor. One of them says the train was moving at that time six or



eight miles an hour; the other, who was the engineer of the train, stated that it was going from four to six miles an hour. When the conductor directed the deceased to jump on, he was standing on the passenger platform three or four feet north of the steps connecting with the freight platform, and he started to jump on the front platform of the passenger car while it was thus in motion. He was caught in some shape, as the witnesses say, without being able to describe exactly how, and rolled along the station platform with his head and shoulders above it. His body was caught about the hips. The train was stopped, and he was taken out, and died within a short time.

From this evidence it is quite plain that the train was in comparatively rapid motion at the time when the deceased made his attempt to board it. I say comparatively rapid motion—meaning by that a motion that was rapid, when taking into consideration that a man was attempting to board it. There can be no doubt from this evidence that the train was moving at least six miles an hour. The engineer fixes it from four to six; and being a witness for the plaintiff, and not in the defendant's employ at the time he was sworn, it may be assumed that he did not put the speed any greater than in fact it was.

The deceased was a man in the full vigor of life, presumably of ordinary judgment, at least up to the average of mankind, and he was at a familiar station, and about to take a train to go to a neighboring village a few miles distant. It was the duty of the railroad company (having advertised so to do) to stop its trains at the station in question, and to give ample time to all persons desirous of getting on or leaving trains at that station to do so.

The important question which arises is, Does a man who is *sui juris*, and in the full possession of his faculties, with nothing to disturb his judgment, act with ordinary care in endeavoring to board a train moving at the rate of six miles an hour? It seems to me there can be but one answer to such a question. That it is a dangerous—a most hazardous—attempt must be the common judgment of all men. Persons are taught from their earliest youth the great danger attending upon an attempt to board or leave a train while it is in motion, and there is no person of mature years and judgment but has the knowledge that such an attempt is dangerous in the highest degree.

It is substantially admitted in this case that it would have been negligence on the part of the deceased to make the attempt, had it not been for the request, or what is termed the direction, of the conductor to him to get on. It may be assumed that this direction implied a notice to the deceased that the train would not stop at that station, and that unless he attempted to get on while the car was thus in motion, he would be left at the station, and compelled to take another and a later train. It may be assumed that, in giving this direction, and in failing to stop the train, the company was chargeable with negligence; and yet it counts for nothing as a justification or excuse for the conduct of the deceased in attempting to board a train while thus in motion.

There may undoubtedly be circumstances under which an attempt to get on or off a moving

train would not be regarded as negligence, as matter of law, and where the question of negligence, under all the circumstances of the case, should be submitted to the jury. One such case was that of *Filler v. N. Y. Cent. R. Co.* 49 N. Y. 47.

There the plaintiff received the injuries complained of in attempting to get off the cars while they were in motion making very slow progress. The plaintiff, who was a woman, was directed by the brakeman on the car to get off; and there was evidence upon which the jury might have found that she was told by him that they would not stop or move more slowly to enable her to do so. The name of the station had been called and the speed of the train had been greatly reduced, so much so that baggage had been taken from the baggage car and removed by the porter, and one man who was supposed to be a little lame had gotten off safely. Allen, J., in delivering the opinion of this court, said: "She was put to her choice without any fault of hers whether to obey the advice and suggestion of the defendant's servant and follow the example of the man who had preceded her, or to remain on the cars and be carried beyond the place of her destination and away from her friends; and it was a proper question for the jury whether this was or was not, under the circumstances, an act of ordinary care and prudence." The learned judge, continuing, said: "Had the cars been going at a rapid rate the plaintiff must have known that she would be injured in leaping from them; and the attempt to leave the cars under such circumstances, even at the instance of a railway servant, would have been a wanton and reckless act, and no recovery could be had against the defendant."

In *Morrison v. Erie Railway Company*, 56 N. Y. 802, it was held that the question whether a person has been guilty of contributory negligence in attempting to alight from a car while it is in motion is not in every case a question of fact for a jury; that, when the facts are undisputed, the question of contributory negligence may become one of law. In that case the plaintiff, suing by guardian, was about twelve years of age, and the train when it approached the station slowed up. It had passed the platform, and while still in motion the plaintiff's father took her under his arm and stepped from the car, and fell, and she was injured. Folger, J., delivering the opinion of the court, said:

"Can it be said that a person of ordinary prudence and care would have swung himself from a car in motion down to the ground in the dark, laden with the weight of a child twelve years old, having but one hand and one arm to aid himself with, when there was no other danger to be avoided by meeting this, and no incentive to the act other than the inconvenience of being carried by his place of abode, and with a full apprehension of the danger he was about to run? I think not, and I am of the opinion that it is so clear that the law and the court should have given the answer without calling in the aid of a jury." See also *Phillips v. Rensselaer & S. R. Co.* 49 N. Y. 177; *Solomon v. Manhattan R. Co.* 103 N. Y. 487, 4 Cent. Rep. 775.

In the last cited case *Andrews, J.*, says:

"Negligence, no doubt, is usually a question of fact, of which the jury must inquire; but the inference of negligence in a given case may be so clear and convincing that the Judge may direct a verdict. The conclusion that it is *prima facie* dangerous to alight from a moving train is founded on our general knowledge and common experience, and it is akin to the conclusion, now generally accepted, that it is in law a dangerous, and therefore a negligent, act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train, but this is an inconvenience merely, which does not justify exposing himself to hazard. . . . If men will take hazards they must bear the consequences of their own rashness; and it is no just reason for visiting the consequences upon another that his negligence co-operated in producing the result."

We think that the facts in this case are so overwhelming in their nature that no reasonable judgment can be formed as to the act of the deceased in attempting to jump upon this moving train other than that it was dangerous and reckless, and that the injury resulting therefrom was contributed to by him. We do not regard it as of the slightest importance, under the circumstances of this case, that the conductor of the train notified the deceased to jump on. That notification certainly cannot be interpreted to mean more than that the train would not stop or go slower than it was then going, and that if the deceased wanted to take it he must jump on at that moment. That does not alter the highly dangerous nature of the act itself. The deceased was in absolute safety at the time the direction was given. It created no emergency which called for the exercise of immediate judgment in the choice between the two dangers. It was a simple question of possible inconvenience of taking a later train, or reaching his destination by some other conveyance, and it afforded not the slightest justification or excuse for attempting to board a train moving at that rate of speed; and when he did it he did it at his own risk. We think the plaintiff, upon this state of facts, should have been nonsuited.

For these reasons *the judgments of the Courts below should be reversed, and a new trial granted, costs to abide the event.*

All concur, except **Danforth, J.**, who reads for affirmance.

#### **Danforth, J., dissenting:**

It is not suggested by the appellant that there was any misdirection by the trial Judge, nor but that the defendants were guilty of negligence in not stopping their train.

The appeal rests upon the single proposition that the attempt of the plaintiffs' intestate to get upon the moving train was an act of negligence contributing to his injury, and therefore sufficient as matter of law to defeat a recovery. On the contrary, it seems to me that it was merely one act among others in the case, and to be considered with all the attendant cir-

cumstances. It may derive its explanation from the conduct of the defendants, and it was therefore for the jury to say how far the decedent was influenced by them upon the occasion of the accident. *Bucher v. N. Y. Cent. & H. R. R. Co.* 98 N. Y. 128; *Filer v. N. Y. Cent. R. Co.* 49 N. Y. 47; *Glushing v. Sharp*, 96 N. Y. 676.

And if they found that the conditions which led him into danger were of the defendants' own creation, both common sense and justice forbid that they should be allowed to withhold compensation. If, on the other hand, the danger, notwithstanding the solicitation of the conductor, was so manifest that in the exercise of ordinary prudence the intestate should have observed it, or, if observing it, he went recklessly to the car, he should suffer the consequences of an injury brought on by himself. Many circumstances are to be taken into account in answering these questions, and if inferences are to be drawn, not all one way, then no tribunal save a jury is authorized to pass upon them.

The appellant relies upon the single fact that the train was in motion. That, as appears from the cases referred to, is not enough to exonerate the defendants. Those decisions show that an intending passenger may attempt to board a moving train, and if injured in doing so may still recover; that is, the act is not negligent of itself. The speed of the train is in all cases to be considered, but this in connection with the conduct of the train servants, and the age and activity of the traveler, before his action upon the occasion in question can be characterized. *Eppendorf v. Brooklyn City & N. R. Co.* 69 N. Y. 195; *Filer v. N. Y. Cent. R. Co.* *supra*; *Burrows v. Erie R. Co.* 68 N. Y. 556; *Hickey v. Boston & L. R. Co.* 14 Allen, 429.

It is of the greatest importance, therefore, to ascertain the speed of the train. What was it? No exact testimony was given. But the train left Cooperstown at the usual time. The run to Phoenix was two and one half or three miles only, and at Cooperstown the engineer shut off steam and the train ran north to Phoenix, a distance of only two and one half or three miles, without steam. It was a regular passenger station, where all trains were advertised to stop. The conductor intended to stop at that station, and was trying to do so.

At about eighty rods distant the whistle was blown for the station, and the brakes applied continually until the train in fact came to a standstill, a short distance beyond the platform, twenty or thirty feet, or, as one witness says, fifty feet, and would have stopped sooner, or at the station, except that there was only one brakeman, and his brakes were defective. All that time the conductor stood upon the platform. In that position, and while eight or ten rods distant, he leaned out by the side of the car looking forward, and saw Hunter upon the station platform, facing the incoming train, and evidently waiting for it. When within eight or ten feet the conductor said to him: "Are you going? If you are, jump on." He reached out his hand and foot, tried to get on the car, and in some way was caught and killed.

These are circumstances about which there

is no doubt—the engine moving without steam; the conductor intending to stop at the station; the whistle blown for the station as notice of that intention; the brakes applied; the train actually slowing up; and the conductor, expecting a passenger, calling him to get on. The effort was made to do so, and it failing, the train was actually stopped within a few feet from the place where the accident occurred. Do not these circumstances all tend to show and permit the inference that the train was moving very slowly? There was the intention to stop, the conductor's expectation to take his passenger, and the actual stoppage of the train when the accident occurred.

But the opinions of witnesses are referred to as showing the contrary. In view of the circumstances I have exhibited, those opinions may be taken with many grains of allowance.

One witness says: "I should think the train was going about six or eight miles an hour." He was a bystander. His attention was not called to the speed of the train at the time in question; but he was the plaintiffs' witness, and his evidence is in the case for what it is worth. What is it worth? About six or about eight—at once a difference of two miles.

The engineer says: "At the time the train passed the station I should say it was going from four to six miles an hour." Wicks, the fireman, testifies: "I would say from four to six miles an hour, slackening all the while."

The phrase used by all the witnesses in expressing an opinion is in the highest degree indefinite, and their testimony must be weighed in view of the circumstances to which I have alluded. The rate of speed was to be determined as a fact. No witness spoke from accurate information, but gave his opinion merely, the conductor not testifying to it.

Observers are competent witnesses, but few are able to say, with even tolerable accuracy, the rate of speed at which a train at any given moment is moving. In this case their attention was not directed to it, and the weight of

their testimony was to be determined. The court cannot say from it that the train was, as a fact, moving at a given rate. A jury might say the speed was less than four miles an hour—as much less as the circumstances alluded to might indicate to them, and not necessarily faster than one might walk. The deceased was a young man, so far as appears, with the active habits of that age. He stood upon the platform of the station, mentally prepared to take the train, with every reason to expect that it would stop as usual.

It cannot be said as matter of law that a man of ordinary prudence would not have yielded to the direction of the conductor; nor can it be said that to him, in view of the circumstances, the train was moving at a palpably dangerous rate. He did not attempt to board the train by reason of his own impatience, but upon the invitation of the defendant's servant. It is to be considered whether this direction of the conductor was not only a practical expression of his belief that the step might be taken in safety, but also as a strong expression of his opinion that the movement of the train was slow and within the bounds of safety.

All these things might properly lead a jury to the reasonable belief that to the decedent the train did appear to be moving slowly, and, moreover, that it was in fact brought to such a point as only prevented complete inertness or stoppage—a resource of engineers to avoid the necessity of overcoming the *vis inertia* of a heavy train at rest. At any rate, the defendant ought not to be permitted to assert that the intestate did not exercise what now it seems would have been better judgment in the condition in which he was placed by their acts. That he did not act prudently should not be adjudged as matter of law, nor to what extent his action was governed by what he might reasonably infer from that of the conductor.

The questions were for the jury, and were properly submitted to them. I think the judgment which followed their verdict should be affirmed.

## ALABAMA SUPREME COURT.

### EAST BIRMINGHAM LAND CO. *et al.*,

*Appts.*,

*v.*

J. F. DENNIS.

(....Ala....)

**A bona fide purchaser of certificates of corporate stock standing on the company's books in the name of the former owner, regularly indorsed by him in blank, and stolen from the present owner without his fault, gets no title, because such instruments are not negotiable.**

**Certificates of stock not being negotiable**

*NOTE.—Usages and customs.*

A usage is ineffectual unless established, known and applicable to the matter in controversy. *Janney v. Boyd*, 80 Minn. 812; *Taylor v. Mueller*, Id. 848; *Dunham v. Haggerty*, 1 Cent. Rep. 600, 110 Pa. 560. That custom cannot deprive a person of a legal right, see *Attorney-General v. Tarr*, 2 L. E. A. 87, note.

3 L. R. A.

paper, it is not permissible to prove a custom or usage among stockbrokers to the contrary.

**No usage is good which conflicts with an established principle of law.**

(January 15, 1889.)

**A**PPPEAL by defendants, from a decree of the City Court of Birmingham (Sharpe, J.), in favor of plaintiff in an action to compel a transfer of certain stock on the books of the corporation and a delivery of a certificate therefor. *Affirmed.*

The bill was filed against J. P. Mudd and the East Birmingham Land Company, to compel a transfer on the books of the corporation of ten shares of stock of which complainant claimed to be owner, and to compel the delivery of the certificate therefor to him by Mudd who had possession thereof and claimed to be the owner. The certificate was issued in the name of one

Dearborn, and was indorsed by him in blank. Complainant claimed to have derived title to it through Dearborn, and that it had been lost by or stolen from him without fault on his part. Mudd purchased the certificate for value from stockbrokers in Birmingham, and denied complainant's ownership as well as claimed that he acquired a good title by the custom and usage of the brokers in Birmingham. A decree having been rendered for complainant each defendant appealed separately.

Further facts appear in the opinion.

**Mr. S. D. Weakley**, for J. P. Mudd, appellant:

"A certificate of stock, accompanied by an irrevocable power of attorney, either filled up or in blank, is, in the hands of a third party, presumptive evidence of ownership in the holder; and where the party in whose hands the certificate is found is a holder for value without notice of any intervening equity his title cannot be impeached. The holder of the certificate may fill up the letter of attorney, execute the power, and thus obtain the legal title to the stock. And such a power is not limited to the person to whom it was first delivered, but inures to such *bona fide* holder into whose hands the certificate and power may pass."

*Prall v. Tilt*, 28 N. J. Eq. 479; *Mount Holly, L. & M. Turnp. Co. v. Ferree*, 17 N. J. Eq. 117; *Rogers v. New Jersey Ins. Co.* 8 N. J. Eq. 167; *Fatman v. Lobach*, 1 Duer, 354; *Leavitt v. Fisher*, 4 Duer, 1; *Bank of Utica v. Smalley*, 2 Cow. 770; *Cornick v. Richards*, 3 Lea, 1; *Cherry v. Frost*, 7 Lea, 1; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41. See also 1 Morawetz, Corp. §§ 181, 185, 188, 190, and authorities cited; *Galveston City Co. v. Sibley*, 56 Tex. 269; *Cleveland & M. R. Co. v. Robbins*, 85 Ohio St. 488.

The question in this case was decided in *Winter v. Belmont Mining Company*, 53 Cal. 428, and also in *Barstow v. Savage Mining Company*, 64 Cal. 888, but differently in each case.

Cook, Stocks, § 868, does not agree with Morawetz. It appears there is a conflict in the authorities; but the rule announced in the case in the New Jersey Equity Reports and in Morawetz on Corporations is the better, more just and equitable rule.

We are not without a statute upon this subject. Section 1671 of the Code of Alabama (1886) is as follows: "It is the duty of every private corporation to require the transfer of its stock to be made or registered on the books of the corporation; and persons holding stock not so transferred or registered, or holding any stock under hypothecation, mortgage or other lien, must have the transfer, hypothecation, mortgage or other lien made or registered on the books of the corporation; or, upon failing to do so within fifteen days, all such transfers, hypothecations, mortgages or other liens shall be void as to *bona fide* creditors or subsequent purchasers without notice."

If Mudd is a "subsequent purchaser without notice" within the meaning of this section, then the result must be in his favor.

Buying, as he did, upon the faith of Dearborn's blank indorsement, with no knowledge

or notice of Dennis's claim, with the stock standing on the books of the company in the name of Dearborn, he in effect bought from Dearborn and comes clearly within the spirit of the statute, if not the letter.

**Mr. W. R. Houghton** for appellee.

**Somerville, J.**, delivered the opinion of the court:

We concur in the conclusion reached by the judge of the city court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it some time in March, 1888.

The only question is whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant. The established rule is that no person can ordinarily be deprived of his ownership of property save by his own consent or his negligence. The only exception to this rule is the case of a *bona fide* purchaser for value, of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It cannot be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking house, whence it was abstracted by some unknown person, apparently without any fault on his part. Nor does any question arise involving the rights of a subsequent *bona fide* purchaser of stock from one shown to be the owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to *bona fide* creditors or purchasers without notice." Code 1886, § 1671; *Fisher v. Jones*, 83 Ala. 117.

If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant, Dennis, himself, by two or more intermediate transfers, the first of whom was a fraudulent holder without title.

Whether Mudd's title to the stock, therefore, is superior to that of Dennis depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as negotiable paper. The rule is well settled that a *bona fide* purchaser of a negotiable bill, bond or note, although he buys from a thief, acquires a good title, if he pays value for it, without notice of the infirmity of his vendor's title.

The authorities are clear in support of the

view that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper; and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or his authority to make the sale.

This question arose and was decided by the New York Court of Appeals in *Mechanics Bank v. New York Railroad Company* (1856), 13 N. Y. 599. It was there held that such a certificate does not partake of the character of a negotiable instrument, and that a *bona fide* assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer or order of the party to whom they are given." They were said to be in some respects like a bill of lading or warehouse receipt, being "the representation of property existing under certain conditions, and the documentary evidence of title thereto."

The most that can be said is that all such instruments possess a sort of quasi negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In *Shaw v. Spencer*, 100 Mass. 382, it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name must fill out the blanks . . . so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares."

The case of *Sewall v. Boston Water Power Co.* 4 Allen, 282, decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in *Barstow v. Savage Mining Company*, 64 Cal. 388, where it was expressly held that a *bona fide* purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in regard to the matter of negligence, as follows:

"But if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true

owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading in *Gurney v. Behrend*, 8 El. & Bl. 623, decided by the English Queen's Bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The correspondent, without authority, fraudulently transferred the bill for value, and it was held by Lord Campbell that, for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of *Barstow v. Savage Mining Company*, *supra*, is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it. *Woolley v. Sergeant* [8 N. J. L. 262], 14 Am. Dec. note, p. 427, and cases there cited; *Cook, Stocks*, §§ 7, 10, 192, 368, 487; 2 Daniel, Neg. Inst. 8d ed. § 1708 g.

It harmonizes entirely with the declaration of our statute that shares of stock in private corporations are "personal property, transferable on the books of the corporation" in accordance with the rules and regulations of the corporation. Code 1886, § 1669; *Campbell v. Woodstock Iron Co.* 88 Ala. 351.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustee to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases it has often been held that the true owner, having conferred on the holder by contract all the external *indicia* of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." 2 Daniel, Neg. Inst. 8d ed. § 1708 g; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Mount Holly, L. & M. Turnp. Co. v. Ferree*, 17 N. J. Eq. 117; *Prall v. Tilt*, 28 N. J. Eq. 479; *Merchants Bank v. Livingston*, 74 N. Y. 228.

These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver, than a stranger who has been negligent in trusting no one. *Allen v. Maury*, 66 Ala. 10.

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stockbrokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract. *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656, note 664; *East Tennessee, V. & G. R. Co. v. Johnston*, 75 Ala. 596; *Lehman v. Marshall*, 47 Ala. 863.

The decree of the Court below is in accordance with these views, and must be affirmed.

## TEXAS SUPREME COURT.

ST. LOUIS, ARKANSAS & TEXAS R.  
CO., *Appl.*,

L. WELCH.

(....Tex.....)

1. A foreman of a bridge gang, engaged in repairing bridges along the line of a railroad, is a fellow servant with the persons operating a freight train on the same road, and cannot recover for injuries occasioned by negligence.
2. Although asleep upon a side track in a car provided for that purpose, the foreman of a bridge gang, who is liable to be called at any moment to go out with his gang upon the road, is on duty so far as to be at the time a fellow servant with the men operating a freight train, whose negligence causes his injury.

(December 14, 1888.)

**A** PPEAL by defendant, from a judgment of the District Court of Smith County in favor of plaintiff in an action to recover damages for personal injuries alleged to have been occasioned by defendant's negligence. *Reversed.*

The facts are fully stated in the opinion of the court.

**Mr. N. Webb Finley**, for appellant:

An employé of a railway company who receives injuries while engaged in the line of his employment, resulting from the negligence of a fellow servant, cannot recover from the railway company; what is here meant by "while engaged in the line of his employment" is that he is in his place as such employé, subject to and ready to respond to immediate orders of service from his superior in such employment.

*Houston & T. C. R. Co. v. McNamara*, 59 Tex. 255; *Houston & T. C. R. Co. v. Marcelles*, Id. 834; *Murray v. S. O. Railroad Co.* 86 Am. Dec. 283; 2 Thomp. Neg. p. 1046; *Baltimore & O. R. Co. v. State*, 33 Md. 554; *Baird v. Pettit*, 70 Pa. 483; *Russell v. Hudson River R. Co.* 17 N. Y. 138; *Gillkannon v. Stony Brook R. Corp.* 10 Cush. 231; *East Line & Red River R. Co. v. Scott*, 71 Tex. —.

The servant undertakes all risk of being injured through the negligence of his fellow servants in all such matters as are incident to such employment.

*Dallas v. Gulf, C. & S. F. R. Co.* 61 Tex. 196; 2 Thomp. Neg. p. 969.

The court should have instructed the jury that if the plaintiff and those operating the freight train were in any degree mutually dependent upon each other for their personal safety in the discharge of their respective duties, then, in law, they would be fellow servants, and plaintiff could not recover.

*Houston & T. C. R. Co. v. Rider*, 62 Tex. 207.

**Messrs. John M. Duncan, J. J. Rice and Robertson & Robertson**, for appellee:

Appellee, Welch, though engaged in the line of his employment, was in a department or line of the railroad service wholly unconnected with the department in which the fireman, conductor and engineer who hurt him were at the time engaged; therefore he assumed no risk of

their negligence and correctly recovered for the injury caused by the negligence of the latter.

*Houston & T. C. R. Co. v. Marcelles*, 59 Tex. 834; *Chicago, M. & St. P. R. Co. v. Ross*, 113 U. S. 877 [28 L. ed. 787]; 2 Thomp. Neg. pp. 1087, 1098, § 88; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 808; 1 Redfield, Railways, 6th ed. p. 568, and authorities cited in note 17, also Id. 570, note 20; *Ryan v. Chicago & N. W. R. Co.* 60 Ill. 171; *Fitzpatrick v. New Albany & S. R. Co.* 7 Ind. 486; *Gillenoater v. Madison & I. R. Co.* 5 Ind. 839; *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73; *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272-285; *Meloy v. Chicago & N. W. R. Co.* 83 Am. & Eng. R. R. Cas. 858; *Hobson v. New Mexico & A. R. Co.* 28 Am. & Eng. R. R. Cas. 360; *St. Louis & S. F. R. Co. v. Weaver*, 28 Am. & Eng. R. R. Cas. 341, 353, 354, 35 Kan. 412.

Welch, though he may have been a fellow servant of the engineer and conductor, who negligently caused his injuries when on duty in the line of his employment, was not such fellow servant at the time he was hurt, and so properly recovered.

2 Thomp. Neg. p. 1046, § 48; *Baltimore & O. R. Co. v. State*, 33 Md. 542-555; *Washburn v. Nashville & C. R. Co.* 3 Head, 638.

**Gaines, J.**, delivered the opinion of the court:

This was an action for personal injuries brought by appellee against appellant. The case made by the plaintiff showed the following facts:

The plaintiff was the foreman of a bridge gang in the employment of the defendant company, engaged in putting in and repairing bridges along the line of its road. About 8 o'clock in the morning, on the day of the accident, he was asleep in the bunk of a sleeping car, provided by the company for the purpose, which was lying on a side track of the railway in the Town of Gilmer. At the time mentioned the employes of the defendant operating a freight train on its road negligently ran the train rapidly upon the side track, and struck the car upon which he was sleeping with such violence that he was thrown from his bunk, and seriously injured. He and the employes who caused the injury were engaged in different departments of the company's road. His employment was in the bridge department, and he received his instructions from the superintendent or management of that department, while the employes on the train were working in the transportation department, and were under the orders of its superintendent.

It appears from the testimony that the plaintiff was subject to the orders of the company to go out on duty at any time. Without referring to the assignments of error, it is sufficient to say here that the two questions presented by the record are, whether the plaintiff and the employes of the train are to be deemed fellow servants in the sense that precludes him from a recovery of the company for injuries inflicted by reason of their negligence; and, if so, whether he is to be considered as on duty at the time of the accident.

Upon the question, who are to be held "fellow servants," in the legal sense of that term, there is great contrariety of judicial opinion. The doctrine that one fellow servant cannot recover of the master for injuries inflicted through the negligence of his fellow servant is of comparatively recent origin. It was first announced in 1887, in the English Court of Exchequer, in the case of *Friedly v. Fowler*, 8 Mees. & W. 1.

The Supreme Court of South Carolina laid down the same rule in the case of *Murray v. South Carolina Railroad Company*, 1 McMul. L. 886. This case was decided in 1841, and is the first case in which the rule was applied in this country. The opinion shows that the court was unaware of the decision in *Friedly v. Fowler*, *supra*.

In 1842 the subject was very carefully considered by the Supreme Court of Massachusetts in the case of *Farwell v. Boston Railroad Corporation*, 4 Met. 49, and the same doctrine was announced. This has become the leading case, and has been rigidly followed by the courts of England and by a majority of the courts in this country. The question of persons employed in different departments of the same general business of the common master was considered in that case, and in discussing it, Chief Justice Shaw, who delivered the opinion, uses this language:

"It was strongly pressed in argument that, although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree influence or control the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and when the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty."

The language employed in the last sentence quoted has been generally used by courts and text writers as the basis of the definition of the term *fellow servants*. Substantially the same language has been frequently employed by our own courts in defining the term. *Houston & T. C. R. Co. v. Rider*, 62 Tex. 207; *Texas & P. R. Co. v. Harrington*, Id. 597; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549.

The rule so announced in *Farwell's Case* has, as previously intimated, been followed closely in the Courts of England, and generally in the American Courts, in its broadest application. Lately there has been shown some disposition to modify the doctrine, but it has mainly been in the direction of making a distinction between servants of a different grade.

The case of *Chicago Railroad Company v. Ross*, 112 U. S. 877 [23 L. ed. 787], is a case of this latter character. As to service in different departments of the same common employment, there is less conflict of authority. In the courts of a few of the States it has been held that the

employees in different branches of the same general employment are not fellow servants.

This is the rule in Illinois (*Chicago & N. W. R. Co. v. Moran*, 108 Ill. 576); in Tennessee (*Nashville & D. R. Co. v. Jones*, 9 Heisk. 27); in Kentucky (*Louisville, C. & L. R. Co. v. Cavens*, 9 Bush, 559); in Georgia (*Cooper v. Mullins*, 80 Ga. 150); and perhaps in Virginia (*Moore v. Richmond & A. R. Co.* 78 Va. 745).

This was the ruling in Indiana in the earlier decisions (*Willenwater v. Madison & I. R. Co.* 5 Ind. 889; *Fitzpatrick v. New Albany & S. E. Co.* 7 Ind. 436); but these cases have since been overruled (*Columbus & I. C. R. Co. v. Arnold*, 81 Ind. 174).

Judge Thompson, in his work on Negligence, lays this down as the exceptional doctrine. 2 Thomp. Neg. 1026.

Our researches have satisfied us that this is correct, and that the great weight of authority is the other way. The cases are too numerous for citation; but see Thomp. Neg. *supra*; Shearm. & Redf. Neg. §§ 103, 109; Whart. Neg. § 230; Wood, Master & Servant, § 425. See also Patterson, Ry. Accident Law, §§ 824, 825, where the cases are grouped.

In reference to these citations, the caution is to be observed that in many of the cases in which certain employees were not held fellow servants it was upon the ground that the one was subject to the control of the other. In considering this question, there is danger of a mistake growing out of that class of cases which hold a railroad company liable to its servants operating its trains for injuries resulting from negligence in the keeping of the track. In deciding these cases, the courts sometimes say that the train men and the track repairers are not fellow servants; and it is pretty generally held that in these cases the person charged with the duty of keeping up the track is the representative of the company, and not a servant only. But the true rule, as we take it, is that it is the implied obligation and duty of the company to its employees to furnish a safe track.

But in the present case, if we should hold that the plaintiff, as to repairing bridges, etc., was the representative of the company, and that the servants in the transportation department could recover for injuries resulting from his neglect, it would not follow that he could recover for their negligence. A servant may be a representative of the company in one relation; a fellow servant with coemployees in another. *Crispin v. Babbitt*, 81 N. Y. 516.

Recurring to our own decisions, we think it has been decided in the case of *Dallas v. Gulf, C. & S. F. Railway Company*, 61 Tex. 196, that service in different departments of duty does not exempt an employee of a railroad company from the operation of the general rule. There the railroad company was engaged in constructing an extension of its line. The plaintiff had been employed in watching the ties along the line, but had undertaken (for the company) to procure and record a deed, and in the discharge of this duty took passage upon the construction train, when he was injured by the negligence of the employees who were operating the train. He was held not entitled to recover. We understand the decision to be placed upon the broad ground that the fact that plaintiff



though engaged in a different line of duty from the employes who were running the train, was their fellow servant. We confess that the reasoning upon which the rule has been adopted is not very satisfactory.

It is said that when the servant accepts the employment of the master he impliedly assumes the risk of the negligence of his fellow servants. The argument seems illogical. It amounts to saying that the law is that he cannot recover because he takes the risk, and that he takes the risk because the law is so. By a parity of reasoning, we might assume that he takes the risk of his master's own personal negligence, and that, therefore, the master would not be liable to a servant for such negligence.

A more reasonable ground is that of public policy. It is frequently asserted as the true basis of the doctrine, and is founded upon the theory that it is calculated to make servants in a common employment watchful of each other, and thereby to promote carefulness in the performance of their duties. If this is to be taken as the true ground, the rule should be confined to those servants whose duties bring them into such juxtaposition that one would be enabled to observe the negligence of his fellows. But, however unsatisfactory may be the reasons for the doctrine, it is too well established, and its limits, in so far as the question before us is concerned, are too well defined, to permit us to intrench upon it.

We feel constrained, both by the former opinions of this court and the great weight of authority elsewhere, to hold that the employes who were operating the train which caused the injury in this case were the fellow servants of the plaintiff. If we could hold it an open question, our ruling might be otherwise; but

we consider the doctrine too firmly established to be changed, except by the action of the Legislature.

The other proposition in this case requires no extended discussion. The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for that purpose, which was placed upon its side track. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors, we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment, and who are injured during the intervals in which the master has no claim upon his services.

We think the court should have instructed the jury that if plaintiff was foreman of the bridge gang, and was injured by the negligence of the employes operating a train on the road, he was the fellow servant of such employes; and also that if at the time of the accident he was asleep upon a car provided for the purpose by the company, and under his contract was subject to be called out for duty at any moment, he was on duty.

The assignment that the court erred in overruling the motion for a new trial, on the ground that the evidence is not supported by the verdict, sets out fully the particulars in which the evidence fails to support the verdict, and is well taken.

*The judgment will accordingly be reversed, and the cause remanded.*

## CALIFORNIA SUPREME COURT.

MERRILL LODGE, No. 299, I. O. G. T.,

*Resp.,  
v.*

A. M. ELLSWORTH *et al.*, *Appts.*

(....Cal.....)

**A subordinate lodge**, duly incorporated under state laws, cannot be deprived of the possession and control of property belonging to it, by the grand lodge of the order with which it is connected,

**NOTE.—Fraternal and benevolent societies; property rights.**

The Supreme Lodge of A. O. U. W., incorporated under the laws of Kentucky, demanded assessments of the Michigan Grand Lodge, which in turn demanded them from the members of subordinate lodges; but it was decided by the courts that this could not be done. It is not competent for the respondent (the grand lodge) to subject itself or its members to a foreign authority in this way. There is no law of the State permitting it, nor could there be any law of the State which would subject a corporation created and existing under the laws of this State to the jurisdiction and control of a body existing in another State and in no manner under control of our laws. *Lumphere v. Grand Lodge, A. O. U. W.* 47 Mich. 429; *Hirschl, Fraternities & Societies*, 45.

Plaintiff, as treasurer of Cayuga Lodge, sued the defendants to recover from them certain lodge

money, although under the constitution of the order it has been suspended by the grand lodge.

(January 23, 1889.)

**A** PPEAL by defendants, from a judgment of the Los Angeles County Superior Court (Brunson, J.), in favor of plaintiff in an action to restrain interference with certain real and personal property. *Affirmed.*

The facts sufficiently appear in the opinion of the commissioner.

property, and stated that the defendants had formerly constituted said lodge, but had been expelled by the grand lodge, and their charter revoked, and that plaintiffs had then been installed by the grand lodge, and had been directed to receive from the defendants all the lodge property. It was unanimously decided that the defendants were not bound by the decree rendered against them in the grand lodge, and that such decree formed no valid basis on which to rest the lawsuit. *Austin v. Searing*, 16 N. Y. 112; *Hirschl, Fraternities & Societies*, 45.

It has been decided that the Grand Lodge of Pennsylvania A. O. U. W. had no power to demand assessments from members of subordinate lodges, in order to raise a fund to be sent to the other States, because by its charter it (the grand lodge) is limited to the relief of the members of its own lodge, and of its subordinate lodges. *Corona Lodge v. Grand Lodge, Iowa Workman*, April, 15, 1888; *Hirschl, Fraternities & Societies*, 45.

**Messrs. Julius Lyons and Chapman & Hendrick** for appellants.

**Messrs. Will D. Gould and James H. Blanchard**, for respondent:

The plaintiff's power to hold and control its property is derived from the State.

Civil Code, §§ 595, 596.

The plaintiff could not be divested of this power without due process of law.

Const. Cal. art. 1, par. 18.

"Due process of law" means judgment of law in its regular course of administration through courts of justice.

*Fetter v. Will*, 46 Pa. 460.

Neither the grand lodge nor any of its agents had any authority to interfere with plaintiff's property.

Good Templar's Dig. pp. 10, 286; Proceedings of the Right Worthy Grand Lodge, 5th Sess. p. 18; 14th Sess. p. 12; Hirschl, Fraternities & Societies, pp. 44, 45; *Austin v. Searing*, 16 N. Y. 112; *Lamphere v. Grand Lodge A. O. U. W.* 47 Mich. 429; *McCallion v. Hibernia S. & L. Society*, 70 Cal. 166.

It would be against public policy to allow a secret organization, by means unknown to the law and the courts, to amass and control property all over the country. The courts will not lend their power to aid or enforce obedience to the commands of any secret organization. Obedience must be voluntary.

*Austin v. Searing*, 16 N. Y. 112; *McCallion v. Hibernia S. & L. Society*, 70 Cal. 166.

Either party may sever the relations between a subordinate and a grand lodge.

Hirschl, Fraternities & Societies, pp. 44, 45; *Austin v. Searing*, 16 N. Y. 112.

**Hayne, C.**, delivered the following opinion:

Suit for an injunction to restrain the defendants from interfering with certain real and personal property. The court below gave judgment for the plaintiff, and the defendants appeal.

The case appears to have grown out of a dispute between the members of the lodge, as to its management and control.

The answer admits that the plaintiff is, and was at the time in question, a corporation duly organized under the laws of the State of California, and avers that on April 1, 1886, "Will D. Gould, James H. Blanchard, C. C. Dunn, M. W. Childs and others, members of said Merrill Lodge, got control of said lodge, and elected the officers thereof, the said Gould, Blanchard and Childs being elected trustees thereof, and undertook to destroy the said order, and to control the same for their own private ends."

It further avers, in substance, that the plaintiff is a "subordinate" lodge of the order; that by the constitution of the grand lodge it is declared that any subordinate lodge which fails to do certain things "shall be deemed an extinct lodge, and its charter shall be forfeited;" that the plaintiff by its conduct brought itself within this provision, and was "suspended" by the grand lodge; and that the defendant Ellsworth "was by the grand chief templar of the grand lodge of the State of California appointed the deputy of said grand chief templar, and directed by him to take possession of the books, papers and the other property of said Merrill

2 L. R. A.

Lodge, and hold the same subject to and until the further order of said grand lodge," which the said Ellsworth proceeded to do.

These averments of the answer (except as to the wrongful intent of the persons who "got control" of the corporation) appear to be true. Upon the question of the ownership of the property the court finds that "Said plaintiff, in furtherance of its objects, leased a certain hall . . . that said plaintiff is now, and has been since December 8, 1874, in possession of, and entitled to the possession of said hall;" that plaintiff, "for the purpose, for which it was incorporated, has expended for carpets, furniture, fixtures, books and necessary property, for the carrying on of its work, the sum of \$2,000; that said hall is a necessary and proper place in which to keep all of said property, and for the promotion of its said benevolent purposes;" and that "The defendants, or either of them, have no right, title or interest in or to, or any right of possession of said hall, or the furniture, books," etc.

The appellants make no criticism upon the sufficiency of this finding as a finding of ownership. Their position seems to be that the suspension by the grand lodge, and the appointment of Ellsworth as the deputy of the grand chief templar, entitled him to the possession and control of the property. The relation between the grand lodge and the corporation plaintiff is not very clear from the record before us; but, as we view the case, no question as to the rights of the plaintiff or its members, as members of the order, is involved.

The question presented is one of property merely; and in relation to this two controlling facts appear from the record, viz.: that the plaintiff is a corporation duly organized under the laws of the State of California, and that it is the owner of the property in question, in which the defendants have no right, title or interest. It follows from these facts that the plaintiff is entitled to be protected against the acts of the defendants. The ownership of the property draws to itself the right of possession and control. And since the plaintiff is a corporation it can only be dissolved in the manner prescribed by the laws of California.

The provision of the constitution of the grand lodge that in certain contingencies the subordinate lodge "shall be deemed an extinct lodge, and its charter shall be forfeited," and the "suspension" by the grand lodge, and the action taken by the grand chief templar, have not the slightest effect upon the legal existence of the corporation; and as long as it exists its affairs must be managed by its duly elected officers, as provided by law. If they misconduct themselves, appropriate proceedings to remove them must be resorted to. But the propriety of their conduct will not be inquired into in a suit by the corporation to protect its property.

The showing seems to us to be sufficient to entitle the plaintiff to an injunction. We therefore advise that the judgment be affirmed.

We concur: **Belcher, C. C.; Foote, C.**

**Per Curiam:**

For the reasons given in the foregoing opinion, the judgment is affirmed.

## GEORGIA SUPREME COURT.

FLUKER, *Pff. in Err.*,

v.

GEORGIA RAILROAD &amp; BANKING CO.

(....Ga....)

1. **The dominion of a railroad corporation** over its trains, tracks and right of way is no less complete or exclusive than that which every owner has over his own property. Hence, the corporation may exclude whom it pleases when they come to transact their own private business with passengers or other third persons, and admit whom it pleases when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches.
2. **A mere implied license**, no matter how long enjoyed, to transact such business, for which no consideration has been paid, is revocable at any time; and such revocation results from notice not to prosecute the business in the future.
3. **One who persists in using the license** after notice of its termination, may be prevented from so doing by such force, not extending to life or limb, as may be necessary to effectuate his expulsion from the premises.
4. **A lessee or licensee** of the exclusive privilege of entering the cars or upon the right of way to sell or supply lunches, is not a servant or agent of the corporation, so as to render it liable for an assault, or an assault and battery, committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers.
5. **A master has no right of action for an assault**, or an assault and battery, upon his servant, unless some loss of service or capacity to serve results therefrom.

(January 21, 1890.)

**ERROR** to the Green County Superior Court (Jenkins, J.), to review a judgment of nonsuit in an action to recover damages alleged to have resulted to plaintiff by being expelled from defendant's right of way. *Affirmed.*

The facts appear in the opinion.

*Messrs. H. F. & H. G. Lewis* for plaintiff in error.

*Messrs. J. B. Cumming and J. A. Billups* for defendant in error.

**Bleckley, Ch. J.**, delivered the opinion of the court:

The plaintiff had for some nine years, without objection on the part of the company, exercised the privilege of coming upon the right of way, and dealing with passengers by supplying them with lunches. A part of the time he had even used the platform of the company for this purpose, and perhaps also had been allowed to enter the cars. The privilege, except as to coming upon the right of way, was revoked some four years previously to October, 1886. On the 10th of said October the plaintiff received notice to cease the exercise of the privilege as to the right of way, and was also informed that the exclusive right of serving lunches to passengers had been leased by the company to one Hart.

About a week after receiving this notice the plaintiff's servant was on two or three occasions expelled from the right of way by a servant of the company and in one instance the company's servant, in controlling the action of the plaintiff's servant, did not desert where the right of way stopped, but conducted the intruder across the public street, and up to the plaintiff's door. The plaintiff, seeing that he could not carry on his business through the medium of a servant, undertook to conduct it himself, and he also was expelled—both Hart and the defendant's servant co-operating in his expulsion, and Hart, but not the servant, continuing the use of force beyond the right of way, and into the public street.

The plaintiff, after this, undertook to advertise his business by ringing a bell in the street in front of his premises, and Hart alone interfered with that, and committed an assault upon him in the street. For these grievances he brought his action against the company. The case was tried, and the court granted a nonsuit.

1. It is contended that the company has no such exclusive dominion over the tracks and spaces embraced in its right of way as to entitle it to exclude therefrom any person entering thereon in an orderly manner, and upon lawful business; and especially that it cannot discriminate against one person and in favor of another. We have discovered no authority for this position, either in its more limited or more extended form. On the contrary, it would seem that the very nature of property involves a right of exclusive dominion over it in the owner.

We cannot believe that there is a sort of right of common lodged in the public at large to enter upon lands on which railroads are located, and over which they have secured the right of way. Such lands the railroad companies may inclose by fences if they choose to do so, and exclude any and all persons whomsoever. Their dominion over the same is no less complete or exclusive than that which every owner has over his property. If they do not choose to erect fences and make inclosures, they may, by mere orders, keep off intruders, and they may treat as intruders all who come to transact their own business with passengers, or with persons other than the companies themselves. To do this, however, they must give fair notice; inasmuch as by a sort of common law or common understanding in this country an unforbidden entry on uninclosed lands is not a trespass, unless the intruder comes for some improper purpose, or to remain an undue or unnecessary length of time.

It is manifest that the grant of the privilege to one or more is no rightful cause of complaint on the part of others to whom a like privilege is denied. The right to make such discriminations is incident to the ownership of all property which is not devoted to some use that in and of itself involves an invitation to the public to enter and enjoy for the time being. The business of selling lunches to passengers, or of soliciting from them orders for the same, is not one which every citizen has the right to engage in upon the tracks and premises of a railway.

\*Head notes by BLECKLEY, CH. J.

company; and consequently those who do engage in it and carry it on must be dependent upon the company for the privilege. And whether the permission, when granted, be called a lease or a license, makes no difference; nor does it make any difference, except in the matter of revocation, whether the grant be gratuitous, or made for a consideration. *Barney v. Oyster Bay & H. Steam-Bot Co.* 67 N. Y. 801; *Landrigan v. State*, 81 Ark. 50; *Hazen v. Boston & M. R. Co.* 2 Gray, 577; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *Sweeney v. Boston & A. R. Co.* 128 Mass. 5; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Keller v. Dillon*, 26 Ga. 701.

2. That the company allowed the plaintiff to sell his lunches upon its right of way for a long space of time, say nine years, without objection, gave him no right to the privilege in perpetuity. He paid the company no consideration, but enjoyed a mere implied license, which was revokable at any time; certainly so after giving him reasonable notice. In this instance, he had notice for about one week before any decisive steps were taken to put a stop to his dealings. He refused to yield to the notice, and for that reason alone a resort to force on the part of the company was had. There can be no doubt that such a license could be terminated by notice. 1 Washb. Real Prop. 400; 8 Kent, Com. 452, 453; *Parish v. Kaspars*, 109 Ind. 896, 7 West. Rep. 869; *Wingard v. Tift*, 24 Ga. 179; *Colcord v. Carr*, 77 Ga. 103; *Cook v. Pridgen*, 45 Ala. 840; *Macon v. Franklin*, 12 Ga. 289; *Sheffield v. Collier*, 8 Ga. 62.

The force used by the company's servant as of a mild and gentle character; certainly so as against the plaintiff himself. Not only was no violence done to life or member, but not even was the plaintiff treated rudely; and the company's servant desisted before the plaintiff had withdrawn beyond the right of way. A

far greater degree of force than that used would have been justifiable, had the plaintiff rendered it necessary in order for his expulsion to be accomplished. *Wood v. Leadbitter*, 18 Mea. & W. 838.

4. For the violence of Hart, the lessee or licensee of the privilege, the company is not responsible. He was not acting as a servant of the company, but in his own behalf; and although the company, by its servant, co-operated with him in the beginning, that co-operation ceased before Hart had transcended the limits of his own rights. If Hart pursued the plaintiff into or upon the street, he alone is responsible. The company's servant declined to take part in that proceeding, but confined himself and his action to the company's premises. This same distinction applies to Hart's interference with ringing the bell in front of the plaintiff's premises on the street. Hart alone undertook to deal with the plaintiff for using the bell, and, so far as appears, no servant of the company was even present on that occasion. His conduct then and there certainly affords no cause of action against the company.

5. It does appear, however, that the company's servant, although he did not chase the plaintiff beyond the right of way, pushed the matter further in dealing with the plaintiff's servant. He not only forced him off the right of way, but across the street, and to the plaintiff's door. This may give a cause of action to the servant, but it furnishes none to the plaintiff, because there was no loss of service, nor any impairment of capacity to render service; and, for a master to have a right of action for an assault and battery committed upon his servant, one or both of these consequences must ensue. *Robert Mary's Case*, 9 Coke, 113 a; *Wood, Mast. & Serv.* § 224; *Bigelow, Torts*, 108, 109; 1 Minor, Inst. 224, and authorities cited. *Judgment affirmed.*

## MARYLAND COURT OF APPEALS.

William H. RITTLER, *Appt.*,

v.

Emeline SMITH, *Admrz.*

(.....Md.....)

**1. A creditor has an insurable interest in the life of his debtor.**

*NOTE.—Insurable interest in life of another.*

To create an insurable interest which will support a life insurance contract, there must be a reasonable ground, founded in the relations of the parties—either pecuniary, or of blood, or affinity—to expect some benefit or advantage from the continuance of the life of the insured. *United Brethren Mut. Aid Society v. McDonald*, 1 L. R. A. 238, note.

### Parent.

A parent has in like manner an insurable interest in the life of a child, and the child in the life of a parent. *Loomis v. Eagle L. & H. Ins. Co.* 6 Gray, 896; *Mitchell v. Union L. Ins. Co.* 45 Maine, 104; *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. 154; *Corson's App.* 4 Cent. Rep. 300, 113 Pa. 438.

### Wife.

A wife has an insurable interest in the life of her husband, or the husband in the life of his wife. *Baker v. Union Mut. L. Ins. Co.* 43 N. Y. 233.

2 L. R. A.

**2. A life insurance policy is but a chose in action for the payment of money, and may be assigned as such under the Maryland Act of 1889, chap. 51.**

**3. A creditor who, in pursuance of a bona fide effort to secure payment of his debt, insures the life of his debtor and takes a policy in his own name, or for his own benefit, which he is obliged to keep alive by pay-**

### Sister.

In *Lord v. Dall*, 12 Mass. 115, a young unmarried female, without property, who for several years had been supported and educated at the expense of her brother who stood to her *in loco parentis*, had an insurable interest in his life.

### Betrothed female.

A single woman under contract to marry, has an insurable interest in the life of her intended husband. *Chisholm v. Nat. Capitol L. Ins. Co.* 52 Mo. 213.

### Creditor.

A creditor has an insurable interest in his debtor's life. *Von Lindenau v. Desborough*, 8 Car. & P. 353; *S. C.* on motion for new trial, 8 Barn. & C. 586; *Anderson v. Edie*, N. P. 1793, cited in 2 Park. Ins. 915; 2 Marshall, Ins. 776.

The law of Scotland is to same effect. *Lindsay v. Barmecote*, 13 Ct. of Sess. Cas. 2d series, 718; *Bliss, L. Ins.* § 13, p. 17.

So the creditor has an insurable interest

ing premiums, is entitled to hold all he can recover on the policy, if there is not such a gross disproportion between the debt and the amount of the policy as to make the transaction a speculation or wager.

4. A creditor who took out policies in mutual aid associations on the life of his debtor, on which policies he became liable to be assessed as a member, and on which he paid, within the period of about nine months thereafter, the sum of \$351.75, and the amount collected on which, on the debtor's death, was \$2,124.83, being an excess of \$474.58 over the amount of the debt, is entitled to hold the whole amount received, as there is no such disproportion between the debt and the insurance as to warrant a condemnation of the transaction as a speculation or wager.

(February 21, 1889.)

**A PPEAL** by defendant, from a judgment of the Circuit Court of Baltimore City in favor of plaintiff in an action to recover insurance money collected by defendant upon a policy insuring the life of plaintiff's intestate. *Reversed.*

The facts are fully stated in the opinion.

Argued before Miller, Robinson, Irving, Stone, Bryan, Yellott and McSherry, JJ.  
*Messrs. J. Wilson Leakin and R. R. Battee* for appellant.

*Mr. T. Alexander Seth* for appellee.

Miller, J., delivered the opinion of the court:

In June, 1886, Victor Smith was indebted to William H. Ritter in the sum of about \$1,000; and Smith, being insolvent, Ritter took out certificates of insurance on Smith's life in four several mutual aid associations, aggregating on their face the sum of \$6,500. These certificates were all in favor of Ritter and he paid all the premiums or assessments thereunder.

Smith died in March, 1887, and Ritter collected from these insurances the sum of \$2,124.83, which appears to have been all that could have been collected, according to the terms of the certificates and the financial conditions of the associations. Deducting from

est in the life of each member of the firm; and each member of a firm has such interest in the life of every member of another firm which is its debtor. Each member of the debtor firm is individually liable for the whole debt, and each member of the creditor firm is interested in the whole debt. *Mitchell v. Union L. Ins. Co.* 45 Maine, 104; *Lewis v. Phoenix Mut. L. Ins. Co.* 39 Conn. 100; *Rawls v. American L. Ins. Co.* 39 Barb. 357, 27 N. Y. 233; *Biss, L. Ins.* § 27, p. 37.

Persons advancing money, have an insurable interest in the lives of those going to dig gold, and for whom the advances were made. *Leonard v. Eagle L. & H. Ins. Co.* (N. Y. Supreme Ct.) 4 Liv. U. S. Law Mag. 233; *Miller v. Eagle L. & H. Ins. Co.* 2 R. D. Smith, 233; *Morell v. Trenton Mut. L. & F. Ins. Co.* 10 Cush. 233; *Bevin v. Conn. Mut. L. Ins. Co.* 23 Conn. 244; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 578; *Hoyt v. N. Y. L. Ins. Co.* 3 How. 443; *Mitchell v. Union L. Ins. Co.* 45 Maine, 104.

It has been said, however, on the authority of *Onghill v. Boldero*, 9 East, 72, that an insurance upon the life of a debtor, in behalf of a creditor, is in legal effect but a guaranty of the debt, and if the debt is paid, the insurance is at an end; but it is now settled that this case is now the law. It was directly drawn in question and was expressly overruled in *Halby v. India & L. L. Assur. Co.* 15 C. B. 345; *Corson's App.* 4 Cent. Rep. 310, 113 Pa. 428.

*Amount insurable on life of debtor.*

As to what will constitute an insurable interest in 2 L. R. A.

this sum the debt and interest due Ritter the premiums he had paid and the costs and expenses of effecting the insurances, there remained a balance of \$474.58, as of the first of June, 1887.

On the third of October following, letters of administration on Smith's estate were granted to an administratrix, who thereupon filed her bill claiming this balance as belonging to the estate of the decedent. In his answer Ritter denied this claim, and insisted that the money belonged to him. The case was heard on bill and answer, and the court below decreed in favor of the complainant. From this decree Ritter has appealed.

The question as thus presented is an interesting one, is of first impression in this State, and has been very ably argued. On the part of the appellant it is contended that where a creditor with his own money, and for his own account, effects and keeps up an insurance on the life of his debtor, the whole of the proceeds belong to him, unless it appears that he has gone into it for the mere purpose of speculation, which in this case is expressly negatived by the answer, the averment of which must be taken as true, the case having been on bill and answer.

On the other hand, counsel for the appellee contend that where the creditor receives more than enough to reimburse him for his debt and outlay with interest, he will, as to the balance, be regarded as a trustee for the personal representative of the debtor; that the law says to the creditor in such a case: "You may protect yourself; you may, by insuring your debtor's life, secure your debt with all outlay and expenses; you may make yourself whole, but you shall not have a greater direct pecuniary interest in his death than you may have in his life."

There have been numerous decisions upon this subject, some of which are conflicting. On many points, however, bearing upon the question, there is a general concurrence of judicial opinion and authority. For instance it is generally held by the courts in this country that one who has no insurable interest in the

the life of another, and the amount to which a creditor should be permitted to take insurance on the life of his debtor, see *Keystone Mut. Ben. Assn. v. Norris*, 7 Cent. Rep. 304, 115 Pa. 444; *Grant v. Kline*, 7 Cent. Rep. 625, 115 Pa. 615; *Baldorf v. Fehler* (Pa.) 8 Cent. Rep. 230.

The amount of the insurance placed upon the life of the debtor cannot be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, without leaving the transaction open to the imputation of being a speculation or wager upon the hazard of a life. *Wainwright v. Bland*, 1 Moody & Rob. 481; *Miller v. Eagle L. & H. Ins. Co.* 2 R. D. Smith, 233; *Cammack v. Lewis*, 82 U. S. 15 Wall. 645 (21 L. ed. 244).

*Measure of recovery.*

The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured, at the maturity of the policy, if it was valid at its inception, and in the absence of express stipulation to the contrary, the sum expressed on the face of the policy is the measure of recovery. *Rawls v. Am. Mut. L. Ins. Co.* 27 N. Y. 233; *Mowry v. Home L. Ins. Co.* 9 R. I. 346; *Hoyt v. N. Y. L. Ins. Co.* 3 Bosw. 440; *Phoenix Mut. L. Ins. Co. v. Bailey*, 50 U. S. 13 Wall. 618 (20 L. ed. 501); *Corson's App.* 4 Cent. Rep. 311, 113 Pa. 428.

There is no reason why the contract should not be carried out according to its terms. *McKee v. Phoenix Ins. Co.* 23 Mo. 333; *Corson's App.* 4 Cent. Rep. 311, 113 Pa. 428.

life of another cannot insure that life. Such insurances are considered gambling contracts and for that reason void at common law, apart from any statute forbidding them. In England they were held valid at common law, but were prohibited as introducing a "mischievous kind of 'gaming,'" by the first section of the Statute 14 Geo. III. chap. 48. The effect of this section, as construed by the English courts, is to make the law of England, by Act of Parliament, the same as it has been held to be by the courts of this country without such an Act.

In some cases they have been denounced as void, not simply because they tend to promote gambling, but because they are incentives to crime. The force of this latter suggestion has been, and may well be, doubted. It means that one not related or connected by consanguinity or marriage, who may have a direct pecuniary interest in the speedy death of another, will thereby be tempted to murder him, though he knows that hanging is the penalty of such a crime.

This doctrine carried to its logical result has a far reaching effect. It strikes down every legacy to a stranger which may become known to the legatee, as is frequently the case, before the death of the testator. It makes void every similar limitation in remainder after the death of a life tenant. Every like conveyance of property in consideration that the grantee shall support the grantor during his life falls under the same condemnation. Yet we know of no case in which a court has declared such testamentary dispositions or conveyances to be void on this ground. Other instances in which the same result would follow from the application of this doctrine could be readily suggested, but we need not pursue the subject further.

All the authorities also concur in holding that a creditor has an insurable interest in the life of his debtor. In England it was at one time held that though the creditor had an insurable interest at the time the policy was issued, yet if his debt was paid in the lifetime of his debtor, and his interest had therefore ceased, he could not recover, because the contract of life insurance, like insurance of property, was one of indemnity. But this doctrine has long since been repudiated, and the settled rule in England now is that a life insurance in no way resembles a contract of indemnity, but is an agreement to pay a certain sum of money upon the death of the person insured, in consideration of the due payment of a certain fixed annual sum of premium during his life; and hence if the contract be valid at the time it was entered into, the fact that the interest of the creditor has ceased during the life of his debtor is immaterial; he may still recover on the policy though the result may be that he will be twice paid for his debt, once by his debtor and again by recovery on the policy. *Dalby v. India & L. L. Assur. Co.* 15 C. B. 865.

The same construction of the contract has been approved and adopted by this court. *Emerick v. Coakley*, 35 Md. 198; *Whiting v. Independent Mut. Ins. Co.* 15 Md. 826.

In support of the view taken by the appellee's counsel, cases have been cited in which it has been held that the assignee of a life policy, who has no insurable interest in the life, stands in the same position as if he had originally taken

out the policy for his own benefit. In other words the contention is that the assured himself can make no valid absolute assignment of his policy to one who has no insurable interest in his life.

But our own decisions are opposed to this. It is settled law in this State that a life insurance policy is but a chose in action for the payment of money, and may be assigned as such under our Act of 1829, chap. 51. *N. Y. L. Ins. Co. v. Flack*, 8 Md. 841; *Whitridge v. Barry*, 42 Md. 150.

It is quite a common thing for the bond or promissory note of a private individual to be sold through a broker to a *bona fide* purchaser for less than its face value; and when the latter takes an assignment of it without recourse, he becomes its absolute owner, and is not bound to refund to the vendor anything he may recover upon it over and above what he paid for it. So a life policy being a similar chose in action may be disposed of and assigned in the same way, provided the assent of the insurer is obtained where it is so stipulated in the instrument. In such case the assignee must of course keep the policy alive by the due payment of premiums if he wishes to realize anything from it. Such an assignment is valid in this State if it be a *bona fide* business transaction, and not a mere device to cover a gaming contract. Such is also the English rule. *Ashley v. Ashley*, 3 Sim. 149.

These considerations prevent us from adopting some of the reasoning of the supreme court in *Warnock v. Davis*, 104 U. S. 775 [26 L. ed. 924].

It seems to us, with great deference, that, from the facts in that case, the association, which was the assignee, could well be regarded as standing in the same position as if it had taken out the policy in its own name, and having no insurable interest in the life, it clearly became a wager policy. The assignment was made the day after the policy was issued in pursuance of an agreement to that effect made the day of its issuance. The assignment was evidently a mere device to cover up a gaming transaction.

In the preceding case of *Cammack v. Lewis*, 82 U. S. 15 Wall. 648 [21 L. ed. 244], the debt due the creditor was only \$70, and the policy was for \$3,000. It was taken out by the debtor, who was in bad health, at the suggestion of the creditor, and was assigned to him immediately after it was made out—he, at the same time, taking a note from his debtor for \$3,000, confessedly without consideration. In view of these facts the court well said: "It was a sheer wagering policy and probably a fraud on the insurance company. To procure a policy for \$3,000 to cover a debt of \$70, is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him, deprives it of all pretense to be a *bona fide* effort to secure the debt; and the strength of this proposition is not diminished by the fact that Cammack was only to get \$2,000 out of the \$3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis and assigned by him to Cammack." It was "under these circumstances" that the court held that Cammack could hold the policy only as security for the debt due him when it

was assigned, and such advances as he might afterwards make on account of it.

If such, then, be the nature of a life insurance contract, and if a *bona fide* assignee for value, though a stranger, may recover and hold the whole amount for his own use, why may not a creditor, who in pursuance of a *bona fide* effort to secure payment of his debt, insures the life of his debtor and takes the policy in his own name or for his own benefit, be entitled to hold all he can recover? He is, in fact, the owner of the policy, takes the risk of the continued solvency of the insurance company, and is obliged to keep the policy alive by paying the annual premiums during the life of the debtor, and the latter is under no obligation to do anything, and in fact does nothing in this respect. If he pays the debt to his creditor he has only discharged his duty; and what interest has he either in the policy or in what his creditor may recover upon it?

In a recent English case it was held that a creditor who had insured the life of his debtor could retain all the sums he had received from the policies, without accounting for them to the representatives of the debtor, unless there was distinct evidence of a contract, to the effect that the creditor had agreed to effect the policy and that the debtor had agreed to pay the premiums; in which case only will the policy be held in trust for the debtor. *Bruce v. Garden*, L. R. 5 Ch. App. 82.

This is the latest English authority to which we have been referred, and was decided by Lord Chancellor Hatherly on appeal. In that case the amount received from the policies by the creditor was nearly twice as much as the debt due him by his debtor.

We agree that there may be such a gross disproportion between the debt and the amount of the policy as to stamp the transaction as indicating upon its face want of good faith, and as a mere speculation or wager. The case of *Cammack v. Lewis* affords an instance of such gross disparity; but no general rule on this subject has as yet been laid down by the courts, and it is probably better to leave each case to depend on its own circumstances. The disparity between the debt of \$1,000 and \$6,500, the aggregate of the sums named in the certi-

ates, is certainly great; but upon examination it is more apparent than real.

The answer, which we must take as true shows *bona fides* on the part of the creditor. The policies were all in mutual aid associations where mortuary dues are paid by assessments and where, of course, the sum to be realized depends upon the number and solvency of the members. One of the certificates for \$2,000, contained a condition that only one half should be paid if the assured should die within one year from its date, an event which actually occurred. Another expressly provided that he should receive an amount not exceeding \$3,000, but according to the numbers liable to assessment on this certificate, and from that he received according to its terms only \$250. Another of the associations was in financial difficulties and he compromised his claim on a certificate for \$1,000 and received only \$182.82. By taking out these certificates he became liable to be assessed as a member; and during the short time they were running (from June to the following March) he paid in this shape and in premiums the sum of \$351.75.

In view of the character of these certificates and of the associations by which they were issued, we cannot say the disproportion between the debt and the real amount and value of the insurances is so great in this case as to warrant a sentence of condemnation against the transaction as being a mere speculation or wager on the life of the debtor.

Without attempting a review of all the numerous decisions on this subject, we simply refer, in support of our views, to the following cases in addition to those already cited: *Mutual L. Ins. Co. v. Allen*, 188 Mass. 24; *Clark v. Allen*, 11 R. I. 439; *Olmsted v. Keyes*, 85 N. Y. 598; *Amick v. Butler*, 111 Ind. 578, 9 West. Rep. 842; *Johnson v. Van Epps*, 110 Ill. 562; *Corsan's App.* 113 Pa. 488, 4 Cent. Rep. 307; and among the text writers, to Bliss on Life Insurance, § 30, and Life Insurance, Law of Assignments (Hines & Nichols) 81, 83.

On the whole we are of opinion the weight of reason as well as of authority sustains the appellant's claim.

*We shall therefore reverse the decree appealed from and dismiss the appellee's bill.*

### MISSISSIPPI SUPREME COURT.

Charles W. McCROY, *Appt.*,

v.

H. A. TONEY.

(....Mss.....)

A lease made on the 15th day of December, 1887, for the year 1888, may be valid, although not in writing, under Mississippi Code, § 1282, excepting from the necessity of writing a lease for not longer than one year.

(February 4, 1889.)

**A** PPEAL by plaintiff, from a judgment of the Circuit Court of Coahoma County sustaining a demurrer to the declaration in an action to recover damages for the alleged

breach of a parol contract to lease lands. *Reversed.*

Defendant, on December 15, 1887, orally leased certain land to plaintiff for the year 1888. He refused to deliver possession when the time agreed upon arrived, and this suit was brought to recover damages for breach of contract. Defendant demurred to the declaration, alleging invalidity of the contract under the Statute of Frauds. The demurrer having been sustained, the case was brought to this court.

*Messrs. Calhoun & Green* for appellant.  
*Messrs. Cutrer & Cutrer* for appellee.

**Campbell, J.**, delivered the opinion of the court:

The single question presented for decision by



this record is, Was the lease of the land by words, without writing, on the 15th day of December, 1887, for the year 1888, invalid? After careful consideration of all the learning on the subject furnished by the text books and English and American decisions accessible to us, and touching this question, we answer it in the negative.

The reasoning by which we reach this conclusion is this: Without the Statute of Frauds such leases would be valid, and they are expressly excepted from it. It is as if our statute was, in the language of that of Georgia, "contracts creating the relation of landlord and tenant, for any time not exceeding one year, may be by parol;" and from that language the Supreme Court of Georgia thought it indisputable that a contract for the renting of land, made on the 25th of December, 1875, for the year 1876, was valid. *Steininger v. Williams*, 33 Ga. 475.

The object in excepting from its provisions contracts for the making any lease (of land) for not more than one year is to let them stand as at common law, whereby they were valid. The exception may be supposed to have been made with reference to the custom of the country in which leases for a year are generally made without writing. As the statute applies only to leases for a longer term than one year, and thereby excludes leases for a year or less, it is not to be assumed that the very next clause of the statute (the *infra annum* clause) was intended to apply to and invalidate what had been carefully excepted by the preceding clause, for the purpose of leaving it, as at common law, unaffected by the statute.

Our view is sustained by the courts of England, New York, Colorado, Iowa, Indiana, Georgia, Michigan and Tennessee, and maintains the prevailing custom of the people of this State. *Reed*, Stat. Frauds, §§ 190, 815, and notes, where cases are cited.

It is opposed by the courts of Alabama, Illinois, Kentucky, Massachusetts and perhaps other States, but upon grounds unsatisfactory to us, and in most instances, as it appears to us, without much consideration of the question. The Statute of Frauds sprung from the notion that certain matters should be evidenced by writing, lest perjury should be committed to maintain claims on them.

In England it was thought a lease for not more than three years from the making thereof, with a prescribed rent, was not of sufficient moment to incite to perjury, and such leases

were excepted from the statute (29 Car. II.), and, being excepted, were held not to be embraced by the *infra annum* clause of the fourth section of that statute. With us it was considered that a lease for one year is not of sufficient importance to cause perjury, and therefore it is not required to be evidenced by writing.

Section 11-8 of the Code, corresponding to section 2 of 29 Car. II., excepts a term of not more than one year from the requirement of a writing to convey land, and section 1292, which corresponds to the fourth section of the statute (29 Car. II.), also excepts from its provisions the making any lease of land for a term not longer than one year, while the English Statute does not, in its fourth section, except the leases excepted by its second section; and yet it is held there that such leases as are excepted by the second section, although not excepted expressly by the fourth section, are by virtue of the exception in section 2 not embraced in section 4.

Surely, as our statutes (sections 1188 and 1292) both exclude leases for a term not longer than one year, they cannot be held to be affected by section 1232.

Before the statute (29 Car. II.) a term might be created by parol to commence in future. By that Act writing was made necessary, except as to leases for not more than three years from the making thereof, etc. By our statute writing is necessary, except as to leases for not more than one year, but the clause of the English Statute, "from the making thereof," is omitted; hence, the conclusion that it has reference to the duration of the term, and not to the date of its commencement. The term created by parol must not be for more than a year; but that may commence when the contracting parties agree it shall begin. *Ita lex scripta est*, and it conforms to the practice of the people of this State.

It is said if a lease may be made on Christmas Day for the next year, without writing, it may be made to commence a year or five or ten years hence. If true, what of it? If two persons, able and willing, actually should contract, the one to let and the other to enjoy and pay rent for premises for the year 1900, where is the harm of upholding the contract, though not in writing? The improbability of any such contracts being made suggests the improbability of their inclusion in any legislative scheme to regulate the transactions of society.

*Reversed, demurrer overruled, and cause remanded.*

## VIRGINIA SUPREME COURT OF APPEALS.

William H. COFFMAN, *App't*,

v.

D. A. HEATNOLE, Admr. etc., of Hiram Coffman, Dec'd., *et al.*

(....Va....)

**1. A testator can disinherit his heirs or**

**NOTE.—Disinheriting heir.**

It is one of the rules of construction of wills that the heir is not to be disinherited without an express § L. R. A.

next of kin only by leaving his property to others. Mere words of exclusion will not suffice. The estate must be actually given to somebody else.

**2. A will which simply revokes all other wills theretofore made by the testator, and declares that a certain son shall be excluded from all participation in the estate because he has be-**

devised or necessary implication (*Roomer v. Fulton*, 7 Cow. 71; *Jackson v. Burr*, 9 Johns. 104), importing, not natural necessity, but so strong a

come the heir to certain other property, and testator is about to make a final settlement, giving him as much as the estate would pay to the other legal heirs, is not sufficient to exclude such son from participation in the estate, but is a nullity, where no provision is made for giving the estate to anybody else.

(November 15, 1888.)

**A**PPEAL by defendant, William H. Coffman, from a decree of the Circuit Court of Rockingham County (McLaughlin, J.), in a suit brought for the settlement of a certain estate and the distribution of the property according to testator's will. *Reversed.*

This was a suit in equity brought by Alberta Coffman against the heirs and personal representatives of Hiram Coffman, deceased, to settle his estate and construe his will.

William H. Coffman, a son of decedent, filed an answer denying that his father left a will and averring that the alleged will was and is not a testamentary paper.

The paper was as follows:

"I, Hiram Coffman, of Rockingham County and State of Va. do make and ordain this to be my last will and testament, hereby revoking all other wills heretofore by me made. It is my will that my son Wm. H. Coffman be excluded from all of my estate at my death and have no heirship in the same, he having become the heir to his mother's interest in her father's estate, and I his guardian have paid him, and am now about to make a final settlement with him which will make as much to him and probably more than my estate will pay to each of my other legal heirs.

"In witness," etc.

The paper was proven to be wholly in testator's handwriting and was admitted to probate in the probate court as his will. The court decided that it was a devise by implication and that it operated to exclude W. H. Coffman from any participation in the estate of his father; whereupon, he took this appeal.

**Mr. William B. Compton**, for appellant:

A man cannot disinherit his heirs or next of kin in any other way than by giving his estate to some one else.

probability that an intention to the contrary cannot be supposed. *Br. Devise, 52; Clache's Case, Dyer, 330 b.; Comber v. Hill, 2 Strange, 939; Gulliver v. Wickett, 1 Will. 106; Roe v. Wickett, Will. 309; Doe v. Wilkinson, 2 T. R. 209; Doe v. Dring, 2 Maule & S. 448; Wilkinson v. Adam, 1 Ves. & B. 486; Denn v. Mellor, 5 T. R. 558; Trent v. Hanning, 7 East, 97, 1 Bos. & P. N. R. 118; Dashwood v. Peyton, 18 Ves. Jr. 40; Oortyon v. Helyar, 2 Cox, Ch. 340; 2 Jarm. Wills, 841.*

Whether or not an omission to provide for a child by will was intentional or by mistake, may be ascertained from the terms of the will or by parol. *Loring v. Marsh, 73 U. S. 6 Wall. 337 (18 L. ed. 802).*

When answered from perusal of will it is limited to the time of its execution, and oral proof is received to ascertain the mind of the testator at the same period. *Id.*

In Pennsylvania, the heir cannot be disinherited without the use of express words; and evidence of memoranda of the testator is not admissible. *Wilkins v. Allen, 59 U. S. 18 How. 385 (15 L. ed. 390).*

By the Spanish law a testator cannot disinherit a child without naming the child and the reasons for doing so. *Meegan v. Boyle, 60 U. S. 19 How. 130 (15 L. ed. 577).*

Merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object. Accordingly, a direction that the proceeds of land shall be deemed personal estate, although  
2 L. R. A.

*Boisseau v. Aldridge, 5 Leigh, 222; Wright v. Hicks, 12 Ga. 155, 58 Am. Dec. 457; Doe v. Lanius, 3 Ind. 441, 56 Am. Dec. 518, and notes, 5 1; Blackman v. Gordon, 2 Rich. Eq. 43, 44 Am. Dec. 241; Denn v. Gaskin, 2 Cowp. 657; Schaubert v. Jackson, 2 Wend. 13; Hall v. Hall, 2 McCord, Ch. 269.*

**Messrs. George G. Grattan and J. B. Stephenson**, for appellees:

A will is a declaration, made in due form of law, of a man's mind or last will of what he would have to be done with his estate after his death.

1 Jarm. Wills, 26.

While the testator may not use express words to indicate the persons to take his estate, yet if it can be fairly implied from the context of the will the persons who are to be the recipients of his bounty, this will be sufficient, and the courts will effectuate the will of the testator so implied from the language employed by him.

8 Lomax, Dig. 148; 1 Jarm. Wills, 441.

In performing the duty of expounding a will the court will make the amplest allowance for the unskillfulness and negligence of the testator; technical informalities will be disregarded, the most perplexing complications of words and sentences will be carefully unfolded, and the traces of the testator's intention will be diligently sought out in every part of the instrument, and the whole carefully weighed together.

*Wootton v. Redd, 12 Graft. 205.*

In *Boisseau v. Aldridge, 5 Leigh, 240*, every Judge in the cause declared that if the paper had at all intimated who should take his estate, to the exclusion of the Aldridges, they would sustain it as a will; or if it could have been implied from the language of the paper what disposition he desired should be made of his estate, that would have been sufficient.

**Lewis, P.**, delivered the opinion of the court:

A will is defined to be the disposition of one's property, to take effect after death. Therefore, to sustain the decree of the circuit court in this case, two things must be implied from the paper in question, viz.: *first*, that the decedent intended it as a disposition of his property, to

joined with an express declaration that the heir at law shall not take in case of lapse, will not exclude the claims of the heir at law. *Taylor v. Taylor, 3 DeG. M. & G. 190; Robinson v. London Hospital, 10 Hare, 19; Pitch v. Weber, 6 Hare, 145; Sykes v. Sykes, L. R. 4 Eq. 200; Gordon v. Atkinson, 1 DeG. & Sm. 478; Flint v. Warren, 18 Sim. 124; Shallicross v. Wright, 12 Beav. 501; Hopkinson v. Ellis, 10 Beav. 169; Williams v. Williams, 5 L. J. N. S. (Ch.) 84; Collins v. Wakeman, 2 Ves. Jr. 683; cited in 1 Jarm. Wills, 623.*

#### Heirs favored at law.

Heirs are favored in law, and get the benefit of any doubt affecting their rights. See *Roberts v. Oxbourne, 37 Ala. 174; Parish v. Parish, Id. 591; Cleveland v. Spillman, 25 Ind. 95; Sims v. Smith, 6 Jones, Eq. 347; Burke v. Chamberlain, 22 Md. 388; Ferris v. Smith, 17 Johns. 221; Olmstead v. Olmstead, 4 N. Y. 56; Shutt v. Rambo, 57 Pa. 149; Bacon's App. Id. 504; Turner v. Kittrell, 1 Winst. Eq. 33; Doe v. Dill, 1 Houst. 398; Physick's App. 50 Pa. 128; McKenzie v. Jones, 39 Miss. 230; Steiner v. Kolb, 57 Pa. 123; Quillman v. Custer, Id. 125; Wigram, Wills, p. 78.*

Where the will contains no special provision on the subject, the land of deceased descends to his heirs, and their rights cannot be divested or impaired by the unauthorized acts of the testator. *Brush v. Ware, 40 U. S. 15 Pet. 93 (10 L. ed. 672).*

take effect at his death; and *second*, that he meant to leave, and did leave, the whole of his estate to those persons standing in the relation of his heirs and next of kin, other than the appellant, who is expressly excluded.

On the other hand, the appellant contends that the instrument makes no disposition of the estate at all, and consequently that the decedent died intestate.

The paper is certainly an anomalous one, and none exactly like it is to be found in any case that has heretofore come before this court. The application, however, of certain well settled principles, in construing it, leads, we think, to the conclusion that the position taken by the appellant is the correct one.

It is a maxim that a testator can disinherit his heirs or next of kin only by leaving his property to others. Mere words of exclusion will not suffice; the estate must be actually given to somebody else. "Though the intention to disinherit the heir be ever so apparent," said Lord Mansfield in *Denn v. Gaekin*, Cowp. 657, "he must, of course, inherit, unless the estate is given to somebody else; and the reason is that the law provides how a man's estate at his death shall go, unless he, by his will, plainly directs that it shall be disposed of differently; so that the doctrine is not peculiar to the law of primogeniture, as is very properly conceded."

It is true the devise or bequest need not be in express terms, and that it may be by necessary implication; but to justify such an implication the intention of the testator must be so apparent that an intention to the contrary cannot be supposed, for otherwise the implication is not a necessary one. 1 Jarm. Wills, 582.

Thus a devise to the testator's heirs after the death of A gives to A a life estate by implication, because otherwise the devise to the heirs, upon whom the law casts the property in the absence of a disposition of it by the testator, would be rendered nugatory; and it would therefore be absurd to suppose that the testator meant to devise the land to his heirs at the death of A, and yet that the heirs should have it in the mean time. But no such implication arises where the devise is to a stranger after the death of A; for in such a case it is possible to suppose that the testator meant the heir to take the land during the life of A; and therefore an intention to give a life estate to A cannot be supposed. And this, says Jarman, is an exact illustration of the difference between necessary implication and conjecture.

According to Lord Mansfield, "necessary implication" is that which clearly satisfies the court what the testator meant by the words used. It is the opposite, he said, of "conjecture," and leaves no room to doubt. *Wilkinson v. Adam*, 1 Ves. & B. 486; *Jones v. Morgan*, cited in 4 Brown, Ch. 460; Hawk. Wills, 5.

Redfield lays it down that, in order to create a devise or legacy by implication, it must not be a case of mere slight probability, but something in regard to which most men would not be expected to raise any question. It must not rest upon conjecture. Neither is it required that the inference should be absolutely irresistible. It is enough if all the circumstances taken together leave no doubt in the mind of the court. The words of the will, he adds, 2 L. R. A.

must admit of no other implication. 2 Redf. Wills, 203.

In Cruise' Digest, title, *Devise*, chap. 10, § 18, it is said: "The courts have, in some instances, allowed of a devise by implication, where it has been very apparent, in order to support and effectuate the intention of the testator; but in cases of this kind the implication must be a plain, and not merely a possible or probable, one; for, the title of the heir at law being plain and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification." See also 8 Lomax, Dig. 148; Bac. Abr. title, *Wills*, G; 2 Minor, Inst. 969; Schouler, Wills, § 479; *Wright v. Hicks*, 13 Ga. 155; *Wilkinson v. Allen*, 18 How. 385; *Bradford v. Bradford*, 6 Whart. 344; *Fitch v. Weber*, 6 Hare, 145.

The doctrine of devises by implication was very fully considered in *Boisseau v. Aldridge*, 5 Leigh, 232. In that case the decedent left a written instrument as follows: "Not having made any will so as to dispose of my property, and two of my sisters marrying contrary to my wish, should I not make one I wish this instrument to prevent either of their husbands from having one cent of my estate—say the husbands of my two sisters Martha Aldridge and Dorothy Aldridge—nor either of them to have one cent, unless they should survive their husbands; in that case, I leave them to be paid out of the collection of any of my moneys \$500 each. Given under my hand and seal," etc. And on the paper was indorsed the following: "*Memorandum*. To prevent Burnett Aldridge and Burwell Aldridge from having any part of my estate that each might claim in right of their wives, without a will made by me."

It was argued by Messrs. Johnson and Leigh that, excepting the two contingent legacies, this writing was a devise and bequest, by implication, of the whole of the testator's estate to those persons who would take according to the Statutes of Descents and Distributions, other than the two sisters and their descendants. The latter they insisted could have been excluded for no other purpose than to give the estate to others, and that, if the testator did not mean that, he meant nothing. But this view, though pressed upon the court with great earnestness and ability, was not adopted, and the decree of the lower court was affirmed, which declared that the right of a person to disinherit his heirs, or any one of them, exists, not as an abstract substantive power, but as the consequence of the power to leave his estate to others; that the paper in question was not a devise or bequest by necessary implication; and that it was evidently executed under the erroneous impression that, if its author declared his intention to exclude his two sisters, the law would dispose of his estate among his heirs and next of kin, to the exclusion of the sisters mentioned therein. It is true that two of the Judges who delivered opinions in that case were of opinion that the instrument itself furnished internal evidence that it was not intended by the decedent to operate as a will any further than the contingent legacies therein bequeathed; but the principle that a man can disinherit his heirs only by unmistakably giving his estate to somebody else was none the less emphatically asserted. To hold otherwise, it was said, would give to a testator the power to repeal the Statute of Descents and Distribu-

tions, so far, at least, as it affected his own estate. It was also held that if in every case in which a testator declares an intention to exclude his heirs, or any one of them, it is to be implied from that alone that he intends to devise away his estate from such excluded person or persons, the principle that to disinherit his heirs he must give his estate to somebody else would be of no consequence, since it would give effect to the simple disinheritance by holding it tantamount to a positive disposition. Another analogous principle affirmed in that case, and which is very material to the present, is this: that while the intention of the testator, when consistent with the rules of law, is the pole star to guide the judicial expositor of the will, yet his intention to dispose of his estate must be indicated with a legal certainty; otherwise effect, as a will, cannot be given to the instrument—the true inquiry being, not what the testator meant, but what the words used import. *Judge Brooke*, in his opinion, said:

"When a testator has devised his estate by will, and is not precise as to the persons who are to take, or as to the quantity of estate they are to take, from necessity, and to effectuate his intention to dispose of his estate, and not to leave it to the law to dispose of it, courts imply his intent as to persons, and the quantity of the estate they are to take. But when the question is whether he intended to devise his estate or not, we are not unauthorized to imply that he does, unless it is a necessary inference from the language he uses."

He then referred to the case of *Denn v. Gaskin*, in which the testator gave his heir at law a disinheriting legacy, as it is called (that is, he gave him ten shillings), and then gave his nephews real estate without adding words of inheritance. He began his will thus: "As to all such worldly estate as God has endued me with," etc.; and the question was whether by necessary implication from these words, and the intended exclusion of the heir, the life-estate given the nephews was enlarged into a fee. *Lord Mansfield* held that it was not, although he said he suspected extremely that the testator meant to give the devisees an estate in fee, as he had no other landed property, and had made them residuary legatees of his personalty, and had disinherited the heir; but that, if he did mean it, the misfortune was that *quod voluit non dixit*. And he added the remark already quoted from his opinion, namely: that, though the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else. Accordingly, it was held that the fee, being undisposed of, descended to the heir, notwithstanding the intention of the testator to disinherit him; just as in *Boissieu v. Aldridge* the two excluded sisters were held entitled, not only to their contingent legacies, but to share in the residue of the estate as to which the testator died intestate, because, as was said, the statute gives the power to devise, and not in any other way to disinherit.

In *Wootton v. Redd*, 12 Gratt. 196, *Judge Lee*, speaking for the court, announced the same doctrine. He said: "Conjecture cannot be permitted to usurp the place of judicial conclusion—nor to supply what the testator has failed to sufficiently indicate. The law has

provided a definite successor to the estate in the absence of a testamentary disposition, and the heir is not to be disinherited, unless by express words or necessary implication." "The courts must therefore declare, if they can," he continued "what intention the testator has expressed with sufficient legal certainty; not the intention which he may have entertained, but which he has failed sufficiently to manifest"—citing *Guy v. Sharp*, 1 Myl. & K. 589, 602; *Martin v. Drinkwater*, 2 Beav. 215. See also, *Hatch v. Hatch*, 80 Va. 169; *Senger v. Senger*, 81 Va. 687; *Sutherland v. Sydnor*, 6 S. E. Rep. 480.

Let us now apply these principles to the present case. The paper in question is as follows:

I, *Hiram Coffman*, of *Rockingham County* and *State of Virginia*, do make and ordain this to be my last will and testament; hereby revoking all other wills heretofore by me made. It is my will that my son *William H. Coffman* be excluded from all of my estate at my death, and have no heirship in the same, he having become the heir to his mother's interest in her father's estate; and I, his guardian, have paid him, and am now about to make a final settlement with him, which will make as much to him, and probably more, than my estate will pay to each of my other legal heirs. In witness of this being my last will and testament, I hereunto set my hand, and annex my seal, this, the 10th day of March, 1877.

*Hiram Coffman*. [Seal.]

Now, this paper is certainly in the form of a will, and was declared by the decedent to be his will, and it excludes his son *William*, the appellant here, as plainly as the intention could be expressed. But is it in substance a will? Does it dispose of anything? The circuit court held that by implication it does. But is such a conclusion a necessary implication from the words used? Can the words be said to have no other signification? Taken together, do they clearly satisfy the mind, leaving no room to doubt that the decedent meant to dispose of his estate?

We think not. On the contrary, fairly construed, the instrument simply revokes all other wills theretofore made by the decedent, and excludes the appellant, giving the reason therefor. That is all, and to hold that it amounts to anything more would render futile the principle that a man can disinherit his heirs only by giving his estate to somebody else; and by carrying too far the doctrine of devises by implication would by judicial construction make a will for the decedent that he has not made for himself.

The record presents the case of a man who has a valuable estate, and a wife and five children, a son by his first marriage, another son by his second marriage, and three children by his third and last marriage. All his children are equally as near, and all presumably are equally as dear, to him. The eldest son has already inherited property equal in value, we will say, to one fourth of his father's estate. Accordingly, the father, wishing to do what he considers justice to all of his children, writes a paper which he calls a "will;" and in that paper he says, in substance, that he wishes to disinherit his eldest son; and then, lest his motive be imputed to a want of parental affection (we will

assume) he goes on and gives the reason for wishing to exclude him, and there he stops. He does not say his "other legal heirs" are to have the estate, but that his eldest son is not to have any part of it; and from this we are asked to imply that he intended to give, and consequently, as a legal conclusion, to hold that he did give, the whole of his estate to his other children; in other words, to hold that the reason assigned to exclude one of the children operates a disposition of the estate to the other children.

But this view is contrary to the plainest principles of the law, as we have already seen, for the question is not what the decedent intended, but what he has said; not what he may have thought would be the result of what he wrote, but what is the legal effect of the paper. And, although he may have intended to dispose of his estate, yet, if he has not said so with legal certainty, we cannot alter or add to his words, but our judgment must be as *Lord Mansfield's* was in *Denn v. Gaskin, quod voluit non dicit*; for we sit here, not to make wills, but to construe them—not to make law, but to administer it.

It is quite probable the paper was written by the decedent under the erroneous impression that if he would declare his intention to exclude the appellant, in the form of a will, the Statute of Descents and Distributions would step in and do the rest; i. e., that it would in effect make a better will for him than he could make for himself, by giving his estate to his other heirs and next of kin, and hence he made no disposition of it. His language, we think, shows this. Had he stopped at the point where he declared the appellant is to have no heirship in the estate, there could be no controversy, notwithstanding the paper in the introductory part is called a *will*. This is conceded, and yet what follows merely shows why he wished to exclude him, which is a very different thing from actually excluding him by disposing of his estate, no matter what his intention was; for in such a case an intention not expressed or clearly manifested is equivalent in law to an absence of a testamentary intent altogether. And herein lies the error of the decree complained of, namely: in giving effect to the intention of the decedent to exclude the appellant by making it tantamount to a disposition of the estate to the other children, which can no more be rightly done than the starting of a person on a journey can be said to be, in legal contemplation, the arrival of such person at the point of destination; and so here the decedent, intending to exclude the appellant, started out well enough in that direction; but unfortunately for the appellees he stopped before he reached the legal consummation of his purpose. That, in order to effect that purpose, he would have gone further, and given his estate in unmistakable terms to his other children, if the necessity for so doing had occurred to him, is also probable; for it is impossible to read the paper in question without perceiving that the thought uppermost in his mind was to exclude the appellant. But the idea that under any circumstances he would have done so rests upon conjecture merely, which is not necessary implication, but the opposite, and can never alone support a devise or bequest.

In *Jones v. Morgan*, *Lord Mansfield* said that

"'Conjecture,' is when you suppose what would have been the testator's meaning if he had had the whole case before him, and what, if he had thought of such an event, he would have said upon it;" "and," he added: "You are not to conjecture what he would have done in an event he never thought of; that will not do,"—citing 1 *Fearne, Contingent Remainders*, App. 577.

Every man, it is true, is presumed to know the law; but to say that the decedent must be presumed to have known that the mere exclusion of the appellant would not operate to give the estate to anybody else, and therefore that he meant to give, and consequently did give, the estate to his remaining children, is substantially to assert a proposition which has been emphatically repudiated by this court, and by all courts where our system of jurisprudence prevails. Moreover, no executor is appointed by the paper in question, nor is there any mention of the debts of the decedent, or of the widow's dower or interest in the estate, or any direction as to how the estate shall be divided or disposed of; and, while it is true the law provides for the payment of debts, the assignment of dower, etc., yet the omission to make mention of any of these matters is a circumstance in the case not without significance, as tending to support the view already expressed.

Persons often die intestate, but it is certainly not usual, nor can it hardly be said to be natural, for a man having a valuable real and personal estate to leave a will disposing of it, and make no specific devises or bequests, or give any direction touching the estate whatever. And here there is no direction as to anything, but simply a revocation of previous wills, and a disinherison of the appellant; because, in the language of the decedent, the appellant's inheritance from another source "will make as much to him, and probably more, than my estate will pay to each of my other legal heirs"—words which of themselves import intestacy, being emphatically words of inheritance. And as to the word *pay*, upon which so much stress is laid by counsel for the appellees, that is quite as applicable to the distribution of an estate of an intestate as to any other.

Again, suppose the appellant had died before the decedent, leaving descendants. What is there in this paper to prevent those descendants, as heirs at law of the decedent, from sharing in the estate? There is certainly nothing that would expressly exclude them, and this circumstance also strengthens the view that the paper was written, not to dispose of anything, but simply to revoke previous wills, and to exclude the appellant, without going or intending to go further than to give the reasons.

Our conclusion therefore is that the paper is not the will of the decedent; that, if he meant to dispose of his property, he has not said so with legal certainty; and consequently that at his death his estate passed to his heirs and next of kin, including the appellant. It is certainly safer, and more consonant with public policy, to closely adhere to settled principles, than in doubtful cases to interrupt the course of descents and distribution of estates which the statute describes in cases of intestacy; for the statute, which has been said to be a transcript of the human affections, is a wise and just one, and

ought to govern in all cases not plainly without it.

In *Boissieu v. Aldridge* it was said by Judge Brooke, and reaffirmed by the court without dissent in the recent case of *Sutherland v. Sydnor*, 6 S. E. Rep. 490, that property is the creature of the law, and can be disposed of at all only because the law permits it to be done in certain modes. And hence the result in the present

case imposes no hardship on anyone, as it puts all the children of the decedent on the same footing with respect to his estate, simply because their father has not availed himself of the permission that the law gave him to dispose of it differently.

*The decree must therefore be reversed, and a decree entered here in conformity with this opinion.*

## TENNESSEE SUPREME COURT.

SOUTH NASHVILLE STREET R. CO. *et al., Appts., v.*

Henry B. MORROW, Trustee of Davidson County.

(...Lea...)

1. A statute authorizing assessments of property omitted from the assessment made by the regular assessor, or an additional assessment, where the first one has been made upon an inadequate valuation, is not unconstitutional.
2. Taxation of shares of corporate stock in the hands of stockholders, as their individual property, is not unconstitutional as constituting double taxation because a tax has already been laid upon the property of the corporation but from which the capital stock in the hands of the corporation is omitted.
3. Shares of stock in a corporation have no actual situs and may properly be made taxable at the place where the corporation has its situs.
4. The burden of proof is on a taxpayer claiming that he has not been allowed an exemption to show that he has not, at some time or place, received it.
5. Bonds of a corporation can only be taxed by the government having jurisdiction of the owner, and are not taxable in a State where the owner does not reside.
6. A citizen cannot be taxed on corporate bonds in a county where he does not reside, although that is the location of the corporation.
7. An Act requiring a corporation to retain, from the interest due on its bonds having negotiable coupons the amount of state, county and city taxes assessed against the owners of the bonds, is invalid, inasmuch as the tax is void as to nonresidents, and the corporation cannot be required to determine as to each coupon, whether it may lawfully reserve the tax from the interest or not.

(February 23, 1899.)

**A**PPEAL by plaintiffs, from a judgment of the Circuit Court of Davidson County (McAlister, J.), in favor of defendant in an agreed case submitted to the court to determine the validity of certain tax assessments. *As affirmed in part and reversed in part.*

The facts fully appear in the opinion.

*Messrs. Vertrees & Vertrees and Hill & Granbery*, for appellants:

I. One tax on the property of an incorporated company, and another upon the shares of stock in the hands of the shareholders, is double taxation, and forbidden by the Constitution of Tennessee.

Although it has been held in *Union Bank v. 2 L. R. A.*

*State*, 9 Yerg. 490; *Memphis v. Enaley*, 6 Baxt. 553; *Mayor and Council v. South Nashville St. R. Co.* MSS. Nashv. 1879; *Nashville Gas Light Co. v. Nashville*, 8 Lea, 406; *Louisville & N. R. Co. v. State*, 8 Heisk. 795; and *Farrington v. Tennessee*, 95 U. S. 636 (24 L. ed. 560),—that the capital stock and the shares of stock are distinct things, and that they may both be taxed, and it is not double taxation, yet we maintain that the differences are not of a kind to establish that a tax on both is not double taxation.

In *Tennessee v. Whitworth*, 117 U. S. 136 (29 L. ed. 582), the court says:

"In corporations four elements of taxable value are sometimes found: (1) franchises; (2) capital stock in the hands of the corporation; (3) corporate property; (4) and shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation;" and the Chief Justice shows conclusively that a tax on both capital stock and shares is double taxation.

See *De Soto Bank v. Memphis*, 6 Baxt. 415; *Bank of Commerce v. McGowan*, 6 Lea, 703; affirmed, 104 U. S. 493 (26 L. ed. 810); *State v. Butler*, 83 Tenn. 633. See also *Bank of Cape Fear v. Edwards*, 5 Ired. L. 516.

Trust property held by an incorporated trustee is no more liable to double taxation than when held by a trustee who is not incorporated.

*Berry v. Windham*, 59 N. H. 288. See also *Robinson v. Dover*, 59 N. H. 527.

Numerous decisions of high authority concur in declaring that the taxation now complained of is unequal, and violative of the constitutional provision requiring equality of taxation.

See *People v. Badlam*, 57 Cal. 504; *San Francisco v. Mackey*, 23 Fed. Rep. 602; *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 550; approved in 6 Lea, 706; *State v. Hannibal & St. J. R. Co.* 37 Mo. 265; *Cheshire Co. Telegraph Co. v. State*, 63 N. H. 167; *Robinson v. Dover*, 59 N. H. 527; *State v. Bransin*, 23 N. J. L. 484; *Bangor & P. R. Co. v. Harris*, 21 Maine, 533; *Oliver v. Washington Mills*, 11 Allen, 268; *Hoadley v. Essex Co.* 105 Mass. 527; *N. O. R. Co. v. Alamance*, 91 N. O. 459; *Rice Co. v. Citizens Nat. Bank*, 23 Minn. 282, 233; *New Haven v. City Bank*, 31 Conn. 106; *Nichols v. New Haven & N. Co.* 42 Conn. 103; *State v. Cumberland & P. R. Co.* 40 Md. 22; *Frederick Co. v. Farmers & M. Nat. Bank*, 48 Md. 117; *State v. Baltimore & O. R. Co.* 149; *Johnson v. Com.* 7 Dana, 842; *Ryan v. Leavenworth Co.* 30 Kan. 188.

When the tangible property of a corporation, is taxed at its actual value, and its capital stock is also taxed at its market value, without

any deduction on account of the value of the tangible property of the corporation, it is plain that that would be double taxation.

Welty, Assessm. § 246; *Com. v. Standard Oil Co.* 101 Pa. 119.

The authority of *Union Bank v. State*, 9 Yerg. 490, has been shaken in the following cases:

*Memphis & C. R. Co. v. Gaines*, 8 Tenn. Ch. 804; *Chicago, B. & K. O. R. Co. v. Guffey*, 120 U. S. 575 (30 L. ed. 734); *Bank of Commerce v. McGowan*, 6 Lea, 708; *De Soto Bank v. Memphis*, 6 Baxt. 415; *State v. Butler*, 86 Tenn. 633; *Nashville v. Thomas*, 5 Coldw. 604; *McLaughlin v. Chadwell*, 7 Heisk. 408.

II. Even though one tax on the company's property and another tax upon the individual shares be not in themselves double taxation, nevertheless, when the company is required to pay the tax levied upon the shares, and look to the shareholders for reimbursement, it then is double taxation; and the Assessment Act of 1887, which operates companies with this obligation, is unconstitutional and void.

See *New Orleans v. Houston*, 119 U. S. 265 (30 L. ed. 411).

III. Negotiable bonds are mere evidences of debt.

*Kirtland v. Hotchkiss*, 100 U. S. 498 (25 L. ed. 562).

When the debt is evidenced by a writing having the quality of negotiability, no tax can be imposed upon such bond in the hands of a nonresident. As to nonresident bondholders the Act is undoubtedly void.

*State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300 (21 L. ed. 179); appd. in *Gloucester Ferry Co. v. Pa.* 114 U. S. 208 (29 L. ed. 164); *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 844; *Pierce, Railways*, 472; *Valle v. Ziegler*, 84 Mo. 214; *Cooley, Const. Lim.* 4th ed. p. 607; *Murray v. Charleston*, 96 U. S. 433 (24 L. ed. 760); *Kirtland v. Hotchkiss*, 100 U. S. 498 (25 L. ed. 562).

IV. The Assessment Law of 1887, in so far as it affects the bonds issued by the South Nashville Street Car Company, is unconstitutional and void, because it impairs the obligation of the contracts contained in the bonds, and also on the coupons. These bonds were issued in July, 1884. The law taxing such bonds and requiring the companies to pay the tax first appeared in the Assessment Act of 1885. The obligation of the bond and the detachable coupons is to pay 6 per cent interest semi-annually at the American National Bank in Nashville.

By the present law the business manager is allowed to retain the tax out of the interest for the company's indemnity; but pay it he must. The result is that instead of being a contract for interest at the rate of 6 per cent, the contract is altered into one for interest at the rate of 6 per cent minus the tax assessed.

*Cooley, Taxn.* 65; *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300 (21 L. ed. 179); *Murray v. Charleston*, 96 U. S. 433 (24 L. ed. 760).

To require the tax assessed upon the bond to be paid out of the interest payable upon the coupons is to make the holder of the coupon pay the tax due from the bondholder.

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See *Hartman v. Greenhow*, 102 U. S. 684 (26 L. ed. 276).

V. The Constitution provides that "All property, real, personal and mixed, shall be taxed; but the Legislature . . . shall exempt \$1,000 worth of personal property in the hands of each taxpayer."

Art. 2, § 28.

This assessment is invalid to the extent of \$1,000 in each shareholder's case.

See *New York v. Weaver*, 100 U. S. 542 (25 L. ed. 706); *Albany Co. v. Stanley*, 105 U. S. 805 (26 L. ed. 1044); 1 *Desty, Taxn.* 334, 335.

The assessment made for and in the year 1887, by the regular assessor, was a judicial act and, unless fraudulent in the matter of valuation, was final and conclusive.

*Stanley v. Albany Co.* 121 U. S. 550 (30 L. ed. 1008); 1 *Desty, Taxn.* 546; *Cooley, Taxn.* 283.

*Messrs. Matt W. Allen, J. B. Daniel, T. M. Steger, M. R. Priest and G. W. Pickle, Atty-Gen.*, for appellee:

The county trustee has the power to assess omitted property and to correct and increase inadequate assessments.

Act 1879, chap. 79, p. 93; *Otis v. Boyd*, 8 Lea, 679; Acts 1883, chap. 81, p. 255; Acts 1885, chap. 23, p. 70.

The Code (Mill. & V.), § 663, reads as follows:

"All collectors are hereby made assessors to assess all property which by mistake of law or fact has not been assessed, whether the omission be for the particular year for which the collector is acting, or for any previous year or years. And it is hereby made the duty of such collectors in all cases, where property has not been assessed, but on which taxes ought to be paid by law, to immediately assess the same and proceed to collect the taxes."

See also Acts 1883, chap. 105, p. 111, § 25; Acts 1885, chap. 1, p. 13, § 25; Acts 1887, chap. 2, p. 34, §§ 24, 46.

The constitutionality of the Act of 1879 and amendments was passed upon and sustained by this court in *State v. Whitworth*, 8 Lea, 600; and *Wilson v. Benton*, 11 Lea, 51.

See also *Franklin Co. v. Nashville, O. & St. L. R. Co.* 12 Lea, 521; *State v. Memphis & O. R. Co.* 14 Lea, 56, 63; *Louisville & N. R. Co. v. State*, 8 Heisk. 795; *Shelby Co. v. Miss. & T. R. Co.* 16 Lea, 410.

Such statutes have always been held constitutional.

*People v. Board of Assessors*, 92 N. Y. 430; *Bradley v. Lincoln Co.* 60 Wis. 71; *Cooley, Const. Lim.* 209; *Bellows v. Weeks*, 41 Vt. 590-599; *Mills v. Charleston*, 29 Wis. 400; *Weister v. Hade*, 52 Pa. 479.

Statutes authorizing reassessments of property inadequately assessed have likewise been held valid and constitutional.

*State v. Northern Belle Mill & Min. Co.* 15 Nev. 385; *Simmons v. Aldrich*, 41 Wis. 250.

An abortive attempt to make an assessment does not exhaust the power.

*Himmelmann v. Cofran*, 36 Cal. 411; *Pond v. Negus*, 8 Mass. 280; *Libby v. Burnham*, 15 Mass. 144; *Bangor v. Lancy*, 21 Maine, 472. See also *Oerring v. Foote*, 43 N. Y. 294; *N. O. v. Southern Bank*, 15 La. Ann. 89; *Dean v.*



*Borchsenius*, 80 Wis. 236; *Cooley*, Taxn. 1st ed. p. 232; citing *Goodrich v. Lunenburg*, 9 Gray, 38; *Hubbard v. Garfield*, 102 Mass. 72; *May v. Holdridge*, 23 Wis. 93; *Cooley*, Taxn. 2d ed. 310.

The property of the corporation is taxable, the stocks issued by the corporation are taxable, and the bonds issued by the corporation are taxable under the law.

See § 23, art. 2, Tenn. Const.; Assessment Act 1887, chap. 2, § 4.

Street railroads and corporate franchises are taxable.

1 *Desty*, Taxn. pp. 300, 379; *Baltimore Appeal Tax Ct. v. Western Md. R. Co.* 50 Md. 300; *People v. Cassidy*, 46 N. Y. 46; *North Beach & M. R. Co.'s Appeal*, 32 Cal. 499; *Providence Gas Co. v. Thurber*, 2 R. I. 21; *Providence & W. R. Co. v. Wright*, 2 R. I. 462; *Mohawk & H. R. Co. v. Clute*, 4 Paige, 384; *Wheeler v. Rochester & S. R. Co.* 12 Barb. 227; *San José Gas Co. v. January*, 57 Cal. 614; *Veazie Bank v. Fenno*, 75 U. S. 8 Wall. 547 (19 L. ed. 487); *Wilmington & W. R. Co. v. Reid*, 80 U. S. 13 Wall. 264 (20 L. ed. 568); *New Orleans City Gaslight Co. v. Assessors*, 81 La. Ann. 476; *Atlantic, T. & O. R. Co. v. Mecklenburg*, 87 N. C. 129; *Richmond & D. R. Co. v. Brogden*, 74 N. C. 707; *Belv. v. Forsyth County*, 82 N. C. 415; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 557; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 296 (21 L. ed. 163); *Com. v. Lancaster Sav. Bank*, 124 Mass. 495; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 385; *People v. Utica Ins. Co.* 15 Johns. 882; *Ontario Bank v. Bunnell*, 10 Wend. 186; *North Mo. R. Co. v. Maguire*, 87 U. S. 20 Wall. 46 (23 L. ed. 287); *Providence Bank v. Billings*, 29 U. S. 4 Pet. 517 (7 L. ed. 939); *Memphis Gaslight Co. v. Shelby County Taxing Dist.* 109 U. S. 398 (27 L. ed. 976); *Society for Savings v. Coite*, 73 U. S. 6 Wall. 594 (18 L. ed. 897); *Provident Institution for Savings v. Massachusetts*, 73 U. S. 6 Wall. 611 (18 L. ed. 907).

*Cooley*, on Taxation, 274, 1st ed. says:

The tracks of a local railway company may be assessed as real estate, though laid down in a highway where the company has no title.

See *People v. Cassidy*, 46 N. Y. 46; *New Haven v. Fair Haven & W. R. Co.* 83 Conn. 422; *Burlington & M. R. Co. v. Spearman*, 12 Iowa, 112; *North Beach & M. R. Co.'s App.* 32 Cal. 499; *Western U. Tele. Co. v. State*, 9 Baxt. 509; *Chicago City R. Co. v. Chicago*, 90 Ill. 573, 32 Am. Rep. 54; *Chicago v. Baer*, 41 Ill. 306; *Parmeles v. Chicago*, 60 Ill. 267.

Our supreme court in *Louisville Railroad Company v. State*, 8 Heisk. 795, mentions specifically the franchises as one of the four distinct taxable properties of a corporation.

*Nashville v. Thomas*, 5 Coldw. 604; *McLaughlin v. Chadwell*, 7 Heisk. 389; *Bedford v. Nashville*, 7 Heisk. 409; *Union Bank v. State*, 9 Yerg. 490, and *Brightwell v. Mallory*, 10 Yerg. 196, sustain this tax and the mode of collection.

The *Union Bank Case* has been approved in—*McLaughlin v. Chadwell*, 7 Heisk. 389; *Memphis v. Enaley*, 6 Baxt. 555; *Nashville Gaslight Co. v. Nashville*, 8 Lea, 406; *Farrington v. Tennessee*, 95 U. S. 689 (24 L. ed. 561); *Memphis v. Farrington*, 8 Baxt. 540.

The capital stock and the shares may both 2 L. R. A.

be taxed, and it is not double taxation; and the corporation may be required to pay the tax out of its corporate funds or be authorized to deduct the amount paid for each shareholder out of his dividends.

*Angel & A. Corp.* §§ 556, 557; *Union Bank v. State*, 9 Yerg. 490; *Van Allen v. The Assessors*, 70 U. S. 3 Wall. 573 (18 L. ed. 229); *Bradley v. Illinois*, 71 U. S. 4 Wall. 459 (18 L. ed. 433); *First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353 (19 L. ed. 701); *State v. Branin*, 23 N. J. L. 484; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316 (4 L. ed. 579). See *Nashville Gaslight Co. v. Nashville*, 8 Lea, 406; *New York v. Tax Comrs.* 71 U. S. 4 Wall. 244 (18 L. ed. 344); *Maltby v. Reading & O. R. Co.* 52 Pa. 140; *Haight v. Pittsburg etc. R. Co.* 78 U. S. 6 Wall. 15 (18 L. ed. 818); *U. S. v. Baltimore & O. R. Co.* 84 U. S. 17 Wall. 322 (21 L. ed. 597); *Minot v. Phila. etc. R. Co.* 85 U. S. 18 Wall. 206, 230 (21 L. ed. 888, 896); *Am. Coal Co. v. Allegany County*, 59 Md. 197; *St. Albans v. National Car Co.* 57 Vt. 80; *Hershire v. First Nat. Bank*, 35 Iowa, 272; *Cummings v. Merchants Nat. Bank*, 101 U. S. 153 (25 L. ed. 903).

Notwithstanding a corporation has paid a tax upon its real estate, purchased with money paid in as capital stock, it may still be bound to pay the tax imposed on its shareholders, retaining the same out of their dividends.

*Memphis v. Enaley*, 6 Baxt. 554; *Nashville Gas-Light Co. v. Nashville*, 8 Lea, 406; *Baltimore v. Baltimore City Pass R. Co.* 57 Md. 31; *First Nat. Bank of Mendota v. Smith*, 65 Ill. 54; *St. Albans v. Nat. Car Co.* 57 Vt. 81.

If the Legislature could have provided, in the charter, originally, that the stocks and bonds should be taxed here, it may do so at any time thereafter by general or special law.

*Providence Bank v. Billings*, 29 U. S. 4 Pet. 516 (7 L. ed. 939); *Augusta v. North*, 57 Maine, 392, 2 Am. Rep. 55.

The Legislature has power to fix the *situs* of the shares of stock.

*Nashville v. Thomas*, 5 Coldw. 604; *McLaughlin v. Chadwell*, 7 Heisk. 389; *Bedford v. Nashville*, 7 Heisk. 409; *Fox v. South Tredegar Iron Co.* 85 Tenn. 189; *Tappan v. Merchants Nat. Bank*, 86 U. S. 19 Wall. 490 (22 L. ed. 189); *Maltby v. Reading & O. R. Co.* 52 Pa. 146.

All taxes shall be presumed legally assessed and also that the assessors did not neglect an important part of their duty.

2 *Desty*, Taxn. p. 615; *Hunt v. Chapin*, 42 Mich. 25; *Blackwood v. Van Vleet*, 80 Mich. 118; *Buck v. People*, 78 Ill. 560; *St. Peter's Church v. Scott Co.* 12 Minn. 895; *New Orleans v. N. O. Canal & Bkg. Co.* 29 La. Ann. 851, 99 U. S. 97 (25 L. ed. 409); *Beers v. People*, 83 Ill. 489; *Toule v. Holt*, 14 Neb. 231; *Miller v. Hurford*, 13 Neb. 13; *State Auditor v. Jackson Co.* 65 Ala. 152; *State, Harmed. v. Manning*, 41 N. J. L. 275; *Blossom v. Cannon*, 14 Mass. 177.

*Lurton, J.*, delivered the opinion of the court:

The plaintiff in error is a corporation, organized in 1859 under a charter granted by the Legislature of this State. As such corporation it obtained from the City of Nashville a right

to lay down, maintain and operate a line of street railway upon certain streets of that city. Under this charter and right of way granted by the city, it has, for many years, been running a line of street cars.

In 1887 it was assessed by the regular assessor, for purposes of state and county taxation upon the following valuations: real property \$10,000; personal property \$50,000. In 1888 it was assessed as follows: mules \$3,600; cars \$2,500; real estate \$9,000; stockholders \$75,000.

By section 24 of the Assessment Law of March 24, 1887, it is provided that, if at any time after the assessments have been made, it should come to the knowledge of the chairman or judge of the county court, or the clerk of the county court, the county trustee or sheriff, that any person or corporation has not been assessed, or has been assessed upon an inadequate amount, then it shall be the duty of such officer on the motion of the Attorney-General to cite said person or corporation, their agent, or attorney or representative, to appear before the trustee for the purpose of being assessed according to law, "and said trustee is hereby authorized and empowered to make the proper assessment against such person, firm or corporation . . . and to cause the same to be entered on the tax books for collection." Acts 1887, p. 84.

Under this authority the defendant, who is the county trustee for Davidson County, upon the motion of the Attorney-General, and upon notice to the said corporation, reassessed the corporate property for both 1887 and 1888, and at the same time and upon the same notice treating the corporation as the agent for and representative of the shareholders and bondholders of said company, he assessed the shares of stock in said corporation to the individual shareholders by name, and the outstanding coupon bonds of the company to "unknown owners."

By this reassessment the valuation of the corporate property has been largely increased. The shares of stock and the bonds of the company not having before been assessed are assessed as omitted property. The company denied the right of the county trustee to increase the assessment for 1887, it having theretofore paid the tax assessed against it for that year. It denied the right of the trustee to assess the shares of stocks, or to assess its bonds in such manner as to compel the company to collect the tax thus assessed from its shareholders or bondholders, or to compel the company to pay such tax so assessed, or be liable for the same. It likewise denied the liability of its bonds to assessment, and the legality of the assessment made. Both the shareholders and the company denied the right of the trustee to assess both the company's property and the shares of capital stock, as being double taxation.

Thereupon an agreed case was made up, to have the validity of these several assessments determined, and to have the Act of 1887 construed and its constitutionality considered and the liability of the company by reason of said assessments under the provisions of the Act, declared and ascertained. The parties to this agreed case are the company and its shareholders upon the one side and the county trustee upon the other. The bondholders are unknown and of course are not parties to this suit.

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The agreed case was submitted to the Circuit Court of Davidson County, and all of the assessments were sustained as valid, except in so far as the franchise of the corporation had been, in the opinion of the learned Circuit Judge, assessed separately and independently of other property of the company. The action of the learned Circuit Judge is supported by an exceedingly able and exhaustive opinion, which having been made a part of the record has been of great service in reaching the conclusions we shall presently announce.

That part of the assessment quashed by the circuit court will be first disposed of. The assessor has undertaken to itemize the several properties of the company and to value them separately. The franchises of the company, together with its easement in the streets of Nashville, under the ordinances of said city and the contract between the city and the street railway company, are assessed as of a valuation of \$50,000.

This assessment was quashed under the authority of the case of *Louisville Railroad Company v. Bate*, 12 Lea, 573, as being a separate and independent assessment upon a mere franchise.

We think this a misconception of the property included in the item valued at \$50,000. The right of way in the streets of Nashville is an easement in realty and is assessable as realty. This is well settled. *Desty*, Tamm, 300, 305, 361, 379.

In the case of *Chicago City Railway Company v. Chicago* this question as to whether the easement of a street railway company in the streets of a city was assessable as property was determined in the affirmative. Concerning such an interest the court said: "It is true, as urged by counsel, that the railway company has not become the owner of any portion of the street in fee, but it has certainly through its charter . . . and its contracts with the city acquired a property in them of a most valuable character, which neither the Legislature nor the city can take away without the consent of the company, and capable, like other property, of being sold and conveyed. The city has made a contract with the company, by which it has granted to the latter what is substantially a leasehold in a portion of this street for a number of years. It has acquired rights in the street which no other person or company, nor the general public, possess." 90 Ill. 573.

This easement in the streets, together with the franchises, are assessed as of a valuation of \$50,000. It would have been better to assess these elements of value with the iron rails, ties, spikes, etc., as together constituting so much street railway.

In the case of *Louisville Railroad Company v. Bate*, *supra*, we held that an assessment upon a line of railway, as a continuous line, without a separate and independent assessment upon its franchises as a corporation, was not error. This was sound law and we adhere to it. But we do not think that case governs this.

The franchise to be a corporation is property, and as such must be assessed; it ought, however, to be assessed with the tangible property of the company and not separately. Here it has been assessed along with a valuable ease-

ment, and interest in realty, and we see no reason for quashing such an assessment as void.

The assessment of property, omitted from the assessment made by the regular assessor, is expressly authorized by the Act of 1887; we have repeatedly sustained the validity of such assessments and the constitutionality of the Acts authorizing them. *State v. Whitworth*, 8 Lea, 594; *Shelby Co. v. Miss. & T. R. Co.* 16 Lea, 401.

That part of the Act which authorizes an additional assessment when the original assessment has been upon an inadequate valuation is not new legislation. The same provision was contained in the Act of 1873, and a reassessment of the property of the Louisville & Nashville Railroad Company was sustained by this court as being authorized by that Act. *Louisville & N. R. Co. v. State*, 8 Heisk. 790. See also the case of *State v. Nashville Sav. Bank*, 16 Lea, 114.

We do not see any constitutional objections to such legislation. The objection that the actual payment of the tax as originally assessed should preclude any further or additional assessment, does not go to the constitutionality of the Act. The objection is not of serious import in any view of it. The reply of the Circuit Judge is complete in every aspect of the question. He said: "The Constitution and laws prescribed that all property should be assessed according to its value; and if by the misfeasance or nonfeasance or mistake of the assessor, it is not assessed according to its value, but upon arbitrary basis fixed by the assessor at far less than its value, why should the tax debtor escape simply because he has made payment? . . . It may be that such a law will work inconvenience and annoyance to the citizen, but all tax laws are odious and vexatious. It is said the citizen ought to know when he is through with the tax gatherer; but he will know when he has paid his taxes on his property according to its value. He will know then he is secure against reassessment, and the law will protect him."

The next objection to be considered is that the assessment of the corporate property and of the shares of stock is double taxation and prohibited by that clause of the State Constitution which requires that "All property shall be taxed according to its value."

Conceding that the effect of this provision is to prohibit double taxation, the first question is as to what is double taxation. It is not every indirect duplication of a tax which constitutes double taxation. If the duplication be only an incident of the tax, it is not double taxation in the sense of the requirement that equality and uniformity shall be preserved. Taxes may be divided into two great classes: direct and indirect. A direct tax, as defined by Mr. Mill, is "one demanded from the very person who it is intended or desired should pay it." A tax assessed as a direct tax, in the sense in which Mr. Mill uses the term, may nevertheless fall ultimately upon one other than the one desired to pay it. To illustrate: Political economists are generally agreed that the greater part of a tax assessed against a landlord falls finally upon his tenant. So a tax upon mortgages upon land in the end proves to be a tax

upon the borrower. In neither of these cases was it intended or desired that the burden of the tax should fall upon either the renter or the borrower. Yet, although it may happen that the renter and the borrower have in other forms fully paid their due proportion of taxation, the unintended duplication of their burden will not make the tax, which they have indirectly been compelled to pay, double taxation. So there seems to be double taxation of the same property to two individuals where the purchaser of property on credit is taxed to its full value, while the seller is taxed to the same amount on the debt.

Concerning all these incidents of taxation, Judge Cooley says: "Now, whether there is injustice in the taxation in every instance, in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to consider. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of such unequal results . . . There is a sense," he says further on, "however, in which duplicate taxation may be understood—and which we think is the proper sense—which would render it wholly inadmissible under any Constitution requiring equality and uniformity in taxation. By duplicate taxation in this sense is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once." Cooley, *Taxn.* 2d ed. 320, 325.

In this connection and as illustrating what he deems double taxation, he cites the instances of a tax on a merchant's stock by value, and another tax for the same purpose and by the same authority on the same stock as a part of his whole property. So he says: "The same may be said of a tax on the property of a corporation, and also on the capital which is invested in the property; if the latter is taxed as property, this is also duplicate taxation, and as much unequal as would be the taxation of a farmer's stock by value, when on the same basis it is taxed as a part of his general property. When, for instance, the money paid in as capital of a manufacturing corporation has been invested in buildings and machinery, these are what then represent the capital; and to tax the capital as valuable property distinct from that which represents it, would be to tax a mere shadow, and it would make the shadow stand for the substance in order that it might be taxed when the substance itself is taxed directly under its own proper designation." *Supra*, 226.

It is clear upon careful consideration that in the paragraph just quoted the eminent author is not speaking of a tax upon the shares in the hands of stockholders, but upon the capital as property of the corporation and taxed to it as such. This is evident, not only from the illustration he uses and which we have quoted; but in his chapter upon equality and uniformity of taxation, he says that "A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself or its stock, and may be laid irrespective of any tax-

ation of the corporation when no contract relations forbid. *Supra*, 231.

For this proposition he cites a great number of cases. If the whole of the capital stock had been converted into property and a tax was laid upon the latter, it would be difficult to see what valuation could be put upon capital, considered apart from the property into which the capital had gone, and apart from the shares in the hands of stockholders. Capital stock, when so considered, would not have any thinkable substance or shape, and as such could hardly be valued for taxation without treating the property into which it had been converted as the element which gave it taxable value, and this would be to duplicate the latter as a taxable value.

It was to the capital stock in the hands of the corporation that Judge Cooper referred when, in the case of *Bank of Commerce v. McGowan*, he said that "As a general rule the taxation of the capital stock of a corporation may protect its property in which the capital may be invested, and the taxation of the property may protect the capital stock, for the capital is usually representation of the property of the corporation and the property the representative of the capital stock." 6 Lea, 705.

Neither would be under all circumstances the representative of the whole of the other. All of the capital might not be converted into property, then something of value might remain for taxation as capital stock. So the property of a corporation might greatly exceed in value the whole of the capital, then a tax laid upon the latter might still leave an excess of property, which might be taxed without imposing a double tax upon the capital stock. The tax in the case now being considered is laid upon the property of the corporation, and the capital stock in the hands of the corporation is by express direction of the law makers omitted from assessment. The shares of stock in the hands of the stockholders, and as the individual property of the shareholders, are taxed.

Now, are these shares exempted by reason of the taxation laid upon the property of the company? It may be true that the tax upon the property of the corporation may ultimately fall upon the shareholders, but this is only so by indirection, and such a result is only an incidence of a tax laid upon this peculiar and anomalous species of property. It is no more double taxation than the instances already put of the final result of a tax upon rental property or mortgaged land, or that upon property sold upon a credit where the debt is also taxed in the hands of the seller. That a tax upon the shares laid upon the owners and a tax upon the corporate property is not double taxation, has been settled law in this State for half a century. The opinions of our predecessors upon this subject are numerous and the constitutionality of such taxation has been vindicated by reasoning so forcible and exhaustive that we cannot hope to add to their strength. *Union Bank v. State*, 9 Yerg. 490; *McLaughlin v. Chadwell*, 7 Heisk. 389; *Memphis v. Easley*, 6 Baxt. 555; *Nashville Gas-Light Co. v. Nashville*, 8 Lea, 406; *South Nashville Street R. Co. v. Nashville*, MS. Nashville, 1880.

We have already seen the view taken by Judge Cooley upon this question, which he 2 L. R. A.

supports by opinions from a large majority of the States of this Union. The Supreme Court of the United States, in a number of opinions, has taken precisely the same view of this question.

In the case of *Farrington v. Tennessee*, a case which went up from this State, Mr. Justice Swayne so clearly defines the distinction between the capital stock and the property in shares in the hands of the stockholders that we cannot refrain from quoting a paragraph from his opinion:

"The capital stock," says the Judge, "and the shares of the capital stock, are distinct things. The capital stock is the money paid, or authorized or required to be paid in, as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it may be invested in. If a large surplus be accumulated and laid by, that does not become a part of it. The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. It is a trust fund held by the corporation as a trustee. It is subject to taxation like other property. If the bank fail, equity may lay hold of it, administer it, pay the debts and give the residuum, if there be any, to the stockholders. If the corporation be dissolved by judgment of law, equity may interpose and perform the same functions." "The shares of the capital stock are usually represented by certificates. Every holder is a *cestui que trust* to the extent of his ownership. The shares are held and may be bought and sold and taxed like other property. Each share represents an aliquot part of the capital stock. But the holder cannot touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon the dissolution of the institution each shareholder is entitled to a proportionate share of the residuum after satisfying all liabilities. The liens of all creditors are prior to his. The corporation, though holding and owning the capital stock, cannot vote upon it. It is the right and duty of the shareholders to vote. They in this way give continuity to the life of the corporation and may thus control and direct its management and operations. The capital stock and the shares may both be taxed, and it is not double taxation. The bank may be required to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends." 95 U. S. 686, 687 [24 L. ed. 560].

The later case of *Tennessee v. Whitworth*, 117 U. S. 129 [29 L. ed. 830], has been cited as in conflict with the *Farrington Case*. There is no conflict between the cases as we understand them. The *Whitworth Case* involved a claim of exemption from taxation by the shareholders by virtue of the charter of the Nashville & Chattanooga Railroad, which provided that the capital stock of the company should be forever exempt from taxation, and that the property of the company should be exempt for the period of twenty years, and no longer. The court held that the exemption of capital stock meant an exemption of the shares in the hands of the shareholders, this view be-

ing reached upon a construction of the words of the charter. Two distinct things were held to be exempted: the property of the corporation for twenty years, and the capital stock forever. That the same thing was not meant by "capital stock," which had been exempted by other express words and for a shorter term. The distinction between capital stock in the hands of the corporation and shares of stock in the hands of stockholders was distinctly recognized, *Chief Justice Waite* saying:

"It is no doubt true that the Legislature may make a difference for the purpose of taxation between capital stock in the hands of the corporation itself, and the shares of the same stock in the hands of the individual shareholders."

Counsel for the plaintiff have urged that under section 9 of the Assessment Act, the president or manager of the associations or corporations referred to in said section is expressly required to pay the tax assessed against the shares of stock out of the corporate funds, and that therefore the tax is one assessed against the corporation and hence double taxation. If the corporation were required to pay such tax whether it had dividends due to the tax debtors or not, there might be something in this objection.

Section 9 is taken from the Act of 1878. In the latter Act it was manifestly limited to private banking associations. The original section has added to it words which seemingly make parts of it apply to all corporations. Just what is meant by this section it is unnecessary to say, farther than that it has no application, in our opinion, to domestic corporations. The liability cast upon such corporations, by assessments upon stocks or bonds, is defined by the other sections of the Act. By the 8th section, it is provided that no tax shall be assessed upon the capital stock of corporations, but that they shall be taxed upon their property. It is also provided that the shares of stock and the bonds issued by such corporations shall be taxed in "the valuation of the personal property of such bondholders and stockholders in the assessment of state, county and city taxes," at the place where such corporation is located whether such owners reside at such place or not.

Section 10 requires each corporation to keep, subject to inspection, a correct list of such shareholders and bondholders, with their residences, and the amount of stock and bonds owned by each.

By section 11 a lien is declared to exist upon the shares of stock and bonds assessed under this Act, and the collector authorized to institute attachment proceedings to collect the tax in certain cases.

By the 12th section it is provided "that it shall be the duty of the president or managing officer of every such bank or other corporation doing business in the State to retain so much of any dividend or interest belonging to such stockholder or bondholder as may be necessary to pay any and all taxes assessed in pursuance of this Act, until it shall be made to appear to such officers that said taxes have been paid."

From these provisions it is most obvious that the tax is not to be assessed against the corporation, but against the shareholders and bond-

holders individually. The last section cited impounds in the hands of the corporation any dividends or interest, or so much thereof as may be necessary, which may be due or which may thereafter become due, to such shareholder or bondholder, and by implication authorizes the corporation to pay out of the fund so due to the tax debtor the taxes assessed upon the stock or bonds held by such tax debtor in the corporation. The company is thereby made an agency of the taxing power for the collection of the tax due from its shareholders or bondholders. It is under no obligation to pay the tax out of its own funds, being only required to reserve from dividends or interest a sufficiency to pay the particular tax.

Clearly, if the corporation should, after such assessment, pay out to its shareholders any dividend without reserving for the payment of the tax, it would voluntarily make itself liable for the payment of the tax. This is the full limit and measure of the responsibility imposed upon such corporations by this Act.

If the corporation is a non-dividend-paying concern, and this condition is real and not colorable, this scheme for the better collection of such a tax will be wholly inoperative. Is this plan for the collection of the tax upon shares of stock liable to taxation subject to any constitutional objections? We see none. It is nothing more than a garnishment proceeding against the corporation, to better secure the payment of the tax out of the dividends due or to become due. No injustice is done the company. The plan looks to a cheap, speedy and sure means of collecting a tax otherwise exceedingly difficult to either assess or collect. The shares are the things taxed. It matters not who may own them, the dividends attach to and belong to the owner of the shares at the time it is declared, and out of these dividends the sum necessary to pay the tax must be reserved. Such methods of collection are not at all unusual or unique.

"For the most part," says Judge Cooley, in his work on Taxation, "the taxes levied by the States are collected of the persons taxed, or are enforced against the property in respect to which they are imposed. In a few cases, however, in which no injustice could result from such a course, the State may reach the party taxed by indirection and collect in the first instance from some one else, who in turn will become collector from the person on whom the tax is really imposed. The reason is that in such cases it is more convenient to the State, and perhaps makes more certain the collection; and it could be resorted to only when the case is such that injustice could result to no one. A case of this kind is where the tax is imposed on the dividends or other receipts of shareholders from the profits of corporations, or upon their shares, and the corporation is required to make the payment, which it would then deduct from the payments to be made to shareholders. Cooley, Taxn. 2d ed. 432.

Indeed, much more vigorous and onerous statutes of this kind have been sustained in other States. The federal government collected an income tax from shareholders and bondholders in corporations by requiring its payment by the corporation in the first instance and permitting the company subsequently to

deduct the same from dividends or interest afterwards due. The act was held valid. *Haight v. Pittsburg Ft. W. & O. R. Co.* 73 U. S. 6 Wall. 15 [18 L. ed. 818].

The State of Kentucky had a statute which required corporations to pay the tax assessed against the shareholders of banks, and in turn collect the same from the dividends next due such tax debtor.

This Act was held valid by the Supreme Court of the United States, *Mr. Justice Miller* saying that "The mode under consideration is the one which Congress itself adopted in collecting its tax on dividends and on the income arising from bonds of corporations. It is the only mode which certainly and without loss secures the payment of the tax on all the shares, resident and nonresident, and it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous and wealthy corporations of those States." *First Nat. Bank v. Ky.* 76 U. S. 9 Wall. 363 [19 L. ed. 701].

An Ohio statute very similar in its provisions to our own was held valid and obligatory upon the corporations affected. *Cummings v. Merchants Nat. Bank*, 101 U. S. 156 [25 L. ed. 904].

Many other States have similar statutes, and constitutional objections have not been sustained as to the collection of the tax on shares. *Malby v. Reading & O. R. Co.* 52 Pa. 140; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *New Orleans v. Louisiana Sav. Bank & S. D. Co.* 81 La. Ann. 826; *Baltimore v. Baltimore City Pass. R. Co.* 57 Md. 81; *St. Albans v. National Car Co.* 57 Vt. 68; *Lionberger v. Rouse*, 43 Mo. 67; *Am. Coal Co. v. Allegany Co.* 59 Md. 197.

The next question to be considered is as to the taxability in this State of shares of nonresidents, it appearing that certain of the stockholders of this company reside in other States. Since the Act of 1869 the *situs* of stocks in domestic corporations has for purposes of taxation been fixed at the place where the corporation was located. Shares of stock are an anomalous kind of personal property. The corporation itself, being an artificial creation of the law, dwells only in law in the State of its creation. *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286 [17 L. ed. 180]; *Young v. South Traders Iron Co.* 85 Tenn. 189.

Its shares are only transferable on the books of the corporation. *Supra*. They only represent the interest the owner has in the dividends of a business carried on by the officers of the company as the agents of the corporation, and protected by the laws of this State. In the event the corporation shall wind up, the shares represent the interest the stockholders may take in the assets remaining after payment of debts. While the company is a going concern, its affairs are controlled and its management directed by vote of the shareholders. Shares are not debts of the corporation as are its bonds or other obligations. The fiction that personal property has no *situs* but that of the owner will always yield whenever the actual fact is opposed to the fiction, and when the purposes of justice likewise demand that the actual *situs* shall be examined. Shares are a species of intangible personal property. They have no actual *situs*, such as tangible personals may have.

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The *situs* of such an anomalous kind of intangible property may very well be fixed, for purposes of taxation, at the place where the corporation has its *situs*. Such a *situs* is more nearly in accord with the fact than any other, and the location is in accord with reason and the demands of justice. The validity of legislation thus fixing the place of taxation has been more than once vindicated by this court. *McLaughlin v. Chadwell*, 7 Heisk. 889; *Nashville v. Thomas*, 5 Coldw. 600; *Bedford v. Nashville*, 7 Heisk. 409.

Precisely similar legislation has been sustained by the Supreme Court of the United States and by the supreme courts of nearly every State in the Union. The constitutionality of such statutes is no longer open to controversy. *Tappan v. Merchants Nat. Bank*, 86 U. S. 19 Wall. 490 [23 L. ed. 189]; *First Nat. Bank of Mendota v. Smith*, 65 Ill. 44; *American Coal Co. v. Allegany Co.* 59 Md. 186; *St. Albans v. National Car Co.* 57 Vt. 81; *People v. Tax Comrs.* 85 N. Y. 428.

A question has been made upon the argument that each shareholder so assessed is entitled to an exemption of \$1,000, as provided by article 2, § 28, which exempts \$1,000 worth of personal property from taxation in the hands of each taxpayer.

This is an agreed case. No such question was submitted or ruled upon by the circuit court; and in this situation no demand for exemption being made in the court below, we think the question is not raised on this record. But upon another ground the contention cannot be here sustained, and that is that it does not appear that such of the shareholders as are entitled have not, in fact, been allowed this exemption by the regular assessor. He is presumed to have done his duty, and it devolves upon the taxpayer when he is assessed upon omitted property, or when the assessment is ancillary to the principal assessment of the tax debtor, to show that he has not at some other time or place received such exemption.

The agreed case shows that in 1884 this company issues bonds to the amount of \$132,000, secured by a mortgage on all of its property. These bonds were divided among its then shareholders. The only consideration seems to have been that the stockholders had for several years suffered all the profits to be expended in extending and improving the corporate property. Having thus voluntarily submitted to a deprivation of dividends, they regarded themselves as entitled to a "bond dividend." The contention of the State and county, that because these bonds were issued without consideration, therefore they are to be treated and taxed as an additional issue of stock is unsound for many reasons. It might be enough to say that they have not been assessed as stock, but as bonds held by unknown owners.

This is not like the case of *Morrow v. Iron & Steel Company*, 3 L. R. A. 37, decided at this term. This was an organized and going corporation, its capital stock all being paid up. The validity of such bonds as they may affect creditors is a question not before us on this record. It is enough, however, that the validity of the assessment, as made, is the only question which we can consider. These bonds were assessed as bonds to the amount of \$132,000 in

the hands of "unknown owners." We are not to be understood as assenting to the validity of an assessment of a larger lot of bonds owned by many different owners, as a block of \$182,000 to "unknown owners." We waive the consideration of this question.

By sections 8, 10, 11 and 12, of the Assessment Act under consideration bonds issued by corporation are placed for purposes of taxation upon precisely the same footing. The tax *situs* of the bonds of such companies is fixed for purposes of state, county and city taxation at the place, county or city where the corporation is located, regardless of the actual residence of the owners of such bonds. The corporation is made the agency of the State, county and city for the collection of the taxes assessed by the several governments, being required to reserve from the interest due on the bonds a sufficient fund to pay the tax assessed against each bondholder. The assessed bondholders being unknown are of course not parties to this proceeding. But inasmuch as a duty and a liability is imposed by the law upon the corporation owning these bonds, it very rightly insists that the law be construed, and its duty defined under the law, with reference to the tax thus assessed upon its bondholders. That the officers of this company should not know who are now owners of these bonds is not remarkable. The bonds bear coupons and are negotiable and have thirty years to run. Such bonds, when sold, require no transfer on the books of the company. The coupons mature every six months and are payable at the American National Bank, and as the agreed case shows are paid by the bank, upon presentation, out of funds of the company placed there for that purpose. Some of these bonds were originally owned by residents of other States; and from the fact that coupons from such bonds are sent to the bank for payment from other States, it may be presumed that some of the bonds are now owned by nonresidents.

Are bonds owned by nonresidents subject to taxation in this State? In a case involving the power of the State to tax bonds owned by nonresidents, *Mr. Justice Field*, in delivering the opinion of the court, said: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imports, excise or licenses, it must relate to one of those subjects. It is not possible to conceive of any other, though as applied to them the taxation may be exercised in a great variety of ways . . . It may touch business in the almost infinite forms in which it is conducted in professions, in commerce, in manufactures and in transportation, unless restrained by provisions of the Federal Constitution; the power of the State as to the mode, form and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 218 [51 L. ed. 186].

"These," says Judge Cooley, in his able and exhaustive work on Taxation, "are conceded or adjudged principles and have ceased to be the subject of discussion or argument." P. 22. 2 L. R. A.

The power of the State must then rest upon the proposition that these bonds are constructively within the jurisdiction of the State, although their owners have no residence here. When a nonresident is the owner of tangible property, real or personal, which has its actual *situs* here, there is no doubt but that the jurisdiction of the State over such property for the purposes of taxation is complete. This is true notwithstanding the fiction of the law that personal property has no *situs* but that of the owner. In such case the fact that the actual *situs* of such personalty is here authorizes the taxation.

Says Judge Story: "The general doctrine is not controverted that although movables are for many purposes to be deemed to have no *situs*, except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined." Conf. Laws, § 500.

Upon this ground, the fiction as to the *situs* of personalty is overcome by an examination as to the actual *situs*; and the purposes of justice requiring that property actually within the State and protected by the State shall bear its just proportions of the expenses of government renders its taxation legal and just. Cooley, Taxn. 2d ed. 373, and cases cited by him.

The bonds sought to be taxed are undoubtedly property, and personal property. They are, however, intangible property, and can have no actual *situs*. They are the mere evidence of debts by the company to the holder or owner thereof. The bond is evidence to support a demand for payment of money. Its destruction by accident would not discharge the debt. The debt would remain and might still be demanded and recovered. *Kirtland v. Hotchkiss*, 100 U. S. 498 [25 L. ed. 562].

The bond is property, but it is the property of the owner—the creditor, and not the debtor. It is not like shares of stock, which is not a debt but which represents the interest owned by the stockholder in the profits of a business conducted here by his agents. The owner of the bond has no interest in the business of the corporation, and no control over it whatever. The losses of the business must be borne and its profits shared by the stockholders. In all this the creditor, by bond or otherwise, has no interest other than that which every creditor has in seeing his debtor preserve an ability to meet his debts. A tax upon the bond is not a tax upon the corporation; it is a tax upon the owner of the bond. Bonds are undoubtedly subject to taxation. But when? By what government? The answer cannot be doubtful. They can only be taxed by the government having jurisdiction of the owner. The *situs* of intangible personalty, such as bonds, notes, accounts, etc., is necessarily the *situs* of the owner.

This identical question was decided in the *Case of the Foreign-Held Bonds* already cited. The case arose under a Pennsylvania statute similar to our own, by which it was sought to tax in Pennsylvania bonds owned by nonresidents, upon the ground that they had been issued by a Pennsylvania corporation and were secured by a mortgage upon property situated in that State. Discussing this question of the *situs* of such bonds, the court said:



"Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditor. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile wherever that may be. These debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways and supported by citations from numerous adjudications; but no number of authorities and no forms of expression could add anything to its obvious truth." 82 U. S. 15 Wall. 320 [21 L. ed. 187].

That these debts are secured by a mortgage upon property situated here can make no difference. The Supreme Court of Pennsylvania had sustained such taxation upon the ground that the *situs* of the security gave the State jurisdiction. *Maltby v. Reading & C. R. Co.* 53 Pa. 140.

But this theory was repudiated and its unsoundness demonstrated in the case just cited from 15 Wallace. Upon this the court said: "The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property nor its protection was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholders or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was, both at law and in equity, a mere security for the debt." 82 U. S. 15 Wall. 322 [21 L. ed. 188].

In this State, as in Pennsylvania, the mortgagee's interest in the mortgaged land is but a security for the debt—the debt being the principal and the land only an incident. *McGan v. Marshall*, 7 Humph. 121.

In Iowa it was held that mortgages held by nonresidents on property in that State were not subject to taxation in Iowa. *Davenport v. Mississippi & M. R. Co.* 12 Iowa, 589.

So in California it was held that the owner of a judgment of foreclosure of a mortgage on lands could not be taxed in the county where the mortgaged lands were, he being a citizen of another county in the State—the debt being held to have only the *situs* of the owner, the mortgage being a mere security. *People v. Eastman*, 25 Cal. 603.

That the legal fiction as to the *situs* of personal will, under certain circumstances, yield is most true. If the State had in the charter of this company authorized the issuance of bonds only upon condition that they should be taxable here, and this provision had been contained in the bonds and coupons, it could not be doubted that each purchaser would take such bonds with notice, and would by contract 2 L. R. A.

subject himself to taxation here. In such a case the purchaser would undoubtedly take this burden into consideration when he bought and abate his price accordingly, and thus the tax would fall at last upon the debtor. The fiction that debts have no *situs* but that of the creditor is founded upon a consideration of the nature of such property. It is not property save in the hands of the creditor. "It is a certain rule," says Lord Mansfield, *O. J.*, "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other it may be contradicted." Comp. 177.

"No fiction," says Sir Wm. Blackstone, "shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience which might result from the general rule of law." 3 Com. 48.

To sustain the jurisdiction of the State over these bonds for purposes of taxation, we must ignore or contradict the legal fiction which ascribes to such property the *situs* of the owner. If the actual *situs* upon examination should prove to be here, then the legal fiction must yield. But the actual *situs* is not here; and to sustain the jurisdiction we must create a fictitious or constructive *situs*, based upon the notion that debts are in some way property in the hands of the debtor, or that, the security for the debt being here, therefore the debt is here. By no sort of fiction can the jurisdiction of the State be held to extend to the property which a nonresident has in a debt which he holds against a resident. The creditor cannot be taxed, because he is not within the jurisdiction, and his property cannot be taxed because it is not within the jurisdiction. *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300 [21 L. ed. 179]; *St. Louis v. Wiggins Ferry Co.* 78 U. S. 11 Wall. 430 [20 L. ed. 194]; *People v. Tax Commr.* 23 N. Y. 224; *Goldart v. People*, 106 Ill. 25; *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 344.

Another question arises. The holders of such bonds are required to be assessed for county taxation and for city taxation at the place where the corporation is located. Now may a citizen and resident of a county, other than that of the location of the corporation, be assessed for county taxation by a county in which he does not reside and in which he has no property? The same jurisdictional defect which prevents the State from assessing bonds of nonresidents of the State exists with reference to the county. Davidson County has assessed all the bonds issued by this corporation. This Act authorizes it. Can the Legislature authorize a county to assess, for county purposes, property not within the county? Is the Act valid in so far as it authorizes either the County or City of Nashville to assess bonds owned by nonresidents of the county or city?

We have already decided that the *situs* of debts is that of the creditor and not that of the debtor. The Constitution authorizes the Legislature to empower counties and towns to assess taxes. This power has two limitations. The taxation must be applied to subjects within the jurisdiction of the county or the city, and it must be exercised only for county or municipal purposes. The State cannot empower a county or city to tax property not within the jurisdic-

tion. The injustice which would result if it were otherwise would be most obvious. If Davidson County could tax the property of a resident of another county just because that property happened to be a debt due by a resident of that county, it would be a gross injustice. This consideration makes the conclusion we have reached upon constitutional grounds accord with every sense of right and justice.

There are two other infirmities which attach to this part of this Act. The first is, that the tax is imposed upon the holder of the bond; the corporation is required to reserve the tax from interest due; the bonds are coupon bonds and run for thirty years; such coupons may be detached and are negotiable. If the coupon should be owned by A and the bond by B, the deduction of the tax from the coupon would be to compel A to pay the tax of B. This precise question arose and was determined in the case of *Hartman v. Greenhow*, when it was held that the tax against the bond was not collectible from the interest where it appeared that the coupon belonged to one and the bond to another. 103 U. S. 684 [26 L. ed. 276].

The second infirmity is this: the tax against nonresidents of the State is void *in toto*; the tax of Davidson County upon bonds not owned in the county is void; the tax of the City of Nashville upon bonds not owned in the city is void. Now, when a coupon is presented for payment, how is the company to determine whether it may lawfully reserve the tax from its interest payment? If the coupon does not belong to the owner of the taxed bonds, it cannot reserve any tax. If it does not belong to a resident of the State, it cannot reserve any tax. If it does not belong to a resident of Nashville, it cannot reserve the city tax. If it does not belong to a resident of the county, it cannot reserve either the county or city tax.

The burden imposed by the Act upon the corporation with respect to the collection of the tax lawfully assessed is too onerous and threatens gross injustice. It would have no way to secure itself against liability to either the bondholder, whose interest it has illegally detained, or to the State for failure to reserve the tax justly due, except by requiring every coupon to be sued upon. The whole scheme of the Act, in so far as it undertakes to convert corporations into agencies for the collection of a tax upon their bondholders, is fatally defective and void. The Act is not limited to collection of state taxes alone, but undertakes to provide machinery for collection of county and city taxes as well. The Act is so faulty as a scheme for collecting the tax on bonds that it cannot be sustained. We therefore hold the Act invalid in so far as it impounds interest due by corporations, or imposes on them any duty or liability on account of the tax assessed upon their bonds. Other objections to the validity of the Act in this particular have been argued, but it is unnecessary to pass upon them. The assessment against unknown holders of bonds is void. The assessment was made, as we have before stated, under the provisions of the law authorizing assessment of omitted property. The Act requires notice to be given to the taxpayer, his attorney, agent or representative. Notice was given to the corporation as the agent of the bondholder. Under the view we have taken of the Act, the corporation is not the agent or representative of the bondholders; hence, the assessment of these bonds as omitted property is void.

*The judgment of the Circuit Court will be reversed in this matter, and as to the assessment on franchisees or right of way; affirmed in other particulars. Costs will be divided as indicated by the Circuit Court.*

## TEXAS SUPREME COURT.

E. HAWES *et al.*, *Appts.*,  
v.

Emma J. NICHOLAS.

(...Tex....)

**The revocation of a will by intentionally destroying it will not revive a former will which was expressly revoked by the later one.**

(January 23, 1889.)

**A**PPEAL by contestants, from a decree of the District Court of Calhoun County admitting to probate, upon appeal from the County Court, the will of H. W. Hawes, deceased.  
*Reversed.*

The facts sufficiently appear in the opinion.

*Mr. E. Hawes* for appellants.

*Messrs. Glass, Callender & Proctor* for appellee.

**NOTE.—Revocation of will, effect of.**

The revocation of a subsequent will does not have the effect to revive the prior will. *Brown v. Brown*, 8 El. & Bl. 378; *Hale v. Tokelove*, 14 Jur. 317; *Boulcott v. Boulcott*, 2 Drew. 25. See *Lawson v. Morrison*, 2 U. S. 2 Dall. 286 (1 L. ed. 384); *Boudinot v. Bradford*, 2 U. S. 3 Dall. 206 (1 L. ed. 375); *Re Dietz*, 4 Cont. Rep. 842, 41 N. J. Eq. 231.

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**Henry, J.**, delivered the opinion of the court:

In the year 1878 H. W. Hawes executed a will, by which he devised specified portions of his estate to one of his sons and his granddaughter Emma J. Nicholas. This paper was styled a "deed," and shortly after its execution was acknowledged by the maker, and recorded as a deed by the County Clerk of Calhoun County. The instrument remained in the custody of one of the devisees, and was produced by him after the death of the maker.

In the year 1879 the said H. W. Hawes executed another will, in which he expressly revoked all prior wills, and which was inconsistent in some material respects with the will of 1878. In 1888 the testator destroyed the will of 1879 by tearing and burning it. He died in the year 1888.

In the year 1887 appellee, Emma J. Nicholas, filed in the County Court of Calhoun County an application to probate the will of 1878, which she produced and proved. This application was opposed by the widow and a number of the children of the deceased, H. W. Hawes.

The contestants pleaded, as reasons why the will of 1878 should not be admitted to probate, the execution and subsequent destruction of the will of 1879.

The case was tried in the county court, and appealed to the district court.

In the district court exceptions to the answer of contestants were sustained, and the will of 1878, upon proper proof of its execution being produced, was admitted to probate. The contestants offered, but were not permitted to prove, the execution as required by law of the will of 1879, containing a clause expressly revoking all previous wills, and provisions inconsistent with the will of 1878, and the subsequent destruction by tearing and burning of the will of 1879.

The contestants appeal, and assign as error that "The court erred in sustaining the exceptions of applicant to contestants' answer, and in holding that the destruction by the decedent of the will of 1879, in 1888, had the effect of reviving the will of 1878."

The question as to whether, and under what circumstances, the destruction of a subsequent will, will revive a prior one, has been much discussed. The authorities are conflicting. In 4 Kent's Commentaries, 582, it is said: "If the first will be not actually canceled, or destroyed, or expressly revoked, on making a second, and the second will be afterwards canceled, the first will is said to be revived. But the first will is not revived if the testator makes a second, and actually cancels the first by an absolute act rendering it void, and then cancels the second will. It will, in such a case, require a republication to restore the first will."

The attorneys for appellee quote in their brief the following language from Redfield on Wills: "The general rule seems to be firmly established from an early day that a later will, revoked, will not prevent an earlier and inconsistent one from remaining in force; and it makes no difference whether the later will contained an express clause of revocation or not." Vol. 1, pp. 208, 309.

But further on the same author says: "It seems to have been regarded as an unsettled question in the English courts, both in Westminster Hall and Doctors' Commons, whether the cancellation of a later revoking will would have the effect to revive the former will thus revoked. The result of the most careful examination of the cases leaves the question in a state of distressing uncertainty. The most we can say is that it depends upon circumstances; and that extrinsic evidence is admissible, in regard to the intention of the testator, was freely admitted before the late statute, which required some positive act of revival." *Id.* 320, 322.

The question is discussed in the case of *Colvin v. Warford*, 20 Md. 391, and there it is said: "The authorities undoubtedly established the principle that an unconditional revocation is not essentially testamentary in its nature, and, like the will containing it liable to vary with the testamentary purpose, but a positive consummated act, producing an immediate and conclusive effect. . . . The principle established in the ecclesiastical courts of England is that the canceling of a will containing an express revocation of a previous will does not necessarily revive the will revoked, although

the presumption of an intention on the part of the testator to revive the previous will may be raised by his destruction of the revoking will."

In the case of *James v. Marvin*, 8 Conn. 577, Chief Justice Hosmer says: "An express revocation is a positive act of the party, which operates, by its own proper force, without being at all dependent on the consummation of the will in which it is found, and absolutely annuls all precedent devises." "It is because an express revocation is a positive act of the party, independent of the will which may happen to contain it, and operating instantaneously, and *per se*. As a clear consequence resulting from this principle, all prior wills are recalled or reversed—the proper meaning of the word 'revoked'—and must remain in this condition until revived by republication. . . . A deed of revocation, separate from a will, has the effect of annulling a prior will instantaneously; and the operation is the same whether the revoking clause be in deed or will, for it is never a necessary part of the latter."

In the case of *Peck's Appeal*, 50 Conn. 563, it appears that Lucy Peck made a will in 1875, and in 1880 made another inconsistent with the first. She died not long afterwards. The last will was never found, but the first one was. The new will did not expressly revoke the first one. The court held that "Prior to 1821 any will might be revoked in writing, and it was not necessary that the writing should be executed with every particular formality. It was then held that a revocation contained in another will was not ambulatory, but took effect immediately, and that the will revoked could not be revived without a republication."

In 1821 a statute enacted that "No devise of real estate shall be revoked otherwise than by burning. . . . or by some other will or codicil in writing," etc. That section required that a written revocation should be in another will. The statute changes the aspect of the question. Before the statute any written declaration to that effect revoked a will, irrespective of any statute, and without regard to the death of the testator. Now, the statute requires that the writing, in order to have that effect, must itself be a will or codicil, and executed with all the formalities required for such instruments.

In our State a statute prescribes the method of revoking a will to be "by a subsequent will, codicil or declaration in writing, executed with like formalities, or by the testator destroying, canceling or obliterating the same, or causing it to be done in his presence." Rev. Stat. art. 4861.

A written declaration, properly executed, as effectually revokes a will from the date of its execution as does its destruction. If the purpose to revoke is sufficiently expressed, and the writing is properly executed, it cannot be controlled or limited by the name given the instrument, or by its containing other provisions. If the will of 1879 was properly executed as a will, and contained a clause expressly revoking the will of 1878, we do not think that the subsequent destruction of the will of 1879 had the effect of reviving the will of 1878.

We think there was error in sustaining exceptions to the answer of contestants, and that for this cause *the case must be reversed*.

# RÉSUMÉ OF THE DECISIONS REPORTED IN THIS BOOK.

SUBJECTS Discussed and Points Decided during First Quarter of 1889, and Reported in this Book, Classified as follows:

1. GOVERNMENTAL AND POLITICAL RELATIONS.
2. COMMERCIAL RELATIONS.
3. CONTRACTUAL RELATIONS.
4. FIDUCIARY RELATIONS.
5. DOMESTIC RELATIONS.
6. SOCIAL RELATIONS.
7. PROPERTY AND PROPERTY RIGHTS AND REMEDIES.
8. DAMAGES FOR TORTS.
9. CRIMINAL LAW.

## 1. GOVERNMENTAL AND POLITICAL RELATIONS.

*United States Government; the Judiciary.* Congress in establishing "inferior courts" must confer upon the judges thereof the constitutional tenure of office, that of holding "during good behavior," before they can become invested with judicial power. p. 239.

*Jurisdiction of circuit courts.* Equity jurisdiction of the federal courts may extend suits for discovery and distribution of assets held by an executor *de son tort*, although the probate system of the State afforded a complete remedy. p. 235. Jurisdiction is not conferred by making a necessary party a nominal defendant in order to comply with the requirement of the Act of Congress as to diverse citizenship of parties. *Id.* To give jurisdiction to federal circuit courts, where two or more parties, whose interests are so separate that any number of them may proceed with the litigation, the interests of each, independent of the others, must amount to \$2,000. *Id.* The courts of the United States, sitting in equity, may administer in suits of which they have jurisdiction, equitable rights peculiar to the laws of the State where the courts are held. p. 158. Where citizens and residents of Pennsylvania, bring their bill in the Circuit Court of Georgia, against citizens of Georgia, and a citizen of New Jersey, and a citizen of New York, and claim therein an equitable lien upon a trust in the assets of the New Jersey citizen, which are entirely within jurisdiction of the court and in which assets all the parties are in a more or less degree interested, the jurisdiction of the circuit court depends upon the *status* of the property upon which the lien or trust is asserted rather than upon the residence of the several defendants. p. 120. In an action brought by the assignee of a claim founded on contract, it must be shown that the suit could have been maintained by the assignor, if no assignment had been made. p. 748. And an action for damages for breach of a written lease is within this rule. *Id.*

*Removal of cause from state court.* A citizen of Alabama brought suit against a citizen of Georgia, a mere stakeholder; a citizen of Ohio, the real defendant, was made a party and re-

moved the cause to the United States Circuit Court. On motion to remand, *held*, that the parties being citizens of different States and more than the jurisdictional amount being involved, the defendant nonresident could remove the case. p. 469.

*Accounting with Treasury Department.* While assignments, transfers, etc., before the issuance of a warrant therefor, are void if the assignors or principals revoke and repudiate them before payment, yet the accounting officers of the Treasury may recognize them, state accounts in their favor, and pay at any time before revocation. Such payments will be binding and conclusive upon the parties and a complete discharge of the indebtedness. p. 571. A United States Marshal may pay witness fees to others than those in whose favor such fees are taxed upon orders, assignments or transfers thereof by the witnesses. Payment of such orders is a valid discharge of the indebtedness. *Id.* Unrevoked and undisputed orders and transfers of such claims against the United States are so far valid that if payment be made thereon the assignors will be estopped from setting up any other claim on their behalf. Such payment is a discharge of the indebtedness. *Id.* While the accounting officers of the Treasury may state and certify accounts in favor of purchasers, assignees or transferees of claims against the United States whose assignments are not controverted, it is not obligatory, but they may exercise their discretion in the matter, with due regard to the convenience of parties and the Government. *Id.* The Act of February 23, 1875 (18 Stat. at L. 838), which requires that the accounts of district attorneys, clerks, marshals etc., shall be forwarded, "when approved," "to the proper accounting officers of the treasury," construed. p. 229.

*Accounting with Post Office Department.* Where the quarterly returns of a postmaster have been regularly rendered to the department and have been passed upon by the auditor, and the balances therein found to be due the Government have been carried into a general account each quarter, such action by the auditor is a complete allowance of the commissions claimed and adjustment of such returns. p. 805. Where the credits in the general accounts show full payment of all balances

charged, so that a complete balance could be struck, it is a complete settlement and commissions are covered by it; and the Postmaster-General cannot "withhold" them as there was nothing to "withhold." *Id.* If, before allowance of credit for commissions, he directs that it be not made, but in lieu thereof credit is given for the amount of the allowance deemed reasonable, the balance thereby shown to be due the Government would be *prima facie*, but not conclusive, evidence against the postmaster. *Id.* Where a postmaster's account has been adjusted, allowed and fully paid, accounting officers cannot, after the postmaster's term of office has expired, evolve an *ex parte* balance in favor of Government solely upon a general allegation of fraud in accounts formerly passed upon, so as to make such balance *prima facie* evidence against the postmaster and his sureties. The allegations must be specific and be sustained by competent evidence. *Id.*

*Military law.* The enlistment of a minor without the written consent of his parent or guardian is invalid, and the invalidity may be claimed by the minor himself either before or after his majority. p. 332.

*Regulation of commerce.* The power to regulate commerce among the several States comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried; Congress may make any regulation to secure and maintain the safety and convenience of the waterway. p. 330. The regulation forbidding a steamboat to carry more passengers than allowed in her certificate of inspection applies to such boats engaged in carrying passengers on a navigable water of the United States between ports of the same State only. *Id.*

*Interstate Commerce Commission.* The Act to Regulate Commerce does not undertake either to create an "inferior court," or to invest the commission appointed thereunder with judicial powers or functions. p. 289. An indictment under the Interstate Commerce Act (§ 2) for "unjust discrimination," need not aver by what device defendant managed to discriminate (p. 444); and counts under the third section for "undue and unreasonable preference" and for "undue or unreasonable prejudice or disadvantage" need not allege that the service was rendered "under substantially similar circumstances and conditions." It is sufficient if it shows that accused has committed an act which gives one shipper or class of shippers an advantage or subjects others to disadvantage. *Id.* It must show with precision that the lower rate was for transportation between the same points as the higher rate. *Id.* Under the sixth section, a count which alleges the allowance of a rate less than that established and published "in force on that date" sufficiently negatives the inference that it might have been reduced without notice. *Id.* In the prosecution of a railroad agent, it need not be alleged or proved that the act complained of was done under authority conferred by the principal; it is sufficient to show that accused was in fact its agent. *Id.*

*State Constitution; passage of statutes.* Although the courts of Michigan may take cognizance of legislative journals in testing constitutionality of a statute, they cannot act upon

anything not found in the journal, nor presume that any requirement of the Constitution has not been fulfilled. p. 609. Every intendment is to be made in favor of the constitutionality of a statute. *Id.* A statute whose object as expressed in the title is to incorporate a city, which is substituted for one whose object as expressed in the title is to organize a new township, cannot be considered a new bill and invalid because not introduced within the first fifty days of the session, when the lands to be affected belong to the same county, and the original bill does not appear in the legislative journals. *Id.* The legislative practice of reading a bill twice by title and only once at length, must be regarded by the courts as a substantial compliance with the Michigan Constitution. *Id.*

*Title of Act.* The title to a statute must be such at least as fairly to suggest or give a clew to the subject dealt with in the Act. p. 739. The titles of statutes, as "An Act to Charter" a railroad company, and "An Act to Amend an Act Entitled 'An Act to Charter'" such company, relate to but one subject and are sufficient to sustain a provision in the Act authorizing counties, townships, etc., to subscribe to the stock of such company. p. 242. An Act, the title to which indicates but one subject, and that the amendment of prior statutes relating to the transportation of passengers and property through pneumatic tubes by atmospheric pressure, but whose provisions enlarge the powers of a corporation formed for such purposes by giving authority to operate a grand underground railway not less than fifteen miles long with two or more tracks through passageways, and which could not be operated by atmospheric pressure, with authority, by the consent of a board of engineer commissioners, to use any other motive power, is unconstitutional and void. p. 739.

*Inhibition of special and local legislation.* The constitutional provision that corporations shall not be created by special Act does not prohibit the assignment of a franchise to a legally organized corporation by those having the right to make the transfer. p. 92. It does not prohibit the assignment of a franchise to a legally organized corporation by persons having the lawful right to transfer the same. *Id.* When the enlargement of corporate powers becomes indistinguishable from a grant of new, substantive rights, a statute attempting to give such powers is within the purview of a Constitutional Amendment prohibiting private or local statute granting any exclusive privileges or franchises to a corporation. p. 739.

*Classification of cities.* The classification of cities, with the view of legislating for either class separately is unconstitutional, unless there exists a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demands legislation for each class. p. 577. The Pennsylvania Act dividing cities into seven classes is unconstitutional where the only possible purpose is to evade the constitutional limitation in respect to local and special laws. *Id.* It cannot go into effect and become operative till the terms of all the members of the council in office at the time of its approval have fully expired. *Id.* Local and special laws in force in some cities at the time of the

adoption of the Constitution are not affected thereby; yet other local or special laws cannot be substituted in their stead. *Id.* Whether the Legislature has transcended its power in passing a local or special Act, is essentially a question of law. *Id.*

*Police regulations.* A rule of the Boston board of police, that "No person shall sing or play, or perform on any musical instrument in the streets or public places of the city, except in connection with a funeral, a military parade or a procession for which a police escort is provided, unless licensed thereto," confers authority upon that board to regulate "itinerant musicians," and is reasonable and valid. A member of the organization known as the "Salvation Army" comes within the general phrase "itinerant musician." p. 142. That an Act was done as a matter of religious worship only will not protect one from the consequences of such act made subject to a penalty under the law. *Id.* The constitutional provision securing freedom of worship was not designed to prevent the adoption of reasonable rules for the use of streets. *Id.* It is not unconstitutional delegation of power to authorize a city council to empower its board of police to make rules and regulations in reference to itinerant musicians. *Id.* An Act of Legislature which will not be declared invalid by the courts, because it abridges the exercise of the privilege of local self government in a particular regard, which privilege is not guaranteed by the Constitution, will not be declared invalid. *Id.* The Legislature may provide that powers previously vested in cities or towns shall be appointed by the Governor, and may provide the mode of appointment and qualifications of appointees. *Id.* An ordinance of a city of the second class that declares it unlawful for any persons, society, association or organization, under whatsoever name, to parade any public way of the city, shouting, singing or beating or playing upon any musical instruments, to attract an unusual crowd upon such way, without the written consent of the mayor, or president of the city council, city clerk or city marshal, is unreasonable, illegal and void. p. 110. Power to fix rates to be charged by a telephone company is not conferred upon a city by provisions of its charter giving it power to "license, tax and regulate," businesses; nor is such power included in the general police power of a municipal corporation. p. 278.

*Liability for neglect of duty.* A municipal corporation cannot abrogate or dispense with the duties and liabilities imposed upon it by its charter in respect to the care of streets. p. 601. A city ordinance permitting a person engaged in building, to deposit materials upon the street for one half of its width is no defense to an action against the city for personal injuries caused by obstructions permitted to remain without light or other signal of warning. *Id.* A recovery can be had against a municipal corporation only where it negligently performs or negligently fails to perform a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. p. 712. It is not liable for damages caused by the falling of a wall of a burned building left standing after the fire, although it had been notified of the fact that the wall was danger-

ous. The owner of the burnt building is liable. *Id.* The owner of the building in such case is liable and his liability is not relieved by the promise of a city officer to take charge of, and, if necessary, take down the wall. *Id.*

*Liable for negligent acts of its employes.* A town which maintains a farm for the support of its paupers and from the surplus income boards paupers of other towns for pay, and also boards persons engaged to work upon its highways, is liable for injuries resulting to third persons from negligence in conducting such farm. p. 500. An employe on a town farm, maintained for the support of paupers is so far the servant of the town that it is liable for injuries resulting from his negligence. *Id.* A blind person walking unattended upon a public street is bound to use only ordinary care to avoid accidents. What care is reasonably necessary to insure his safety is a question for the jury in view of all the circumstances. *Id.* But a city is not liable for injuries resulting to a traveler upon its highway while attempting to cross a draw bridge, from the momentary negligence of the gateman. p. 447.

*But not liable for acts of its officials.* A city is not liable for injuries or damages caused by neglect of its officers in the performance of their duties. p. 866. Street commissioners who, after advertising for proposals fail to enter into any contract, undertake to perform the work themselves and to carry it on through other persons employed by them, are individually liable for injuries sustained by a person through the falling of a derrick in consequence of the negligence of their servants. *Id.* When street commissioners exercise judicial and legislative powers, they are not amenable to anyone except the public for errors, negligence or misfeasance in the matters within their jurisdiction, but become liable when they undertake to carry out their plans and do the work themselves through agents and servants. *Id.*

*Dedication for highway purposes.* No dedication for highway purposes, of a covered surface of a canal feeder belonging to the State, can be inferred from public use for more than twenty years. The land being appropriated to such use, a ground for highway purposes would be unlawful and therefore cannot be presumed. p. 576. Mere acquiescence by the State in the use of a strip of land for purposes of a passage creates a duty on the State to abstain from injuring a person using it, but not a duty of active vigilance to prevent injury, especially where a traveler is familiar with the condition of the surface. *Id.* An acceptance, by the public, of land for a public use, is to be construed in connection with the grant or dedication. p. 87.

*County indebtedness.* The provision of the Missouri Constitution, that "No county shall be allowed to become indebted, in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for such year," refers only to that class of debts which it is optional with the governing body of the county to incur. p. 426.

*Townships.* Townships in South Carolina since the Act of 1870 are mere territorial divisions, with no officials, no perpetual succession, no corporate powers, privileges or purposes; and therefore power to take stock in a railroad

and to levy taxes in payment thereof cannot be exercised for any corporate purpose, within the meaning of the Constitution. p. 242.

*Election to office.* The residence, for purposes of registration as an elector in Detroit, of a single man having no family, is the ward in which he boards. p. 203. Where a township trustee has voted for himself for the office of county superintendent of schools, and been duly elected, the failure of electors not voting for him to interpose objection is not such acquiescence and tacit consent to the announcement of his election as amounts to his appointment to such office. p. 510.

*Election contest.* In an election contest the plaintiff must establish that the ballots have been kept intact, and are the genuine, identical ballots cast at the election. p. 596. The official returns, when duly certified, are *prima facie* evidence of the result, but never conclusive, unless made so by statute. Their record is entitled to the presumption of regularity, and is *prima facie* of its integrity. *Id.* The ballots constitute the best—the primary—evidence of the intention and choice of the voters in an election contest; and such evidence will control the official count if they have not been tampered with and are preserved. The ballots are the best evidence. *Id.* That "Such ballots are entitled to be recounted" is in conformity with the law, and such as it pronounces on that state of facts. *Id.* When shown that they have been securely kept and preserved inviolate, they will not be excluded on account of some omission to comply with directions of the statute. *Id.*

*State courts.* Jurisdiction of courts of equity in New York does not extend to questions arising upon the due execution of alleged wills, they having been committed to the courts of probate. p. 175. Courts in this State have no jurisdiction of an action by a nonresident against a foreign corporation on a cause which did not arise within the State. p. 636. An order of publication in such action may be set aside. *Id.* Where intangible property of nonresidents is transferred out of the State, no jurisdiction attaches over the subject of the action or its cause. Rule applied to copyrights and their royalties. p. 638.

*Co-ordinate departments of government.* The rule which forbids suit against officers of a State, because in effect a suit against the State, applies only where the interest of the State is through some contract or some property right, or where its interest is in a suit in its own name, brought or threatened by its officers, to enforce some state claim. p. 504. Acts in the discretion of state officers will not be interfered with or controlled by courts; for their injustice or oppression some other remedy must be sought. *Id.* The statute gives state railroad commissioners discretion in making rates for railroads; and whether such rates, when made by them, are reasonable and just, or not, is not open to inquiry in a suit to enjoin their discretionary action. *Id.* The statute which confers on them this power is not a delegation of legislative power inhibited by the Constitution. *Id.* The statute having fixed a penalty for violation of the rates fixed, a bill which seeks to enjoin them from instituting an action to recover the penalty is in effect a suit against the State. *Id.* Suit by a railroad company against the com-  
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missioners, to enjoin them from promulgating unreasonable and unjust rates, is not in effect a suit against the State, except so far as the bill seeks to enjoin them from instituting actions in the name of the State to recover the penalty prescribed by the Act. *Id.*

*Board of claims.* An Act authorizing the board of claims to rehear, audit and determine and allow reasonable compensation for meritorious services, on a claim previously rejected by the board of audit because of the lack of legal authority to employ such services, does not violate the Constitution. It is neither an audit nor allowance by the Legislature. p. 603. The Legislature can ratify and approve by subsequent legislation any act performed for the benefit of the State, which it had original authority to provide for. *Id.* So it may ratify acts of its officers in procuring individuals to voluntarily furnish property or render services to the State, and create a liability on the part of the State to make payment therefor. *Id.* The proviso in the Constitution, exempting existing claims from the prohibition against allowing claims after they are barred, cannot apply to any claim accruing after the adoption of the proviso. *Id.* The fact that a claim against the State on an imperfect obligation previously existing would have been barred by lapse of time does not make legislative ratification and authority to allow such claim invalid, under the constitutional provision that no claim shall be audited or allowed, or paid, which, as between citizens, would be barred by lapse of time. *Id.* The fact that the statute has run against an unenforceable obligation, the defect of which may be cured or waived by the debtor, does not bar an action on a new obligation when the defect is waived. *Id.* The value of materials furnished in performance of services referred to in the Act, authorizing the board of claims to rehear and audit claims for work and services for the State, constitutes a part of the claim. *Id.*

*State railroad commissioners.* A power conferred by the Legislature upon a board of commissioners, will not be extended by implication; and if the board attempts to do certain acts under the power, the authority to act must be affirmatively shown to be included in the power. p. 195. Where the Legislative Assembly of the State passed an Act creating a board of railroad commissioners, empowering it to examine into the affairs of railroad corporations, and required the board to make a biennial report, with suggestions "as to what changes in the classification of freights, or in the rate of freights or fares are advisable for the public welfare," but conferred no express authority upon it to regulate the price or to determine when freight charges were unreasonable, the board has no jurisdiction to require a company to refund to a shipper a sum of money alleged to have been exacted from him in excess of a reasonable charge for the shipment. *Id.* Where an Act directs the board to examine into such affairs, and specially requires it to report the result of its investigation to the Legislature, it will not be presumed that it intended to give the board authority to adjust these matters, although empowered by certain of its provisions to hear complaints against railroad companies on account of acts in general done or omitted to be



done by them. *Id.* A provision to the effect that whenever any railroad company violated, refused or neglected to obey a lawful order or requirement of the board, it shall be the duty of the commissioner to enter complaint in the circuit court of the State, sitting in equity, with power in such court upon notice to the company to proceed to hear and determine the matter speedily, etc., did not authorize the court in such proceeding to enforce the repayment of money charged in excess of a reasonable charge; such claim can only be enforced by a common-law action. *Id.* The South Carolina Railroad Commission has no jurisdiction of a complaint against a railroad partly in another State, for charges for transportation partly in such other State. p. 105.

*Public lands; title to.* Adverse possession of the south half of a quarter section of land, claimed by another under a prior patent, is not constituted by actually occupying adversely part of the north half under a registered patent for the whole quarter section. p. 277.

*Eminent domain; due process of law.* A law which authorizes taking property without due process and impairs the obligation of contracts, is unconstitutional. p. 255. A proceeding conclusively and finally disposing of individual property rights will be void, unless founded upon a law providing for notice of some kind. It is not enough that some notice or information may be given; but the law must provide for notice. p. 655.

*Property taken must be for public use.* Railroad companies have the right to invoke the exercise of eminent domain when they need the property for public use; but for private interests and for private purposes, they cannot call into exercise the power of eminent domain. p. 690. Where a corporation sought to condemn land, over which to build a switch, branch road or lateral work, to reach a private manufactory, the use to which the land was to be subjected was a private, not a "public use." *Id.* Evidence that all who wish to avail themselves of the proposed switch, etc., can do so, is not sufficient to show that the use of the work will be for the benefit of the public. *Id.* Whether the use for which property is sought to be taken is public or private is a judicial question, subject to review by the appellate court. *Id.*

*Compensation must be made to owner.* The Compiled Laws do not contravene the State Constitution, or the Fifth Amendment of the Constitution of the United States, as to compensation for private property taken. p. 59.

*Exercise of right by railroad companies.* Under the provision of the State Constitution a railroad company must make full compensation for the right of way appropriated to its use, irrespective of supposed benefits from the construction of the road, or any improvement thereon. p. 217. Where a railroad is laid through a farm or tract of land used for stock purposes, danger to stock may be considered in giving compensation to the land owner, so far as the same affects depreciation of the tract, but not danger or injury resulting from negligent operation of the road. *Id.* A farmer not engaged in buying and selling real estate cannot be a witness as to the value of the land before and after the appropriation of the right of way; but

one conversant with the land, its situation, soil, advantages, etc., may be. *Id.* Danger from fire to buildings, etc., in so far as it depreciates the value of the property, may be properly considered. *Id.*

*Proceedings for condemnation; assessment of damages.* Improvements made for a public use, by a railroad company in possession, with the right to condemn do not belong to the owner of the land, and the value thereof will not be allowed him as damages on condemnation. The maxim *Quicquid plantatur solo, solo cedit*, does not apply in such a case. p. 528. Evidence of average monthly profits of the business conducted on the premises is admissible upon the question of the loss during the time necessarily consumed in moving. p. 422. Where there is conflicting evidence the court will not set aside the verdict; it will interfere only when the amount fixed is contrary to all the proofs when it will be its duty to resubmit the case to another jury. *Id.* It is not intended that the right given the jury to personally examine the premises shall permit them to disregard the sworn testimony in fixing the assessment of damages. *Id.* A new trial should not be refused because the railroad corporation had entered giving bond pending appeal and had made such changes therein as would prevent a new jury viewing it as it was when the proceeding for condemnation was begun. *Id.*

*Protection of navigation within state limits.* The Legislature may authorize building a structure tending to obstruct the navigation of a river altogether within its own boundary; it is only when Congress acts as to such obstructions that its will must be obeyed so far as necessary to insure free navigation. p. 540. The reasonable obstruction of navigation by the repair of a lawful bridge in replacing a drawspan creates no right of action in favor of parties entitled to navigate the river, although it was possible to have avoided all obstruction to navigation by another mode of repair which would have involved unreasonable delay and expense. *Id.* Where a river navigation company acquired by statute only the improvements belonging to the State in its corporate capacity, as distinguished from what was subject to public use under common right, and not any exclusive right of navigation, it has no right of action against a railroad company for the obstruction of navigation by repairing a bridge, under a license valid against the public, when the improvements included in the lease were not injured or interfered with. *Id.*

*Taxation; due process of law.* The denial of due process of law resulting from a statute which assumes to confer authority upon the county board of equalization to increase the valuation of property of an individual taxpayer without giving him an opportunity to be heard, renders such provisions unconstitutional. p. 655.

*Public property not taxable.* Property of a municipality acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject, within the purview of the tax laws, unless specially included. p. 148. It seems that this principle, unless expressly made so by statute, does not depend upon the origin of the title, whether acquired by purchase or voluntary grant, or as

the product of taxation; nor does it depend on the locality of the property—whether situate within or without the territorial limits of the municipality. *Id.* The landing place of Fulton Ferry, in the City of Brooklyn, which has been occupied and used as an incident to the ferry franchise, being held and used for public purposes, is not taxable in Brooklyn, unless special authority to tax it is given by the Legislature. *Id.* That the City of New York operates the ferry through lessees, and derives its revenues from the rental, does not make the franchise or the landing taxable. *Id.*

*Exemption.* The burden of proof is on a taxpayer claiming that he has not been allowed an exemption, to show that he has not, at some time or place, received it. p. 868.

*Assessment of omitted property.* A statute authorizing assessments of property omitted from the assessment made by the regular assessor, or an additional assessment, where the first one has been made upon an inadequate valuation, is not unconstitutional. p. 868.

*Collateral Inheritance Act.* The Act taxing certain property thereafter given by will is not an exception to the general provision of the Revised Statutes that "Every law shall begin to take effect only on the twentieth day after its final passage." p. 825. The provision that certain estates shall not be subject to the collateral inheritance tax applies, not to the whole estate, but to the portion passing to the legatee or devisee. *Id.* The statute requiring, as a condition precedent to probate proceedings, payment to the county treasurer, of specified sums arbitrarily prescribed with reference to the value of the estate, is in violation of the constitutional clauses requiring equality of taxation, and the dispensation of justice freely and without purchase. p. 701.

*Real property.* Real property must be assessed to the owner thereof, unless it is occupied and the owner unknown. p. 778. The owner, for the purpose of taxation, is the person having the legal title or estate, and not one who has a mere equity therein. *Id.*

*Tax on mortgage not double taxation.* The owner of a mortgage is taxable in the State of his residence, although the land mortgaged is in another State where taxes were paid upon it within the preceding twelve months. p. 860.

*Interstate railroad bridges.* The revenue statute does not require from officers of railroad corporations within Nebraska a return for assessment of the bridges constructed across the Missouri River, said river being a navigable stream, the right to bridge which can be obtained only by a law of Congress. p. 188. The state board of equalization would have no jurisdiction or authority to include such bridge within the line of roadbed of the railroad for taxation, and could therefore levy no legal tax thereon. *Id.* Such bridge not being within the definition of "roadbed, right of way and superstructure thereon," such part thereof as is within any county of this State would be liable to assessment and taxation by the local assessing and taxing officers of such county. *Id.*

*Corporation stock.* Taxation of shares of corporate stock in the hands of stockholders, as their individual property, is not double taxation because a tax has already been laid upon

the property of the corporation, but from which the capital stock in the hands of the corporation is omitted. Such shares have no actual *situs*, and may be taxed where the corporation has its *situs*. p. 853. A construction, to the effect that under the Tax Laws of Ohio shares held by residents of stock of foreign railroad corporations having property in this State on which they pay taxes, and of consolidated railroad companies, are not taxable, does not bind the State in the proper assessment and collection of taxes upon such shares. p. 556.

*Corporate securities.* The constitutional provision requiring uniformity of taxation is not violated by a section of the statute which makes any scrip, bond or certificate of indebtedness, etc., taxable upon its nominal value; while a prior section provides that "All mortgages, money paid by solvent debtors, etc." shall be taxable at a certain rate on their value. p. 798. All interest-bearing indebtedness of private corporations is made a separate class for the purpose of taxation; and such classification is justified by the peculiar nature of corporate securities. *Id.* The word "of" in a statute, being intended for "off," will not be permitted to affect the plain meaning of the Legislature. *Id.* The provision of the Act that "No person shall be required to include in his statement, as a part of the personal property, moneys or credits, any share or portion of the capital or property of any company which is required to list or return its capital and property for taxation in this State," does not apply to shares of a foreign corporation, although the capital is taxed elsewhere; nor does it apply to shares of a company formed by the consolidation of companies of other States, notwithstanding such company pays taxes elsewhere on the portion of its property which is situated here. p. 556.

*Corporate bonds.* The bonds of a corporation are not taxable in a State where the owner does not reside; nor can a citizen be taxed thereon in a county where he does not reside; although it is the *situs* of the corporation. p. 858.

*Corporation as collector of tax on its securities.* A corporation may be compelled by statute to act as collector of a tax on its securities, by deducting it from the interest due thereon and returning it into the state treasury, instead of paying it to the holders of the securities. p. 798. But the corporation may contest the constitutionality of such a law. *Id.* An Act requiring a corporation to so act as collector of a tax against the holders of its bonds having negotiable coupons was held invalid. It cannot be required to determine as to each coupon, whether it may lawfully reserve the tax from the interest or not. p. 853. The commissioners of taxes having deducted unearned premiums from the net surplus of an insurance company because it is less than 10 per cent of the capital, the regularity of the assessment must be determined by the valuation so fixed by them. p. 772.

*Payment.* Parol evidence is admissible to show that taxes were in fact paid by a person other than the one named as payer in the tax receipts. p. 512. A voluntary payment without duress of person or goods, of an assessment for grading and paving under a void or

dinance, is a mistake of law, and cannot be recovered back. p. 626.

*Payment by tenant in common.* One who redeems property, in which he afterwards becomes a tenant in common, from a tax sale, is entitled to have the lien kept alive as against his cotenant. p. 172. Statutes relating to the preservation of a lien in favor of one tenant in common who pays taxes apply simply to a payment in the first instance, not to a redemption of the premises after a sale. *Id.* A suit for partition, brought by a tenant in common, will be defeated by a valid adverse tax claim to the premises, made by his cotenant. *Id.*

*Municipal tax on railroads.* A municipal ordinance levying a tax upon every railroad running through the corporate limits is not void as a tax on interstate commerce, nor as a violation of the principle of uniformity in taxation. p. 284.

*License to practice medicine.* The words in the statute, "suitable graduate in medicine," include one legally licensed to practice under the laws of the State, although never graduated as a doctor of medicine. p. 710.

*Club liable for liquor license.* A club properly organized in good faith under Public Acts cannot purchase liquors by the quantity and distribute them among its members receiving pay therefor by the glass, the proceeds to be used in purchasing other liquors, without being liable to pay a retail tax for selling such liquors and exhibit the tax receipt. p. 494. The servants, agents and employés of the club are liable equally with the principal. *Id.*

*Tax title.* Title acquired by taking actual possession of vacant land after having paid taxes thereon for seven years under color of title in good faith is such a fixed title as will enable one to defend his possession, or to recover possession from a subsequent taker. p. 512. A tax deed under an Act which provides that such deed shall be conclusive evidence of the regularity of the assessment, except for fraud, is a contract with the State; and a subsequent Act making such deed only *prima facie* evidence of such regularity is void; it impairs the obligation of the contract. p. 778. But parties may stipulate to waive the conclusive character of the deed. So an admission that if, in the judgment of the court, the person to whom the property was assessed was not the true owner, will make the tax deed void. *Id.*

*Municipal corporations; contracts of.* Under the New York City Charter conferring upon the common council the power and duty of deciding whether the provisions as to letting a contract by public advertisement shall be dispensed with, an ordinance delegating to the commissioner of public works power to decide whether work for the city shall be done by contract or otherwise is void as being an unlawful delegation of authority. p. 626. The certificate of the proper officer that certain work is necessary to complete a particular job for the city, or that any supply is needful for any purpose, is conclusive as between the contractor and the city, where there is no fraud, and the facts indicate that the necessity certified is a possible incident of such work or supply. p. 751. The conclusion of the officer specially charged with the determination of the question

of the necessity of certain work or supplies for the City of New York, where the facts called for the exercise of his judgment, will not be reviewed by the court of appeals. *Id.* A contract with the City of New York, for a consideration, to substitute cherry for pine in finishing the interior of a public building in process of construction, need not be founded upon a sealed bid or proposal under the Consolidation Act, requiring contracts for extra work to be so founded. *Id.*

*Control and care of streets.* The power given to a municipal corporation by its charter to control and regulate streets does not give power to prohibit the circulation or giving away of any circulars, handbills or advertising cards in or upon any of the public streets and alleys of the city. p. 721. Where the alleys of a city have been dedicated to the public, no further action is required by the city to open them for public use. p. 56. They retain the character of alleys, although the lots on both sides thereof are owned by one person, and so intersected by a railroad as to make them practically impassable. *Id.* Where a dangerous piece of machinery is placed in an alley by the owner of abutting lots, and is allowed to remain for years, both the individual and corporation are guilty of negligence, and both are liable for injuries sustained thereby. *Id.* Municipal corporations, in Michigan, are held not liable for damages occasioned by grading or otherwise improving streets; they have no power to erect a bridge in a street over a railroad, and damages which would be caused by such a bridge must be provided for under the power of eminent domain. p. 54. The city is therefore liable for damages to abutting private property, occasioned by such bridge and its approaches. *Id.* A railroad company may, under the statute and the authority of a city ordinance, construct its railroad in a public street without being liable to abutting lot owners or others for damages; but cannot wrongfully and unnecessarily block up or obstruct a street. p. 59. Where a corporation lays out and plats its land as an addition to the city, a reservation, to itself, of the use of the streets for the purpose of a railroad, does not relieve the company from constructing, operating and maintaining its line of railroad in a legal and proper manner. *Id.* A city is liable for damages to private property occasioned by grading a street without the authority of an ordinance, passed as required by the Code. p. 606.

*Street Railroads.* The franchise of a street railroad company, for the transportation of freight and passengers, survives the dissolution of the corporation. p. 255. The company, although created for a limited period, may take from a city in which the title to streets is vested an interest in perpetuity which is irrevocable. *Id.* The resolution granting the franchise expressly providing for traffic contracts by another company to obtain a right to run cars over its tracks without limitation as to time gave an estate in perpetuity under the authority of the Constitution and laws of the State. *Id.* A law attempting to take away from a dissolved street railroad company, such franchise, and to direct its sale and transfer and the payment of the purchase price to the city, is unconstitutional. *Id.* An express reserva-

tion of power to repeal a charter gives no such authority. *Id.* The provisions of New York Laws 1860, § 48, that the repealing of a charter shall not impair any remedy existing against the corporation, its directors or officers upon a liability previously incurred, is a contract protected by the provisions of the Federal Constitution. *Id.* Whether the Attorney General can, to avoid multiplicity of suits, maintain another action in the name of the People to obtain a judgment declaratory of the rights and the liabilities of the several parties affected by dissolution—*quære*. *Id.* The law prohibiting leases of parallel roads does not prohibit traffic contracts for a portion of their length, where possession or control is not surrendered. *Id.* A contract between street railroad companies to make no change in rates of fare will terminate by force of its own limitation when a statute is passed reducing such rates. p. 884. A statute making it unlawful for the street railroad companies in a certain city to change the rates of fare does not impair the obligation of a contract between companies operating street railroads by which each has agreed to change the rates without the consent of the other. *Id.* Under the constitutional Amendment prohibiting the passage of a private or local bill giving to any corporation any exclusive privilege or franchise, an Act which gives to a corporation the right to a complete occupation of a street for underground railway purposes, is unconstitutional. p. 789. When the provision of the Rapid Transit Act has been complied with, and the determination of the commissioners to construct the road has been confirmed by the supreme court, after the giving public notice and opportunity to be heard, such decision of the supreme court, being the decision of a competent tribunal, will estop such owners from thereafter attacking the validity of such incorporation collaterally. p. 859.

## 2. COMMERCIAL RELATIONS.

**Partnership.** Though a partnership is not a person, it is a legal entity, and for some purposes a quasi person, with powers and functions exercisable by the partners severally or jointly. p. 828. In a limited partnership, the majority of the partners have no authority to change the location of the works, against the will of the minority. p. 43. Notice of dissolution, as in the case of a general partnership, is not necessary where a person attempting to become a special partner has by virtue of the Pennsylvania Act (Pub. Laws, 148), become liable as a general partner by reason of non-compliance with the provisions of that statute. p. 796.

**Corporation; suit against.** A corporation cannot be sued as such, on the ground that it is not a corporation, because suing the corporation as such is an admission of its existence. Defendants sued jointly with it cannot be charged in such an action with having, jointly with such corporation, usurped the rights of a corporation, etc. p. 92. In such a case, the facts showing that its existence has terminated must be set forth. *Id.* An answer which specifically denies an unlawful claim or unlawful exercise of such franchise, etc., is sufficient, without affirmatively justifying their right to  
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its exercise. *Id.* The affirmative allegation of the existence of a corporation is mere surplusage. *Id.* The persons unlawfully claiming to be a corporation, and not the corporation, are the parties to be proceeded against. *Id.* A court based on the nonexistence of a corporation will not sustain a judgment which merely decrees a recovery of its franchises, and enjoins defendant from their exercise. *Id.*

**Conditions imposed upon foreign insurance companies.** A person or corporation is liable under the statutes of Illinois for aiding a foreign insurance company in the transaction of insurance business in any manner; although not the agent of such company in the ordinary sense of the term, and although acting under a contract with the insured expressly stating that such person or corporation is his agent only. p. 340. It is a question of fact for the jury, whether a corporation acting under a contract which declares it to be the agent of the insured only in obtaining insurance from a foreign corporation, in any manner aids the foreign company in transacting its insurance business within the prohibition of the Act of 1869. *Id.*

**Action against foreign corporation.** In an action against a foreign corporation it is not necessary under the Texas Act of March 31, 1886, to allege that it had an agent or representative in the county, and that its principal office was also in the county; but it is enough to allege either that it had an agent or representative in the county, or that its principal office was there. p. 405.

**Banking.** The genuineness of the last indorsement on a check does not relieve the bank from scrutinizing preceding indorsements. p. 96. The liability of a bank to its depositor is not avoided by payment of money upon his check to a person who forges the name of the payee. *Id.* The depositor is not precluded from holding the bank liable for cashing his check on a forged indorsement, by the fact that a note and deed forged in the same manner had been palmed off on the depositor himself. *Id.* The entry in his bank book, of the payment of a check, puts him under no obligation to see whether the check was paid upon a forged indorsement or not. *Id.* Where the money was held by the bank as a mere deposit he is not entitled to interest on recovery of the money paid out on a forged indorsement. *Id.* A bank holding a check for collection has no right, unless specially authorized to do so, to accept anything in lieu of money. p. 491. If it surrenders a check to a bank on which it is drawn, and accepts a cashier's check or other obligation in lieu thereof, its liability to its depositor is fixed as much as if it had received the cash. *Id.* Where it has become liable to pay a check sent to it for collection, it cannot claim the benefit of any payment made in the mean time to the payee of the check by the drawer. *Id.* A check properly indorsed as for collection and sent by a national to a third bank to be collected, which is not accomplished until after such insolvency, is the property of the principal bank and may be recovered by it in a suit against such third bank. p. 700. Where money collected by a bank for another bank, under instructions for immediate return, is allowed to remain for several months with the collecting bank, which becomes insolvent with-

out having made return, the banks for which the collection was made will not be considered a *cestui que trust*, but will be treated as an ordinary creditor. p. 480.

**Warehousemen.** Warehousemen in Alabama who deliver up cotton stored with them, to a third person producing their receipt therefor, may be held liable to the mortgagee of such cotton whose mortgage is properly recorded in another county, although they have no actual notice of the mortgage. p. 475.

**Railroad corporations.** The dominion of a railroad corporation over its trains, tracks and right of way is no less complete or exclusive than that which every owner has over his own property. The corporation may exclude whom it pleases when they come to transact their own private business with passengers, and admit whom it pleases when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches. p. 848. A mere implied license, no matter how long enjoyed, to transact such business, is revocable at any time; and such revocation results from notice not to prosecute the business in the future. *Id.* One who persists in continuing the use of such license, after notice may be prevented by force sufficient to effectuate his expulsion from the premises. *Id.* Such licensee is not a servant or agent of the company. *Id.*

**Property of railroad corporation.** Property of railroad corporations is to all intents and purposes private property, although applied to a use in which the public have an interest. p. 680. Where a railroad company took title to a portion of mortgaged premises from one who acquired title by adverse possession, subsequently to the execution of the mortgage, and the validity of such title was not litigated in the foreclosure suit, the company was estopped by the decree from setting up its title so acquired, in a proceeding thereafter instituted by it to condemn the mortgaged land to railroad uses. p. 528.

**Consolidated railroad corporation.** While the Constitution of this State provides that no foreign railroad corporations doing business in this State shall be entitled to exercise the right of eminent domain, or acquire the right of way or real estate for its uses, until it becomes a body corporate of this State, it does not prohibit existing companies from becoming a body corporate by consolidation, if done pursuant to the laws of this State. p. 564. Where two corporations consolidated their stock and franchises into one corporation or joint stock company, to be known as the "Chicago, Burlington & Quincy Railroad Company," under the provisions of law by virtue of such consolidation, it thereby became a body corporate of this State, and was therefore not a foreign corporation. *Id.*

**Stockholders may enjoin transfer of stock.** A stockholder may, without consulting the directors, bring an action to enjoin them from unlawfully transferring the stock to a consolidated corporation. p. 594. An answer alleging that the consolidation had been made and ratified by the stockholders will not be construed as meaning that the stockholders applying for the injunction assented thereto, where the Act under which the consolidation was attempted, allowed

a consolidation by a majority vote. *Id.* The Legislature cannot authorize the consolidation of a corporation under the general power reserved to alter or annul the charter, when the rights of stockholders will thereby be affected, unless the consolidation is made by the unanimous consent of the stockholders. *Id.*

**Carrier of passengers.** A regulation of a railroad company, by which, although a passenger may himself get off at a regular station he will not be sold a ticket to that place or his baggage checked to or delivered at that station, but will be compelled to pay for a ticket to another station a mile distant, and go there for his baggage, is unreasonable, arbitrary and invalid. p. 489. The reasonableness of such a regulation is within the province of the court as a matter of law. *Id.* Exemplary damages may be awarded for refusal to sell a passenger a ticket or to check his baggage to a regular station in pursuance of such a regulation. *Id.*

**Carrier by water.** A passenger is entitled to protection as such as well while leaving the vehicle and returning as at any other time. p. 88. A passenger on a steamboat, who has purchased a ticket not entitling him to meals, can properly go on shore for them at an intermediate stopping place, and has a passenger's right to protection during his egress, for that purpose. *Id.* A carrier of passengers is bound to exercise the utmost care and diligence in providing against those injuries which human care and foresight can guard against. This is the rule at all times and in all places while the relation of passenger and carrier exists. *Id.* "Utmost care and diligence" mean the utmost consistent with the carrier's undertaking, and with a due regard for all other matters considered in conducting the business. *Id.* When a proper place of exit is provided, a warning not to leave at another part of the boat is a reasonable regulation; and disobedience thereof will prevent the passenger's recovery from the carrier for an injury growing out of it. *Id.* Effects of passengers, not in daily use or attached to the person, are not only to be contributed for, but are liable to contribute, in general average. p. 287.

**Carrier of goods.** Liability cannot be avoided by the road last named on the through bill of lading by the simple fact that it pushed the cars to the track of another railroad and procured that road to haul them with its engine a short distance and deliver them to the mills to which the goods were shipped. p. 102. A complaint alleging that defendant, a connecting railroad of a continuous line, received machinery which it negligently transported, states only a common-law action and does not raise the question of liability of the last of several railroads under the Georgia Code, making such railroad liable for damage to goods received in good order from the shipper. *Id.* The carrier may be liable for damage caused by the weather or rust, if occasioned by its negligence or by unreasonable delay, although the goods were shipped at the owner's risk. *Id.* Though a shipper agrees to transportation upon open cars, the carrier may still be liable for such damage during detention on the road, if the carrier failed to cover the cars during such detention. *Id.* A contract in a bill of lading for a shipment from Boston to Atlanta, although not a good contract if made in Georgia, can be

enforced in that State if a good contract in Massachusetts and not intended to take effect wholly in Georgia, but to be partly performed in different States, including Massachusetts. *Id.*

*Carrier of stock.* A common carrier has no right to demand of a shipper a waiver of his rights, as a condition precedent to receiving freight (p. 75); and a custom cannot repeal or suspend a law. Hence, evidence of a custom requiring the owner of stock to hold railroads harmless against ordinary delays in taking up freight is inadmissible. *Id.* So a custom of railroads not to receive for transportation any live stock, unless under certain conditions modifying their common-law liability, would be contrary to law and public policy. *Id.* A carrier has the duty to feed and water stock during transportation, and cannot transfer it to the shipper by a custom requiring him to go along on the same train with the stock. *Id.* A custom cannot require a shipper expressly to agree that he would give notice before removing the stock, as a condition precedent to right of recovery for loss. *Id.* A custom in delivering stock at destination cannot be stated by a witness unless it is shown that the custom is uniform, reasonable and notorious. *Id.* Nor can a shipper, by custom, be required to agree that his measure of damages shall not be more than the cash value of the stock shipped, at the place of shipment. *Id.* Where the contract is in writing, testimony cannot be elicited from the shipper on cross examination as to its nature. *Id.* But he may give his opinion as to what the value of the stock would have been at its destination if not injured in transportation. *Id.* The measure of damages, where mares are with foal when shipped, and lose their foal on the way, if the loss is total, is the price, less freight charges, they would have brought if delivered in reasonable time having had due and necessary care while in the carrier's possession; and if the loss is partial, it is the difference between such price, less freight, and the actual value of the animals as delivered. *Id.* A carrier is not guilty of conversion where he in good faith takes goods from the possession of the owner, by the direction of another having the apparent control of the goods, and delivers them to such other person in another place. p. 80.

*Telegraph company.* A telegraph company which has, by mistake, changed the first name of the person to whom the message is sent, is not liable for damages consequent on the failure of a connecting line to deliver the message promptly, when, by the exercise of due diligence it would have been delivered to the proper person. p. 601. A printed condition on a telegraph blank, "This company is hereby made the agent of the sender, without liability to forward any message over the lines of any other company when necessary to reach its destination"—is reasonable. *Id.* Delay in delivering a telegram stating the death of a relative will not subject the company to damages based on injury to fraternal feelings from inability to attend the funeral. p. 766.

*Telephone company.* A telephone company having special franchises and privileges is subject to public regulations; and the State has power to fix and prescribe a maximum rate to be charged by it for telephone service. p. 278.

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Power to fix rates is not conferred upon a city by provisions in its charter, giving power to "license, tax and regulate" business; nor is such power included in the general municipal police power. p. 278.

*Liability of officers for debts of corporation.* The liability imposed on the officers of a corporation for debts of the corporation incurred while they were officers, if any certificate, report or notice by them shall be false in any material representation, is in the nature of a penalty, and cannot be enforced by the courts of another State. p. 779. A judgment rendered in one State against directors, under an individual liability statute for debts of their corporation, the original claim being a penalty for a false certificate, cannot be enforced in another State. The original claim is not changed by reduction to judgment. *Id.*

*Liability of stockholder for corporate debts.* When a corporation, lessee of property, permits waste thereon, for which the lessor recovers damages, the judgment obtained on the claim is an "indebtedness" for which any stockholder is liable to the amount unpaid on his stock. p. 270.

*Pledge of corporate stock.* Railroad bondholders, to whom stock has been mortgaged as collateral security, cannot in equity charge the lessor of the mortgaged road with the earnings derived under the lease, when such lease is not alleged to be void or voidable as between the parties to it. p. 467. That the mortgage for such stock was given by the State does not bind the State to use its controlling interest in the road exclusively in the interest of its mortgagees of the stock, nor to impress the earnings received by the lessor of the road with a trust for the benefit of such mortgagees. *Id.*

*Purchaser of corporate stock.* A bona fide purchaser of stock standing on the company's books in the name of a former owner, and indorsed by him in blank, is not negotiable. p. 886. It is not permissible to prove a custom or usage to the contrary; as no usage is good which conflicts with an established principle of law. *Id.* A guaranty of a certain per cent in dividends so long as the purchaser should retain the stock sold him, given by a firm, is not limited to the duration of the partnership or the lives of the copartners. p. 183. A guaranty of the amount of dividends that shall be received from the stock, made as inducement to the purchase of the stock, is an original, and not a collateral, undertaking. *Id.* A purchaser at execution sale, of stock in a corporation, previously transferred in good faith on the books of the corporation as collateral security, acquires no title by such purchase, so as to make him chargeable with liability, as stockholder, to the creditors of the corporation. p. 476. The transfer of stock on the books of a corporation, by persons holding it as collateral security to such purchaser, does not make him liable as a stockholder, where such transfer is made without his request or knowledge. *Id.*

*Chicago Board of Trade.* The doctrine that when private property is devoted to a public use it ceases to be *juris privati*, subject only to public regulation, applies to the furnishing of market reports to the public by the Chicago Board of Trade. p. 411. The Chicago Board of Trade cannot discriminate between persons

and say that anyone shall not receive the market reports, when he is willing to conform equally with others to reasonable rules on the subject and pay for the information. *Id.* The Chicago Board of Trade, and the telegraph companies acting in connection with it, have no right to refuse to furnish another "exchange" corporation organized for buying and selling grain with the regular telegraphic "ticker" market quotations—where such exchange was willing to conform to the regulations of the board of trade and to pay for the same, it not being engaged in a gambling or "bucket shop" business. *Id.*

*Conspiracy to monopolize trade; sugar trust.* The formation of the "Sugar Refineries Company"—an unincorporated association composed of a board of trustees created under a deed of trust executed in the names of certain sugar refining corporations and partnerships, owning nearly all the sugar refineries in the country—is to be considered as the corporate act of the corporations concerned and not simply the individual act of the stockholders. p. 38. Such trust, being in effect the uniting of corporations concerned into a practical consolidation or partnership, not authorized by their charters nor effected under the statutes in reference to consolidation of corporations, is *ultra vires* and warrants the forfeiture of corporate existence, and its dissolution at the suit of the people. *Id.* Such combination being the centralization of corporate franchises in a single irresponsible power, furnished with every delegated facility for regulating and controlling at will, throughout the country, the production and price of a particular and necessary article of commerce, viz.: refined sugar—creates a monopoly in a legal sense, is detrimental to the public, and is consequently unlawful. *Id.*

*Restraint of trade.* Under the Constitution of Georgia, a purchase by a railway company in Georgia of the contract to construct the line of a competitive company, with a view to prevent its construction, is illegal and void. p. 120.

### 3. CONTRACTUAL RELATIONS.

*Bills, notes, etc.* A telegram by a bank offering to pay a draft means at the bank's place of business, and imposes no obligation to accept "with exchange" on another place. p. 709. One who indorses a note in blank, whether by writing his name above or below that of the payee, is liable, *prima facie*, as a maker, and may be sued as such. p. 428. A note given for borrowed money with interest, stipulating for every \$10 so advanced to deliver to the lender for storage and sale on commission one bale of cotton, in default of which he should pay as liquidated damages storage for one month, and commissions for selling, is not usurious if the advance is made by a warehouseman or commission merchant; but if there is no reasonable expectation of his being able to deliver it, the contract is usurious. p. 589.

*Conversion of negotiable instrument.* Payment of a judgment for the conversion of a promissory note, left with converter by payees and holders for discount, gives title to the note as of the date of the conversion, which was merely the obligation of the makers, no contract of indorsement having been consummated,

by reason of the refusal to discount the note, and retaining it. p. 449.

*Building contract.* A written contract for building a house, stipulating that no charge for extra work or materials shall be made unless ordered in writing, will not prevent recovering for extra expense incurred on the express agreement of the other party to pay for it, or on his request therefor, under circumstances implying consent irrespective of the written contract. Parties cannot, by contract, tie up their freedom of dealing with each other. p. 625. When a building contract provided that the decision of the architect should be conclusive it was an implication, indispensable to the effectuation of the purpose of the parties, that such decision should be an honest one. p. 544.

*Consideration.* The surrender of a prior mortgage with accrued interest is a valuable consideration for a new mortgage. p. 784. Whether a mortgagee is chargeable with notice of a prior unrecorded mortgage in possession of the attorney who acted in both transactions, and whose duties to both were consequently conflicting—*quære*. *Id.*

*Continuing guaranty.* A guaranty creating a continuing pecuniary obligation, the consideration for which is given once for all, is not terminated by the death of the guarantor, unless such intention is plainly in the guaranty itself. p. 183. Where a man gives his note jointly with his sons, to raise money for the use of the sons' firm, and he executes a mortgage to secure the note, all parties are bound as principals, although, as between themselves, he may be merely a surety. p. 589.

*Insurance policies.* The receipt of insurance policies, under a written agreement that they shall be returned if policies held by the insured in other companies should not be surrendered on terms satisfactory to him, is an acceptance of the policies only upon a condition precedent; and no valid contract is thereby created until the condition is complied with. p. 150. A creditor who insures the life of his debtor, and takes a policy for his own benefit, is entitled to hold all he can recover on the policy, if there is not such a gross disproportion between the debt and the amount of the policy as to make the transaction a speculation or wager. A life policy is but a chose in action for the payment of money, and may be assigned as such under the Maryland Act. p. 844. A certificate of life insurance payable to the devisees or heirs at law of the insured, where insured dies intestate without issue, is payable to his widow. p. 161. A fire policy cannot be reformed to cover the interests of children of insured, when nothing was said at the time of the insurance as to the nature of the interest insured. p. 64. Where an agent, to effect insurance was fully apprised of the illiteracy of the insured, and he knew the extent of her title, a policy will not be void because she is not the absolute and unconditional owner. *Id.* An agent issuing an insurance policy, with full power to do so, will be regarded as the principal—however his knowledge may have been acquired. *Id.* A policy insuring horses, with other personal property, as "all contained in above described barn," against fire and lightning, and excluding personal property while removed from the particular building,



does not cover a horse killed by lightning while in a field at pasture. p. 52.

*Leases.* A provision in a lease of a building that if during the term the premises should be rendered partially untenable by fire or the elements, but the business of the lessee could still be conducted therein while the lessor should repair the same as soon as practicable, and during the time of repair the basement became untenable, by reason of water percolating under the basement walls—*held*, that only some sudden, unusual or unexpected action of the elements, as floods, tornadoes and the like, are referred to in the lease. p. 849. A lease for fourteen years, with a covenant to renew for another fourteen years, is a lease for a longer period than fifteen years, within the meaning of the Maryland Act making leases for more than fifteen years redeemable at the lessee's option, after the expiration of ten years. p. 711. The lessee cannot waive his option of redemption by agreement; the act not being for his exclusive benefit, but being based upon ground of public policy. *Id.* A lease made on the 15th day of December, 1887, for the year 1888, may be valid, although not in writing, under Mississippi Code. p. 847.

*Sales.* Where a contract for the sale of sugar of a certain test and color, to be shipped from a foreign port, is performed by the seller by delivering it on board the vessel at the port of shipment, where he assumes no risks of the voyage he is not responsible for any deterioration in the strength or color. p. 519. The words in the contract, "The sugars to be thoroughly sampled and tested on arrival," will not imply an assumption of risk as to its condition or quality on arrival at the port of destination. *Id.* Although delivery of goods to a person in compliance with his request makes out a *prima facie* case of liability to pay for them, yet if the presumption is shaken the seller must show an assumption of liability to him to pay money. p. 697. If a contract is usurious no custom can legalize it. p. 589. If a lender of money charges a greater price for selling and storing cotton than he charges for the same services where no money is loaned the contract is usurious. *Id.*

*Statute of Frauds.* The provisions of the Statute of Frauds in reference to a note or memorandum in writing, of an agreement, does not require the whole agreement to appear in a single writing. p. 212. A memorandum is sufficient to support an action for the price of goods sold, where a verbal order containing necessary particulars was given to a traveling salesman and the buyer, after the goods were shipped, wrote to the seller "Don't ship paint ordered through your salesman; we have concluded not to handle it." *Id.* An executed consideration avoids the Statute of Frauds. p. 697. So, if one furnishes goods upon an executed consideration he cannot maintain an action to recover for their price although the original agreement was void under the Statute of Frauds. *Id.*

*Sale of seed wheat; contract, when complete.* Where, upon a *bona fide* sale of seed wheat, the amount of wheat specified in the seed grain note was in a bin containing a larger quantity, out of which the purchaser was to take away the wheat purchased—weighing or measuring is

not absolutely essential to a completed sale except when necessary to define the subject matter. p. 409. Where the seed grain is actually and in good faith sold and furnished for seeding purposes, and a portion of the amount received is appropriated by the maker of the note, and not sown on the land, that fact will not defeat the lien of the seller, for the price of that portion actually sown, upon the crop grown therefrom. *Id.* The statute authorizes the holder of a seed grain note, upon condition broken, to take possession of the crop raised from the seed for which it is given; and the holder thereof may maintain an action against the holder of a subordinate lien thereon for the conversion thereof. *Id.*

*Literary services.* A recovery upon a *quantum meruit* cannot be had for literary services under a contract which provides that compensation therefor is to be derived solely from a division of profits from sales after publication. p. 159.

*Contracts in relation to right of way of railroad.* A written agreement by the grantor of the right of way to a railroad company, to fence it on each side through his lands, will not affect the right of a subsequent purchaser to require the company to fence its road. p. 199. The mere use and occupation of the right of way by the company and its successors for the purpose of a railroad will not constitute constructive notice of the existence of such agreement. *Id.* A stipulation in a deed of right of way to a railroad company, that the company shall construct and maintain a fence along its right of way where land is used solely for pasturage, cannot be enforced by a subsequent owner of such land. It is not a covenant running with the land. p. 281.

*Remedy or practice cannot be ingrafted by contract.* A judgment by confession in an action of forcible detainer upon a warrant of attorney in a lease, is *coram non judice* and void. A party cannot ingraft by contract a remedy or practice not warranted by statute. p. 717.

*Action; abatement of.* A suit does not abate by reason of the nonresidency of some of the defendants; but the nonresident defendants who have been properly served by publication or otherwise, and who fail to appear, are nevertheless bound. p. 120.

*Limitation of.* A mortgage which contains a covenant to pay the sum thereby secured is not barred in six years, under the Indiana Statute. p. 189. The Statute of Limitations may be set up in the orphans' court precisely as in a court of law, and is not tolled by a mere demand upon an executor. p. 159. Where a suit on coupons is barred by the statute, overdue interest on the bonds cannot be included in an action on such bonds. p. 353. The fact that the Statute of Limitations has run against an obligation unenforceable by reason of some vice or defect, which may be cured or waived by the debtor, does not bar a cause of action on a new obligation growing out of the old one, when the vice or defect is waived. p. 608. A defense of the statute properly arises under a demurrer when the facts creating the bar are shown by the complaint. p. 779.

*Garnishment process.* Garnishment process served within the State upon a resident com-

mon carrier will not reach property not actually within the State but in course of transportation by the carrier to a point without the State. p. 417.

*Security for costs required of nonresident.* An independent foreign government is "a person residing without the State," within the meaning of New York Code of Civil Procedure, requiring security for costs. p. 642. When a deposit of money as security for costs has once been made, the court has no authority to require any additional security. *Id.*

*Doctrine of lis pendens.* The doctrine of *lis pendens* affects only those who purchase from parties to the suit. p. 48. It applies only to a purchaser *pendente lite*; hence, the purchaser will not be affected with notice of a pending suit, involving simply the title to the mortgage, not to the land. *Id.* The rule applies to a purchaser from a husband pending a divorce suit. p. 615. Joint obligors will be affected by acts of their co-obligor and will not be released, by erroneous payment, from their joint personal liability to the actual owner of the bond and mortgage. p. 48.

*Arbitration and award.* An express agreement not to revoke, and to waive any right to revoke, a submission to arbitration does not prevent a revocation thereof, under New York Code, at any time before the closing of the proofs and the final submission of the cause for decision. p. 180. Making a claim to land and erecting a fence thereon, after an adverse award by arbitrators as to the boundary line, does not constitute a breach of a stipulation "to abide by and perform the award;" the remedy is by an action of tort. p. 532. Fraud in the decision of the arbiter may be set up in a suit on the contract, in avoidance of his decision, even though it does not appear that the party who would benefit by it has colluded. p. 544.

#### 4. FIDUCIARY RELATIONS.

*Attorney or agent.* An attorney has no lien on the land in controversy nor any claim against defendants personally for his fees under Kentucky General Statutes, giving an attorney a lien on a demand arising out of contract for collection on judgment, and on property recovered, upon the dismissal, in good faith, of an action, although against the consent of such attorney. p. 708. No person is entitled to demand or receive greater compensation for services rendered as agent or attorney in procuring a pension than that provided by statute, although such person is not recognized by the commissioner of pensions as a pension agent or attorney. p. 745. An attorney who has done a large amount of business for a client in investing money upon mortgages will not be held, in the absence of evidence, to have remembered facts at the time of taking a mortgage on the same property for another client, so as to charge the latter with notice of the prior mortgage. p. 784. An attorney, who has prepared deeds of trust and been consulted as to the purposes for which they were made, cannot afterwards, on purchasing the land included therein, on an execution sale, maintain a suit to set aside such deeds as fraudulent. p. 78.

*Agent in charge of business.* An agent placed

in charge of a retail store to conduct the business, with express authority to use money especially deposited for that purpose, is a general agent with special powers, and cannot bind the principal by a purchase on credit. p. 808. In order to bind a principal by ratification, assent or acquiescence in prior acts, a knowledge of the material facts must be brought home to him. *Id.* Any evidence is relevant on an issue as to the implied, in excess of express, authority of an agent, which shows prior, similar acts, and which tends to prove or disprove the knowledge of the principal, and reliance on the part of those dealing with the agent upon the principal's recognition of such acts. *Id.* Where a man on leaving gave an agent authority to purchase goods, which he revoked on his return from a temporary absence, it is a question for the jury whether the parties dealing with the agent had notice of such revocation. *Id.* The knowledge of an agent, to operate as constructive notice to the principal, must have been acquired after the relation of principal and agent was formed. *Id.* That the principal might have known that the agent was exercising power in excess of his authority, if he had exercised ordinary diligence, does not estop him from denying such authority. He may act on the presumption that third parties dealing with the agent will not be negligent in ascertaining the extent of his authority. *Id.* To hold a principal chargeable with knowledge which his agent obtained on a prior occasion in an independent transaction, it must be shown that the knowledge was in the mind of the agent at the very time of the later transaction. p. 734.

*Knowledge of agent; effect of.* If an agent recollected a prior mortgage, but honestly though mistakenly believed it had been satisfied, the principal for whom he takes a subsequent mortgage will not be chargeable with knowledge of the former one by reason of the agent's knowledge. p. 734. The burden of proof to show that an agent had in mind knowledge gained by him on a former occasion, and in a different transaction, is on the party who seeks to charge the principal with notice by reason of such knowledge. *Id.*

*Persons dealing with agent.* The rule that a seller who deals with the agent of an undisclosed principal can, upon discovering the principal, resort to the latter for payment, does not apply in a case in which the agent bought contrary to instructions, and the seller gave credit to the agent, and the principal has in the mean time paid the agent. p. 749. Where the principal settles with his agent in good faith supposing the latter had purchased for cash supplied to him for the purpose, or upon his personal credit, he is not liable to the seller. *Id.*

*Brokers.* It is not the duty of a broker to buy in the corn within a reasonable time after the principal's refusal to supply the margin, where such refusal was accompanied by a promise to pay the losses when differences were settled. p. 836. Under the rules of the Chicago Board of Trade, where a broker sells for future delivery, the principal must furnish margins when demanded; and if he fails, the broker is authorized to buy produce to fill his contracts. *Id.* The sum paid a broker for

corn purchased to fill a contract is a debt recoverable upon common money counts, as money advanced to defendant's use. *Id.* Interest is recoverable under statute, upon such advances made by a broker. *Id.*

*Guardians of estates of insane.* The provisions of general laws authorizing the organization of annuity, safe-deposit and trust companies, granting power to act as guardians of the estates of insane persons, are valid. p. 418.

*Township trustees.* A township trustee acts in a fiduciary as well as an official capacity, and is amenable to the rule which forbids an agent or trustee to have his interest conflict with his duty towards his principal or *cestui que trust.* p. 510.

### 5. DOMESTIC RELATIONS.

*Husband and wife; antenuptial contract.* A contract in consideration of marriage, where each releases all interest in the property of the other is upon a sufficient consideration. It is upon a valid consideration although the promise was made six years before the contract was drawn, as such contract merges mere oral negotiations. Such contract may be made by a woman who has an estate of her own, and no particular form of words is necessary; for, however informal, it will be effectual if the intention is manifest, and can be executed in law or in equity. Such a contract is generally considered a good bar to dower, and the word *heirs*, contained in it, includes any legal heirs, and excludes the claim of either as heir of the other. p. 872.

*Contracts between.* A wife cannot contract partnership with her husband under the Michigan statute giving a married woman the right to acquire separate property. p. 848. Nor can she contract jointly with him in reference to property held in entirety. p. 845. The doctrine of estoppel cannot be invoked to remove the incapacity of a married woman where her contract is utterly void for want of power or capacity to make it. p. 769. The parol agreement of a wife, in consideration of her husband's leaving her his property by will absolutely, to transfer the remainder to his heirs, may be enforced against her representatives, after her death, notwithstanding the Statute of Frauds. p. 662.

*Inchoate right of wife in husband's property.* The inchoate interest of a married woman in real estate of her husband is discharged from a mortgage in which she joined with him to secure a note given by him and others, when with the mortgagee's consent one of the makers of the note has been released or discharged by renewal or otherwise. Extension of time of payment of a note to which a married woman is not a party does not of itself discharge her inchoate right in her husband's property from a mortgage in which she has joined. p. 189.

*Wearing apparel of family.* In an action for the loss of a trunk containing clothing of wife and child the presumption is that the clothing was furnished by the husband and father. p. 716. Merely providing ordinary clothing by the husband does not make it the wife's property, within the statute providing that all property acquired by a wife, including that acquired by gift from or contract with the husband, shall become her separate estate. *Id.*

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*Conveyance to husband and wife.* A deed conveying real estate to a husband and wife conveys the same to them in entirety; and on the death of one, the survivor takes the entire estate. This rule of the common law has not been changed by statute in Kansas. p. 434.

*Conveyances by.* The grantee in a deed executed by a husband and his infant wife, married before the Enabling Acts were passed, but after that Act empowering her to sell by joining her husband in the conveyance, takes the husband's right to the possession and the wife's interest, subject to her right of disaffirmance, which she may do, on a bill filed during her husband's lifetime; and the Statute of Limitations does not run against her right to disaffirm until her coverture is ended. She is under no obligation before rescinding to refund purchase money not coming to her hands, but must pay her individual indebtedness canceled by grantee at the time of the conveyance as part of the consideration. p. 741. A conveyance of community property by the husband, with full statutory power to sell, passes the common title although he signs only as his wife's agent. p. 715.

*Mortgage by.* A married woman, who, with her husband, has executed a mortgage containing covenants of seisin, quiet possession and warranty, on her separate property, is, in Dakota, estopped from setting up against the purchaser on foreclosure any title subsequently acquired by her. p. 868. A mortgage by a wife on her separate property, in which her husband does not join, is void, although he has been absent fifteen years, although the man with whom she lives, believing him in good faith to be her lawful husband, joins with her in the instrument. The doctrine of estoppel cannot be invoked to remove her incapacity to contract where her contract is void for want of power to make it. p. 769.

*Divorce; decrees for wife's support.* On a divorce granted to the wife for causes other than adultery, the court may decree to her the title of her husband's property under statutes authorizing it, to be "set apart" for her support. p. 615. In such case the rule of *lis pendens* applies to a purchaser pending the divorce suit. *Id.* Nor is a sale by the husband taken out of the rule merely because the wife told him he might sell it. *Id.*

*Sale pending divorce.* A sale by a husband, pending divorce, in which a decree is asked setting apart the property to the wife, is not taken out of the rule of *lis pendens* by the fact that the wife told him he could sell it if he wanted to, and that she wished he would, where the purchaser had no knowledge of such statements. p. 615. A suit in equity to set aside such deed will not be defeated on the ground that she had a remedy at law. *Id.*

*Master and servant.* A master has no right of action for an assault, or an assault and battery, upon his servant, unless some loss of service or capacity to serve results therefrom. p. 843.

### 6. SOCIAL RELATIONS.

*Fraternal societies.* A subordinate lodge, duly incorporated under state laws, cannot be deprived of the possession and control of prop-

erty belonging to it by the grand lodge of the order with which it is connected, although under the constitution of the order it has been suspended by the grand lodge. p. 841.

**Financial aid associations.** It is *ultra vires* a corporation created "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members," and declared by statute not to be an insurance company, to contract for "endowment insurance" payable to a member on his arriving at a certain age. The plea of *ultra vires* is maintainable by it as a defense to an action for such endowment insurance. p. 420. The beneficiary certificate or policy is valid as a certificate or policy payable to the widow or children of the plaintiff upon his death, and void only as a certificate or policy payable to him after being a member in good standing for twenty-five years or upon arriving at seventy years of age. *Id.* The assessments were not paid by insured to be retained to increase property of the association, but to be paid out to other persons entitled by virtue of beneficiary certificates, and it is to be presumed this was done; and the payment is not recoverable back. *Id.*

**Railroad relief association.** A railroad employes relief association cannot be bound by the declaration of a paymaster of the railroad company, so as to be rendered liable to an employe for benefits, where the railroad company was authorized to deduct dues only after being notified that the employe has been admitted to membership, and it had not been so notified. p. 44. A railroad paymaster is a servant, not an agent, of the railroad company. *Id.* Mortality tables have no connection with a suit for weekly benefits. *Id.* In an action to recover benefits, testimony of the association's medical examiner may be admitted to show that plaintiff had not become a member. *Id.* Benefits accruing after commencement of suit are not recoverable in an action of assumpsit. *Id.* The measure of damages in such action is the sum stipulated by the constitution and by-laws. *Id.* An injury which incapacitates a member from labor, but which permits him to earn as much as some other employment, will not entitle him to benefits for a "total inability to labor." *Id.* Receipts for benefits as a former member are not admissible to show the rules and regulations of the association. *Id.*

**Mutual benefit association.** For a substantial breach of the contract contained in a policy to pay a percentage of an assessment upon the happening of a certain event, the beneficiary may recover substantial damages in an action at law. p. 786. The question whether or not the beneficiary in a policy issued by a mutual benefit association has mistaken his remedy in bringing an action at law to compel an assessment to pay his claim may be raised by demurrer. *Id.* Upon demurrer to a complaint alleging the refusal to make an assessment and also that plaintiff's share of the assessment would be a certain amount, the court cannot say, as matter of law, that plaintiff has only sustained nominal damages by reason of such refusal, merely because it may be difficult, in advance of a levy, to ascertain the precise damages to which plaintiff is entitled. *Id.*

**Minors as members.** Minors are not, merely because of their minority, disqualified from

becoming members of mutual benefit societies, in the absence of any statute on the subject. p. 549.

**Benefit certificate, as a contract.** When a benefit certificate is sent by the supreme lodge to a subordinate lodge, for a person who has passed a medical examination which has been approved, the contract between the applicant and the supreme lodge is complete. p. 206. An action on a benefit certificate may be maintained without producing it at the trial, when it is in the possession of a subordinate lodge, which had refused to deliver it on the ground of fraud. *Id.* In such action the failure of defendant to deny an explicit averment that there was duly prepared a paper in the usual form is an admission of the execution of the certificate. *Id.*

**Notice of assessment.** Although the charter prescribes what notice of assessment shall be sufficient, and limits it to notice by posting, yet, if the company adopts the practice of sending written notice by mail, and as soon as informed, payment was tendered, the company is estopped from claiming the forfeiture. p. 118. Forfeitures are not favored by the law; and where the company misleads the insured his rights will be protected, and the company estopped from claiming a forfeiture, under the letter of the contract. *Id.* In matters affecting the execution of contracts, estoppel has no significance when the contract has been complied with. *Id.*

**Right of action by beneficiary.** When a mutual benefit life insurance association refuses to make an assessment in a proper case, the remedy is by an action for a breach of contract. p. 784. Unless the association establishes that the amount should be less, because all members do not respond to assessments, the measure of damages in such cases is the amount assessable upon all insured. *Id.* That the insured had used alcoholic drinks to such extent as to induce delirium tremens is not conclusive on the rights of the beneficiary, nor is he estopped by affidavits of physicians as to the cause of death. *Id.*

**Dissolution of society; jurisdiction.** Jurisdiction to decree the dissolution of a corporation may be conferred upon courts of equity by statute; and such jurisdiction is conferred by the Illinois Act in reference to mutual benefit societies. p. 549. A proceeding to dissolve a mutual benefit society, or to remove its officers, is not a criminal prosecution, but is a civil proceeding in equity to protect property rights. *Id.* Dissolution will be warranted where mortuary assessments were used to pay current expenses; or for the creation of a tontine reserve fund out of moneys collected for death benefits; or a promise to refund to members all the reserve fund to which they would be equitably entitled; or limiting and perpetuating the administration by means of a system of blank proxies; or numbering certificates of membership higher than the actual number issued; or for a failure to keep correct and intelligible books of account. *Id.*

## 7. PROPERTY AND PROPERTY RIGHTS.

**Homestead right.** Under the North Carolina Constitution, giving a homestead right in real estate, a person who moved with his family

out of the State and then returned is not, while so living out of the State, although returning two or three times a year for the purpose of purchasing supplies and looking after property left there, a resident entitled to a homestead in North Carolina. p. 106. A change of residence, clearly manifested as matter of law by acts, cannot be defeated by a subsequent declaration of the person that he did not intend his acts to have such effect. *Id.*

*Patent rights.* When one has taken out two patents, the first for a novel composition of matter, the second for a combination of this composition with another article, such first patent may be set up as a prior patent to defeat his claim under the second. p. 857. The principle that an infringing article or machine made before the expiration of a patent cannot be used after such expiration does not apply to a combination of parts which is *bona fide* broken up and, after the expiration of the patent, recombined. p. 489. An order requiring a defendant to operate a machine invented by him for discovery as to such invention, which would in effect compel him to disclose his defense, is an improvident exercise of chancery powers, and will not support a commitment as for a contempt. p. 228. An English patent, if regular in form, is sufficient consideration to support a promissory note given therefor and made in Massachusetts. p. 168. A clause in a contract for its sale that "It is understood that said English patent is in full force and effect," means that the patent was to be "of effect," in a sense that a United States patent must be. *Id.*

*Right of fishery.* No rights in favor of fishermen now exist by virtue of the proviso in the Province Charter of Massachusetts Bay that the rights of English subjects to fish, etc., and to erect wharves, etc., upon waste lands not in the possession of particular proprietors should not be abridged. p. 87.

*Right to use of navigable waters.* A person who, after the erection of a bridge over a lake, has purchased boats and engaged in renting them, has no other rights than are enjoyed by other persons in respect to the navigation of the lake. p. 282.

*Right to erect structures in navigable waters.* The right of the City of New York to erect structures in the navigable waters of the State is subject to sovereign control; and the authority to grant such right to others than littoral owners inhibits such grants, except by implication, on compliance with the conditions annexed. p. 629. Lessees of a wharf may extend and improve it so as to increase its facilities; the pier becomes an accretion to the wharf and upon surrender of leased premises vests in the landlord title to the structures remaining thereon (*Id.*); and tenants who obtained the right to build a pier attached to the wharf are estopped to set up any right against their landlords except under the lease. *Id.* A tenant who has never surrendered his rights during the term, or committed any act which authorized a re-entry, can acquire no rights during that term by adverse possession. *Id.*

*Reservation in town grant for landing places.* A reservation in an ancient town grant of land "for landing places for the inhabitants of Gloucester forever," is a reservation for the 2 L. R. A.

public at large, and not merely for the inhabitants of the town. p. 87. Acceptance is not limited to those parts of the lands so reserved which were in actual use as landing places. *Id.* No acceptance by the public, or by the inhabitants of the town was necessary. *Id.*

*Right to the use of running water.* An adverse, exclusive and uninterrupted use of all the water of a creek, taken by ditch and conveyed for mining purposes for any period beyond that of the Statute of Limitations relating to entry upon land, bars the owner of the land through which the creek runs of his riparian rights; but where originally appropriated under a license, such adverse use, unless hostile to the owner, cannot be established. p. 568. The use must have been in defiance of any right upon the part of the owner to use it for any purpose. *Id.* To authorize one to claim a forfeiture of valuable property rights for violation of a condition of grant, he must proceed to enforce it at once. *Id.* Acquiescence in sales and transfers of the ditch and water-right must be deemed a waiver of the condition that they should not be sold by the miner. The case discusses the relative rights of parties under an arrangement between them for the use of the water for the several purposes of each party. *Id.*

*Right of subrogation.* An insurer, on payment of insurance covering only part of a mortgage debt, cannot take by subrogation from a mortgagee any part of his claim until the mortgage debt is paid in full. p. 607. A ship owner, who has recovered and received from the owner of another vessel damages for a collision, is answerable to the owner of the cargo (or to insurer subrogated to such owner's right) for the whole value received. p. 178.

*Property rights; estate created by deed.* A condition in a deed that, in default of payment for three consecutive years of the yearly payment, the conveyance might be revoked by repaying the amount already paid, is not opposed to public policy nor repugnant to the estate granted. p. 526. A demand of each annual payment on the day it becomes due is not necessary in order to create a forfeiture of the estate, the party bound having equal knowledge of the thing to be done and the time to do it. *Id.* Mere indulgence or silent acquiescence in the failure to perform a condition is never construed into a waiver, unless some element of estoppel can be invoked. *Id.* The vendor who executed and delivered a deed with the name of the grantee left blank cannot question the title of an innocent purchaser for value from him who fills up the blank. p. 529. A purchaser, although bound to take notice of the right claimed by one in possession, is not chargeable with notice of a claim which may subsequently accrue or a right which is not asserted. *Id.* Relinquishing other security in consideration of a transfer of land by deed absolute, but in reality as security, entitles grantee to protection as a *bona fide* purchaser against the defects in the grantor's title. *Id.* A purchaser at a judicial sale, who contracts for a deed on a day fixed, is entitled to a deed under a decree which will convey an unquestionable title on the day fixed, and should not be subjected to further proceedings to perfect title. p. 465. A covenant of warranty in a deed of

land on which is situated a mill and dam embraces an easement claimed by the grantor as to ponded water occasioned by such dam on an adjoining tract of land of another person, and the grantees may maintain an action for breach of the covenant in respect to such easements. p. 285.

**Estate created by will.** The statutory provision that an exemplified copy of a will devising real estate executed by a nonresident or of the record thereof shall be presumptive evidence of the will and of its execution, does not render such will effectual to pass real estate in this State unless executed in accordance with the laws of this State. p. 425. A will giving property to a daughter with power to dispose of it by her own will in case she dies before her father, operates, in case of her death leaving a will, to devise and bequeath the property by its own force in accordance with her will. p. 198. A devise which assumes to give a life estate to the ancestor and the remainder in fee to the "heirs" of such ancestor (the word "heirs," being used in its technical sense and not as the intention to give only a life estate), will not control; but under the rule in *Shelley's Case* (in force in Illinois) the ancestor takes the fee. p. 455, disapproving and partly overruling *Belsay v. Engel*, 107 Ill. 182. The word "surviving," in a will devising property to a testator's wife for life, and adding: "But on her decease I give and devise the same to my surviving children to be divided equally between them," refers to the children surviving on the wife's decease. p. 448. A restraint upon alienation of an equitable life estate may be imposed by the settlor of the estate and will be enforced in equity. p. 118. A testator can disinherit his heirs or next of kin, only by leaving his property to others. Mere words of exclusion will not suffice. p. 848. A will which simply revokes all prior wills and declares that a certain son shall be excluded from all participation in the estate is a nullity. *Id.* A devisee of the legal estate in land, in possession of the property devised, there being no trust, cannot, in New York, maintain an action in equity to establish the will against the heir at law. p. 175. The Code of Civil Procedure which repeals the law which provides for determination of the validity of a will by the supreme court, provides for an action to determine such validity of a devise in a properly executed will, and not for an action to determine the validity of the will itself. *Id.* The revocation of a will by intentionally destroying it will not revive a former will which was expressly revoked by the later one. p. 833.

**Sureties on official bond.** Sureties to whom money of an estate has been loaned by an administratrix as a condition of becoming her sureties are not relieved from liability by repaying the money when a decree discharging her and them from their bond is subsequently vacated on the ground of fraud. p. 644. The sureties are not entitled to notice of a proceeding to vacate such decree, and are precluded from questioning any lawful order in a proceeding wherein she is a party, if obtained without collusion. *Id.*

**Estate by descent.** A grandchild whose father is dead and who has been adopted by his paternal grandfather cannot, if his grandfather

dies intestate, inherit in a double capacity, as adopted son and as representative of his deceased father, but will take only one portion and that as adopted son. p. 698.

**Right of administration of estate.** Upon a petition for letters of administration, although it is not necessary to cite a citizen of the United States having a right to letters prior or equal to that of the petitioner, but residing in another State, yet if such person appears before the surrogate, and presents his claim before the issue of letters, his claim cannot be disregarded. p. 795. The right of a nonresident to sue is not one of the privileges and immunities granted to citizens of the several States by the Federal Constitution. p. 686. Appointment of a nonresident as administrator in this State does not authorize him to sue as a resident under New York Code of Civil Procedure. *Id.*

**Partition of estate.** Partition cannot be maintained where there has been an ouster of the complainant by acts so overt and notorious as to imply notice to his cotenants. p. 225. A tenant by curtesy in an estate which consists of coal mines and mining privileges has the right to work open mines even to exhaustion, although he is not tenant of the surface. p. 429. Where he had a share of the property delivered to him in severalty in partition, other parties to the partition cannot afterwards deny that he was a life tenant. *Id.* A devise of coal mines and mining privileges, separate from the estate in the surface of the land, includes the use of the surface so far as necessary for mining purposes, and the use of a pit mouth thereon. *Id.* When the record in a partition suit discloses the existence of persons not made parties who might have an interest, a purchaser will not be compelled to accept title, although such omitted persons were, by reason of alienage, incapacitated from having an interest. To be conclusive the record must establish their incapacity. p. 465. The burden of establishing alienage of persons otherwise interested in property is upon the plaintiff in partition. *Id.*

**Property held in trust.** Where a will gives property to trustees upon certain trusts, and directs that the trustees may sell the real estate and divide the net proceeds, if necessity compels the sale of part of the real estate before the ten years expires the proceeds of the sale will be held upon the same trusts and will not be distributed before the expiration of such time. p. 768. The limitation of the power of a *cestui que trust* to dispose of his interest in the income of property devised in trust, is valid; and an assignment by one son of his interest in rents and profits is not valid. p. 118. Where a father purchases land, and has it conveyed to his son, the presumption is that the purchase was intended to be an advancement to the son, and no trust results in favor of the father. But evidence is admissible to rebut this presumption, and show that a trust results in favor of the father. p. 816.

**Estate of insolvent.** An assignment made in New York, which is legal there, will not be held void in Georgia for failure to attach a schedule and inventory as the law of that State requires, where there is nothing to show that it was intended to have effect in Georgia, merely because debts due by citizens of that State to the assignors, were assigned in the instru-

ment. p. 99. The schedules are not part of the contract, and such contract is not within the rule that contracts made out of the State, which contravene the policy of the State, are void. *Id.* The situs of a debt follows the creditor, and where the debtor and creditor reside in different States the law of the domicile of the creditor prevails. *Id.* An assignment in one State passes title to the property in another State as between residents of the former State, although never recorded in the latter State. p. 355. Statutes which relate to voluntary assignments by "insolvent debtors" and require sworn schedules of assets and creditors, assume the right of insolvent firms to assign the partnership property for the benefit of their creditors, though the partners themselves, as individuals, may be solvent. p. 828. When the schedules are in fact attached, failure of the writings to declare expressly on their face that they were then attached is of no consequence. *Id.* That one of the preferred debts was a due-note payable to the attorney who drafted the assignment and was given to him by the firm "for services and advice and counsel in reference thereto," does not render the assignment void *per se*. If no fraud was intended, but the amount of the note is more than services are worth, a proper deduction from the amount can be made, and the note be left to stand good against the assets for the balance only. *Id.* The statutory prohibition against preferences in the distribution of assets of insolvent national banks will not prevent a *cestui que trust* from following trust money held by such bank into any new investment thereof, capable of identification, but will prevent its being followed after it is mingled with the general funds of the bank. p. 480. The fact that the local statute provides that a creditor whose debt is mature and unpaid may ask for a receiver, is an exception to the rule making the existence of a lien a prerequisite to such an application. p. 158.

*Unconstitutional laws regarding.* A law which requires creditors to accept payment of obligations before maturity is unconstitutional. p. 255. So one making proof of the cost of an obligation the measure of the creditor's recovery, instead of the liability of the debtor as shown by the terms of his contract, is unconstitutional. *Id.* So a law which provides for the appointment of a receiver of a dissolved corporation and a transfer of its assets to him after the title to the property vested by dissolution in its directors, as trustees for stockholders and creditors, and which makes him a referee to take proof of claims and a judge to determine the materiality of evidence offered in their support, is unconstitutional. *Id.*

*Uses and trusts; common school funds.* Courts will take judicial notice that funds raised for the support of common schools pertain to the school corporation of a township, and can only be administered by the township trustee. p. 187. A school township is capable of taking a devise in trust for the support of common schools therein. And a bequest for such purpose is for a public and charitable use. *Id.* A devise or bequest will be held to be for the school township when the intention appears to create a fund for the support of common schools. *Id.* And where there is more than

one township of the same name, evidence is admissible to prove which one was meant. *Id.* The trust does not fail if a corporation trustee is incapable of acting; the proper court may appoint a new trustee. *Id.*

*Colleges.* The provisions of the New York Revised Statutes as to the incorporation of colleges are not restricted to colleges incorporated by the regents of the university of the State, but apply also, except as otherwise provided, to colleges created by special charters. p. 887. The charter of Cornell University gives it power to take and hold property, by gift, grant or devise, to a certain limit in amount, and a devise or bequest which will exceed the limit of the amount it is entitled to take and hold is void for the excess. *Id.* The power to raise the question of its right to take the property is not confined to the State, but may be raised by the heirs or next of kin. *Id.* Where certain sums were given in trust to a university with directions to convert the estate into money, it operates as an equitable conversion of the estate, and no real estate of the testator is thereby devised. *Id.*

*Trusts for charitable uses.* It is competent to prove by parol evidence that land conveyed to a grantee by a deed absolute on its face is in fact held by him in trust for charitable uses; but such evidence should be clear, convincing and conclusive. p. 758. Where the grantee is Archbishop of the Roman Catholic Church, the canons and decrees of his diocese are competent evidence to show that it is so held in trust by him; and the courts will take cognizance, and assume control over it, for the purpose of preventing its abuse, perversion or destruction. *Id.* Where the property is held for separate uses, each use is a separate trust, and property held for such separate use cannot be charged with the expense of improving another. *Id.* Property so held in trust does not pass to the assignee of the trustee, whose assignment in insolvency passes no better or different title than the assignor had. *Id.* Although the several congregations and persons respectively having charge of churches, schools, cemeteries and asylums are severally unincorporated, yet they have such an interest in the trust property as permits their representation in court, for the purpose of protecting the trust property. *Id.* Changes in membership do not affect their legal identity, but they respectively remain in legal contemplation the same congregations and bodies. *Id.* The interest of the beneficiaries is measured by and limited to the uses for which the property is held, and a pecuniary interest need not be shown by them. *Id.* Where such trustee has made advances from his own private means, to assist in buying or improving the trust property, he has a claim upon the property so purchased or improved, which passes to his assignee in insolvency; and it is competent for the court to order an accounting with a view to subjecting such property to the satisfaction of such claim. *Id.* Such a trustee may charge the trust property with the reasonable expense of its necessary preservation, in favor of one who expends money, labor or materials for that purpose. *Id.* Where property is claimed by a church organization not incorporated, and the property is in dispute, any number of the members of such association or congregation may maintain an action



for the benefit of the church, under Kansas Compiled Laws 1885, § 35, p. 146. Where the association purchases real estate for the benefit of such congregation, and the property is conveyed to some person in trust for such church, a trust is thereby created that may be enforced, although not in writing; and it can make no difference that the person to whom the land is conveyed is the bishop of the denomination of which said church is a part. *Id.*

*Rights and remedies.* Where the invasion of a right, if submitted to on the one hand and persisted in on the other a sufficient length of time, may result in its extinction, a remedy may be sought before actual damage has occurred. p. 87. Relief in equity may be had before plaintiff has established his rights at law, where the material facts out of which his rights arise are admitted; and if there is a doubt it is one of law only. p. 429. One from whom property has been wrongfully taken may regain his momentarily interrupted possession thereof by the use of reasonable force short of wounding or the employment of a dangerous weapon, especially after making demand for its return. Whether or not the force used is excessive is a question for the jury. p. 628.

*Enforcement of trust.* Where a contractor for railroad construction transfers the contract and securities to another, who borrows from a pledgee of part of the profits to arise under the contract, money to pay the purchase price, such pledgee has an equitable lien on the contract and securities, and a subsequent purchaser of the contract and securities, takes them subject to such lien, and the moneys and assets arising under the transfer constitute a trust as to pledgee enforceable in equity, especially where fraud is shown. p. 120. An attorney will be compelled to reconvey land conveyed to him by a client in trust for the client's children, for the purpose of coercing his wife to a separation on advantageous terms. p. 164.

*Following trust fund wrongfully converted.* The doctrine that when a trust fund has been wrongfully converted it can be followed and subjected to the preferential rights of the *cestui que trust*, is to be limited to cases where the identity of the fund can be traced, and is not to be extended to cases where it has been so mingled with other moneys or property that it can no longer be specifically separated. p. 480. A bill is not multifarious although the claims of the several complainants arose under different contracts, if they are pursuing a common trust fund in which they are jointly interested. p. 120.

*Equitable relief from fraud.* A person not intending to pay, by inducing one to sell him goods on credit through the fraudulent concealment of his insolvency, is guilty of a fraud which entitles the vendor to disaffirm the contract, if no innocent third party has acquired an interest in the property. p. 154. If the traders were insolvent at the time of their statement to Bradstreet, their statement of complete solvency, made "willfully with the intent to deceive, or recklessly without knowledge," is fraudulent under the law of Georgia, as to parties who were misled thereby. *Id.* The facts stated by the bill and affidavits make this a proper case for the chancellor to grant

the injunction sought and to appoint a receiver. *Id.*

*When equity will not relieve.* Where a contract has been made to accomplish a fraudulent purpose, equity will not at the suit of a *particeps delicti*, if the contract is executory, either compel its execution or decree its cancellation, but will leave the parties in the position in which they have placed themselves. p. 816. If another person, having notice of reduction of property to possession, takes possession by any other means than legal procedure, he is a mere trespasser and has no standing to maintain a suit to quiet his title. p. 512. He who comes into a court of equity must come in with clean hands; therefore when both are in fault, equity will not interfere and enjoin as a nuisance what one does against the other. p. 868. A reconveyance should not be refused on the ground that the transaction was against public policy and that the grantor was *in pari delicto*, where a deed of trust has been made by a man while sick and under nervous excitement. p. 164.

*Specific performance of contract.* An agreement by a vendor on rescission of a contract to reimburse the other party for expenditures upon the land is not within the Statute of Frauds, and may be enforced. p. 487. In an action to compel conveyance of land in performance of a contract, where the defense is insolvency of the widow of vendee, and abandonment by her of all claim to the land, a reply that the vendor agreed to take back the lot and pay her the value of the improvements, and demanding a sum due her under such agreement, is not such a departure in pleading as to defeat the action.

*Id.* A judicial sale of the equitable interest of a deceased vendee will not bar his widow's right to recover the value of improvements on such agreement. *Id.* The tender of a deed after verdict, for a sum claimed as alternative relief in an action for specific performance, is too late to be effectual. *Id.*

*Practice and procedure; trial of issue of will or no will.* Upon an issue *devisavit vel non*, the proponents of the will have the affirmative of the issue, and the right to open and conclude the argument. p. 668.

*Proponents may offer the will, and evidence of its due execution.* In the trial it is proper for the proponents to offer the will, the evidence of its due execution, and the competency of the testator at the time it was executed, and having made a *prima facie* case to rest; and after evidence against its validity to permit them to offer other evidence to sustain the will, as well as evidence in rebuttal. p. 668. The time to be looked to by the jury, in determining the capacity of a testator, is the time when the will was executed. *Id.* It requires less capacity to make a will than to make a deed. *Id.* It is not necessary that a person should possess the highest qualities of mind, nor that he should have the same strength of mind as formerly; it is sufficient if he have mind enough to understand the nature of the business in which he is engaged. *Id.*

*Old age is not of itself evidence of incapacity.* It is sufficient if at the time he was mentally capable of recollecting all his property and the objects of his bounty. p. 668. It is not necessary that he should name all his children or

give each a portion; it is immaterial to whom he gives his property. *Id.* Although he may have been influenced by feelings of resentment or dislike which may have influenced him to give his whole estate to one or more and little or nothing to others, it will not make the will invalid. If he was induced by extreme kindness and attention it will not constitute undue influence. *Id.* This case states the evidence admissible and inadmissible on trial of such an issue and the practice in giving instructions. *Id.*

*Practice and procedure, generally.* The defense of payment in advance need not be pleaded as payment, but may be raised by the general issue. p. 697. So proof of an estoppel is admissible in trespass to try title under the plea of not guilty. p. 715. The opinions of experts are admissible in evidence (p. 450—a case of injury by moving cars); of medical experts can only be given in a hypothetical case stated (p. 669); may testify as to effect of personal injury. p. 450. Admissibility of testimony of deceased witness on a former trial (p. 78); of testimony where charge of court confines jury to sole question (p. 84); granting instructions when immaterial error (p. 384); refusal when not error. p. 450. Verdict: liberty to jury to further hold consultation (p. 186); may be directed by the court (pp. 840, 808); when general verdict must control special interrogatories (p. 614); failure to find some facts in issue not objectionable (p. 520); newspaper comments on trial not a ground for setting aside verdict. p. 671. A general objection to evidence will not present any question on appeal. p. 614. Exceptions to findings and refusals to find present questions of law on appeal. p. 629. Cross petition in error must be filed within two years from rendition of judgment. p. 753. The exclusion of a question to a witness cannot be considered on appeal, unless the bill of exceptions shows what the answer would have been, or what it was offered to prove. p. 696. An appeal from an order of the general term is not premature although no judgment is entered thereon. p. 795.

## 8. DAMAGES FOR TORTS.

*Liability for tortious or negligent acts.* One who violates a duty owing to others, or commits a tortious or wrongfully negligent act, is liable not only for those injuries which are the direct and immediate consequences of his act, but for consequential injuries such as are likely to and do result from his act. p. 696.

*Libel and slander.* Publications of commercial agencies, issued to their subscribers generally, are privileged only when made in confidence to a subscriber interested in the pecuniary standing of the merchant reported; and the question of agency is one of fact. p. 405. If a libel consisted in reporting plaintiff's standing as a merchant, "in blank," the complaint must show that it was injurious and defamatory. Stating the substance of the language or its meaning is bad on general demurrer. *Id.* A witness in possession of a key to the reports may be allowed to explain what is reporting a merchant's standing "in blank." Testimony which is mere opinion as to the effect upon the credit of plaintiff is not admissible. *Id.* In oral defamation, as in the written, if the words uttered are not privileged the law implies mal-

ice. p. 139. A letter of a mere volunteer containing defamatory statements as to character, not known to be true, is not privileged. *Id.* A communication based upon mere rumors and hearsay, although believed to be true, is not rendered privileged by a request for information as to such rumors. *Id.* Defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered on the most urgent solicitation, where the person is under no obligation of interest or duty to utter them, and he to whom they are addressed has no right, interest or duty to hear. *Id.*

*Fraudulent representations.* False representations by one selling railroad bonds, as to their value as security, will not render him liable even though he made the statements in bad faith. p. 743.

*Malicious prosecution.* A plaintiff, in a suit for malicious prosecution on a criminal charge, may show his general good reputation known to the defendant, to show that the prosecution was without probable cause. p. 517. Evidence of what defendant had stated before the complaint was made may properly go to the jury as tending to show a warrant for belief in the statements. *Id.* Testimony of statement of witness in the criminal case in the absence of the one making the complaint is not admissible. *Id.*

*Nuisances.* The fall of ice and snow from a building upon a horse, causing him to start, is the direct, proximate cause of injury to the driver although the ice and snow did not hit the driver. p. 695. Where a portion of the roof of a building projects over the highway, and injury results therefrom by the fall of snow, and such injury is caused by negligence in the construction, the encroachment on the highway is wrongful. *Id.* The Act, making a private nuisance of any fence unnecessarily exceeding six feet in height, is within the limits of the police power and constitutional. p. 81. Malevolence must have been the motive for erecting such a fence to render it a nuisance. If such height is necessary, there is no liability; and if the owner thinks it necessary he is not liable because he also acts malevolently. *Id.* Help given by one lawfully building such a fence upon his wife's land will not of itself render him liable to prosecution. *Id.* A right, by custom, to maintain a building or permanent structure upon the land of another cannot be acquired. p. 87.

*Abatement of nuisance.* The Iowa Code, section 3331, giving the right to "any person injured thereby" to maintain an action to abate a nuisance, does not change the ordinary rule that a private individual will not be allowed to restrain or abate a public nuisance unless he can show some peculiar or special damage or injury to himself. p. 282. Where two families occupy rooms in the same house, using in common the halls and stairways, equity will not restrain the one from committing a nuisance against the other, unless the proof is clear and strong; equity will discourage interfering in mere domestic broils. p. 368. While the doing of certain acts in the use of his dwelling-house might not in themselves amount to a private nuisance, yet when done wantonly and maliciously, to annoy his neighbor, and destroy the

peace and quiet of his home, they may amount to a nuisance which equity will restrain. *Id.*

*Tort for loss of son's services.* In an action of tort brought by a father for the loss of his son's services, the father will not be permitted to testify that in his own mind he did not intend to emancipate the son, if the facts in the case warrant a finding by the jury of an implied emancipation which would cut off the father's right to maintain the action. p. 608.

*Negligence of directors of savings bank.* Where the directors of a savings bank met, in some years, but once or twice, instead of every week as required by their by-laws, and never caused the books of the bank to be examined, or called for a statement of their accounts with other banks, although there was nothing to show dishonesty or bad faith, they were held guilty of such negligence as held them liable for losses to depositors occasioned by the insolvency of the bank. p. 584. They are personally responsible for frauds and losses resulting from their gross negligence of duties to their trusts. *Id.*

*Negligence of horseman on crowded thoroughfare.* Riding a horse at an improper speed along a public street, and at the time looking in another direction, is culpable negligence. p. 614. Foot passengers have equal rights in the streets with those mounted on horseback or driving in carriages. Neither has a priority of right over the other; both are bound to use reasonable care to avoid collision. *Id.* Evidence is admissible to show the excess of travel on that street over other streets. *Id.*

*Negligence of physician and surgeon.* The degree of care and skill required of physicians is that reasonable degree of care and skill which physicians ordinarily exercise in the treatment of their patients. p. 587. In an action for damages, based upon lack of care and skill of a physician, the burden of proof is on the plaintiff. *Id.* If for the preservation and prolongation of a woman's life the physicians perform an operation, they are justified in doing so if she consents, whether her husband consents or not. *Id.* The patient is presumed to consent; and the burden of proof to show lack of consent is on the party alleging it. *Id.*

*Passenger carriers; liability for injuries by negligence.* Railroad corporations are not insurers of the lives or safety of passengers upon their cars; their neglect of a duty owing to the passenger must be shown to render them liable. p. 252. The failure of a railroad company to remove, while yet on the route, a thin covering of ice and snow which had accumulated on the platform, will not constitute such negligence as will make it liable for an injury which a passenger sustained by slipping thereon. *Id.*

*Their obligation.* The obligation in this respect is analogous to that imposed on municipal corporations, and the degree of care required must be determined by the circumstances of each case. *Id.* A passenger who goes from one car to another of a moving train, to find a seat, does not, while so upon the platform, take the risk of a collision with another train. p. 166. The relation of passenger is established on safely entering the car with intent to become a passenger. *Id.* If a railroad company in using tracks belonging to a third party might have

discovered, by the exercise or due care, their dangerous character, it will be liable for an accident whether the defect was in the original construction of the road or however otherwise it may have been caused. p. 502. Under the Public Statutes that in certain cases the damages shall be assessed with reference to the degree of culpability of the corporation or of its agents or servants, "the corporation is not rendered liable by showing that it had assumed a contractual or quasi contractual responsibility for third persons who were not its servants, but through whose negligence the injury happened. p. 503. The corporation is entitled to go to the jury on the question of safety of the road. *Id.* The Pennsylvania Act limiting the amount to be recovered in actions against common carriers for negligence, to \$3,000 in cases of personal injuries and \$5,000 in case of death, did not constitute a contract with a corporation, and is abrogated by the new Constitution. p. 621. "Utmost care and diligence" mean the utmost care consistent with the carrier's undertaking and with a due regard for all the other matters which ought to be considered in conducting the business. p. 88. A woman carried by a railroad train beyond her station, the employee refusing to put her off, and to whom they were "indecorous or insulting" in manner, may recover punitive damages. p. 694. Exemplary damages may be given for the refusal to sell a passenger a ticket or to check his baggage to a regular station of a passenger train. p. 490.

*Damages for injury to traveler.* A railroad company which has made an excavation in a highway for its track, throwing up an embankment on which travelers may pass, is liable for injury sustained by a traveler where his horse is frightened by the running of a hand car on the track. p. 450. Knowledge that there is some danger will not preclude a recovery where the traveler was using the only highway which led to or from his home, with ordinary care. *Id.* The rights of a traveler are not lost by one who stops his wagon in a reasonable manner in the highway, for the purpose of unloading goods. p. 696.

*Damages for death caused by negligence.* A widow, resident of Nebraska, appointed as executrix of her late husband who died in Kansas from injuries received in Missouri, may maintain an action for damages against a railroad company for negligently causing his death. p. 67. The distribution of the money recovered may be enforced by the courts of Nebraska, in the manner prescribed by the laws of Kansas. *Id.*

*Liability of master for negligently causing death of servant.* A railroad company is liable for negligence in permitting a defective car to be used so as to make it dangerous to brakemen going between cars to uncouple them, where the defect was known or might have been known to the company. p. 520. Where the material facts to show were a hidden or latent defect in a car, a special verdict which shows the manner in which the accident and injury occurred and the condition of the car and appliances, need not be required to describe the appliances. *Id.* If a special verdict is silent as to facts in issue the court will assume that the party upon whom rested the burden

of proof failed to prove them. *Id.* A brakeman is not chargeable with contributory negligence in going between cars to uncouple them, not knowing of a dangerous defect in the appliances. *Id.* Where it appears that decedent was at the time of his death in the employ of the company, and that he left a widow and one child four years old, the inference is that he was in the vigor of manhood and was at the time earning money for their support. *Id.* The company cannot defend on the ground that he was killed while working in violation of the Sunday Law. *Id.* Declarations which are the natural emanation or outgrowth of the act or occurrence in litigation, although not precisely concurrent in point of time, may be admissible as part of the act or transaction itself. *Id.* Declarations of a brakeman within two minutes after he was thrown under a car while attempting to uncouple it are admissible as part of the *res gestae*. *Id.* The construction and operation of a railroad without blocking its frogs and switches is not negligence *per se*, of which a court will take judicial notice. To warrant a recovery evidence must be adduced to show that the frogs and switches were inherently unsafe and dangerous when prudently working them, and that blocking lessens the danger. p. 67. To hold a corporation liable for an injury to an employé, resulting from the negligence of a superior employé, there must not only be subordination, but the party in control should have such an extended authority that the court may justly say that he is a vice-principal. p. 192.

*Fellow servants; who are.* A foreman of a bridge gang, engaged in repairing bridges, is a fellow servant with the persons operating a freight train on the same road. p. 839. Although asleep upon a side track, liable to be called at any moment to serve with his gang, he is on duty so as to be at the time a fellow servant with the men operating a freight train, whose negligence causes his injury. *Id.*

*Damages for killing cattle.* The Montana statute attempting to make a railroad liable for all damages to animals by running trains cannot be construed to mean that the killing shall be *prima facie* evidence of negligence. p. 813. It is unconstitutional as attempting to create the liability without reference to any violation of law or omission of duty. *Id.*

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## 9. CRIMINAL LAW.

*Procedure in federal courts.* A state law passed since 1789 cannot affect criminal procedure in the federal courts. The federal courts are governed in criminal causes by general common-law procedure. The common-law practice and procedure detailed. p. 229. In a State where the use of local jails for the United States prisoners is permitted, when a prisoner is committed to jail, a copy of the commitment should be left with the jailer; and where practicable it should be certified and bear the seal of the court. *Id.*

*State statutes.* The Illinois Warehouse Act imposing a penalty for issuing receipts for property not actually in store, is germane to and embraced within the title: "An Act to Regulate Public Warehouses," etc. p. 461. It was intended to protect the public; and the issuance of receipts, transferable by indorsement, when no property is in store, and given as security for loans, renders the warehouseman liable criminally, without intent to defraud; as knowing it to be false is sufficient. *Id.* The Act was not repealed by the Criminal Code. *Id.* The words "intoxicating liquors" as used in the Iowa statute mean "alcohol, wine, beer, spirituous, vinous and malt liquors and all intoxicating liquors whatever." Liquor containing alcohol is, as a matter of law, intoxicating, however much diluted, and regardless of the quantity drunk at any one time. p. 406. Whether cider is vinous or spirituous is to be determined by the jury; and this may be determined by its effect upon the drinker. p. 415. Citizens of Tennessee prohibited from again marrying because of their adultery are not protected from prosecution, by leaving the State temporarily for the purpose of evading its laws, and contracting a marriage in another State where such marriages are not prohibited. p. 708. When punishment is prescribed within defined limits, evidence of intent is admissible to fix the degree of criminality and the punishment commensurate thereto. p. 461.

*Adultery.* Citizens of Tennessee prohibited from marrying because of their adultery while married to another are not protected from a prosecution by leaving the State temporarily for the manifest purpose of evading its laws and contracting a marriage in another State where such marriages are not prohibited. p. 708

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# GENERAL INDEX

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(Separate Index to Notes precedes this.)

**ACCEPTANCE.** See **BILLS AND NOTES, NOTES AND BRIEFS.**

**ACTION OR SUIT.** See also **INSURANCE, 18, 21.**

1. Where the invasion of a right,—as, by the erection of a permanent structure on the land of another,—if submitted to on the one hand and persisted in on the other a sufficient length of time, may result in the extinction of the right, a remedy may be sought before actual damage has occurred. *Attorney-General, Adams, v. Tarr* (Mass.) 87

2. Where it is claimed that certain persons are unlawfully claiming to be, and are exercising the functions of, a corporation which never had an existence, such persons are the proper parties to be proceeded against, and the alleged corporation is not a proper defendant. *People, Attorney-General, v. Stanford* (Cal.) 92

3. A bill is not multifarious, although the claims of the several complainants arose under different contracts, if they are pursuing, upon the same grounds and for the same reasons, a common trust fund in which they are jointly interested. *Langdon v. Central R. & Bkg. Co.* (C. C. S. D. Ga.) 120

4. Where a citizen or citizens of one State sue in equity citizens of other States, to enforce a trust, in the district where the property in controversy is situated, and of which one or more of the defendants is or are inhabitants, the suit does not abate by reason of the non-residency of some of the defendants; but the nonresident defendants who have been properly served by publication or otherwise, and who shall fail to appear, are nevertheless bound. *Id.*

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**ADVANCEMENTS.** See **EVIDENCE, 5.**

**ADVERSE POSSESSION.** See also **WATERS AND WATERCOURSES, 5, 6, 9.**

1. Actually occupying adversely part of the north half of a quarter section of land, under a recorded patent including the whole quarter section, does not constitute adverse possession of the south half, which is claimed under a separate title. *Turner v. Stephenson* (Mich.) 277

2. A tenant that has never attempted to surrender his rights during the existence of the term, or committed any act which authorized a

re-entry thereunder, can acquire no rights during that time by adverse possession. *Bedlows v. New York Floating Dry Dock Co.* (N. Y.) 629

3. Title acquired by taking actual possession of vacant land after having paid taxes thereon for seven years under color of title made in good faith is, by force of the Illinois Statute of Limitations, such a fixed title as will enable one, not only to defend his possession, but to recover possession from another who has subsequently taken it. *Gage v. Hampton* (Ill.) 512

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**ANTENUPTIAL CONTRACTS.** See **HUSBAND AND WIFE, 1-3.**

**APPEAL AND ERROR.** See also **DAMAGES, 2.**

1. An appeal from an order of the general term is not premature, although no judgment has been entered thereon, where the order is in a special proceeding appealed from the surrogate which could only terminate in an order. *Libbey v. Mason* (N. Y.) 795

2. Under Ind. Code, § 658, a judgment cannot be reversed where it appears that the merits of the cause have been fairly tried and determined in the court below. *McNutt v. McNutt* (Ind.) 372

3. The court of appeals will not review the conclusion of the officer specially charged with the determination of the question of the necessity of certain work to complete a job or certain supplies for the city of New York, where it appears that the facts called for the exercise of his judgment, and that a reasonable necessity might by possibility have existed. *Brady v. New York* (N. Y.) 751

4. A defendant in error against whom, as cross petitioner in the trial court, a judgment had been rendered which is in favor of all the other parties to the suit, and to which no error is assigned by another party, is required to file his cross petition in error within two years after

the rendition of such judgment, in order to obtain its reversal. *Mannis v. Purcell* (Ohio) 753

5. Objections to a judgment must be presented by the proper motion to the trial court, or they will not be regarded on appeal. *McNutt v. McNutt* (Ind.) 872

6. Exceptions to alleged findings of fact when they are supported by evidence, and to the refusals to find when they are established by undisputed proof, present questions of law reviewable in the New York Court of Appeals. *Bedlow v. New York Floating Dry Dock Co.* (N. Y.) 639

7. A general objection to evidence as "incompetent, immaterial, and irrelevant," is not sufficient to present any question on appeal. *Stringer v. Frost* (Ind.) 614

8. The exclusion of a question to a witness cannot be considered on appeal, unless the bill of exceptions shows what the answer would have been, or what it was offered to prove by him if he were allowed to answer. *Smethurst v. Independent Cong. Church* (Mass.) 695

9. Where, on the trial of an issue *devotio vel non*, a medical expert was permitted to answer two improper hypothetical questions, which he did, fully covering the whole case, and the court refused to permit him to answer two proper hypothetical questions which embraced no more than the two he was permitted to answer, the party who was thus deprived of having his proper hypothetical questions answered was not, and could not have been, prejudiced by the error; and for such error the appellate court would not reverse the decree and set aside the verdict. *Kerr v. Lunsford* (W. Va.) 668

10. The admission of testimony relative to an injury to property by the flow of water is not injurious where the charge of the court confines the jury to the sole question of damages caused by the obstruction of the street in front of the property. *Schneider v. Detroit* (Mich.) 54

11. Where there is no pretense of any defense except under the general issue requiring plaintiff to prove his case, and this is done by undisputed testimony showing a right to recovery, error in the instructions is immaterial. *Perin v. Parker* (Ill.) 336

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#### ARBITRATION AND AWARD. See also ASSUMPSIT, 8; CONTRACTS, 11, 17.

1. An express agreement not to revoke, and to waive any right to revoke, a submission to arbitration, does not prevent a revocation thereof, under N. Y. Code Civ. Proc. § 2383, at any time before the closing of the proofs and the final submission of the cause for decision; and upon such revocation the foundation of the arbitrator's power is gone, and no further action can be had under the submission. *People, Union Ins. Co. v. Nash* (N. Y.) 180

2. When a building contract provided that the decision of the architect should be conclusive on the question whether work done in the

course of the erection of the building was within the specifications, or not, it was an implication indispensable to the effectuation of the purpose of the parties, that such decision should be an honest one. *Whism v. Schipper* (N. J.) 544

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#### ARMY AND NAVY.

The enlistment of a minor without the written consent of his parent or guardian, if he has one entitled to his services and control, is invalid and of no legal effect; and the invalidity may be claimed by the minor himself, either before or after attaining his majority. *Re Chapman* (C. C. N. D. Ga.) 332

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#### ASSAULT AND BATTERY. See also LICENSE, 2.

1. A master has no right of action for an assault, or an assault and battery, upon his servant, unless some loss of service or capacity to serve results therefrom. *Fluker v. Georgia R. & Bkg. Co.* (Ga.) 843

2. A lessee or licensee of the exclusive privilege of entering the cars or upon the right of way to sell or supply lunches is not a servant or agent of the corporation, so as to render it liable for an assault, or an assault and battery, committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers. *Id.*

3. One from whom property has been wrongfully taken may regain his momentarily interrupted possession thereof by the use of reasonable force short of wounding or the employment of a dangerous weapon, especially after making demand for its return. *Com. v. Donahue* (Mass.) 623

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#### ASSIGNMENT FOR CREDITORS. See CONFLICT OF LAWS, 1-4; INSOLVENCY AND ASSIGNMENT FOR CREDITORS.

#### ASSUMPSIT. See also EVIDENCE, 60.

1. A voluntary payment, without duress of person or goods, of an assessment for the expense of grading and paving a street, under an ordinance which was void on its face, is a mistake of law, and no action will lie to recover back the money so paid. *Phelps v. New York* (N. Y.) 626

2. A recovery upon a *quantum meruit* cannot be had for literary services, under a contract which provides that compensation therefor is

to be derived solely from a division of profits from sales after publication. *Keyser's Appeal* (Pa.) 159

8. Making a claim to land and erecting a fence thereon, after an award by arbitrators as to the boundary line, finding that the land belongs to the adjoining owner, does not constitute a breach of a stipulation in the submission "to abide by and perform the award," for which assumption will lie; but the remedy is by an action of tort. *Weeks v. Trask* (Me.) 582

4. If one furnishes goods upon an executed consideration, he cannot maintain an action to recover for their price, although the original agreement was void under the Statute of Frauds. *Starratt v. Mullen* (Mass.) 697

5. The sum paid by a broker for corn purchased by him to fill a contract, in conformity with rules and usages of the board of trade, whereby the principal is under an implied obligation to indemnify him, is a debt recoverable upon common money counts as money advanced to defendant's use. *Perin v. Parker* (Ill.) 836

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A proceeding in equity to enjoin an intrusion thereon, and to compel the removal of buildings erected on land reserved for public landing places by private individuals, may be maintained by the attorney-general. *Attorney-General, Adams, v. Tarr* (Mass.) 87

#### ATTORNEYS. See also NOTICE, 1.

1. Plaintiff's attorney has no lien on the land in controversy, or any claim against defendants personally for his fees, under Ky. Gen. Stat. chap. 5, § 15, giving an attorney a lien on a demand arising out of contract placed in his hands for collection, and on a judgment whether in contract or for a tort, and on property recovered, upon the dismissal in good faith of an action to enforce a contract for land, without any recovery or consideration except that each party shall pay his own costs, although it is against the consent of such attorney. *Rouse v. Fogle* (Ky.) 709

2. An attorney who has prepared deeds of trust and been consulted as to the purposes for which they were made cannot afterwards, on purchasing the land included therein, on an execution sale, maintain a suit to set aside such deeds as fraudulent; and where another person simply loans to him the use of his name in purchasing the lands and bringing the suit, the case will be treated as if the attorney were the actual party. *Davis v. Kline* (Mo.) 78

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#### BANKS AND BANKING. See also INTEREST, 2; TRUSTS, 4, 5.

1. The entry in a depositor's bank book, which is returned to him, of the payment of a check to the payee named therein, puts the depositor under no obligation to look to see whether the check was paid upon a forged indorsement or not. *Atlanta Nat. Bank v. Burke* (Ga.) 96

2. A bank depositor is not precluded from holding the bank liable for cashing his check on a forged indorsement, by the fact that a note and deed forged in the same manner had been palmed off on the depositor himself. *Id.*

3. The liability of a bank to its depositor is not avoided by payment of money upon his check to a person who forges the name of the payee. *Id.*

4. The genuineness of the last indorsement on a check does not relieve a bank from looking to the genuineness of preceding indorsements. *Id.*

5. Where money collected by a bank for another bank, under instructions for immediate return, is allowed to remain several months with the collecting bank, which becomes insolvent without having made return, the bank for which the collection was made will not be considered a *cestui que trust*, but will be treated as an ordinary creditor. *Philadelphia Nat. Bank v. Dowd* (C. C. E. D. N. C.) 480

6. The statutory prohibition against preferences in the distribution of assets of insolvent national banks will not prevent a *cestui que trust* from following trust money held for him by such bank as trustee, into any new investment thereof made by the bank, capable of identification, but will prevent its being followed after it has lost its identity by being mingled with the funds of the bank. *Id.*

7. Where a national bank contracts to collect drafts and checks for another bank, under which contract it has the right to mingle the proceeds of collections with its own funds and make itself debtor for the amount, its insolvency will terminate such right; and the proceeds of a check properly indorsed as for collection and sent by it to a third bank to be collected, which is not accomplished until after such insolvency, are the property of the principal bank, and may be recovered by it in a suit against such third bank. *Manufacturers Nat. Bank v. Continental Bank* (Mass.) 699

8. Directors of savings banks are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust. *Marshall v. Farmers & M. Sav. Bank* (Va.) 534

9. Where, instead of meeting every week, as required by their by laws, the directors of a savings bank met, in some years, but once or twice, and never caused the books of the bank

to be examined, or called for a statement of their accounts with other banks, while their vaults and cash drawer were emptied by illegal abstractions and insolvent loans; and while one of them was president of an insolvent railroad company, and knew its condition, and secured himself, its notes to the bank for a large sum were allowed to become worthless, — although there was nothing to show dishonesty or bad faith, they were held guilty of such negligence as made them liable for losses to depositors, occasioned by the insolvency of the bank. *Marshall v. Farmers & M. Sav. Bank* (Va.) 584

10. A person who is not the owner of stock in a national bank, and has no beneficial interest therein, cannot be held liable for assessments thereon by reason of the fact that the shares have been assigned to him to hold in trust, where it appears upon the proper books of the bank that he holds the same as trustee. If he can be held to be technically a stockholder, under U. S. Rev. Stat. § 5151, he must be also held exempt from liability as trustee, under § 5152. *Welles v. Larrabee* (C. C. N. D. Iowa) 471

11. A pledgee of stock in a national bank, who holds it solely as collateral security for a debt due from the real owner of the stock, cannot be held liable as a stockholder for assessments thereon, when the name of such pledgee as owner or holder of the shares has never appeared upon the books of the bank, or even upon the certificates of stock. *Id.*

#### NOTES AND BRIEFS.

See also SET-OFF AND COUNTERCLAIM.

Liability to depositor; payment of altered or raised check or forged paper. 96

Relation of depositor; duty to know signature; payment of forged paper. 97

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Cashier's check; deposit of drafts or checks; paper for collection; set-off. 275

Liability of pledgee of stock. 471

Presentation of check; effect of; delay in presenting. 493

Collections; rights and liabilities arising from. 699

**BENEFIT SOCIETIES.** See also CORPORATIONS, 23, 24; EVIDENCE, 48; INSURANCE, II.; TRIAL, 11.

1. Minors are not, merely because of their minority, disqualified from becoming members of mutual benefit societies, in the absence of any statute on the subject; and their admission is not such a violation of the policy of the law as will subject such a society to dissolution. *Chicago Mut. L. Indemnity Assn. v. Hunt* (Ill.) 549

2. The use of advance mortuary assessments to pay current expenses is such a violation of law as will warrant the dissolution of a mutual benefit society, where the statute provides that no part of the funds collected for the payment of death benefits shall be applied for any other purpose. *Id.*

3. It is a breach of official duty for the officer

of a mutual benefit society to fail to keep correct and intelligible books of account, whether such failure results from design, carelessness, or want of skill. *Id.*

4. Limiting and perpetuating the administration of the society in the hands of the manager and secretary, by means of a system of blank proxies unadvisedly signed by applicants for membership, is a violation of the provision of the statute requiring the affairs of mutual benefit societies to be managed by not less than five trustees. *Id.*

5. A promise to members to refund to them, at the expiration of a certain period, all the reserve fund to which they would be equitably entitled, is a violation of the statutory prohibition against the receipt by members of mutual benefit societies of any money as profit. *Id.*

6. The creation of a tontine reserve fund to be distributed among persistent members after a certain period, out of moneys collected for death benefits, is a violation of the statute which requires such moneys to be devoted to payment of death benefits only, and will warrant a dissolution of the society. *Id.*

7. Numbering certificates of membership much higher than the actual number issued operates as a fraud upon those becoming members in reliance upon such false numbers, and is an improper practice, whether or not done with an actual intent to deceive and defraud. *Id.*

8. A subordinate lodge duly incorporated under state laws cannot be deprived of the possession and control of property belonging to it, by the grand lodge of the order with which it is connected, although under the constitution of the order it has been suspended by the grand lodge. *Merrill Lodge, No. 299, I. O. G. T. v. Ellsworth* (Cal.) 841

#### NOTES AND BRIEFS.

See also INSURANCE.

What are; purposes of; *ultra vires*; as insurance companies. 420

Remedy for refusal to levy assessment; damages; practice and pleading. 786

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Dissolution of. 549

**BILLS AND NOTES.** See also CONTRACTS, 8; USURY, 1.

1. An English patent, if regular in form and in existence as a document, is, by force of the English decisions, sufficient consideration to support a promissory note made in Massachusetts, even although the patent is in fact invalid for want of novelty, and notwithstanding the fact that, under the Massachusetts decisions, a note given for an invalid United States patent is without consideration. *Chemical Electric Light & Power Co. v. Howard* (Mass.) 168

2. Where the payee of a promissory note, who, for the purpose of discounting it, had left it, with their indorsement, to enable the proposed purchaser to inquire as to the solvency of the makers, had obtained judgment for the value of the note against the purchaser, who

refused either to discount or return it, the payment of the judgment invested the latter with title to the note as of the date of the conversion, but without any obligation of the payees as indorsers, because the indorsement, being made for the mere purpose of discounting the note, had never been consummated. *Haas v. Sackett* (Minn.) 449

3. One who indorses a note in blank, whether by writing his name above or below that of the payee, is liable *prima facie* as a maker, and may be sued as such. *Bellows Falls Nat. Bank v. Dorset Marble Co.* (Vt.) 428

#### NOTES AND BRIEFS.

See also **BANKS AND BANKING.**

Liability of cashier; parol evidence to affect. 428

Acceptance by telegram; qualified acceptance; payable at banking house. 709

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#### BOARD OF TRADE.

1. The doctrine that when private property is devoted to a public use and becomes affected with a public interest it ceases to be *jure privationis*, and is subject to public regulation, applies to the furnishing of market reports to the public by the Chicago Board of Trade. *New York & C. Grain & Stock Exch. v. Chicago Board of Trade* (Ill.) 411

2. The Chicago Board of Trade cannot, after having so conducted its affairs for a long term of years as to create a standard market for agricultural products, and, in concert with telegraph companies, built up a system for the instantaneous and continuous indication of that market, until such system has become impressed with a public interest, be allowed to discriminate between persons, and say that one shall and another shall not receive the market reports, when all are equally willing to conform to reasonable rules on the subject and pay for the information. *Id.*

3. Hence, *—held*, that the Chicago Board of Trade, and the telegraph companies acting in connection with it, have no right to refuse to furnish the New York & Chicago Grain & Stock Exchange—an Illinois corporation organized for buying and selling grain—with the regular telegraphic “ticker” market quotations, it appearing that such Exchange was willing to conform to the regulations of the Board of Trade in reference to furnishing such quotations, and to pay for the same, and that it was not engaged in a gambling or “bucket shop” business. *Id.*

#### NOTES AND BRIEFS.

Regulation of business; discrimination by, in giving information. 411

**BONA FIDE PURCHASER.** See DEED; MORTGAGE, 3; VENDOR AND PURCHASER, 4, 5.

#### NOTES AND BRIEFS.

Relinquishing security; valuable consideration. 529

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**BONDS.** See EXECUTORS AND ADMINISTRATORS, 5, 6; FRAUD AND FRAUDULENT CONVEYANCES; LIMITATION OF ACTIONS, 6; TAXES, 8-10.

#### NOTES AND BRIEFS.

See also **TAXES.**

Of municipality; validity of; recitals; power of towns to issue. 242

Past-due coupons attached. 858

**BRIDGES.** See HIGHWAYS, 12; TAXES, 4; WATERS AND WATERCOURSES, 2-4, NOTES AND BRIEFS.

**BROKERS.** See also ASSUMPSIT, 5; INTEREST, 1.

1. It is not the duty of a broker who is entitled to have a margin supplied by his principal on the sale of corn, to buy in the corn within a reasonable time after the principal's refusal to supply the margin, where such refusal is not absolute, but accompanied by a promise to pay the losses when differences were settled, and not before. *Perin v. Parker* (Ill.) 886

2. Under the rules of the Board of Trade of Chicago, where a broker sells for future delivery under authority from his principal, the latter is under an implied contract to furnish margins when demanded; and if he fails to do so the broker is authorized, without waiting for the maturity of the contract, to buy produce to fill his contracts. *Id.*

**BURDEN OF PROOF.** See EVIDENCE, II.

**CANALS.** See also HIGHWAYS, 3.

The State, having for more than twenty years suffered merely by acquiescence, without permission or agreement, the use of a strip of covered surface over a canal feeder for purposes of passage, owes a duty to abstain from injuring, either carelessly or intentionally, a person so using it, but not a duty of active vigilance to prevent such injury, especially where the traveler is perfectly familiar with the condition of the surface. *Donahue v. State* (N. Y.) 876

#### CARRIERS.

##### I. OF PASSENGERS.

##### II. OF FREIGHT.

##### NOTES AND BRIEFS.

See also CONFLICT OF LAWS, 5; CUSTOM AND USAGE, 2; DAMAGES; EVIDENCE, 14, 15; INDICTMENT, ETC.; TROVER.

##### I. OF PASSENGERS.

1. An excursion ticket having the words “Not good for passage,” on the going part of the ticket, and the words “If detached,” on the returning part, is valid when both parts are presented together at the same time, to the same conductor, on the going trip, although the parts have become separated by inadvertence. *Wightman v. Chicago & N. W. R. Co.* (Wis.) 185

2. The relation of passenger is established when one has safely entered a passenger car, with the intention of becoming a passenger,

although at a stopping place not a station; and where no invitation was held out to take trains, but where they were permitted to be taken. *Devoire v. Boston & M. R. Co. (Mass.)* 106

8. A passenger who goes to one car from another of a moving train to find a seat does not, while so upon the platform, take the risk of collision with another train; and when his conduct does not contribute to an injury from such collision, he may recover from the railroad company for its negligence. *Id.*

4. Railroad corporations are not the insurers of the lives or safety of passengers upon their cars, and in order to render them so, it is essential to show that they have neglected the performance of some duty which, in the exercise of reasonable care, prudence, and diligence, they owe to such passengers. *Palmer v. Pennsylvania Co. (N. Y.)* 252

5. The failure of a railroad company to remove from the platform of a passenger car on a through train, before 5 o'clock A. M., while yet on the route, a thin covering of ice and snow which had accumulated during the night, will not constitute negligence such as will make it liable for an injury which a passenger sustained by slipping thereon, especially when he had several times crossed over the platform during the night and knew of its slippery condition. *Id.*

6. Endeavoring to board a train moving at the rate of 6 miles an hour is an act of such danger as to prevent any recovery from the railroad company for the death of the person attempting it, even though the train was evidently about to pass the station where it was advertised to stop, and where he was waiting for it, without stopping, and the conductor called to him to jump on if he was going. *Hunter v. Cooperstown, etc. R. Co. (N. Y.)* 823

7. If a railroad company is using tracks belonging to a third party, and the dangerous character of such tracks might have been discovered by the exercise of due care, it will be liable for an accident occasioned thereby and resulting in the death of a passenger, whether the defect was in the original construction of the road, or was due to the failure of the owner to make repairs, or however otherwise it may have been caused. *Littlejohn v. Fitchburg R. Co. (Mass.)* 502

8. A passenger is, whenever the performance of the contract of carriage in a usual and proper way necessarily involves leaving the vehicle and returning to it, entitled to protection as such, as well while so leaving and returning as at any other time. *Dodge v. Boston & B. Steamship Co. (Mass.)* 83

9. A passenger on a steamboat, who has purchased a ticket not entitling him to meals, can properly go on shore for a meal at any intermediate stopping place before reaching his destination, and has a passenger's right to protection during his egress, in the proper manner, from the steamer for that purpose. *Id.*

10. When a proper place of exit for passengers from a steamer is provided, a warning to a passenger not to leave at another part of the boat is a reasonable regulation which the passenger is bound to obey; and his disobedience thereof will, in the absence of a good reason

for it, prevent his recovery from the carrier for an injury growing out of it. *Id.*

11. A carrier of passengers is bound to exercise towards its passengers the utmost care and diligence in providing against injuries which human care and foresight can guard against. This rule applies at all times when, and in all places where, the parties are in the relation of passenger and carrier, and includes attention to all matters which pertain to the business of carrying the passenger. *Id.*

12. The words "utmost care and diligence," which carriers of passengers must exercise, do not mean the utmost care and diligence which men are capable of exercising; but they mean the utmost care consistent with the carrier's undertaking and with a due regard for all the other matters which ought to be considered in conducting the business. *Id.*

18. The traveling public have the right to stop and receive their baggage at any regular station or stopping place for the train on which they may be traveling; and any regulation that deprives them of that right is necessarily arbitrary, unreasonable, and illegal. *Pittsburgh, O. & St. L. R. Co. v. Lyon (Pa.)* 480

14. A regulation of a railroad company by which, although a passenger may himself get off at a regular station or stopping place of a passenger train, which is just across the street from the station of another railroad, he will not be sold a ticket to that place, or his baggage checked to or delivered at that station, but will be compelled to pay for a ticket to another station a mile distant, and go there for his baggage,—is unreasonable and invalid. *Id.*

15. The dominion of a railroad corporation over its trains, tracks, and right of way is no less complete or exclusive than that which every owner has over his own property. Hence, the corporation may exclude whom it pleases when they come to transact their own private business with passengers or other third persons, and admit whom it pleases, when they come to transact such business. This applies to selling lunches to or soliciting orders from passengers for the sale of lunches. *Flucker v. Georgia R. & Bkg. Co. (Ga.)* 843

## II. OF FREIGHT.

16. A custom cannot require that a shipper should expressly agree, as a condition precedent to his right to damages for injury to stock during transportation, that he would give notice before removing the stock. *Missouri Pac. R. Co. v. Fagan (Tex.)* 76

17. A custom requiring a shipper to agree, as a condition of shipment, that his measure of damages should not be more than the cash value of the stock shipped at the place of shipment, is illegal. *Id.*

18. A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. *Id.*

19. A carrier has the duty to feed and water stock during transportation, and cannot transfer it to the shipper by a custom requiring him to go along on the same train with the stock to feed and water them at his own risk and expense. *Id.*

20. Although goods are shipped at the own-



er's risk, the carrier may be liable for damage caused by the weather or rust, if occasioned by the carrier's negligence or by unreasonable delay upon the road. *Western & A. R. Co. v. Exposition Cotton Mills (Ga.)* 102

21. If a shipper of machinery agrees that it may be transported upon open cars, the carrier may still be liable for damage by rust or by the weather during a detention on the road, if ordinary diligence required the carrier to cover the cars during such detention, and it failed to do so. *Id.*

22. On a shipment from Boston to Atlanta, the last road named on the bill of lading, which runs into Atlanta, cannot avoid its liability, under Ga. Code, § 2084, as the last of several connecting roads, by the simple fact that it pushed the cars to the track of another railroad in Atlanta, and got that road to haul them with its engine  $2\frac{1}{2}$  miles, and deliver them to the mills to which they were shipped. *Id.*

23. Contracts by a railroad company with other companies for the establishment of through routes and through rates for the continuous carriage of interstate traffic do not violate § 7 of the Act to Regulate Commerce, prohibiting a combination to prevent the carriage of freights from being continuous. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. D. Ky.)* 289

24. No authority to issue through tickets or through bills of lading for property, at through rates, over connecting lines, is conferred by the Act to Regulate Commerce upon common carriers of interstate commerce, in the absence of arrangements between the companies. *Id.*

25. The requirement of the Act to Regulate Commerce, that every common carrier shall afford reasonable, proper, and equal facilities to connecting lines, imposes upon a carrier no duty either to form new connections or to establish new stations, yards, or depots, or to pay any part of the expense of providing such new facilities, either for the convenience of the public or of other carriers; and a carrier cannot be compelled to receive or deliver traffic at a point where another company has made a new connection with its roads, but has not provided proper facilities. *Id.*

26. Neither at common law nor under the Act of Congress of June 15, 1866 (U. S. Rev. Stat. § 5258), or the Interstate Commerce Act of February 4, 1887, can a common carrier be compelled to make through traffic arrangements with connecting lines. *Id.*

27. The Interstate Commerce Law does not require a common carrier subject to its provisions to establish through routes and through rates with all connecting lines, merely because it may have done so with one of them. *Id.*

28. Where the charter of a railroad company provided "that any and all such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated," the connection thus authorized is a physical, and not a business connection, and it does not require an interchange of traffic at the point of junction. *Id.*

29. An individual shipper or consignee cannot legally require a railroad company to send a shipment by a particular route beyond the 2 L. R. A.

company's line, at the same or equivalent through rates which such company may have established with other connecting lines; and what the individual shipper of interstate commerce may not lawfully demand, common carriers engaged in transporting such traffic may not lawfully require of connecting lines. *Id.*

30. Refusal of a carrier to interchange traffic with a new road, at a point where proper facilities therefor do not exist, does not constitute any discrimination or any undue or unreasonable preference or advantage, within the meaning of the Interstate Commerce Act. *Id.*

31. All discriminations and preferences by one carrier between others are not forbidden or made unlawful by the Interstate Commerce Act, but only such as are unjust or undue or unreasonable. *Id.*

32. A carrier cannot be compelled by a new connection formed with its road by another railroad, at a point where there are no facilities for handling freight, to concede the use of its own track and terminal facilities to the new company, and accomplish the interchange of traffic at its own yards and with its own employes. The use of such advantages can be acquired only by mutual agreement. *Id.*

33. A bridge company owning no freight cars, which solicits freight for railway companies who will furnish the cars and over whose lines the freight is to go, and merely transfers such cars over its bridge to the railway companies furnishing them, charging for its service its regular bridge toll, but making no charge for transporting the freight contained or carried in the cars,—is not a common carrier of such interstate freight. *Id.*

34. A bridge company which is not, either in law or in fact, a common carrier of interstate traffic, cannot invoke the provisions of the Act to Regulate Commerce to compel railway companies to transact business with or through such bridge company. *Id.*

35. The franchises and powers of building, maintaining, and operating a bridge and approaches, designated as its terminal facilities, do not, in and of themselves, constitute the bridge company a common carrier of property; nor do they, by any clear implication, confer upon it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor." *Id.*

36. Under the charter of a bridge company making its bridge and approaches thereto a public thoroughfare or highway, for the use of which, by railroads or street cars, wagons, vehicles, animals, and foot passengers, it was authorized to charge "reasonable tolls," for the collection of which suitable tollgates could be established, the word "tolls" is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services which the bridge company may perform or be permitted to render. *Id.*

37. Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for its engines, cars, and trains, it is regarded, under the Act to Regulate Commerce, § 1, as the owner or operator of the bridge and approaches, for the time being, as to all freight transported by

it over the bridge. And as to all such traffic, it, and not the bridge company, must be regarded as the common carrier. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (O. O. D. Ky.) 280

88. A corporation which, being under no legal obligation to do so, voluntarily contracts to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman. *Id.*

89. When an agent of a railroad is prosecuted under the Interstate Commerce Act, it is not necessary either to allege or prove that the particular unlawful act complained of was done under authority conferred by its principal or by its direction; it is sufficient to show that the accused was in fact an agent of a railroad subject to the Act, and that the wrong was committed under color of his office or agency. *United States v. Tozer* (D. C. E. D. Mo.) 444

40. The South Carolina Railroad Commission has no jurisdiction of a complaint for charges unlawfully made by a railroad partly in North Carolina, for transportation which was partly in the latter State, although it was for part of the original transportation by connecting lines between points both in South Carolina, such transportation being interstate commerce. *Sternberger v. Cape Fear & Y. V. R. Co.* (S. C.) 105

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**CHARITABLE USES.** See also EVI-  
DENCE, 25, 27.

1. A charitable trust is one of which the  
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courts will take cognizance and assume control for the purpose of preventing its abuse, perversion, or destruction. *Mannix v. Purcell* (Ohio) 75:3

2. Where property is held by an archbishop, of the Roman Catholic Church in trust to be devoted to the uses of public religious worship, cemeteries, orphan asylums, and schools, each church, cemetery, asylum, and school is held upon a separate trust and for its own separate uses; and one piece of property so held is not chargeable with any part of the expense of improving another, or of improving church property generally in the diocese. *Id.*

3. Property held upon such trusts by the archbishop does not pass to his assignee in insolvency by a deed of assignment made in his individual capacity for the payment of his individual debts. Such an assignment passes to the assignee no better or different title to the assigned property than the assignor held; and *contra* *quis* trust may assert, as against the assignee and the creditors of the assignor, the same rights that they could against the latter if no assignment had been made. *Id.*

4. Though the several congregations of the churches so held in trust, and the persons respectively possessing and having charge of such schools, cemeteries, and asylums, are severally unincorporated and otherwise incapable of holding the legal title to the property so used, they nevertheless have such an interest in the trust property as permits them to be represented in court by a number less than the whole, having a common interest with them, for the purpose of protecting the property from seizure and sale for the satisfaction of the private debts of the trustee. *Id.*

5. Changes in the membership of such congregations and bodies do not affect their legal identity; and for the purpose of continuing and enjoying the uses to which the properties respectively possessed by them are devoted, they respectively remain, in legal contemplation, the same congregations and bodies. *Id.*

6. It is not essential to the existence or enjoyment of a trust for charitable uses that the individual beneficiaries are able to show that they contributed to, or have a personal, pecuniary interest in, the trust property; their interest is measured by, and limited to, the uses for which the property is held. *Id.*

7. Where such trustee has made advances from his own private means, otherwise than as donations, to assist in buying or improving the trust property, he has a claim upon the particular property so purchased or improved, which passes to his assignee in insolvency as individual assets; and in a proceeding by the assignee to subject the assets of his assignor to the payment of his debts, it is competent for the court to order an accounting of the advances so made, with a view to subjecting such property to the satisfaction of such claim. *Id.*

8. Such a trustee has power, by contract, to charge the trust property with the reasonable expense of its necessary preservation, improvement, and repair, in favor of one who expends money, labor, or materials for that purpose. *Id.*

9. A bequest to a school township for the support of common schools is a public and

charitable use. *Skinner v. Harrison Twp.* (Ind.) 187

10. A school district in Indiana is capable of taking a devise in trust for the support of common schools therein. *Id.*

**CHATTEL MORTGAGE.** See MORTGAGE.

**CHECK.** See BANKS AND BANKING, NOTES AND BRIEFS.

**CITIZEN.** See CONSTITUTIONAL LAW, 18.

**CLAIMS.**

1. An Act authorizing the board of claims to rehear, audit and determine, and allow reasonable compensation for meritorious services, etc., rendered to the State, on a claim which had been previously rejected by the board of audit because of the lack of legal authority for employing such services, does not violate N. Y. Const. art. 8, § 19, which declares that "the Legislature shall neither audit nor allow any private claim or account against the State," etc. *O'Hara v. State* (N. Y.) 608

2. The proviso in the amendment to N. Y. Const. art. 7, § 14, exempting existing claims from the prohibition against allowing claims after they are barred, cannot apply to any claim accruing after the adoption of that amendment. *Id.*

3. The value of the materials furnished by the claimant in the performance of the services referred to in the New York Act of 1886, authorizing the board of claims to rehear and audit the claims of O'Hara & Co. for work and services performed by them for the State under the directions of the quarantine officials, constitute a part of the claim. *Id.*

4. When individuals voluntarily furnish property or render valuable services to the State at the request of state officers, with the expectation of payment, the Legislature may ratify the acts of such officers, although previously unauthorized, and make the State liable for the payment. *Id.*

5. Legislative ratification of an unauthorized contract by officers on the part of the State gives a claim therefor a legal existence for the first time; and the fact that a claim against the State on the imperfect obligation previously existing would have been barred by lapse of time does not make such legislative ratification and authority to allow such claim invalid, under the New York Constitution, art. 7, § 14, providing that no claim shall be audited or allowed or paid which, as between citizens of the State, would be barred by lapse of time. *Id.*

6. While the accounting officers of the treasury may state and certify accounts in favor of purchasers, assignees, or transferees of claims against the United States for witness fees, whose assignments are not controverted, they may exercise their own discretion in the matter, with due regard to the convenience of parties and the Government. Such assignees have no rights which make it obligatory upon the accounting officers to so state accounts in their favor. *Lopez v. United States* (D. C.) 571

7. Unrevoked and undisputed orders, as-

signments, and transfers of claims against the United States are so far valid under the law, that, if payment be made thereon, the assignors will be estopped from setting up any other claim on their behalf; and such payment will be a valid discharge of the indebtedness. *Id.*

8. A marshall may pay witness fees to persons other than those in whose favor such fees are taxed by the court, upon the unrevoked and undisputed orders, assignments, or transfers thereof by the witnesses. *Id.*

9. The Act of Congress of February 22, 1875 (18 Stat. at L. 383), which requires that the accounts of district attorneys, clerks, marshals, etc., shall be forwarded, "when approved," to the proper accounting officers of the treasury, does not make presentation to such officers a condition precedent to a right of action, nor is rejection of a claim by the accounting officers of the treasury such a determination of a "commission or department authorized to hear and determine," within the meaning of the Act of Congress of March 3, 1887 (24 Stat. at L. 505), as will bar an action in the proper courts. *Erwin v. United States* (D. C. S. D. Ga.) 220

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Against United States; assignment. 571

## CLERK.

1. In determining the number of folios in a final record, each separate and distinct order, notice, or other paper is to be counted separately according to the rule prescribed in U. S. Rev. Stat. § 854; and the aggregate of the folios so found is the number of folios in the record. *Erwin v. United States* (D. C. S. D. Ga.) 220

2. Where the clerk makes the copy subpoenas or subpoena tickets, and furnishes them to the marshal for service, at the request or by the acquiescence of the district attorney, the clerk is entitled to charge the Government for making such copies. *Id.*

3. When the clerk states the accounts of jurors and witnesses, taking their affidavits as to travel and attendance, and presents the accounts stated in a report to the court for its approval, he is entitled to the fee prescribed by the statute "for making any report." The original orders signed by the judge should be entered of record and placed upon file by the clerk; and he is entitled to a fee of 10 cents for filing each. *Id.*

4. Where, by order of the court, the clerk enters upon the minutes, as memorial services in respect to the late Vice-President, a proceeding in court of official character, the fee for entering is properly chargeable to the government. *Id.*

5. The fees of the clerk for entering orders approving accounts of marshals, clerks, attorneys, commissioners, etc., as required by the Act of Congress of February 22, 1875 (18 Stat. at L. 383), and for certified copies of such orders for the department, are properly chargeable against the United States. *Id.*

6. The clerk is entitled to charge for filing each separate paper sent up by commissioners

after hearing in criminal cases, and for filing each separate account of deputy marshals, being the vouchers to accounts current of the marshal. *Erwin v. United States* (D. C. S. D. Ga.) 229

7. The clerk is entitled to a docket fee for a hearing by the court on application for a warrant for the transportation of a defendant to another district, under the provisions of U. S. Rev. Stat. § 1104. *Id.*

8. An attachment against a defaulting witness or juror for contempt of court is an independent suit, and a "cause" for which a docket fee is chargeable, under the fee bill. The clerk is required to make a final record of the proceedings in such a case. *Id.*

9. The offices of clerk and commissioner are compatible. A person who holds two distinct compatible offices may receive the compensation of each. A clerk is given a *per diem* fee "for his attendance" at a session of the court; a commissioner is given a *per diem* fee "for hearing and deciding,"—services clearly distinct. *Id.*

10. Since the passage of the Act of Congress of March 3, 1887 (4 Stat. at L. 541), it is not necessary that business be transacted in court to entitle the clerk to his *per diem*; it is sufficient if the court be opened for business by the judge. *Id.*

11. Where his deputy attends a session of the court, the clerk is entitled to a *per diem* compensation for such attendance, even though the clerk has received a *per diem* for his personal attendance at a session of the court at another place. *Id.*

12. A clerk of a Circuit or District Court of the United States is entitled to compensation for revising the jury box, at the rate of \$5 per day, for a period not exceeding three days for a term of the court; also to charge 15 cents per folio for recording the names, residences, etc., of jurors, on a record which he is required to make by a rule of court. *Id.*

13. While the general rule is otherwise, when a statute is silent as to compensation, if additional labor is imposed on a clerk, not in the line of the duties ordinarily appertaining to such an office, and if contemporaneous construction of the statute by the Attorney-General, and analogous provisions of other statutes subsequently passed, indicate an intention to pay for such services, the officer is entitled to compensation. *Id.*

14. The affidavit and other papers to show proper proceedings before a committing magistrate, in compliance with the constitutional provisions in respect to criminal information, in a court of the United States, should be entered on the record; and the clerk is entitled to fees for making such entries. *Id.*

15. The fee for attaching a seal to certified copies of commitments furnished for service on a jailer by a clerk is properly allowed. *Id.*

16. A clerk of a court of the United States is entitled to fees for making certified copies of writs of commitment to be served on the jailer, where prisoners are committed to the local jails of the State. *Id.*

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## CLOUD ON TITLE.

When possession has been taken of vacant land, after payment of taxes for seven years under color of title, another person, having notice of such reduction to possession, has no right, although claiming title, to take possession except by due legal procedure; and if he takes possession by any other means, he is a mere trespasser, and has no standing to maintain a suit to quiet title. *Gage v. Hampton* (Ill.) 512

## NOTES AND BRIEFS.

Removal of.

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**CLUB.** See INTOXICATING LIQUORS, 2, 2.

**CODE.** See STATUTES, NOTES AND BRIEFS.

**COLLATERAL INHERITANCE TAX.** See STATUTES, 11; TAXES 21, NOTES AND BRIEFS.

## COLLEGE.

1. The provisions of the New York Revised Statutes as to the incorporation of colleges are not restricted to colleges incorporated by the Regents of the University of the State, but apply also, except as otherwise provided, to colleges created by special charters. *Re McGraw's Estate* (N. Y.) 387

2. An agreement made August 4, 1886, between the State of New York, through the commissioners of the land office acting under and by virtue of N. Y. Laws 1886, chap. 481, and Ezra Cornell, for the sale to the latter of the agricultural land scrip held by the State, must be construed to make such sale at 80 cents per acre, with an additional 30 cents if so much should be thereafter realized on the sale by the vendee; and the fact that he agreed to pay his profits, if any were realized, into the treasury of the State as the property of Cornell University, does not make such profits any portion of the purchase price of the scrip. These profits which he hoped to realize, and which were entirely speculative, were paid over, not as a debt to the State, but as a gift of his own to the university. *Id.*

3. Section 5 of the Charter of Cornell University, which provides that "the corporation hereby created may hold real and personal property not exceeding \$3,000,000 in the aggregate," gives the measure of the power of the university to take, as well as to hold, real property. It cannot be held that, while the power of a college, given by 1 N. Y. Rev. Stat. 460, "to take and hold by gift, grant, or devise any real or personal property the income or revenue of which shall not exceed the value of \$25,000," is enlarged in respect to the power to hold property, the power to take is thereby left unlimited. *Id.*

**COLLISION.** See SHIPPING, 1.

**COMMERCE.** See also INTERSTATE COMMERCE COMMISSION.

The power to regulate commerce among the

several States comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried; and to this end Congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the waterway; which regulations are as applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce. *The City of Salem* (D. C. D. Or.) 880

NOTES AND BRIEFS.

Power of Congress to regulate or tax. 298  
Interstate; when vessel engaged in. 880

**COMMERCIAL AGENCIES.** See **LIREL AND SLANDER**, 4.

**COMMISSIONERS.** See **RAILROAD COMMISSIONERS**.

**CONDEMNATION.** See **EMINENT DOMAIN**.

**CONDITION.** See **REAL PROPERTY, NOTES AND BRIEFS**.

**CONFLICT OF LAWS.** See also **WILLS**, 1.

1. The rule that contracts made out of the State, which contravene the policy of the State, will be held void, does not make void an assignment for creditors merely because it does not have annexed to it the schedule required in such cases by the laws of the State, as such schedules are not parts of the contract. *Birds-eye v. Baker* (Ga.) 99

2. An assignment made in the State of New York, which is legal there, will not be held void in Georgia for failure to attach such a schedule and inventory as the law of that State requires in such cases of assignment, under the provision of Ga. Code, § 8, that a writing intended to have effect in that State must be in conformity to the laws of that State, where there is nothing to show that it was intended to have effect in Georgia, merely because debts were due by citizens of that State to the assignors and were assigned in the instrument. *Id.*

3. The *situs* of a debt follows the creditor, and where the debtor and creditor reside in different States, the law of the domicile of the creditor prevails. *Id.*

4. An assignment for creditors, made in New York in conformity with the laws of that State, passes the title to property in Pennsylvania, as between residents of New York, although the assignment has never been recorded in Pennsylvania in accordance with the Pennsylvania Act of May 8, 1855 (P. L. 415). *Bacon v. Horne* (Pa.) 855

5. A contract in a bill of lading for a shipment from Boston to Atlanta, although it would not have been a good contract if made in Georgia, not being intended to take effect wholly in Georgia, can be enforced in that State if it is a good contract in Massachusetts. *Western & A. R. Co. v. Exposition Cotton Mills* (Ga.) 102

6. A widow appointed administratrix of her husband in Nebraska may sue a railroad com-

pany in Kansas for causing her husband's death in that State, to enforce a cause of action given by the Kansas Statute to the administratrix, as the statute does not limit the right to an administratrix appointed in the State of Kansas. *Missouri Pac. R. Co. v. Lewis* (Neb.) 87

7. The distribution of money recovered in Nebraska on a cause of action, under the Kansas Statute, for causing the death of a person in Kansas, may be enforced in the former State in the manner prescribed by the Statute of Kansas. *Id.*

8. Citizens of Tennessee prohibited by its laws from marrying because of their adultery while one of them was married to another person are not protected from a prosecution in that State for lewdness in living together as man and wife, by leaving the State temporarily for the manifest purpose of evading its laws and contracting a marriage in Alabama, where such marriages are not prohibited. *Pennegar v. State* (Tenn.) 708

NOTES AND BRIEFS.

See also **BANKRUPTCY**.

Validity of foreign assignment. 100  
Validity of contract; assignment for creditors. 328, 355

**CONSTITUTIONAL LAW.** See also **BOARD OF TRADE**, 1; **COMMERCE**; **RAILROADS**, 1; **STATUTES**, 7-10; **TAXES**, 5.

1. Under the New York City Charter (Acts 1873, chap. 885, § 91) embodied in the Consolidation Act of 1882, § 64, conferring upon the Common Council of New York City the power and duty of deciding in each particular case whether the provisions as to letting a contract by public advertisement shall be dispensed with, where work for the corporation is to be performed requiring an aggregate expenditure of more than \$1,000, an ordinance delegating to the Commissioner of Public Works power to decide whether work for the city shall be done by contract or otherwise is void as being an unlawful delegation of authority. *Phelps v. New York* (N. Y.) 626

2. A statute conferring on a commission authority to regulate the charges of railroads for transportation of passengers and freights is not a delegation of legislative power forbidden by the Constitution of Florida. *McWhorter v. Pensacola & A. R. Co.* (Fla.) 504

3. The constitutional provisions securing freedom of worship were not designed to prevent the adoption of reasonable rules for the use of streets; and a religious body cannot avail itself of these provisions as an authority to take possession of a city street, in violation of such rules, for the purpose of public worship therein. *Com. v. Plaisted* (Mass.) 142

4. That an act was done as a matter of religious worship only will not protect one from the consequences of an act which is made subject to a penalty under the law. *Id.*

5. It is not an unconstitutional delegation of power for the Legislature to authorize a city council to empower the city board of police to make rules and regulations in reference to itinerant musicians. *Id.*

6. An Act of the Legislature will not be declared invalid by the courts because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by the Constitution. *Com. v. Plaisted* (Mass.) 143

7. Mass. Acts 1887, chap. 848, making a private nuisance of any fence unnecessarily exceeding 6 feet in height, maintained for the purpose of annoying owners of adjoining property, is within the limits of the police power, and is constitutional in respect to fences erected either before or after its passage. *Rideout v. Knox* (Mass.) 81

8. Kan. Comp. Laws 1886, chap. 28, § 47, subd. 4, authorizing the construction of railroads in streets, is not in contravention of Kan. Const. art. 12, § 4, or of the 5th Amendment to the Constitution of the United States, as the constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but indirectly or consequentially injured. *Ottawa, O. & C. G. R. Co. v. Larson* (Kan.) 59

9. N. Y. Laws 1886, chap. 271, attempting to take away from a street railroad company which is dissolved by legislative action, the franchise which has been granted to it in perpetuity to construct and maintain a street railroad in a certain street, and to direct the sale and transfer of such franchise, and the payment of the purchase price to the city, is unconstitutional as an effort to change the ownership of the franchise without due process of law. *People v. O'Brien* (N. Y.) 255

10. The appointment of a receiver of property of a dissolved corporation, and the transfer of its assets to him by force of a statute, after the title to the property had become vested, by dissolution of the corporation, in its directors as trustees for the stockholders and creditors, in an action to which such directors were not parties, is a violation of the constitutional provisions in relation to the taking of property without due process of law. *Id.*

11. Under S. C. Const. art 9, § 8, giving counties, townships, etc., power to assess and collect taxes for corporate purposes, which thereby impliedly inhibits taxation for other purposes, a statute declaring that townships may subscribe to the stock of a railroad company, and that they shall be bodies politic and corporate, invested with the necessary powers to carry out that purpose, is unconstitutional, for the reason that townships in South Carolina, since the Act of 1870 repealing most of the provisions of the Act of 1868 organizing townships, etc., are mere territorial divisions, with no officials, no perpetual succession, no corporate powers, privileges, or purposes; and therefore power to take stock in a railroad and to levy taxes in payment therefor cannot be exercised for any corporate purpose, within the meaning of the Constitution. *Floyd v. Perrin* (S. C.) 243

12. The denial of due process of law resulting from the provisions of the Indiana Statute which assumes to confer authority upon the county board of equalization to increase the valuation of property of an individual taxpayer

listed by him for taxation, by a decision which is final, without giving him an opportunity to be heard, renders such provisions unconstitutional. *Kunts v. Sumption* (Ind.) 653

13. The right of a nonresident to sue in the courts of a State is not one of the privileges and immunities granted to citizens of the several States by Fed. Const. art. 4, § 2. *Robinson v. Ocean Steam Nav. Co.* (N. Y.) 636

14. Where individual rights are concerned, and the matter is one upon which a party is entitled to be heard, a proceeding conclusively and finally disposing of individual property rights will be void, unless founded upon a law providing for notice of some kind. It is not enough that some notice or information may be given, but the law must provide for notice. *Kunts v. Sumption* (Ind.) 655

#### NOTES AND BRIEFS.

See also RELIGIOUS SOCIETIES; STATUTES.

Control of business affected with public interest. 411

Attempt to create absolute liability upon railroad for killing stock. 814

Devesting property without due process. 843

Protection of rights; due process. 255, 655

#### CONTEMPT.

An order requiring a defendant to operate a machine invented by him (the so-called "Keely Motor"), made in a suit for a discovery as to such invention, before issue joined and before legal testimony could have been taken, and which would in effect compel him to disclose his defense, is an improvident exercise of chancery powers, and hence not sufficient to support a commitment as for a contempt in not obeying such order. *Com. v. Perkins* (Pa.) 223

#### NOTES AND BRIEFS.

Lack of jurisdiction. 223

#### CONTRACTS.

I. NATURE AND REQUISITES.

II. CONSTRUCTION; VALIDITY.

III. PERFORMANCE; CHANGE OR EXTINGUISHMENT.

IV. ACTIONS; IMPAIRING OBLIGATIONS.

#### NOTES AND BRIEFS.

See also ASSUMPSIT, 4; CONSTITUTIONAL LAW, 1; CORPORATIONS, 18; HUSBAND AND WIFE, 1-3; INSURANCE, 5; WATERS AND WATERCOURSES, 7.

#### I. NATURE AND REQUISITES.

1. A contract with the city of New York, for the consideration of \$975, to substitute cherry for pine in finishing the interior of a public building in process of construction under a valid contract, need not be founded upon a sealed bid or proposal, under the Consolidation Act, § 64, requiring contracts for extra work to be so founded where "the several parts of the said work or supply shall together involve the expenditure of more than \$1,000." *Brady v. New York* (N. Y.) 751

2. Where a verbal order is given to an agent for goods, which he immediately enters in a

memorandum book, and the purchaser subsequently writes to the other party: "Don't ship paint ordered through your salesman; we have concluded not to handle it,"—the written entry by the agent, taken in connection with the letter, makes such a note or memorandum in writing of the bargain as will satisfy the requirements of the Statute of Frauds. *Louisville Asphalt Varnish Co. v. Lorick* (S. C.) 212

8. The parol agreement of a wife, in consideration of her husband's leaving her his property by will absolutely, to transfer the remainder, after she was done with it, to his heirs, may, after her death leaving it unperformed, be enforced against her representatives notwithstanding the Statute of Frauds. *Gilpatrick v. Gladden* (Me.) 662

4. An agreement by a vendor, on rescission of a contract, to reimburse the other party for expenditures upon the land, is not within the Statute of Frauds. *Houston v. Sledge* (N. C.) 487

5. A lease made on December 15, 1887, for the year 1888, may be valid, although not in writing, under Miss. Code, § 1292, excepting from the necessity of writing a lease for not longer than one year. *McCoy v. Toney* (Miss.) 847

6. The fact that a promise to marry was made six years before the writing was drawn and signed does not impeach the consideration of the contract, as the written instrument merges mere oral negotiations. *McNutt v. McNutt* (Ind.) 872

## II. CONSTRUCTION; VALIDITY.

7. A written contract for building a house, stipulating that no charge for extra work or materials shall be made, unless ordered in writing, will not prevent the contractor from recovering for extra expense incurred on the express agreement of the other party to pay for it, or on his request therefor, under circumstances implying a consent to be liable for it, irrespective of the written contract. Parties cannot by contract tie up their freedom of dealing with each other. *Bartlett v. Stanchfield* (Mass.) 625

8. A telegram by a bank offering to pay a draft by a certain person for \$2,000 means to pay it at the bank's place of business, and imposes no obligation to accept a draft for \$2,000 "with exchange" on another place. *Lindley v. Waterloo First Nat. Bank* (Iowa) 709

9. A clause in a contract made in the United States, by citizens thereof, for the sale of a certain English patent, that "it is understood that said English patent is in full form and effect, otherwise said H. is to be relieved from payment," etc.,—construed to mean that the patent was to be "of effect" in a sense that a United States patent must be to obtain recognition in our courts. *Chemical Electric Light & Power Co. v. Howard* (Mass.) 168

10. A father purchased real estate, and had it conveyed to his son by an absolute deed. In a suit in equity by the heirs, after the father's death, to set up a resulting trust in their favor, they cannot be permitted to show that the conveyance to the son was made for a fraudulent purpose by the father, in order to rebut the

presumption that it was an advancement or gift to the son. *McClintock v. Loiseau* (W. Va.) 816

11. Fraud in the decision of an arbiter, to whose decision a question is referred by contract, may be set up in a suit on the contract, in avoidance of his decision, even though it does not appear that the party who would benefit by it has colluded. *Chism v. Schipper* (N. J.) 644

## III. PERFORMANCE; CHANGE OR EXTINGUISHMENT.

12. Where a contract has been made to accomplish a fraudulent purpose, a court of equity will not, at the suit of a party to the fraud,—a *particeps delicti*,—if the contract is executory, either compel its execution or decree its cancellation, or, after it has been executed, set it aside, and thus restore to the plaintiff the property or other interest which he has fraudulently transferred. It will leave the parties in the position in which they have placed themselves. This rule applies, not only to the original parties to the fraudulent transaction, but to their heirs, and to all parties claiming under or by title derived from them, where no equitable rights intervene to protect such parties. *McClintock v. Loiseau* (W. Va.) 816

13. A mechanics' lien given by statute is liable always to be modified, altered, or repealed by the same power that created it. Being only a means for enforcing the payment of a debt arising from the performance of a contract, it is not a vested right, but may be taken away without impairing the obligation of the contract. *Hanes v. Wadey* (Mich.) 498

14. A married woman who, during minority, joins with her husband in a conveyance of her land in which he has a life interest, is under no obligation, before rescinding, to refund purchase money paid to the husband and which did not come to her hands, but which may be presumed to have been paid for his interest. She must, however, pay her individual indebtedness to the grantee, which he canceled at the time of the conveyance as part of the consideration thereof. *Stull v. Harris* (Ark.) 741

15. The fact that a deed of trust was made by a man while sick, troubled, and under nervous excitement, to a trustee acting as his counsel, for the purpose of coercing his wife into a separation on advantageous terms, will not prevent the grantor from demanding a reconveyance, on the ground that the transaction was against public policy and that he was *in pari delicto*. *James v. Steers* (R. I.) 164

16. An attorney will be ordered to reconvey land conveyed to him by a client in trust for his children, for the purpose of coercing his wife to a separation on advantageous terms, although it contains no power of revocation, where the client was under a misapprehension as to the trustee's power to reconvey. *Id.*

17. The certificate of the proper officer that certain work is necessary to complete or perfect a particular job which is being performed for the city of New York, or that any supply is needful for any particular purpose, is conclusive as between the one contracting to furnish such work or supply and the city, where there is no allegation of fraud, and where the facts



indicate that the necessity certified is a possible incident of such work or supply. *Brady v. New York* (N. Y.) 751

#### IV. ACTIONS; IMPAIRING OBLIGATIONS.

18. A judicial sale of the equitable interest of a deceased vendee in a contract for lands will not bar an action by his widow to recover the value of improvements, on an agreement by the vendor to pay her therefor in consideration of rescission of the contract for the lands. *Houston v. Sledge* (N. C.) 487

19. The time of payment of a pecuniary obligation is a material provision in the contract, and a creditor cannot be compelled by statute to accept payment in advance. *People v. O'Brien* (N. Y.) 255

20. A statute making proof of the cost of an obligation the measure of the creditor's recovery, instead of the liability of the debtor as shown by the terms of his contract, is unconstitutional. *Id.*

21. The provision of N. Y. Laws 1850, § 48, that the repealing of a charter shall not impair any remedy existing against the corporation, its directors or officers, upon a liability previously incurred, is a contract protected by the provisions of the Federal Constitution. *Id.*

22. A tax deed made in pursuance of a sale of property for a delinquent tax, under an Act which provides that such deed shall be conclusive evidence of the regularity of the assessment, except for fraud, is a contract with the State that the deed shall so far remain conclusive evidence of title in the grantee therein; and a subsequent Act of the Legislature, making such deed only *prima facie* evidence of such regularity, is void because it impairs the obligation of the contract. *Tracy v. Reed* (C. C. D. Or.) 778

23. It cannot be presumed, without the clearest language indicating such an intention, that parties to a contract anticipated the enactment of an unconstitutional law, or contracted upon such assumption; and therefore a contract between street railroad companies, to make no change in rates of fare so long as the rates allowed by law upon a certain date shall be received, will terminate by force of its own limitation when a statute is passed reducing such rates. *Buffalo East Side R. Co. v. Buffalo Street R. Co.* (N. Y.) 884

24. A statute making it unlawful for street railroad companies in a certain city to charge the rates of fare then received does not impair the obligation of a contract between two of the companies operating street railroads in that city, by which they have agreed not to change the rates without the consent of each other. *Id.*

25. The Pennsylvania Act of 1868 (P. L. 53) limiting the amount to be recovered in actions against railroad companies and common carriers for negligence to \$3,000 in case of personal injuries and \$5,000 in case of death, providing that "upon the acceptance of the provisions hereof by any carrier or corporation the same shall become a part of its Act of incorporation," does not constitute a contract with a corporation, and is abrogated by the new Constitution of Pennsylvania, art. 3, § 21, providing that no statute shall limit the amount of

recovery for injuries resulting in death, or for injuries to persons or property. *Pennsylvania R. Co. v. Bowers* (Pa.) 631

#### NOTES AND BRIEFS.

See also HUSBAND AND WIFE.

Merger of preliminary negotiations. 152  
Presumption as to, binding personal representatives. 184

Sufficiency of memorandum; note in private book of salesman. 213

Effect of legislation upon. 384

Requiring certificate from architect; effect of fraud. 545

With municipality; changes in, as to extra work. 751

To stifle competition in trade; conspiracies to injure trade; monopolies. 33

Statute of Frauds; memorandum of agreement; sufficiency of; in several writings; what must contain; as evidence. 213

Statute of Frauds; attempt to defraud by. 663

Fraudulent or illegal; denial of remedy. 817

#### CORPORATIONS.

I. NATURE; CREATION; FRANCHISES.

II. POWERS, LIABILITIES, AND OFFICERS.

III. STOCK AND STOCKHOLDERS.

IV. DISSOLUTION.

##### NOTES AND BRIEFS.

See also BENEFIT SOCIETIES; CONSTITUTIONAL LAW, 9, 10; COURTS, 13; EVIDENCE, 28; INSURANCE; JUDGMENT, 2, 4, 7; MASTER AND SERVANT, 6; PLEADING, 1, 10, 11; STATUTES, 9, 10, 19; STREET RAILWAYS; TAXES; TRUSTS, 1.

I. NATURE; CREATION; FRANCHISES.

1. Cal. Const. art. 4, § 31, providing that corporations shall not be created by special Act, does not prohibit the assignment of a franchise to a legally organized corporation by persons having the lawful right to transfer the same. *People, Attorney-General, v. Stanford* (Cal.) 93

2. A corporation cannot be sued as such and brought into court, and the action maintained against it, on the ground that it is not a corporation; and other defendants sued jointly with it cannot be charged in such an action with having jointly, with such corporation, usurped the rights of a corporation, etc.,—because by suing a corporation as such its existence is admitted. *Id.*

3. The centralization of corporate franchises in a single irresponsible power furnished with every delegated facility for regulating and controlling at will, throughout the country, the production and price of a particular and necessary article of commerce,—viz., refined sugar,—creates a monopoly in a legal sense, is detrimental to the public, and is consequently unlawful. *People v. North River Sugar Refin. Co.* (N. Y.) 83

4. A trust which is, in effect, the uniting of several corporations into a practical consolidation or partnership not authorized by their charters, or effected under the statutes in refer-

ence to consolidation of corporations, is *ultra vires*, and warrants the forfeiture of corporate existence. *Id.*

5. The formation of the "sugar trust" denominated the "Sugar Refineries Company," an unincorporated association composed of a board of trustees created under a deed of trust executed in the names of certain sugar refining corporations and partnerships owning nearly all the sugar refineries in the country, with the express object of promoting economy of administration, and reducing the cost of refining, and promoting the interest of all parties to the deed in all lawful ways, in accordance with the terms of which such partnerships were turned into corporations, and the stock of all the corporations was then transferred to such trustees, in lieu of which they issued trust certificates to the stockholders of the several corporations,—is to be considered as the corporate act of the corporations concerned, and not simply the individual act of the stockholders. *Id.*

6. A corporation which has entered into an illegal combination creating a monopoly is, by reason thereof, liable to forfeiture and dissolution, at the suit of the People, under N. Y. Code Civ. Proc. § 1798, for the abuse of its powers and for the exercise of privileges and franchises not conferred upon it by law. *Id.*

## II. POWERS, LIABILITIES, AND OFFICERS.

7. The power conferred by the New York Act of 1889 upon a railroad corporation to contract with another for the use of their respective roads in such manner as the contract may prescribe involves the power to make a lease for a term of years. *Beveridge v. New York Elevated R. Co.* (N. Y.) 648

8. Where a tripartite agreement between three corporations has been held invalid as to one of them, an action to sever the contractual relations is within the honest discretion of the directors of the other companies. *Id.*

9. An agreement by the directors of a corporation, made in good faith and with apparent reasons, to reduce the amount of moneys payable under a lease of their corporation, is not in excess of their power or voidable at the instance of the stockholders, especially where nearly nine tenths of them have acquiesced and given practical effect to the agreement. *Id.*

10. A corporation, although created for a limited period, may take from a city in which the title to streets is vested, by a grant of a franchise to maintain a street railroad, an interest in perpetuity which is irrevocable. *People v. O'Brien* (N. Y.) 255

11. A corporation, by the common law, had power to take property by devise. *Re McGraw's Estate* (N. Y.) 887

12. A devise or bequest to a corporation of property which will exceed the amount or value which the corporation is by law permitted to take will be void for the excess; and as to that excess no title will vest for a single moment in the corporation, but will vest instantly in the heir or next of kin. The power to raise the question of the right of the corporation to take the property is not confined to 2 L. R. A.

the State, but the question may be raised by the heirs or next of kin. *Id.*

18. Under a provision of the Constitution of the State of Georgia, reciting that "the General Assembly of this State shall have no power to authorize any corporation to buy shares or stock in any other corporation in this State or elsewhere, or to make any contract or agreement whatever with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such agreements and contracts shall be illegal and void,"—a purchase, by a railway company in Georgia, of the contract to construct the line of a competitive company, and of the securities of such competitive company, with a view to prevent the construction of such competing line, is illegal and void, although accomplished indirectly, and constitutes all concerned in such illegal transaction trustees, as to assets resulting therefrom, for the benefit of persons whose rights have been invaded. *Langdon v. Central R. & Bkg. Co.* (O. C. S. D. Ga.) 120

14. The liability imposed on the officers of a corporation by N. Y. Act 1875, chap. 611, § 21, for debts of the corporation incurred while they were officers, if any certificate, report, or notice by them shall be false in any material representation, is in the nature of a penalty, and cannot be enforced by the courts of another State. *Attrill v. Huntington* (Md.) 779

## III. STOCK AND STOCKHOLDERS.

15. A stockholder may, without consulting the directors, bring an action to enjoin them from unlawfully transferring the stock to a consolidated corporation. *Botts v. Simpsonville & B. C. Turnp. Co.* (Ky.) 594

16. Whether or not the Legislature can authorize the consolidation of a corporation, under the general power reserved to alter or annul the charter, it cannot do so when the rights of stockholders will thereby be affected by increasing their liability as such, or diminishing the value of their stock, unless the consolidation is made by the unanimous consent of the stockholders. *Id.*

17. The clause in the charter of a turnpike company, that it, "in matters not expressed in the charter, shall have the rights and privileges granted to the most favored turnpike companies," will not authorize a consolidation against the consent of the stockholder. *Id.*

18. A guaranty by one corporation, on a lease of the road of another, of an annual dividend of 10 per cent on the capital stock of the lessor company, creates no privity between the lessee company and the stockholders of the other; and a statement printed on the certificates of stock to the effect that such dividend is guaranteed, purporting only to be a statement of a fact having reference to an agreement between the companies, which statement is not signed by the lessee company, does not constitute any contract with the stockholders. *Beveridge v. New York Elevated R. Co.* (N. Y.) 618

19. Whether or not a claim of damages for waste is an indebtedness of a corporation, within the scope of Or. Const. art. 11, § 8, mak

ing a stockholder liable for the indebtedness of the corporation to the amount unpaid on his stock, a judgment obtained thereon is such an indebtedness. *Powell v. Oregonian B. Co.* (C. D. Or.) 270

20. A purchaser, at a sale on execution, of stock in a corporation, which defendant had previously transferred in good faith on the books of the corporation as collateral security, acquires no title by such purchase so as to make him chargeable with liability as a stockholder to the creditors of the corporation. *Simmons v. Hill* (Mo.) 476

21. The transfer, on the books of a corporation, of stock by persons holding it as collateral security, to one who had bid off such stock on execution against his debtor, who had pledged it as collateral, does not make him liable as a stockholder, where such transfer is made without his request or knowledge. The fact that he had bid it off on execution does not, by implication, authorize such transfer. *Id.*

22. A *bona fide* purchaser of certificates of corporate stock standing on the company's books in the name of the former owner, regularly indorsed by him in blank, and stolen from the present owner without his fault, gets no title, because such instruments are not negotiable. *East Birmingham Land Co. v. Dennis* (Ala.) 836

#### IV. DISSOLUTION.

23. A proceeding to dissolve a mutual benefit society, or to remove its officers, for failure to make proper reports or for improperly conducting its business, instituted under Ill. Act 1883, § 10, is not a criminal prosecution within the meaning of Ill. Const. art. 6, § 33, which requires criminal prosecutions to be carried on "in the name and by the authority of the People of the State of Illinois," but is a civil proceeding to protect property rights, and may be brought in equity by the attorney-general in his own name. *Chicago Mut. L. Indemnity Assn. v. Hunt* (Ill.) 549

24. Jurisdiction to decree the dissolution of a corporation may be conferred upon courts of equity by statute; and such jurisdiction is so conferred by the Illinois Act of 1883 (1 Starr & C. Stat. 1348) in reference to mutual benefit societies. *Id.*

25. The franchise of a street railroad company, under which it is authorized to construct and maintain a street railroad and run cars thereon for the transportation of freight and passengers, survives the dissolution of the corporation. *People v. O'Brien* (N. Y.) 255

26. An express reservation by the Legislature of power to repeal a charter can give no authority to take away or destroy property lawfully acquired or created under authority conferred by the charter. *Id.*

27. Whether the attorney-general, who has brought an action to wind up the affairs of a corporation in which a receiver has been appointed, and which is still pending undetermined, can, to avoid multiplicity of suits and to carry out the provisions of N. Y. Laws 1886, chap. 810, maintain another action in aid of the former, to obtain a judgment declaratory of the rights and liabilities of the several par-

ties as affected by the dissolution of the corporation, and to determine the fact as to what were the assets of the company, and the extent of the interests of the several parties therein, and to restrain mortgagees and contractors and others from enforcing their rights in and liens upon the property, by legal proceedings,—doubted, but not decided. *Id.*

28. Neb. Const. art. 11, § 8, denying the right of eminent domain to a railroad corporation organized under the laws of another State or of the United States, until it has become a body corporate under the laws of Nebraska, does not prohibit existing railroad companies, one of which is a domestic corporation, from forming a new corporation by consolidation, pursuant to the laws of the State, and thereby becoming a domestic corporation. *State, Leese, v. Chicago, B. & Q. R. Co.* (Neb.) 564

29. A corporation consolidated under the provisions of Neb. Comp. Stat. 1887, chap. 16, § 114, by the union of a corporation operating a railroad from a point within the State, on the Missouri River, and another corporation organized under the Laws of Illinois and of Iowa, operating a railroad from a point on the Missouri River directly opposite the terminus of the other road, to Chicago, is not a foreign corporation. *Id.*

#### NOTES AND BRIEFS.

See also BANKS AND BANKING; TAXES.

Rights of stockholders; mortgage on stock; directors as trustees. 467

Directors as trustees; liability for frauds and breaches of trust; obligation as to care and prudence. 584

Liability of directors for negligence; capital stock as trust fund. 535

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Contract disposing of all property; compelling dividend; effect, as to stockholders, of agreement between corporations; rights of minority of stockholders. 643

Transfer of stock. 837

Forfeiture of franchise; how declared. 255

Liability of stockholder. 270

Power to take property by will and to hold property. 387

As trustees. 418

Acts *ultra vires*. 430

Dissolution of; remedy of stockholder; jurisdiction of equity. 549

Consolidation of; partnership. 564

Consolidation of; suit to restrain. 594

#### COSTS AND FEES. See also CLAIMS, 8.

1. The fact that a party signs his bill *pro se*, where it is not shown that he was not in fact represented by other solicitors, does not prevent him from claiming a solicitor's fee on the foreclosure of a mortgage containing a provision for such fee. *Barry v. Guild* (Ill.) 834

2. An independent foreign government is "a person residing without the State," within the meaning of N. Y. Code Civ. Proc. § 3268, requiring security for costs from such persons. *Republic of Honduras v. Soto* (N. Y.) 643

3. When a deposit of money, as security for costs, has once been made, the court has no authority, under N. Y. Code Civ. Proc. § 8276, to require any additional security. *Id.*

## COUNTIES.

The provision of Mo. Const. art. 10, § 12, that "no county shall be allowed to become indebted, in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for such year," is to be construed as referring to that class of debts which it is optional with the county court or other governing body of the county to incur, and not to compulsory obligations cast on the county by operation of law. *Barnard v. Knox County* (C. C. E. D. Mo.) 426

### NOTES AND BRIEFS.

Constitutional limitation on debts. 426

**COUPONS.** See BONDS, NOTES AND BRIEFS; LIMITATION OF ACTIONS, 6.

**COURTS.** See also CONSTITUTIONAL LAW, 13; CORPORATIONS, 14, 24; EMINENT DOMAIN, 1; EXECUTORS AND ADMINISTRATORS, 3, 4; INJUNCTION, 5; JUDGMENT, 3; SUMMARY PROCEEDINGS; WILLS, 2, 3.

1. The courts of the United States sitting in equity may administer, in suits of which they have jurisdiction, equitable rights peculiar to the laws of the State where the courts are held. *Fechheimer v. Baum* (C. C. S. D. Ga.) 153

2. The equity jurisdiction of the federal courts may extend to a suit for the disclosure and distribution of assets held by an executor *de son tort*, although such suit could not be maintained in the state courts for the reason that the probate system of the State affords a complete remedy. *Rich v. Bray* (C. C. W. D. Mo.) 225

3. Jurisdiction is not conferred on a federal court by making a necessary party, whose interests are all in common with those of the complainants, a nominal defendant, in order that all the complainants may be nonresidents of the State in which the suit is brought and of which the defendants are citizens. *Id.*

4. To give jurisdiction to a federal circuit court, where two or more parties, whose interests are so separate that any number of them may proceed with the litigation without the others, join, as a matter of convenience to prevent multiplicity of suits, in one action for the ascertainment and distribution of their respective interests in a common fund, the interests of each, independent of the others, must amount to \$2,000. *Id.*

5. An action for damages for the breach of a written contract of lease is an action "founded upon contract," in the sense of that language as used in the restriction contained in the Act of Congress of March 3, 1875, § 1; and a Circuit Court of the United States cannot take cognizance of such a suit in favor of an assignee unless the same might have been prosecuted by the assignor if no assignment had been made. *Republic Iron Min. Co. v. Jones* (C. C. N. D. Ga.) 746

6. A state law passed since 1789 cannot affect criminal procedure in the federal courts. 2 L. R. A.

A final record was required to be made by the clerk at common law, and the general method of making the record prescribed by the common law should be followed now, subject to such changes as have been wrought by the character of our institutions and the modifications made necessary by the enlarged Bill of Rights of the Federal Constitution. *Erwin v. United States* (D. C. S. D. Ga.) 229

7. The right asserted by a petitioner asking for the enforcement of an order of the Interstate Commerce Commission arises and is claimed under a law of the United States which relates to a subject over which Congress has exclusive control; and this is sufficient to sustain the jurisdiction of the circuit court, independent of the citizenship of the parties to the controversy, since it involves a federal question. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 239

8. Congress, in establishing "inferior courts" and prescribing their jurisdiction, must confer upon the judges appointed to administer them the constitutional tenure of office,—that of holding "during good behavior,—before they can become invested with any portion of the judicial power of the government. *Id.*

9. Where jurisdiction of a Circuit Court of the United States is based on the fact that the parties on one side are citizens of a different State from any of those on the other, a suit to enforce a lien or trust may be brought in the district where the property is situated and where some of the defendants claiming an equitable lien thereon reside, although neither the plaintiffs nor the defendant who owns the property reside in that district. *Langdon v. Central R. & Bkg. Co.* (C. C. S. D. Ga.) 130

10. Whether, in any given case, the Legislature has transcended its power and passed a law in conflict with the constitutional limitation in respect to local or special laws, is essentially a question of law, and must necessarily be decided by the courts. *Ayars's Appeal* (Pa.) 577

11. A construction by officers having the enforcement of the tax laws of Ohio, since the enactment thereof, to the effect that, under such laws, shares held by residents of Ohio of stock of foreign railroad corporations having property in Ohio on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio, does not bind the successors of such officers, or the State, in the proper assessment and collection of taxes upon such shares. *Western Ins. Co. v. Eatterman* (Ohio) 550

12. The appointment of a nonresident as an administrator in the State of New York does not authorize him to sue as a resident of the State, under N. Y. Code Civ. Proc. § 1780. *Robinson v. Ocean Steam Nav. Co.* (N. Y.) 636

13. No court in the State of New York has jurisdiction of an action by a nonresident against a foreign corporation on a cause of action which did not arise within the State. *Id.*

### NOTES AND BRIEFS.

Jurisdiction of suit to determine validity of devise; interference with proceedings before surrogate; concurrent jurisdiction in equity;

auxiliary jurisdiction; retaining suit in court whence process first issued. 175

Federal; equity jurisdiction; matter in dispute. 225

Federal; jurisdiction as to bridge over navigable waters; removal of cause relating to bridge across navigable river. 540

Federal; nonjudicial power. 295

Federal; jurisdiction of; suit by assignee of chose in action; dismissal of suit. 746

Enforcement of penal laws of foreign State. 779

Jurisdiction of executors and administrators. 828

**COVENANT.** See also **VENDOR AND PURCHASER**, 1, 2.

1. A covenant of warranty of title in a deed conveying a tract of land on which is situated a mill and dam embraces an easement as to ponded water occasioned by such dam or back water therefrom, on an adjoining tract of land of another person, and like easements necessary and incident to the free use and beneficial enjoyment of the mill and dam conveyed, although such easements are not expressly mentioned in the deed. *Bowling v. Burton* (N. C.) 285

2. A stipulation in a deed of land to a railroad company, that the company shall construct and maintain a fence along its right of way where land is used solely for pasturage and enclosed on the other sides, so long as it is used exclusively for pasturage, is not a covenant running with the land, and cannot be enforced by a subsequent owner of such land. *Gulf, O. & S. F. R. Co. v. Smith* (Tex.) 281

3. To constitute a breach of a covenant for quiet enjoyment (or warranty, which is in fact equivalent), there must be a union of acts of disturbance and lawful title. *Barry v. Guild* (Ill.) 834

4. Testimony of a person that he "saw evidence of the possession of the third party in the shape of a derrick and tool-house situated on the land, operated by a stone company," where it does not show whether the stone company had or claimed possession of 1 acre or 20, or that it claimed to hold under lawful title; and testimony of the vendee's agent, "that he never could get possession," without stating what efforts were made; where it does not appear that any of the land is occupied except by the derrick and tool house,—is not sufficient to show a breach of covenant of quiet enjoyment of a tract of 20 acres of land. *Id.*

**NOTES AND BRIEFS.**

In grant to corporation; running with land; personal covenants binding on purchaser; enforcement of restrictive covenants; discretion of court. 199

For quiet enjoyment; warranty; running with land; estoppel by. 834

**CRIMINAL LAW.**

In a State where the use of jails for United States prisoners is permitted, whenever a prisoner is committed to jail a copy of the writ of commitment, showing the grounds therefor, § L. R. A.

should be left with the jailer, whether the commitment is pending examination, or for trial, or after conviction. *Erwin v. United States* (D. C. S. D. Ga.) 229

**CURTESY.** See also **MINES AND MINING**, 2.

Executors, by paying taxes and selling a portion of the estate in coal, which is reserved from the sale of the surface of the ground, but who are not in the actual occupancy or possession of the property, and have no interest therein except a simple power of sale, are in no such possession as to prevent a seisin of the owner sufficient to support a claim of curtesy by her husband after her death. *Rankin's Appeal* (Pa.) 429

**CUSTOM AND USAGE.** See also **CARRIERS**, 16-19; **EASEMENT**, 1; **EVIDENCE**, 28, 57, 53; **STATUTES**, 18; **USURY**, 3.

1. No usage is good which conflicts with an established principle of law. *East Birmingham Land Co. v. Dennis* (Ala.) 886

2. A custom of railroads not to receive for transportation any livestock unless under certain conditions modifying their common-law liability would be contrary to law and public policy. *Missouri Pac. R. Co. v. Fagan* (Tex.) 75

3. A custom which is not pleaded cannot be considered as modifying an unambiguous written promise on which an action is based. *Lindley v. Waterloo First Nat. Bank* (Iowa) 709

**NOTES AND BRIEFS.**

See also **PLEADING**.

Effect on legal right. 87

Effect of. 833

Effect on carrier's liability. 75

**DAMAGES.** See also **CONTRACTS**, 25; **INSURANCE**, 20, 22; **NEW TRIAL**, 2, 3; **PLEADING**, 7; **TELEGRAPH COMPANIES**.

1. A woman carried by a railroad train beyond her station, at which the railroad employes refused to put her off, and to whom they "were indecorous or insulting, either in words, tone, or manner," may be allowed to recover punitive damages. *Louisville & N. R. Co. v. Ballard* (Ky.) 694

2. A judgment for \$3,005 damages in favor of a woman who was carried past her station on a railroad train, in consequence of which she was obliged to walk between one and two miles, carrying a large bundle and valise, and, by the exertion and excitement thereby caused, was made sick for several days, and who was treated in an insulting manner by the railroad employes, will not be set aside as excessive, where substantially the same amount has been given on a former trial. *Id.*

3. Exemplary or vindictive damages may be given for the refusal to sell a passenger a ticket or to check his baggage to a regular station of a passenger train, in pursuance of an unreasonable regulation of the company which indicates a wanton disregard of the rights of passengers. *Pittsburgh, O. & St. L. R. Co. v. Lyon* (Pa.) 489

4. Improvements made for public use by a

railroad company lawfully in possession, with the right to condemn for such use at any time, do not belong to the owner of the land, and the value thereof will not be allowed him as damages on condemnation. The maxim *quis plantatur solo, solo cedit*, does not apply in such a case. *St. Johnsbury & L. O. R. Co. v. Willard* (Vt.) 538

5. When a part of a farm or tract of land is appropriated for the right of way of a railroad, danger from fire to buildings, fences, timber, or crops upon the remainder, in so far as it depreciates the value of the property, may be properly considered in giving compensation to the landowner. *Leroy & W. R. Co. v. Ross* (Kan.) 217

6. Where a railroad is laid through a farm or tract of land used for stock purposes, or adapted to stock purposes, the accidental danger to which stock thereon will be exposed may be considered in giving compensation to the landowner for the right of way appropriated for the railroad, so far as the same affects the value or depreciation of the land, or tract of land, but not any danger or probable injury resulting from the fault or negligence of the railroad company in operating or failing to fence its road. *Id.*

7. Under the provisions of Kan. Const. art. 12, § 4, a railroad company must make full compensation for the right of way appropriated to the corporation, irrespective of any benefits or supposed benefits from the construction of the road, or any improvement thereby. *Id.*

8. The owner of a coal mine is not entitled to any damages in a suit for an injunction, from the fact that one of the defendants had driven away from the mine a person who had a contract with the plaintiff, without any limit as to time, to take coal at a certain price per bushel, and who had cleaned out the entry to the mine, for which plaintiff had paid nothing, where it does not appear that plaintiff may not still mine and sell the coal and get a higher price for it. *Rankin's Appeal* (Pa.) 429

9. Where mares being with foal are shipped, they constitute freight having what is called an inherent defect; and if they lose their foal on the way, the measure of damages is not the difference in their market value as they are and what it would have been had they arrived in good condition; but if the loss is total, it is the price, less freight charges, they would have brought if delivered in reasonable time, having had due and necessary care while in the carrier's possession; and if the loss is partial, it is the difference between such price, less freight, and the actual value of the animals as delivered. *Missouri Pac. R. Co. v. Fagan* (Tex.) 75

10. In an action of assumpsit for weekly benefits due from a relief association, recovery can be had only for what was due at the time the writ issued. *Baltimore & O. Employees Relief Assn. v. Post* (Pa.) 44

11. One who violates a duty owed to others, or commits a tortious or wrongfully negligent act, is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to and in fact do result from his act. *Smethu'at v. Independent Cong. Church* (Mass.) 695

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Exemplary; right to recover. 490

By appropriation of right of way; elements of; inconvenience; reasonably anticipated; speculative and contingent; danger of fire; special; injury to farm or tract of land as a whole; rule as to measure of; uses and purposes of land considered; tract cut off. 217

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In eminent domain; assessment of. 429

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For breach of contract; for neglect of duty to deliver telegram; for mental anguish. 766

In action against benefit society. 786

## DEATH.

## NOTES AND BRIEFS.

See also ACTION OR SUIT.

Caused by negligence; action for. 520

## DEDICATION. See also HIGHWAYS.

1. The acceptance, by the public or by the inhabitants of a town, of landing places reserved to the public in a grant by a town, is not to be held to have been limited to those parts of the lands so reserved which were in actual use as landing places, where it appeared that the parts thereof intruded upon by private individuals could have been fitted for and used as landings, and that they were used by fishermen for the drying of nets, and by them and others for passage to actual landing places, and similar purposes connected with landings and not inconsistent therewith. *Attorney-General, Adams, v. Tarr* (Mass.) 87

2. An acceptance, by the public, of land for a public use, is to be construed in connection with the grant or dedication. Where that clearly includes the premises, less evidence is required to show that any particular part has been accepted than where it is uncertain whether there has been more than a partial and limited dedication. *Id.*

## DEED. See also CONTRACTS, 16; HUSBAND AND WIFE, 9.

A vendor who has executed and acknowledged a deed with the name of the grantee left blank, and delivered it to his vendee, who fills up the blank, cannot question the title of an innocent purchaser for value. *McCleery v. Wakefield* (Iowa) 520

## NOTES AND BRIEFS.

Reservations and exceptions in. 87

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## DEFINITIONS. See WATERS AND WATERCOURSES, NOTES AND BRIEFS.

## DELIVERY. See INSURANCE, NOTES AND BRIEFS.

## DESCENT AND DISTRIBUTION.

See also WILLS, 16, 17.

1. A grandchild whose father is dead and who has been adopted by his paternal grandfather, under Mass. Pub. Stat. chap. 149, cannot, if his grandfather dies intestate, inherit

shares of his personality in a double capacity, as adopted son and as representative of his deceased father, but will take only one portion, and that as adopted son. *Delano v. Bruerton* (Mass.) 698

2. A policy of life insurance payable to the "devises or heirs at law" of the insured, where he dies intestate without issue, is payable, under Ill. Rev. Stat. chap. 89, § 1, to his widow as sole heir, and not to his next of kin. *Alexander v. Northwestern Masonic Aid Asso.* (Ill.) 161

#### NOTES AND BRIEFS.

Disinheriting heir; heirs favored at law. 849

### DISCOVERY.

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**DIVORCE.** See HUSBAND AND WIFE, 4; LIS PENDENS, 1, 2, NOTES AND BRIEFS.

### DOMICIL.

#### NOTES AND BRIEFS.

What constitutes; change of. 203

**DUE PROCESS.** See CONSTITUTIONAL LAW, 12.

**EASEMENTS.** See also WATERS AND WATERCOURSES, NOTES AND BRIEFS.

1. A right to maintain a building or permanent structure upon the land of another cannot be acquired by custom. *Attorney-General, Adams, v. Tarr* (Mass.) 87

2. A party who conveys a mill and dam conveys all the easements that he has, or claims and purports to have, at the time of the conveyance, in connection therewith, incident and necessary to the just enjoyment of the mill and dam. *Dowling v. Burton* (N. C.) 285

**EMINENT DOMAIN.** See also CONSTITUTIONAL LAW, 8; CORPORATIONS, 28, 29; DAMAGES, 4-7; NEW TRIAL, 2, 3; TRIAL, 7, 8.

1. Whether the use for which property is sought to be taken under the exercise of eminent domain is public or private is a judicial question, subject to review by the appellate court. *Pittsburg, W. & K. R. Co. v. Benwood Iron Works* (W. Va.) 680.

2. Evidence that all who wish to avail themselves of the proposed switch, branch road, or lateral work can do so, is not sufficient to show that the use of the work will be for the benefit of the public. *Id.*

3. The property of railroad corporations, so far as concerns the ownership thereof, and the profit or gain to be made from their use, is to all intents and purposes private property, although applied to a use in which the public have an interest. *Id.*

4 L. R. A.

4. As far as the public is concerned, when what railroad corporations need is for "public use," they have the right to invoke the exercise of eminent domain; but, in so far as that which concerns them as to their private interests, their profits and gains, are concerned, they stand as individuals, or merely as private corporations, in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain. *Id.*

5. Where a railroad corporation sought to condemn land over which to build a switch, branch road, or lateral work to reach a private manufactory,—a steel-mill,—for the purpose of transporting freight to and from said steel-mill over petitioner's road,—*held*, the use to which the land was to be subjected was a private, not a "public use." *Id.*

6. Under the Eminent Domain Act of Illinois, it is not intended that the right given the jury to personally examine the premises is to be construed as permitting them to disregard the sworn testimony in fixing the assessment of damages. *Atchison, T. & S. F. R. Co. v. Schneider* (Ill.) 423

#### NOTES AND BRIEFS.

See also DAMAGES; HIGHWAYS; NEW TRIAL.

Authority to take lands; title acquired. 255

Power of; exercise of right through agents; public use; necessity of taking. 690

Use of highway for railroad; damages for. 61

Power of commissioners; damages. 528

**ENTIRETIES.** See HUSBAND AND WIFE, 5, 8.

**EQUITABLE CONVERSION.** See WILLS, 15.

**EQUITY.** See also TRUSTS, 2.

1. A suit in equity by a woman to set aside a deed made by her former husband pending a divorce suit in which a decree was made giving her the land will not be defeated on the ground that she has a complete remedy at law. *Powell v. Campbell* (Nev.) 615

2. Where the material facts out of which plaintiff's rights arise are admitted, and, if there is a doubt as to his rights, it is one of law, not of fact, it is not necessary that he should first establish his rights at law before asking relief in equity. *Rankin's Appeal* (Pa.) 429

#### NOTES AND BRIEFS.

See also COURTS; SET-OFF AND COUNTER-CLAIM,

Maxim as to coming with clean hands. 368

**ESTOPPEL.** See also ATTORNEYS, 2; DEED; HUSBAND AND WIFE, 12; INSURANCE, 19, 23, 24.

1. The doctrine of estoppel cannot be invoked in order to remove the incapacity of a married woman, where her contract relates to a matter concerning which all the common-law disabilities continue, so that the contract is utterly void for want of power or capacity to make it. *Cook v. Walling* (Ind.) 769

2. A married woman in Dakota, who, with her husband, has executed a mortgage contain-



ing covenants of seisin, quiet possession, and warranty, on her separate property, is estopped from setting up against the purchaser on foreclosure any title subsequently acquired by her, even though it is acquired after the foreclosure, and although the mortgage is a mere lien, and not an estate in the land. *Yerkes v. Hadley* (Dak.) 868

8. One clothing an agent with apparent authority is, as to parties dealing on the faith of such authority, conclusively estopped from denying it. *Hubbard v. Tenbrook* (Pa.) 828

4. The principal is not estopped to deny the authority of his agent to do acts in excess of the authority expressly given him, because he might have known that the agent was exercising such power if he had exercised ordinary diligence; he is not required to distrust his agent, but may act on the presumption that third parties dealing with the agent will not be negligent in ascertaining the extent of his authority. *Wheeler v. McGuire* (Ala.) 808

5. To authorize a person to claim a forfeiture of valuable property rights on account of the violation of a condition upon which they are granted, he must proceed to enforce it at once. He cannot remain passive for a long time after acts have transpired upon which others have relied in matters of importance to them, and then insist upon the forfeiture in consequence thereof. *Huston v. Bybee* (Or.) 568

6. Where the owner of land has acquiesced for some years in sales and transfers of a ditch and water right, he thereby waives a condition in the agreement under which the ditch was constructed, that it should not be sold, but should revert to him. *Id.*

#### NOTES AND BRIEFS.

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### EVIDENCE.

#### I. JUDICIAL NOTICE.

#### II. PRESUMPTIONS AND BURDEN OF PROOF.

#### III. BEST AND SECONDARY EVIDENCE.

#### IV. DOCUMENTARY EVIDENCE.

#### V. PAROL EVIDENCE CONCERNING WRITINGS.

#### VI. OPINIONS AND CONCLUSIONS.

#### VII. DECLARATIONS.

#### VIII. RELEVANCY AND MATERIALITY.

#### IX. WEIGHT, EFFECT, AND SUFFICIENCY.

#### NOTES AND BRIEFS.

See also APPEAL AND ERROR, 9; CONTRACTS, 10; TRIAL, 1.

#### I. JUDICIAL NOTICE.

1. A court in Indiana will take judicial notice that funds raised for or appropriated to the support of common schools pertain to the school corporation of a township, and can only be administered by the township trustee in that behalf. *Skinner v. Harrison Twp.* (Ind.) 187.  
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2. The court will not take judicial notice of the fact that unprotected frogs and switches of a railroad are inherently unsafe and dangerous. *Missouri Pac. R. Co. v. Lewis* (Neb.) 67.

### II. PRESUMPTIONS AND BURDEN OF PROOF.

8. Every intendment is to be made in favor of the constitutionality of a statute. *People, Hart, v. McElroy* (Mich.) 609

4. The burden of proof is on a taxpayer claiming that he has not been allowed an exemption to show that he has not, at some time or place, received it. *South Nashville Street R. Co. v. Morrow* (Tenn.) 858

5. Where a father purchases land and has it conveyed to his son, the presumption is that the purchase was intended to be an advancement or gift to the son, and no trust results in favor of the father. But extrinsic evidence, either written or parol, is admissible on behalf of the father to rebut this presumption, and to show that a trust results in his favor. *McClintock v. Loiseau* (W. Va.) 816

6. A grant cannot be presumed where it would have been unlawful. *Donahue v. State* (N. Y.) 576

7. The burden of establishing alienage of persons otherwise interested in property sought to be partitioned is upon the plaintiff in partition. *Toole v. Toole* (N. Y.) 465

8. In a contested election case, the burden of proof rests on the plaintiff. He must establish, to the satisfaction of the jury or trial court, that the ballots have been kept intact, and are the genuine, identical ballots cast at the election; otherwise they will receive no credence, and be rejected as unworthy of credit. *Hartman v. Young* (Or.) 596

9. The burden of proof to show that an agent, in a transaction for his principal, had in mind knowledge gained by him on a former occasion and in a different transaction, is upon the party who seeks to charge the principal with notice by reason of such knowledge. *Constant v. Rochester University* (N. Y.) 784

10. In the case of oral defamation, as in the case of written, if the words uttered are not privileged the law implies malice. *Byam v. Collins* (N. Y.) 129

11. In an action against a physician, based on his lack of care or skill, the burden of proof to show such lack is on the plaintiff. *State Janney, v. Housekeeper* (Md.) 587

12. The party who allows a surgical operation to be performed is presumed to have employed the surgeon for that purpose, and the burden of proof to show lack of consent is on the party alleging it. *Id.*

13. In an action by a man for the loss of a trunk containing the clothing of his wife and child, the presumption is that the child's clothing was furnished by the father, in the absence of evidence to the contrary. *Richardson v. Louisville & N. R. Co.* (Ala.) 716

14. An injury to a passenger on a railroad train sitting next to an open window, by a blow on his eye by some hard substance, probably a piece of coal, hurled with considerable force, while the engine of another train was

directly opposite the window, passing in another direction, where there is nothing to explain the cause of the accident, does not create a presumption of negligence against the carrier. *Pennsylvania R. Co. v. MacKinney* (Pa.) 820.

15. No presumption of negligence on the part of a carrier arises from the naked fact that an injury has been inflicted upon a passenger, unless it appears that it did not result from something entirely disconnected with the operation of the road and with which neither the company nor its employes had anything whatever to do; such presumption must arise, if at all, from the cause of injury or from other circumstances attending it. *Id.*

### III. BEST AND SECONDARY EVIDENCE.

16. Where a witness who has testified on the first trial of a case dies before the second trial, his testimony on the first trial may be proved by persons who heard his evidence; and where it is preserved in a bill of exceptions, it can be read therefrom upon proof that the report is correct in substance. *Davis v. Kline* (Mo.) 78

17. Where there is evidence to show the existence of an antenuptial contract, and that it has been destroyed by one of the parties, the other party may be allowed to give parol evidence of its contents. *McNutt v. McNutt* (Ind.) 872

18. It is a primary rule of elections that the ballots constitute the best—the primary—evidence of the intention and choice of the voters. *Hartman v. Young* (Or.) 596

19. Where the court finds that the ballots have been safely kept and preserved, that no one has tampered with them, and, notwithstanding the opening of the box for the purpose of finding a poll book, that the ballots were the genuine, identical ballots cast by the voters of a precinct, such ballots are the best evidence. *Id.*

20. As between ballots shown or admitted to be the identical ballots cast by the voters, and the official count, the ballots are the best evidence. *Id.*

### IV. DOCUMENTARY EVIDENCE.

21. The record of an inquisition *de lunatico inquirendo* is admissible on the trial of an issue *derisus vel non*; but where the court refused to permit to be read, on such an issue, such portion of the order of adjudication as instructed the committee appointed as to the scope of his duties,—*held*, no error. *Kerr v. Lunsford* (W. Va.) 668

22. Where, on the trial of such an issue, a witness for contestants had testified that the testator, in giving his evidence in a certain action in ejectment was incoherent, and on cross examination said he had the stenographer's notes of his evidence in the action, but that the stenographer was not sworn, but the witness said the notes were substantially correct, and on motion the proponents, to contradict the witness, were permitted to read the notes to the jury,—*held*, no error. *Id.*

23. On the trial of such issue, a will executed in 1879, about two years before the will in issue, at which former date it is shown the testator was competent, is admissible on the question of 2 L. R. A.

his capacity at the time the will in issue was executed. *Id.*

24. Provisions of the statute for the safe keeping of ballots are treated by the courts as directory; and when it is shown that the ballots have been securely kept and preserved inviolate, they will not be excluded as evidence on account of some omission to comply with their directions. *Hartman v. Young* (Or.) 596

25. Where a grantee is in fact archbishop of the Roman Catholic Church for his diocese, its canons and decrees regulating the mode of acquiring and holding church property are competent evidence to show that the property so held by him is held in trust for purposes of public religious worship and other charitable uses. *Mannix v. Purcell* (Ohio) 753

### V. PAROL EVIDENCE CONCERNING WRITINGS.

26. Parol evidence is admissible to show that taxes were in fact paid by a person other than the one named as payer in the tax receipts. *Gage v. Hampton* (Ill.) 512

27. It is competent to prove by parol evidence that land conveyed to a grantee by a deed absolute on its face is in fact held by him in trust for charitable uses, but such evidence should be clear, convincing, and conclusive. *Mannix v. Purcell* (Ohio) 753

28. Certificates of stock not being negotiable paper, it is not permissible to prove a custom or usage among stockbrokers to the contrary. *East Birmingham Land Co. v. Dennis* (Ala.) 836

29. Where a devise to a certain township is made, and there is more than one of the same name in the State, evidence is admissible to prove which was intended. *Skinner v. Harrison Twp.* (Ind.) 187

### VI. OPINIONS AND CONCLUSIONS.

30. A physician speaking as an expert can testify as to the effect of a personal injury. *Evansville & T. H. R. Co. v. Orist* (Ind.) 450

31. A man who has managed hand cars, or assisted in managing them, may express an opinion as to the rate of speed of a moving hand car on a specified occasion. *Id.*

32. A farmer not engaged in buying and selling real estate, not knowing the market value of real estate, not living in the neighborhood of the land inquired about, and who does not know its situation and fertility, its advantages and disadvantages, cannot, as a witness, give his evidence as to the value of the land before and after the appropriation of the right of way by a railroad company. A farmer conversant with the land as to its situation, soil, advantages, etc., is competent as a witness to the value, as having particular knowledge of the facts in issue. *Leroy & W. R. Co. v. Ross* (Kan.) 217

33. A witness in possession of a key to the reports of a mercantile agency may be allowed, in an action for libel, to explain what was indicated by reporting a merchant's standing "in blank," which constitutes the alleged libel. *Bradstreet Co. v. Gill* (Tex.) 405

34. Testimony of witnesses as to the general effect in commercial circles upon the credit of

a person of a rating by a commercial agency is inadmissible, being only the opinion of the witnesses about a matter that the jury are capable of judging. *Id.*

35. A shipper of stock may give an opinion as to what the value of stock would have been at destination if they had not been injured in transportation. *Missouri Pac. R. Co. v. Fagan* (Tex.) 75

36. Upon the trial of an issue *devisavit vel non*, a general question, put to a witness, "Was there anyone who influenced the testator?"—is improper. *Kerr v. Lunaford* (W. Va.) 688

37. When a medical expert is asked to give his professional opinion to a jury, not upon matters within his own knowledge, but upon a hypothetical case founded upon the testimony of witnesses previously examined in the case, the questions to him must be so shaped as to give him no occasion to mentally draw his conclusion from the whole evidence, or a part thereof, and from these conclusions, so drawn, express his opinion, or to decide as to the weight of evidence or the credibility of witnesses; and his answers must be such as not to involve any such conclusion, so drawn, or any opinion of the expert as to the weight of the evidence or the credibility of witnesses. *Id.*

38. The opinion of medical experts, founded on testimony already in the case, can only be given on a hypothetical case; and the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion. *Id.*

39. In putting hypothetical questions to expert witnesses, counsel may assume the facts in accordance with their theory of them; it is not essential that he states the facts as they exist, but the hypothesis should be based on a state of facts which the evidence in the cause tends to prove. *Id.*

40. Where, in the trial of an issue *devisavit vel non*, the contestants, on the question of the testator's capacity, offered a witness who testified that about three months before the execution of the will the testator had sold a property for \$10,000, and it was sold very cheaply; the proponents offered the purchaser of the property, who testified he had paid full value for it; the contestants then offered a witness who had occupied the property as lessee, and testified he knew its value, and asked the witness, "What is the property worth?"—the proponents objected, objection was sustained, and contestants excepted,—*held*, that, if error, it was not a reversible error. *Johnson, P.*, dissenting. *Id.*

#### VII. DECLARATIONS.

41. The testimony of statements tending to show the guilt of accused, made by witnesses to the justice who issued the warrant in a criminal case, in the absence of the one making the complaint, is not admissible in favor of the latter in a subsequent suit brought against him for malicious prosecution by the person arrested. *McIntire v. Levering* (Mass.) 517

42. Evidence, in an action for malicious prosecution, that defendant had stated before the complaint was made that he had heard

that the person upon whose statements he acted in commencing the prosecution had been in jail, may properly be allowed to go to the jury as tending to show how far defendant was warranted in believing the statements, and how far he did in fact believe them. *Id.*

43. In an action against a railroad relief association for benefits as a member, declarations of the paymaster of the railroad company, which is another and distinct corporation, to the effect that dues to the relief association were deducted from plaintiff's pay for a certain month on making such payment, are inadmissible, although the by-laws of the relief association provide that contributions due by the members shall be deducted from the monthly wages due them by either company; especially where it appears that the paymaster had nothing to do with the deductions for dues, and that the money therefor did not pass through his hands, and he had nothing to do with any data from which the pay roll was made up. *Baltimore & O. Employees Relief Assn. v. Post* (Pa.) 44

44. Declarations of a brakeman within two minutes after he was thrown under a car while attempting to uncouple it, made while remaining in presence of the train and of the alleged defective machinery, which he declared was instrumental in producing his hurt, which caused his death in about six hours afterwards and before he had been removed from the spot,—are admissible as part of the *res gestæ*. *Louisville, N. A. & O. R. Co. v. Buck* (Ind.) 520

45. Declarations which are the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made, so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation,—are admissible as part of the act or transaction itself. *Id.*

#### VIII. RELEVANCY AND MATERIALITY.

46. A plaintiff in a suit for malicious prosecution upon a criminal charge may show his general good reputation, known to the defendant when the prosecution was commenced, as tending to show that the prosecution was without probable cause. *McIntire v. Levering* (Mass.) 517

47. In an action of tort brought by a father to recover for the loss of his son's services, the father will not be permitted to testify that in his own mind he did not intend to emancipate the son, if the facts in the case warrant a finding by the jury of an implied emancipation which would cut off the father's right to maintain the action. *McCarthy v. Boston & L. R. Co.* (Mass.) 608

48. Any evidence is relevant, on an issue as to the implied authority of an agent to exercise powers in excess of those expressly given him, which shows prior similar acts, and tends to prove or disprove the knowledge of the principal, and the reliance on the part of those dealing with the agent upon the principal's recognition of such acts. *Whitler v. McGuire* (Ala.) 808

49. Evidence of business transactions by the

testator, both before and after the execution of the will, indicating his mental condition, are admissible on the question of his capacity at the time the will was executed. *Kerr v. Lunsford* (W. Va.) 668

50. In the trial of an issue *deviseavit vel non*, it is not improper for the proponents to offer the will, and the evidence of its due execution, and the competency of the testator at the time it was executed, and, thus having made a *prima facie* case, to rest, and, after the contestants have offered their evidence against the validity of the will, to permit the proponents to offer other evidence to sustain the will, as well as evidence in rebuttal. *Id.*

51. Proof of an estoppel is admissible in an action of trespass to try title under the plea of not guilty. *Dooley v. Montgomery* (Tex.) 715

52. On the question of negligence in riding at an improper speed on a street, evidence is admissible that there is more travel on that street than on any other in the city. *Stringer v. Frost* (Ind.) 614

53. Where loose declarations have been admitted to prove membership of plaintiff in a relief association, defendant has the right to show that he has never been examined by the medical adviser, as required by the rules, and never accepted as a member. *Baltimore & O. Employees Relief Assn. v. Post* (Pa.) 44

54. When punishment is prescribed within defined limits,—as, in the Illinois Warehouse Act, § 25, imprisonment for not less than one and not more than ten years,—evidence of intent is admissible in order to fix the degree of criminality and the punishment commensurate thereto, notwithstanding it may not be admissible upon the question of guilt or innocence. *Sykes v. People* (Ill.) 461

55. As tending to show the depreciation in the value of the property through which a right of way for a railroad is appropriated, by reason of the danger from fire, all the facts in regard to the situation of the property and improvements relatively to the railroad should be introduced in evidence, and the distance from the road to which the danger extends may also be shown. *Leroy & W. R. Co. v. Ross* (Kan.) 217

56. Evidence of average monthly profits of the business conducted on the premises sought to be condemned under the Eminent Domain Act is admissible when limited to the question of the loss which would be incurred by the suspension of business during the time necessarily consumed in moving. *Aitchison, T. & S. F. R. Co. v. Schneider* (Ill.) 422

57. Evidence of a custom requiring the owner of stock to hold railroads harmless against ordinary delays in taking up freight is inadmissible because, if the law held the railroad harmless, the custom was not necessary; if the law held it liable, the custom could not repeal or suspend the law. *Missouri Pac. R. Co. v. Fagan* (Tex.) 75

58. A witness cannot state what the custom of a railroad is in delivering stock at destination, where it is not shown that the custom is uniform, reasonable, and notorious, and he does not testify to the facts constituting the custom. *Id.*

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## IX. WEIGHT, EFFECT, AND SUFFICIENCY.

59. Where a jury finds that the evidence as to any fact essential to plaintiff's right of recovery, and as to which the burden of proof rests upon him, is evenly balanced, or in equilibrium, the verdict must be for defendant. *Wheeler v. McGuire* (Ala.) 808

60. Although proof of delivery of goods to a person in compliance with his request makes out a *prima facie* case of liability to pay for them, yet this is only a probability; and if it is shaken, the seller must show that language or circumstances import an assumption of liability by the purchaser to pay money. *Starratt v. Mullen* (Mass.) 697

61. The opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them; but if the reasons and facts upon which they are founded are frivolous, the opinions of such witnesses are worth little or nothing. *Kerr v. Lunsford* (W. Va.) 668

62. The evidence of witnesses who were present at the execution of the will is entitled to peculiar weight, and especially is this the case with attesting witnesses. *Id.*

63. It is not necessary for proponents to prove that the testator actually recollected all his property, the objects of his bounty, etc.; it is sufficient if he was, at the time, mentally capable of doing so. *Id.*

64. In an action by a grantee in a tax deed to recover the premises mentioned therein, a stipulation as to the existence of certain facts from which it appeared, in the judgment of the court, that the tax assessment was made to a person who was not the owner of the property, is a waiver of the conclusive character of the deed, under the statute, as to the regularity of the assessment. *Tracy v. Reed* (C. C. D. Or.) 773

65. In determining a contested election, the evidence of the ballots actually cast will control that furnished by the official count, provided the ballots have been preserved and protected from tampering. *Hariman v. Young* (Or.) 596

66. The official returns, when duly certified, are *prima facie* evidence that the result is as declared, but such return or canvass is never conclusive unless made so by statute. As a quasi record, it is entitled to the presumption of regularity, and is *prima facie* evidence of its integrity. *Id.*

## NOTES AND BRIEFS.

Judicial notice of power of railroad company to make a lease; presumption as to legality of acts of directors. 467

Declarations, when part of *res gestae*; burden to show cause of injury or due care. 523

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Presumption as to rightfulness of possession. 660

Presumption of, burden of proof as to, negligence. 691

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Of deceased witness at former trial.	78
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**EXCEPTIONS.** See **APPEAL AND ERROR.****EXECUTION AND JUDICIAL SALE.**  
See also **CORPORATIONS**, 20, 21.

1. A purchaser at a judicial sale who contracts for a deed on a day fixed is entitled to a deed, under a decree, which will convey an unquestionable title on the day fixed, and should not be subjected to further proceedings to perfect title. *Toole v. Toole* (N. Y.) 465

2. When the record in a partition suit discloses the existence of persons not made parties who might have an interest, the title acquired at the judicial sale under the decree therein is defective; and a purchaser will not be compelled to accept it, although it may be that such omitted persons were, by reason of alienage, incapacitated from having an interest. To be conclusive against such persons, the record must establish their incapacity. *Id.*

**EXECUTORS AND ADMINISTRATORS.** See also **COURTS**, 12; **TAXES**, 1.

1. Upon a petition for letters of administration, although it is not necessary to cite a citizen of the United States having a right to letters prior or equal to that of the petitioner, but residing in another State, yet if such person appears before the surrogate, and presents his claim before the issue of letters, his claim cannot be disregarded. *Libbey v. Mason* (N. Y.) 795

2. The judgment of a county court in Nebraska granting letters of administration to a widow may be upheld as *coram judice*, although the sole assets of the estate consisted of a claim against a railroad company for causing the death of the intestate. *Missouri Pac. R. Co. v. Lewis* (Neb.) 67

3. The general rule, that executors and administrators can be sued only in the State where they are appointed, is confined, at least in the State of New York, to claims and liabilities resting wholly upon their representative character. *Johnston v. Wallis* (N. Y.) 828

4. Foreign executors who, by virtue of their appointment, have become owners of a judgment, and have made a contract to assign it, may be sued on such contract outside of the State of their appointment. *Id.*

5. The sureties of an administratrix who has obtained a decree discharging her and her sureties from their bond are not entitled to notice of a proceeding to vacate such decree for fraud. They are privies of the administratrix, and precluded from questioning any lawful order made by the surrogate in a proceeding wherein she is a party, if obtained without collusion between her and the next of kin or creditors of the estate. *Deobold v. Oppermann* (N. Y.) 644

6. Sureties to whom money of an estate has been loaned by an administratrix as a condition of their becoming sureties for her, to be retained until they are discharged from liability on the bond, are not relieved from such liability by repaying the money after examining a decree of the surrogate discharging her and them from their liability on the bond, when such decree is subsequently vacated on the ground of fraud. *Id.*

**NOTES AND BRIEFS.**See also **PRINCIPAL AND SURETY.**

Foreign; incapacity to sue; jurisdiction of.	828
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Effect of decree discharging, as to sureties.	644

**EXPERTS.** See **EVIDENCE**, VI.**FALSE REPORT.** See **FRAUD AND FRAUDULENT CONVEYANCES.****FEDERAL COURTS.** See **COURTS.****FENCES.** See also **CONSTITUTIONAL LAW**, 7; **COVENANT**, 2; **VENDOR AND PURCHASER**, 3.

1. Help given by one in lawfully building a fence upon his wife's land to a greater height than 6 feet will not of itself render him liable to prosecution under Mass. Acts 1887, chap. 348, for erecting or maintaining a nuisance, whatever his motive may be; nor will it tend to prove that he maintained the fence. *Rideout v. Knox* (Mass.) 81

2. Malevolence must have been the motive for erecting the fence to a greater height than 6 feet, without which it would have not have been erected or maintained, to render it a nuisance, within the provisions of Mass. Acts 1887, chap. 348. If such height is really necessary for any reason, there is no liability; and if the owner thinks it necessary and acts upon his opinion, he is not liable because he also acts malevolently. *Id.*

**FERRIES.** See **TAXES**, 2.**FIRE INSURANCE.** See **INSURANCE**, I.**FISHERIES.**

No rights in favor of fishermen now exist by virtue of the proviso in the Province Charter of Massachusetts Bay, that the rights of English subjects to fish, etc., and to erect wharves, etc., upon waste lands not in the possession of particular proprietors, should not be abridged. *Attorney-General, Adams, v. Tarr* (Mass.) 87

**FIXTURES.** See **LANDLORD AND TENANT**, 4.**FORCIBLE ENTRY AND DETAINER.** See **JUDGMENT**, 1.**FORFEITURE.** See **CORPORATIONS**, **BRIEFS AND NOTES**; **REAL PROPERTY**.**FORGERY.** See **BANKS**, 2, 4, **NOTES AND BRIEFS**; **INTEREST**, 2.**FRATERNAL SOCIETIES.** See **INSURANCE**, **NOTES AND BRIEFS**.

**FRAUD AND FRAUDULENT CONVEYANCES.** See also **CONTRACTS**, 11, 12; **PLEADING**, 13; **SALE**, 4, 5; **WAREHOUSEMEN**, 2-4.

False representations by one selling railroad bonds, that the "bond was an A No. 1 bond," and that "the railroad was good security" therefore, made to the purchaser for the purpose of inducing the sale, will not render him liable to damages, even though he made the statements in bad faith. *Deming v. Darling* (Mass.) 748

**NOTES AND BRIEFS.**

False representations, right of action for. 748

**GARNISHMENT.**

Property not actually within the State, but in course of transportation by a common carrier to a consignee in another State, cannot be reached by process of garnishment served on the carrier within the State. *Montross Pickle Co. v. Dodson & H. Mfg. Co.* (Iowa) 417

**NOTES AND BRIEFS.**

On property in transit. 417

**GOVERNMENT.** See **COSTS AND FEES**, 2.

**GRANT.** See **RAILROADS**, **NOTES AND BRIEFS**.

**GUARANTY.**

1. A guaranty of 7 per cent per annum in dividends so long as the purchaser should retain the stock sold him, given by a firm as an inducement for the purchase from them of shares of stock, is not limited to the duration of the partnership or the lives of the copartners. *Kernochan v. Murray* (N. Y.) 183

2. A guaranty of the amount of dividends that shall be received from stock, made by the seller as an inducement to the purchase of the stock, is an original, and not a collateral, undertaking; and the guarantors are principals, and not sureties, in such obligation. *Id.*

**NOTES AND BRIEFS.**

Contract construed; effect of death of guarantor or cosurety; of dividends on corporate stock. 183

**GUARDIAN AND WARD.** See **TRUSTS**, 1.

**HEIRS.** See **WILLS**; **HUSBAND AND WIFE**, 1-3.

**HIGHWAYS.** See also **CONSTITUTIONAL LAW**, 3-6; **MUNICIPAL CORPORATIONS**, 1-3.

1. Where the alleys of a city have been dedicated to the public, no further action is required by the city to open them for public use. *Oaage City v. Larkins* (Kan.) 56

2. An alley retains its character as an alley, although the lots on both sides thereof are owned by one person, and it is so intersected by a railroad as to make it practically impassable. *Id.*

3. No dedication for the purpose of a highway can be inferred by the public use, for more than twenty years, of the covered surface  
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formed by timbers, planks, and earth over a canal feeder belonging to the State. The land being appropriated for use as a canal feeder, a grant for highway purposes could not be made, and a dedication for such purposes, therefore, cannot be presumed. *Donahue v. State* (N. Y.) 576

4. The power given to a municipal corporation by its charter to control and regulate the manner in which streets shall be used does not, expressly or by implication, give power to pass an ordinance prohibiting the circulation or giving away of any circulars, hand-bills, or advertising cards in or upon any of the public streets and alleys of the city. *People v. Armstrong* (Mich.) 721

5. A municipal ordinance making it unlawful to "circulate, distribute, or give away circulars, hand-bills, or advertising cards of any description in or upon any of the public streets and alleys" of a city, even if it can be held to be within the general power granted by the city charter to control and regulate the use of streets, is unreasonable and unwarranted, so far as it applies to giving, to those who express or appear to express a desire therefor, small cards of invitation to attend meetings of the Young Men's Christian Association. *Id.*

6. A municipal corporation cannot abrogate or dispense with the duties and liabilities imposed upon it by its charter for the safety of the public in respect to the care of streets, by means of an ordinance. *McCoull v. Manchester* (Va.) 691

7. A city ordinance permitting a person engaged in building, etc., to deposit materials upon the street for one half of its width is no defense to an action against the city for negligence in permitting obstructions to remain in the street without any light at night or other signal to give warning of them, in consequence of which a traveler sustained injuries. *Id.*

8. Where a corporation owning land adjoining to a city lays out and plats its land as an addition to the city, and dedicates the streets for public use, with the condition that it reserves to itself, its successors, or assigns, the right to use and occupy the streets for the purpose of operating a railroad, such reservation does not relieve the corporation from constructing, operating, and maintaining its line of railroad in a legal and proper manner. *Ottawa, O. C. & O. G. R. Co. v. Larsen* (Kan.) 59

9. A railroad company may, under the provisions of the Kansas statute and under the authority of a city ordinance, construct and operate its railroad in a public street in a legal and proper manner, making such alterations in the surface of the street as are necessary to the construction and operation of its road, and which do not necessarily impair the usefulness of the street, without being liable to abutting lot owners or others for damages; but such a company cannot, any more than an individual, wrongfully and unnecessarily block up or obstruct a street, without being liable therefor. *Id.*

10. A city is not liable for injuries resulting to a traveler upon its highway while attempting to cross a drawbridge, from the momentary negligence of the gateman, where it has supplied a sufficient draw and suitable gates, and

has employed competent persons to manage them. *Butterfield v. Boston* (Mass.) 447

11. Under Iowa Code, § 465, providing that no street of a city shall be graded unless it is ordered to be done by the affirmative vote of two thirds of the city council or trustees, a city is liable for the damages to private property occasioned by grading a street without the authority of an ordinance so passed. *P. H. Church v. Anamosa* (Iowa) 606

13. Municipal corporations in Michigan, in which State they are held not to be liable for damages occasioned by grading or otherwise improving streets, have no power to erect a bridge in a street over a railroad, under the general authority to grade, make, repair, and improve streets, and are liable for damages to property fronting on the street, occasioned by such a bridge; and damages which would be caused by such a bridge must be provided for under the power of eminent domain. *Schneider v. Detroit* (Mich.) 54

18. A railroad company which has made an excavation in a highway for its track, throwing up an embankment on which travelers may pass, and has failed in its duty to so restore the highway as not unnecessarily to impair its use, is liable for injury sustained by a traveler riding on such embankment, where his horse is frightened by the running of a hand car on the track, although, if the company had been free from fault respecting the highway, there might have been no right of action on account of the hand car. *Evansville & T. H. R. Co. v. Crist* (Ind.) 450

14. Knowledge that there is some danger in attempting to ride along a highway on an embankment thrown up by a railroad company, which has failed to restore the highway to its proper condition, will not preclude a recovery for injuries sustained in consequence of the fright of a horse, occasioned by the running of a hand car, where the traveler was using the only highway which led to or from her home. *Id.*

15. Where the wall of a building is on the line of the highway, and a portion of the roof projects over the highway, an injury resulting therefrom by the fall of snow is incidental to its construction and use; and an allegation that such injury is caused by negligence in the construction or management of the building is none the less true because the encroachment on the highway is wrongful. *Smethurst v. Independent Cong. Church* (Mass.) 695

16. The rights of a traveler are not lost by one who stops his wagon in a reasonable manner in the highway, for the purpose of unloading goods. *Id.*

17. Riding a horse at an improper speed along a much used public street in a populous city, and at the same time looking in another direction from that in which the rider is going, is culpable negligence. *Stringer v. Frost* (Ind.) 614

18. A footman about to cross a public street is not required to exercise the same high degree of vigilance in order to avoid contact with a horseman that is required at railroad crossings. Foot passengers have equal rights in the streets with those mounted on horseback or  
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driving in carriages. Neither has a priority of right over the other; both are bound to use reasonable care to avoid collision. *Id.*

19. A blind person walking unattended upon a public street is bound to use only ordinary care to avoid accidents; but in determining what is ordinary care the jury must consider his blindness and other infirmities, and all the circumstances which bear upon the question, What care is reasonably necessary to ensure his safety? *Neff v. Wellesley* (Mass.) 500

#### NOTES AND BRIEFS.

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Railroads in; reservation of right of way; rights of abutting owners; change of grade. 61

Injury to traveler; horse frightened by car; neglect of railroad company to restore. 451

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Right of railroads to use; dedication subject to railway use; injury to owners; power of municipality to license. 59

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#### HOMESTEAD.

Under N. C. Const. art. 10, § 2, giving a homestead right in real estate not exceeding \$1,000 in value, "owned and occupied by any resident of this State," a person who moved with his family out of the State for the purpose of cultivating his wife's land there, and to make it his home until he got the property there in order, which he thought would take about two years, and then return, is not, while so living out of the State, although returning two or three times a year for the purpose of purchasing supplies and looking after property left there, a resident entitled to a homestead in North Carolina. *Lee v. Moseley* (N. C.) 106

#### NOTES AND BRIEFS.

Right, how secured; removal from State. 106

**HUSBAND AND WIFE.** See also CONFLICT OF LAWS, 8; CONTRACT, 6, 14; EQUITTY, 1; ESTOPPEL, 1, 2; EVIDENCE, 18; LIS PENDENS, 2; MORTGAGE, 4, 5; PHYSICIAN AND SURGEON, 2.

1. No particular form of words is necessary to constitute a valid antenuptial contract. However informal the instrument may be, it will be given effect if the intention of the parties is manifest, and it is such as can in law or in equity be executed. *McNutt v. McNutt* (Ind.) 872

2. The word "heirs," in a marriage contract providing that neither party shall take any interest in the property of the other, but that it shall descend to their heirs as if they had not married, is not restricted to the children of the parties, but includes any legal heirs; and such provision excludes any claim of either party as heir by virtue of marriage. *Id.*

3. A contract in consideration of marriage, where each party releases all interest in the other's property, is upon a sufficient considera-



tion as to both parties, at least where each is possessed of property before marriage. *McNutt v. McNutt* (Ind.) 872

4. When a divorce is granted to a wife for causes other than adultery, if the accomplishment of her support renders it necessary the court may decree to her the title of either real or personal property belonging to her husband, under Nev. Gen. Stat. § 496, authorizing property, in certain cases, to be "set apart" for the support of the wife under such circumstances. *Powell v. Campbell* (Nev.) 615

5. A deed conveying real estate to a husband and wife conveys the same to them in entirety, and on the death of one the survivor takes the entire estate. Neither the statutes relating to married women, nor the statutes relating to descents and distributions, nor any other statutes, have changed this rule of law in Kansas with respect to the rights of the survivor. *Baker v. Stewart* (Kan.) 484

6. Merely providing ordinary and necessary clothing for the wife by the husband in discharge of his duty growing out of the marital relation does not make it her property, within the meaning of the Alabama Statute providing that all property acquired by a wife after marriage in any manner, including that acquired by gift from or contract with the husband, shall become her separate estate. *Richardson v. Louisville & N. R. Co.* (Ala.) 716

7. The Michigan Statute giving to a married woman the right to acquire and hold property separate from her husband and free from his influence and control (How. Stat. §§ 6295-6299) does not empower a married woman to make a contract of partnership with her husband. *Artman v. Ferguson* (Mich.) 848

8. The power given to a married woman by How. (Mich.) Stat. §§ 6295-6297, to contract in regard to her separate property, does not extend to a joint contract with her husband in reference to property held by them by entirety. *Speier v. Opfer* (Mich.) 845

9. The grantee in a deed, executed by a husband and wife, of the land of the wife, who is also an infant and who was married before any of the Married Women's Enabling Acts were passed, except that empowering her to sell her land by joining her husband in the conveyance, takes the husband's right to the possession and enjoyment of the rents during his lifetime, and also the wife's interest in the land subject to her right of disaffirmance. *Stull v. Harris* (Ark.) 741

10. An infant married woman who has joined with her husband in a conveyance of her land may file her bill to disaffirm the conveyance during her husband's lifetime. *Id.*

11. A conveyance of community property in Texas, by the husband,—who, under Tex. Rev. Stat. art. 2862, has full power to sell it,—passes the whole of the common title, although he signs only as agent of his wife, under a power of attorney which gave him no power to sell the property. *Dooley v. Montgomery* (Tex.) 715

12. A mortgage by a married woman, on her separate property, in which her lawful husband does not join, is void, under Ind. Rev. Stat. 1876, p. 550 (Rev. Stat. 1881, § 5117), although 3 L. R. A.

he has been absent fifteen years, and she, believing him to be dead, is living with another man whom she believes to be her lawful husband and who joins with her in executing the instrument. As to the effect of the Indiana Statute of 1881 touching estoppels in pais affecting married women, on such an instrument if made after the passage of that Act,—*quære*. *Cook v. Walling* (Ind.) 769

#### NOTES AND BRIEFS.

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Disability of wife at common law; note by; statutory power; estoppel; separate estate of wife. 845

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Antenuptial contract; consideration; validity; Statute of Frauds; enforcement. 373

Divorce and adultery; right to remarry; effect of divorce in another State. 703

Gift to wife. 716

Contracts of wife; estoppel. 769

Community property. 715

Right of wife to disaffirm contract made during infancy. 742

ICE. See HIGHWAYS, 15; NEGLIGENCE, 4.

#### INDICTMENT, INFORMATION, AND COMPLAINT.

1. An indictment under the Interstate Commerce Act, § 2, for "unjust discrimination," need not aver by what particular device the defendant managed to discriminate in favor of a particular shipper. *United States v. Teas* (D. C. E. D. Mo.) 444

2. Counts, under § 3, for "undue and unreasonable preference" and for "undue or unreasonable prejudice or disadvantage," need not allege that the service for which a different rate was charged was rendered "under substantially similar circumstances and conditions,"—those words being only found in § 4, in relation to greater charge for shorter haul. *Id.*

3. A count, under § 3, is sufficient if it shows with requisite certainty by any apt language that the accused has committed an act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage. *Id.*

4. A count, under § 3, charging the subjection of a certain locality to an undue prejudice, by charging its merchants a higher rate for transporting property to a certain point than was exacted from residents of a certain other locality, must show with precision that the lower rate was for transportation between the same points as the higher rate. *Id.*

5. A count, under § 6, alleging the allowance of a rate less than the established and published rate which "was in force on that day," sufficiently negatives the inference that the rate might have been reduced by the carrier without notice, as permitted by that section. *Id.*

**INFANTS.** See ARMY AND NAVY; BENEFIT SOCIETIES, 1; CONTRACTS, 14; HUSBAND AND WIFE, 10; LIMITATION OF ACTIONS, 3.

**NOTES AND BRIEFS.**

See also ARMY AND NAVY.

Right to disaffirm contract during coverture. 742

**INFORMATION.** See INDICTMENT, ETC.

**INJUNCTION.** See also DAMAGES, 8; NUISANCE, 1, 2.

1. Where the law invests an officer with discretion in the performance of an act, the courts will not interfere with or control his action by injunction. If injustice is done by his action, some other remedy must be sought. Under a statute giving railroad commissioners discretion in making rates for railroads, they are entitled to the benefit of this rule. *McWhorter v. Pensacola & A. R. Co.* (Fla.) 504

2. Whether rates made by railroad commissioners are reasonable and just or not, even if subject to judicial control, is not open to inquiry in a suit to enjoin their discretionary action. *Id.*

3. Where two families are occupying rooms in the same house, using in common the halls and stairways, a court of equity will not restrain the one from committing a nuisance against the other, unless the proof of the existence of such nuisance is clear and strong. A court of equity will, as far as it can, discourage a resort to its aid for the purpose of interfering in mere domestic broils. *Matford v. Levy* (W. Va.) 868

4. Where a trustee holding property for the separate use of a married woman for life, with power of appointment in her by will, and, in default thereof, for her child in fee, after the death of the wife and of her child, who left an heir, made a devise of the property upon a trust to convey it to the State upon certain conditions; and the devisee has asked the acceptance, by the State, of the property; and the General Assembly has put an Act on its passage for this purpose,—the right of the heir to assert her claims in court being imperilled, a preliminary injunction will be issued to prevent the transfer of the property by the devisee to the State. *Lee v. Simpson* (C. C. D. S. C.) 659

5. When a defendant *pendente lite* in a Circuit Court of the United States seeks to convey land, the subject of controversy, to a State, he will be restrained by injunction. *Id.*

**NOTES AND BRIEFS.**

Against threatened danger. 660

**INSANE PERSONS.**

Letters of appointment as guardian of an insane person are conclusive, in a collateral action, of the regularity of the proceedings resulting in their issuance, as well as of the insanity of the person upon whose estate they were issued. *Minnesota Loan & Trust Co. v. Beebe* (Minn.) 418

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**INSOLVENCY AND ASSIGNMENT FOR CREDITORS.** See also BANKS AND BANKING, 5-7; CHARITABLE USES, 8; CONFLICT OF LAWS, 1-4.

1. Statutes which relate to voluntary assignments by "insolvent debtors" for the benefit of creditors; and require sworn schedules of assets and creditors to be prepared and attached to the deed or instrument of assignment by "the person, firm, or corporation" making such assignment; and provide that "in case of assignments by firms" the required oaths may be made by any member of the firm,—assume the right of insolvent firms to assign the partnership property for the benefit of their creditors, though the partners themselves, as individuals, may be solvent. It follows that the individual property of the partners respectively need not be assigned in order to render the assignment valid. *Drucker v. Wellhouse* (Ga.) 828

2. Where the schedules required by statute are in fact attached to a deed of assignment, and there is no reason to conclude or even suspect that they were not attached at the time the assignment was executed, failure of the writings to declare expressly on their face that they were then attached is of no consequence. *Id.*

3. That one of the preferred debts of a firm was a due-note payable to the attorney who drafted the assignment, and was given to him by the firm "for services rendered in drawing this deed of assignment, and for advice and counsel in reference thereto, and services to be rendered hereafter for the purpose of protecting and upholding this assignment," does not render the assignment void *per se*. If there was actual fraud, the fraud is matter for proof *alibunde*; and if no fraud was intended, but the amount of the note is more than the services rendered and to be rendered are worth, or if the assignee should not accept the attorney as his counsel in behalf of the creditors, or should not need his services, a proper deduction from the amount can be made, and the note be left to stand good against the assets for the balance only. *Id.*

**NOTES AND BRIEFS.**

See also CONFLICT OF LAWS; PARTNERSHIP.

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Assignment of firm for creditors; provisions for attorney's fee. 829

Recording of assignment; effect of assignment in another State. 856

**INSPECTION.** See SHIPPING, 2.

**INSURANCE.**

**I. FIRE.**

**II. LIFE; ACCIDENT; BENEFIT SOCIETIES.**

**III. FOREIGN COMPANIES.**

**NOTES AND BRIEFS.**

See also DESCENT AND DISTRIBUTION, 2; NOTICE, 7; TRIAL, 23.

**I. FIRE.**

1. The interest of a widow in property insured may include a claim against the property

for payment of incumbrances, although barred by statute. The insurer, not being a creditor of the estate or interested in any manner in the property itself, cannot plead the statutory bar against such claim. *Hartford F. Ins. Co. v. Haas* (Ky.) 64

2. A policy of insurance cannot be reformed to cover the interests of children of the insured, merely because she supposed she was insuring their interests as well as her own, when nothing was said at the time of the insurance as to the nature and extent of the interest insured. *Id.*

3. A colt killed by lightning while in a field at pasture is not covered by a policy by which the colt, with other property, is insured as "all contained in above described barn," and in which there is a general printed clause providing that the policy does not cover or insure personal property of any kind while removed from the particular building therein described. *Ilwaco v. St. Paul F. & M. Ins. Co.* (Pa.) 52

4. Where an agent, having power to effect insurance without even consulting the home office, was fully apprised of the ignorance of the person insured, who was an illiterate German woman unable to read or write the English language, and knew all about the nature and extent of her title, a policy issued by him on her property will not be void because she is not the absolute and unconditional owner, although it contained a stipulation that it should be void in that event. *Hartford F. Ins. Co. v. Ilwaco* (Ky.) 64

5. An insurer, on payment of insurance covering only part of a mortgage debt, cannot take by subrogation from a mortgagee any part of his claim until the mortgage debt is paid, both principal and interest, in full. *Phenix Ins. Co. v. Harrisburg First Nat. Bank* (Va.) 667

6. Where a person who has property was injured by an explosion of gas, brought an action against the gas company for such portion of his loss as was not covered by insurance, and gave a release which was expressly declared not to affect his claim against the insurance companies, such release is no defense to an action on policies of insurance. *North America Ins. Co. v. Fidelity Title & Trust Co.* (Pa.) 566

## II. LIFE; ACCIDENT; BENEFIT SOCIETIES.

7. The receipt of insurance policies, under a written agreement that they shall be returned if policies held by the insured in other companies should not be surrendered on terms satisfactory to him, is an acceptance of the policies only upon a condition precedent, and no valid contract is thereby created until the condition is complied with. Whether the agent of the company had power to make such conditional delivery or not is immaterial, as, if he had not, the result would still be that no contract was made. *Hannickell v. New York L. Ins. Co.* (N. Y.) 150

8. A creditor has an insurable interest in the life of his debtor. *Rittler v. Smith* (Md.) 844

9. A life insurance policy is but a chose in action for the payment of money, and may be assigned as such, under Md. Act 1829, chap. 51. *Id.*

10. A creditor who, in pursuance of a *bona fide* effort to secure payment of his debt, insures the life of his debtor and takes a policy in his own name, or for his own benefit, which he is obliged to keep alive by paying premiums, is entitled to hold all he can recover on the policy, if there is not such a gross disproportion between the debt and the amount of the policy as to make the transaction a speculation or wager. *Id.*

11. A creditor who took out policies in mutual aid associations on the life of his debtor, on which policies he became liable to be assessed as a member, and on which he paid, within the period of about nine months thereafter, the sum of \$381.75, and the amount collected on which, on the debtor's death, was \$2,124.82, being an excess of \$474.53 over the amount of the debt, is entitled to hold the whole amount received, as there is no such disproportion between the debt and the insurance as to warrant a condemnation of the transaction as a speculation or wager. *Id.*

12. The words "total inability to labor, in the by-laws and constitution of a relief association, defining the time for which benefits may be paid, are not restricted to labor in the same employment, where the member is capable of earning as much or more in some other employment. *Baltimore & O. Employes Relief Assn. v. Post* (Pa.) 44

13. Where the Supreme Lodge of the Knights of Honor sends a benefit certificate properly signed and sealed to a subordinate lodge, for a person who has applied for membership, been ballotted for, elected, and had a degree conferred upon him, and has paid his fees and passed a medical examination which has been approved, the contract relations between him and the supreme lodge are complete, although the subordinate lodge has not delivered to him the certificate. *Lorcher v. Supreme Lodge Knights of Honor* (Mich.) 206

14. An action on a benefit certificate of the Knights of Honor may be maintained without producing it at the trial, when it is in the possession of a subordinate lodge to which it had been sent, and which had refused to deliver it on the ground of fraud, which is relied upon as a defense to the action. *Id.*

15. It is *ultra vires* a corporation created "to give financial aid and benefit to the widows, orphans, and heirs or devisees of deceased members," and declared by statute not to be an insurance company, to contract for "endowment insurance" payable to a member on his arriving at a certain age. *Rockhold v. Canton Masonic Mut. Benev. Assn.* (Ill.) 420

16. The plea of *ultra vires* is maintainable by such a corporation as a defense to an action for such endowment insurance, by a member charged with knowledge of the want of power to make such contract, and whose payments of assessments to the corporation had not been retained by it to increase its property, but had been paid to those entitled thereto. *Id.*

17. The beneficiary certificate containing such unauthorized agreement for endowment insurance will be valid in so far as it is payable to the beneficiaries on the death of the member; and when the member has not seasonably

rescinded the contract, and the benefits of the beneficiaries thereunder have intervened, he cannot recover from the corporation assessments paid by him, none of such assessments having been for endowment insurance. *Id.*

18. When a mutual benefit life insurance association incorporated under the laws of Minnesota, and dependent upon securing such amounts as may be required to meet and liquidate death claims through assessments upon its members, refuses to make an assessment in a proper case, the remedy is by an action for a breach of contract. *Bent v. Northwestern Aid Assn. (Minn.)* 784

19. Affidavits of physicians as to the cause of death of a person insured, made on blanks furnished by the insurance association, and forwarded with other proofs of death, will not conclude or estop the beneficiary as to the real cause of death. *Id.*

20. The measure of damages, in an action against a mutual benefit association on a certificate of insurance agreeing to pay the amount of an assessment on the members, where it refuses to make an assessment, is the amount assessable upon all the insured, unless it is shown that the amount would be less because all members did not respond to assessments. *Id.*

21. For a substantial breach of the contract contained in a policy issued by a mutual benefit association to pay to a certain person a percentage of an assessment upon its members upon the happening of a certain event, the beneficiary may recover substantial damages in an action at law. *Jackson v. Northwestern Mut. R. Assn. (Wis.)* 786

22. Upon demurrer to a complaint alleging the refusal of a mutual benefit association to make an assessment in accordance with the terms of its contract, and also that plaintiff's share of the assessment would be at least a certain amount in case the assessment was made, the court cannot say, as matter of law, that plaintiff has only sustained nominal damages by reason of such refusal, merely because it may be difficult, in advance of a levy and attempted collection of the assessment, to ascertain the precise damages to which plaintiff is entitled. *Id.*

23. The fact that by the charter of a mutual benefit association a particular method of notice of assessments falling due is declared to be sufficient and binding on all members does not exempt the corporation from the operation of the principles of equitable estoppel, which apply to all other persons, natural or juridical. *Gunter v. New Orleans Cotton Exch. Mut. Aid Assn. (La.)* 118

24. Though the charter of a benefit society provides only for notice by posting, yet, if the company adopts the practice of always sending written notice by mail, to a particular class of members, of assessments due; and if, on a particular occasion, it failed to send such notice; and if the failure to pay was solely due to the want of notice; and if, upon information, payment was tendered,—the company is estopped from claiming the forfeiture. *Id.*

### III. FOREIGN COMPANIES.

25. Under Ill. Act 1869, § 22, making it unlawful for any agent or agents, or any other

person, in any manner to aid any insurance company not incorporated in the State in transacting insurance business within the State a person or corporation is liable for aiding such foreign insurance company in the transaction of insurance business in any manner, although not the agent of such company in the ordinary sense of the term, and although acting under a contract with the insured expressly stating that such person or corporation is his agent only. *People v. People's Ins. Exch. (Ill.)* 840

### NOTES AND BRIEFS.

See also BENEFIT SOCIETIES.

Fraternal societies; payment of policy; to whom made; designation of beneficiary; designation by statute; restriction on designation; revocation of appointment; distinction between benefit policies and life insurance policy; appointment by will; powers of members of benefit societies. 161

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Insurable interest in life; measure of recovery. 844

Reformation of contract; acceptance of policy. 65

Preliminary agreement; power of agent; delivery of policy; notice to agent; surrender of premium notes. 153

Compelling assessment by benefit society. 785, 787

**INTEREST.** See also LIMITATION OF ACTIONS, 6:

1. Interest is recoverable, under the Illinois Statute Concerning Interest, § 2, upon advances made by a broker for which his principal is under an implied obligation to repay him. *Perin v. Parker (Ill.)* 836

2. A depositor is not entitled to interest on money which he claims to recover against a bank that has paid it out on a forged indorsement of a check, where the bank held the money without interest as a general deposit. *Atlanta Nat. Bank v. Burke (Ga.)* 96

**INTERSTATE COMMERCE.** See CARRIERS, 39; INDICTMENT, ETC.

**INTERSTATE COMMERCE COMMISSION.** See also CARRIERS, 28-38; COURTS, 7; STATUTES, 16.

1. Congress, under its sovereign and exclusive power to regulate commerce among the several States, has the power to create a commission for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C. D. Ky.)* 289

2. The Interstate Commerce Commission is given no power to establish through routes or to fix through rates between connecting lines, such as is conferred upon the English Commission by the English Act of 1873. *Id.*

3. The Interstate Commerce Commission is

invested with only administrative powers of supervision and investigation, which fall far short of making it a court or its action judicial, in the proper sense of the term. Its action or conclusion upon matters brought before it for investigation is neither final nor conclusive. Nor is it invested with any authority to enforce its decision or award. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 289

4. The Interstate Commerce Commission is charged with the duty of investigating and reporting upon complaints; and the facts found or reported by it are only given the force and weight of *prima facie* evidence in such judicial proceedings as may thereafter be had for the enforcement of its recommendation or order. *Id.*

5. The United States Circuit Court is not restricted to the mere ministerial duty of enforcing an order of the Interstate Commerce Commission. The suit in that court is, under the provisions of the Interstate Commerce Act, an original and independent proceeding in which the court hears and determines the cause *de novo* upon proper pleadings and proofs; the latter including, not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy. *Id.*

#### NOTES AND BRIEFS.

Jurisdiction and power of; complaint before. 446

### INTOXICATING LIQUORS.

1. The Pennsylvania Act of 1887 prohibits the sale of intoxicating liquors only so far as they are included in the description, "vinous, spirituous, malt, and brewed liquors, and various admixtures thereof." *Com. v. Reynburg* (Pa.) 415

2. A club properly organized in good faith, under Mich. Pub. Acts 1888, No. 22, cannot purchase liquors by the quantity and distribute them among its members, receiving pay therefor as they are distributed by the glass, the proceeds to go into the treasury of the club, to be used in purchasing other liquors or in paying expenses, without being liable, under the laws of Michigan, to pay a retail tax for selling such liquors, and exhibit the tax receipt. *Peoples v. Soule* (Mich.) 494

3. The servants, agents, and employes of a club engaged in the business of purchasing liquor by the quantity and selling it to its members by the glass, who are engaged as such in said business, if they have not paid the tax, are equally liable with their principal therefor; and under the Michigan Liquor Law of 1887, p. 458, § 24, they may be informed against as principals. *Id.*

#### NOTES AND BRIEFS.

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What are; judicial notice; question of fact. 408

### JOINT CREDITORS AND DEBTORS. See NOTICE, 6.

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### JOINT TENANTS AND TENANTS IN COMMON. See also TAXES, 20.

Mass. Pub. Stat. chap. 12, §§ 63-65, relating to the preservation of a lien in favor of one tenant in common who pays taxes, as against his cotenants, apply simply to a payment in the first instance,—not to a redemption of the premises after a sale, when the tenant takes a deed which is put on record. *Hurley v. Hurley* (Mass.) 173

#### NOTES AND BRIEFS

See also PARTITION.

Trust among. 172

JUDGE. See COURTS, 8.

JUDGMENT. See also EXECUTORS AND ADMINISTRATORS, 2; INSANE PERSONS; LIMITATION OF ACTIONS, 4.

1. A judgment by confession in an action of forcible detainer in Illinois, upon a warrant of attorney contained in a lease, is *coram non judge* and void. The proceeding provided by statute in such cases is exclusive. *French v. Willer* (Ill.) 717

2. A judgment against a director of a corporation for a corporate debt, based on his liability as director, under the New York Act of 1875, by reason of having made a false certificate, merges a claim for the same debt against him as a stockholder. *Attrill v. Huntington* (Md.) 779

3. A judgment rendered in one State for the debt of a corporation against one of its directors, under a statute making them individually liable for such debts by reason of making a false certificate, cannot be enforced in another State; the nature of the original claim, being for a penalty, is not changed by its reduction to a judgment. *Id.*

4. When the provision of the Rapid Transit Act (N. Y. Laws 1875, chap. 606) providing for the appointment of commissioners, and their determination as to the propriety of constructing the proposed railroad in public streets, in lieu of the consents of abutting owners, has been complied with, and their determination that the road should be constructed has been confirmed by the supreme court, after the giving of public notice and an opportunity to abutting owners to be heard, such decision of the supreme court involves the determination of the validity of the incorporation of the company proposing to construct the road, and, being the decision of a competent tribunal in a judicial proceeding in which the abutting owners had an opportunity to be heard on that question, will estop such owners from thereafter attacking the validity of such incorporation collaterally. *Re Union Elevated R. Co's Petition* (N. Y.) 859

5. A railroad company which took title to a portion of mortgaged premises from one who acquired title by adverse possession subsequently to the execution of a mortgage thereafter foreclosed by a suit in which the validity of such title could have been litigated, but was not, is estopped by the decree of foreclosure from setting up the title so acquired by it, in the proceeding thereafter instituted by it to

condemn the mortgaged land to its road uses.  
*St. Johnsbury & L. O. R. Co. v. Willard* (Vt.) 528

6. Where a tenant by curtesy has had a share of property allotted or delivered to him in severalty, in partition, other parties to the partition who did not in these proceedings raise the question of his right cannot afterwards deny that he was a life tenant. *Rankin's Appeal* (Pa.) 420

7. A judgment declaring a tripartite agreement between three corporations to be void as to one of them, rendered in an action by that one against the other two, is not *res judicata* upon any question arising between one of the defendant corporations and the stockholders of the other, or as to the attitude of one of the defendant corporations towards its own stockholders. *Beveridge v. New York Elevated R. Co.* (N. Y.) 648

#### NOTES AND BRIEFS.

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**JUDICIAL NOTICE.** See **EVIDENCE, I.**

**JUDICIAL SALE.** See **EXECUTION AND JUDICIAL SALE.**

#### NOTES AND BRIEFS.

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**JUSTICE OF THE PEACE.** See **LIMITATION OF ACTIONS, 4.**

#### NOTES AND BRIEFS.

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**LANDINGS.** See **DEDICATION; TOWN.**

**LANDLORD AND TENANT.** See also **ADVERSE POSSESSION, 2; CONTRACTS, 5; WHARFAGE AND WHARVES, 3-5.**

1. A lease providing for repair of the premises by the lessor, or termination of the lease in case the premises become partially or wholly untenable "by fire or the elements," refers, by the term "elements," only to some sudden, unusual, or unexpected action of the elements, such as floods, tornadoes, or the like,—extraordinary disasters not anticipated by either party,—and not to percolation of water through and under the basement walls, by reason of springs, making the basement so wet and unhealthy as to be untenable. *Harris v. Corties* (Minn.) 849

2. A lease for fourteen years, with a covenant to renew for another fourteen years, especially when the covenant is that the second shall contain the same covenants as the first, is a lease for a longer period than fifteen years, within the meaning of the Maryland Act of 1888 making leases for more than fifteen years redeemable, at the lessee's option, after the expiration of ten years. *Stewart v. Gortler* (Md.) 711

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8. The lessee cannot waive his option of redemption by any agreement in the lease, which option is given by the Maryland Act of 1888 providing that rents on leases for more than fifteen years shall be redeemable at any time after the expiration of ten years, the Act not being intended for the exclusive benefit of the lessee, but being based on grounds of public policy. *Id.*

4. The surrender of leased premises by operation of law vests the landlord with the title of any structures remaining thereon. *Bedlow v. New York Floating Dry Dock Co.* (N. Y.) 629

**LARCENY.** See **CORPORATIONS, 22.**

**LAW OF PLACE.** See **CONFLICT OF LAWS.**

**LEASE.** See **CONTRACTS, 5; CORPORATIONS, 7; LANDLORD AND TENANT; STREET RAILWAYS.**

**LEGACY.** See **WILLS, NOTES AND BRIEFS.**

#### LEGISLATURE.

The Legislature can ratify and approve, by subsequent legislation, any act performed for the benefit of the State which it had original authority to legislate and provide for. *O'Hara v. State* (N. Y.) 603

**LIBEL AND SLANDER.** See also **EVIDENCE, 10; PLEADING, 2-4; TRIAL, 22.**

1. Defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, or because uttered upon the most urgent solicitation, where the person uttering them is under no duty to utter them, and has no interest to subserve by uttering them, and the person to whom they are addressed has no interest or duty to hear, and no right to demand that he may hear them. *Byam v. Collins* (N. Y.) 129

2. A request by a young lady for information as to any rumors about the young men of the locality does not render privileged a communication based upon mere rumors and hearsay, although believed to be true by the person giving the information. *Id.*

3. A letter by a mere volunteer, containing defamatory statements as to a man's character, not known to be true, written for the purpose of breaking off relations which may lead to his marriage with a friend, but not a near relative, of the writer,—is not privileged. *Id.*

4. Publications of commercial agencies, issued to their subscribers generally, are not privileged communications. They are only privileged when made in confidence to a subscriber who is interested in the pecuniary standing of the merchant reported. *Bradstreet Co. v. Gill* (Tex.) 405

#### NOTES AND BRIEFS.

Malice as an element; inference and presumption of; tendency to injure; privileged publications. 129

Privileged communications by commercial agency. 405

#### LICENSE.

1. A mere implied license, no matter how

long enjoyed, to transact a business on railroad cars, for which no consideration has been paid, is revocable at any time; and such revocation results from notice not to prosecute the business in the future. *Fluker v. Georgia R. & Bky. Co.* (Ga.) 848

2. One who persists in using the license after notice of its termination may be prevented from so doing by such force, not extending to violence to life or limb, as may be necessary to effectuate his expulsion from the premises. *Id.*

#### NOTES AND BRIEFS.

See also SHIPPING.

Municipal taxation of occupations. 284

**LIENS.** See also ATTORNEYS, 1; CONTRACTS, 18; JOINT TENANTS AND TENANTS IN COMMON; TAXES, 20.

1. The special exception in Mich. Pub. Acts 1887, No. 270, repealing former statutes as to mechanics' liens, by which proceedings pending are saved, shows clearly the legislative intent to save nothing else; and a lien which no steps had been taken to fix or enforce is not saved. *Hanes v. Wadey* (Mich.) 498

2. Where the seed grain described in a note or contract is actually and in good faith sold and furnished to the maker of the note for seeding purposes, pursuant to the agreement of the parties, and a portion of the amount received is subsequently sold or otherwise appropriated by him, and not sown upon the land designated, that fact will not defeat the lien of the seller, under the Minnesota Statute, for the price of that portion of such seed grain actually sown upon the land, upon the crop grown therefrom. *Nash v. Brewster* (Minn.) 409

3. The Minnesota Statute authorizes the holder of a seed-grain note, upon condition broken, to take possession of the crop raised from the seed for which it is given; and the holder thereof may in such case enforce his lien as against the holder of a subordinate lien thereon who has taken possession, and may maintain an action against him for the conversion thereof. *Id.*

#### NOTES AND BRIEFS.

Vested right in; repeal of statute; strictly construed; lien on several lots. 499

#### LIFE ESTATE.

#### NOTES AND BRIEFS.

Use or income; commences when; incidents of; provision against alienation. 118

**LIFE INSURANCE.** See INSURANCE, II.

**LIMITATION OF ACTIONS.** See also INSURANCE, 1, 2.

1. The Statute of Limitations may be set up in the orphans' court of Pennsylvania, precisely as in a court of law, and is not tolled upon a mere demand upon an executor. *Keyser's Appeal* (Pa.) 159

2. The fact that the Statute of Limitations has run against an imperfect obligation which is unenforceable by reason of some vice or defect therein which may be cured or waived by

the debtor does not bar a cause of action on a new obligation growing out of the old one, when the vice or defect is waived. *O'Hara v. State* (N. Y.) 608

3. When an infant married woman, who was married before any of the Married Women's Enabling Acts were passed, except that empowering her to sell her land by joining her husband in the conveyance, joins with her husband in a conveyance of her land, the grantee's possession is rightful against her during the lifetime of her husband, and the Statute of Limitations does not run against her right of disaffirmance until coverture is ended. *Stull v. Harris* (Ark.) 741

4. An action upon a judgment rendered in a justice's court is barred in six years from its rendition, although the judgment has been docketed in the county clerk's office, under the provisions of N. Y. Code Civ. Proc. § 8017. An action to compel defendant to allow plaintiff's judgment to be set off against one held by defendant is an action upon a judgment, within the provisions of N. Y. Code Civ. Proc. § 882, that an action upon a judgment rendered in a court not of record shall be commenced within six years. *Diefenbach v. Koch* (N. Y.) 829

5. Although a mortgage which is one of indemnity merely is barred in six years, under the Indiana Statute of Limitations, a mortgage which contains a covenant or express agreement to pay the sum of money thereby secured is not barred in six years. *Crawford v. Hazlerigg* (Ind.) 189

6. Overdue interest on bonds represented by negotiable coupons cannot be included in the recovery in an action on the bonds after an independent suit on the coupons has become barred by the Statute of Limitations. *Griffin v. Macon County* (C. C. E. D. Mo.) 858

#### NOTES AND BRIEFS.

See also ADVERSE POSSESSION.

Under New York Code.

829

#### *LIS PENDENS*.

1. The rule of *lis pendens* applies to one who purchases real property from a husband, with actual notice of a pending divorce suit in which the wife seeks a decree giving her the title to the property. *Powell v. Campbell* (Nev.) 615

2. A sale of property by a husband, pending a divorce suit in which a decree is asked setting apart the property to the wife, is not taken out of the rule of *lis pendens* by the fact that the wife told him he could sell it if he wanted to, and that she wished he would, where the purchaser had no knowledge of such statements. *Id.*

3. Purchasers *pendente lite* are only chargeable with notice when the purchase is from a party to the suit. *Green v. Rick* (Pa.) 48

4. The purchasers of mortgaged land are not affected by the pendency of a suit to which their grantors were not parties, involving only the authority of an agent to whom the mortgage debt was payable, to receive payment. *Id.*



NOTES AND BRIEFS.

Doctrine of; when applies; alienation pending suit void; when initiated. 48  
Effect of, in divorce cases. 615

**LODGE.** See **BENEFIT SOCIETIES**, 8.

**MARKET REPORTS.** See **BOARD OF TRADE**, 1-3.

**MARRIED WOMEN.** See **ESTOPPEL**, 1, 2; **HUSBAND AND WIFE**; **LIMITATION OF ACTIONS**, 8.

**MASTER AND SERVANT.** See also **ASSAULT AND BATTERY**, 1, 2; **SUNDAY**.

1. A foreman of a bridge gang engaged in repairing bridges along the line of a railroad is a fellow servant with the persons operating a freight train on the same road, and cannot recover for injuries occasioned by negligence. *St. Louis, A. & T. R. Co. v. Welch* (Tex.) 889

2. Although asleep upon a side track in a car provided for that purpose, the foreman of a bridge gang, who is liable to be called at any moment to go out with his gang upon the road, is on duty so far as to be at the time a fellow servant with the men operating a freight train, whose negligence causes his injury. *Id.*

3. A railroad company is liable for negligence in permitting a car to be used from which the reach rod was absent from the brake beam in front of the wheels, causing the beam to hang lower and farther forward than it otherwise would have done, making it dangerous to brakemen going between cars to uncouple them, where the absence was known, or might have been known, to the company. *Louisville, N. A. & C. R. Co. v. Buck* (Ind.) 520

4. A brakeman on a railroad train is not chargeable with contributory negligence in going between cars to uncouple them, by reason of the absence of the reach rod from the brake beam on one of them, which was not known to him, and was not obvious, and could not have been discovered except by stooping down and looking under the car. *Id.*

5. An employé on a town farm maintained for the support of paupers and under the management of the overseers of the poor is so far the servant of the town that it is liable for injuries resulting from the negligent performance of his duties, where the overseers are also highway surveyors and selectmen, and where the surplus income is used for town purposes, and the whole operations of the farm are approved by the town. *Neff v. Wellesley* (Mass.) 500

6. Under the provisions of Mass. Pub. Stat. chap. 112, § 212, that in certain cases of death occasioned by the negligence of a corporation, etc., the damages shall be "assessed with reference to the degree of culpability of the corporation or of its agents or servants," the corporation is not rendered liable by showing that it had assumed a contractual or quasi contractual responsibility for third persons who were not its servants, but through whose negligence the injury happened. *Littlejohn v. Fitchburg R. Co.* (Mass.) 502

NOTES AND BRIEFS.

Care required; neglect to block frogs and guard rails; action for death. 67  
2 L. R. A.

Liability for negligence of vice-principal; servant and agent distinguished. 192

Obligation as to machinery, implements, etc.; contributory negligence not presumed; violation of Sunday Law. 520

Injury by negligence of fellow servant. 889

**MAXIMS.**

Quicquid plantatur solo, solo cedit. *St. Johnsbury & L. C. R. Co. v. Willard* (Vt.) 528

**MECHANICS' LIEN.** See **CONTRACTS**, 13; **LIENS**.

**MILLS.** See **EASEMENT**, 2; **WATERS AND WATERCOURSES**, **NOTES AND BRIEFS**.

**MINES AND MINING.** See also **CURTSEY**.

1. A tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion. *Rankin's Appeal* (Pa.) 420

2. A tenant by curtesy in an estate which consists of coal mines and mining privileges has the right to work open mines even to exhaustion, although he is not tenant of the surface. *Id.*

3. A devise of coal mines and mining privileges, separate from the estate in the surface of the land, includes the use of the surface so far as necessary for mining purposes, and the use of a pit mouth thereon, although testatrix in her lifetime had granted a right of way for a tunnel, which had been constructed and could be used for taking the coal to market. *Id.*

4. In partition of coal between owners who do not own the surface, mining privileges pass as appurtenant or incident to the coal, without express words, and include the use of a pit mouth which is not within the lines of either purpart, but which is close to one of them, where it was the manifest intention to divide all the good merchantable coal. *Id.*

**MONEY RECEIVED.** See **ASSUMPSIT**, 1-5.

**MONOPOLIES.** See **CONTRACTS**, **NOTES AND BRIEFS**; **CORPORATIONS**, 3-6.

**MORTGAGE.** See also **ESTOPPEL**, 2; **EVIDENCE**, 25; **LIMITATION OF ACTIONS**, 5; **NOTICE**, 4; **WAREHOUSEMEN**, 1.

1. That the mortgage for railroad stock was given by the State, which owned a majority of the stock, does not bind the State to use its controlling interest in the road exclusively in the interest of its mortgagees of the stock, or to impress the earnings received by the lessor of the road with a trust for the benefit of such mortgagees. *Gibson v. Richmond & D. R. Co.* (C. C. S. D. N. Y.) 467

2. Railroad bondholders to whom stock of the corporation has been mortgaged as collateral security cannot maintain a suit in equity to charge the lessor of the mortgaged road with the earnings derived under the lease, when such lease is not alleged to be void or voidable as between the parties to it. *Id.*

3. A mortgagee occupies the position of

mortgages for a valuable consideration where the mortgage is taken for the surrender of a prior mortgage and accrued interest thereon. *Constant v. Rochester University* (N. Y.) 784

4. The mere extension of the time of payment of a note to which a married woman is not a party does not discharge her inchoate right in her husband's property from a mortgage thereon in which she has joined to secure such note. *Crauford v. Hazelrigg* (Ind.) 189

5. The inchoate interest of a married woman in real estate of her husband is discharged from a mortgage in which she joined with him to secure a note given by her husband and others, when, with the mortgagee's consent and without her knowledge or consent, one of the makers of the note has been released or discharged, by renewal or otherwise, from liability for the note and debt secured; and she may set up such defense to protect such inchoate right from sale on the foreclosure of the mortgage. *Id.*

#### NOTES AND BRIEFS.

See also TAXES.

Holder of, as *bona fide* purchaser; effect of failure to record. 788

**MUNICIPAL CORPORATIONS.** See also CONSTITUTIONAL LAW, 1, 8-8, 11; COUNTIES; HIGHWAYS; NEGLIGENCE, 8; STATUTES, 18-15; TAXES, 2, 8, 14, 15; TELEPHONE COMPANIES; TOWN; WATERS AND WATERCOURSES, 1; WHARFAGE AND WHARVES, 2.

1. A rule of the Boston board of police, that "no person shall sing or play or perform on any musical instrument in the streets or public places of the city of Boston, except in connection with a funeral, a military parade, or a procession of a political, civic, or charitable organization, for which a police escort is provided, unless licensed thereto by the board of police for the city of Boston, or as hereinafter set forth,"—is within the authority conferred upon that board to regulate "itinerant musicians," and is reasonable and valid. *Com. v. Plaited* (Mass.) 142

2. The Legislature has the right to provide—as by Mass. Stat. 1885, chap. 823, placing the police of Boston under the control of a board of police appointed by the governor—that powers previously vested in cities or towns, but not by force of any constitutional provision, shall be vested in officers appointed by the governor, and may fix the qualifications of such officers, and provide that they be appointed from two principal political bodies. *Id.*

3. An ordinance of a city of the second class in Kansas, that declares it unlawful for any person, society, association, or organization, under whatsoever name, to parade any public street, avenue, or alley of the city, shouting, singing, or beating drums or tambourines, or playing upon any other musical instruments, or doing any other act designed, intended, or calculated to attract or call together an unusual crowd or congregation of people upon any of said public streets, avenues, or alleys, without first having obtained in writing the consent of the mayor, or, in his absence, the president of

the city council, city clerk, or city marshal, in the order named, authorizing such parade,—is of doubtful delegated power, is unreasonable, does not fix the conditions uniformly and impartially, contravenes common right, and is illegal and void. *Anderson v. Wellington* (Kan.) 110

4. A city is not liable for damages caused by the falling of a wall left standing after a building which belonged to a private owner was burned, although it had been notified of the fact that the wall was dangerous. *Anderson v. East* (Ind.) 712

5. A recovery can be had against a municipal corporation only where it negligently performs or negligently fails to perform a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. *Id.*

6. A city is not liable for injuries or damages caused by neglect of its officers in the performance of their duties. *Robinson v. Rohr* (Wis.) 866

#### NOTES AND BRIEFS.

See also HIGHWAYS; RELIGIOUS SOCIETIES.

Delegation of power; validity of ordinances regulating business; interference with religious rights. 143

Limitation of power of; regulation of telephone business. 279

Powers generally. 54

As agencies of government. 142

Liability for negligence; for misfeasance or neglect of officers. 866, 500

Liable for injuries caused by grading street. 606

Liabilities of; damage from falling wall; misfeasance or neglect of officers 712

Powers of; ordinances and by-laws; reasonableness of; prohibition of business; special grant of power. 721

**NAVIGABLE WATERS.** See WATERS AND WATERCOURSES.

**NAVIGATION.** See COMMERCE; WATERS AND WATERCOURSES, 2-4.

**NEGLIGENCE.** See also CANALS; CARRIERS; CONFLICT OF LAWS, 6, 7; DAMAGES, 11; EVIDENCE, 2, 14, 15, 44; HIGHWAYS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 4, 5; OFFICERS, 1, 2; PLEADING, 6; RAILROADS; SUNDAY; TELEGRAPH COMPANIES; TOWN, 8; TRIAL, 20.

1. The owner of a building which is burned is liable for damages caused by the falling of one of its walls which he had negligently left standing, knowing it be dangerous. *Anderson v. East* (Ind.) 712

2. The promise of a city officer to take charge of, and, if necessary, take down a wall of a burned building, does not relieve the owner of the premises from liability for damages caused by the fall, when he has negligently left it standing. *Id.*

3. Where a dangerous piece of machinery is placed in an alley by the owner of abutting lots, and is allowed to remain for years, both

the individual and the corporation are guilty of negligence, and both are liable for injuries sustained by a child under nine years who was hurt upon such machinery. *Oeage City v. Larkins* (Kan.) 56

4. The fall of ice and snow from a building upon a horse, causing him to start, whereby the driver, who was engaged in unloading, was thrown from the wagon and injured, is the direct, proximate cause of the injury, although the ice and snow did not hit the driver. *Smethurst v. Independent Cong. Church* (Mass.) 695

#### NOTES AND BRIEFS.

See also CARRIERS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS.

In attempting to get on moving train. 816, 833

Action for death. 67

What constitutes; liability of physicians. 587

Defined; concurrent and proximate cause. 695

Presumption and burden of proof. 820

#### NEW TRIAL.

1. The court will not set aside a verdict merely because a newspaper, during the trial, made improper reference to the trial and the case. *Kerr v. Lunaford* (W. Va.) 668

2. The rule as to the assessment of damages for property taken under the Eminent Domain Act is that, where there is a conflict of evidence, and the verdict is consistent with all the facts and circumstances in the case, it will not be set aside merely because the court may regard the weight of evidence in the record against it; but when it clearly appears that the amount fixed is wholly inconsistent with and contrary to all the proofs, it is the duty of the court to interfere and resubmit the case to another jury. *Atchison, T. & S. F. R. Co. v. Schneider* (Ill.) 423

3. A new trial as to the assessment of damages should not be refused for the reason that the railroad corporation seeking to acquire the property had entered thereon on giving bond pending appeal as provided by the statute, and had made such changes therein as would prevent a new jury viewing it as it was when the proceeding for condemnation was begun. *Id.*

#### NOTES AND BRIEFS.

In eminent domain. 422

**NEW YORK.** See WATERS AND WATER-COURSES, 1.

**NOTICE.** See also CONSTITUTIONAL LAW, 14; EVIDENCE, 9; PARTNERSHIP, 8.

1. An attorney who has done a large amount of business for a client in investing money upon mortgages, which aggregate \$3,000,000 or more, and who has in his office, in a pigeon-hole appropriated to satisfied mortgages, an unrecorded mortgage in favor of such client, taken eleven months before, will not be held, in the absence of any evidence upon that point, to have remembered the facts as to such mortgage at the time of taking a mortgage on the same property for another client, so as to charge the 2 L. R. A.

latter with notice of the prior mortgage. *Con-stant v. Rochester University* (N. Y.) 784

2. To hold a principal chargeable with knowledge which his agent has obtained on a prior occasion in an independent transaction, it must be shown that the knowledge was present to the mind of the agent at the very time of the transaction in question. *Id.*

3. If an agent recollected that there had been a prior mortgage, but honestly believed that it had been satisfied, although mistaken upon that point, the principal for whom he takes a subsequent mortgage will not be chargeable with knowledge of the former one by reason of the agent's knowledge. *Id.*

4. Whether a mortgagee can be held chargeable with notice of a prior unrecorded mortgage in the possession of his attorney in the transaction, who is also the attorney of the prior mortgagee, and whose duties to his clients are therefore conflicting,—*quære.* *Id.*

5. The knowledge of an agent, to operate as constructive notice to the principal, in Alabama, must have been acquired after the relation of principal and agent was formed. *Wheeler v. McGuire* (Ala.) 808

6. Where one of the obligors in a joint bond secured by a mortgage knew of the revocation of the authority of the agent to whom it was payable, and was present when the grantee of the land, who had assumed the mortgage, paid it to the agent, and did not disclose his knowledge, all the co-obligors in the bond are liable for its payment. *Green v. Rick* (Pa.) 48

7. An agent issuing an insurance policy, with full power to do so without even consulting the home office, will be regarded, so far as concerns his knowledge as to the title of the property insured, as if he was in fact the principal; and it is immaterial that his knowledge may have been acquired in business transactions entirely disconnected with the matter of insurance. *Hartford F. Ins. Co. v. Haas* (Ky.) 64

#### NOTES AND BRIEFS.

To agent; effect on principal; constructive notice; possession of land. 784

By possession. 201

**NUISANCE.** See also CONSTITUTIONAL LAW, 7; FENCES; INJUNCTION, 8.

1. He who comes into a court of equity must come in with clean hands; therefore, when there appears to be an unfortunate quarrel between two women, which involves the families of each and both are in fault, a court of equity will not interfere to protect one against the other and enjoin as a nuisance what one does against the other. *Madford v. Levy* (W. Va.) 868

2. While the doing of certain acts by a person in the use of his premises as a dwelling-house might not in themselves amount to a private nuisance, yet when the same acts are done wantonly and maliciously for the mere purpose of annoying his neighbor and to destroy the peace and quiet of his home, and they have such effect, they amount to a nuisance which a court of equity will restrain. *Id.*

3. A provision of Iowa Code, § 8331, giv-

ing the right to "any person injured thereby" to maintain an action to abate a nuisance, does not change the ordinary rule that a private person will not be allowed to maintain an action to restrain or abate a public nuisance unless he can show some peculiar or special damage or injury to himself. *Innis v. Cedar Rapids, I. F. & N. W. R. Co.* (Iowa) 233

4. A person who, after the erection of a bridge over a lake, has purchased boats and engaged in the business of renting them, has no other or different rights than are enjoyed by other persons in respect to the navigation of the lake, sufficient to enable him to maintain an action to abate the bridge as a nuisance, on the ground that it obstructs the navigation of the lake. *Id.*

#### NOTES AND BRIEFS.

In highway or alley.

57

**OFFICERS.**—See also INJUNCTION, 1; MUNICIPAL CORPORATIONS, 6.

1. A board of street commissioners who, after advertising for proposals for building a bridge and accepting a proposal therefor, fail to enter into any contract, but, in accordance with the recommendation of a committee, undertake to perform the work themselves, and carry it on through their superintendent and other persons employed by them and under the supervision of their committee, are individually liable for injuries sustained by a person through the falling of a derrick in consequence of the negligence of their servants. *Robinson v. Rohr* (Wis.) 303

2. Although a board of street commissioners, in adopting plans and specifications, exercise judicial and legislative powers, and are not amenable to anyone except the public for any errors, negligence, or misfeasance in the matters within their jurisdiction, they become liable to third persons for their negligence or misfeasance when, after adopting plans and specifications, they undertake to carry them out practically, and do the work themselves through agents and servants, as in so doing, if they are acting as officers at all, they are merely ministerial officers. *Id.*

3. A vote by a township trustee in Indiana for himself, for the office of county superintendent of schools, is contrary to public policy, and, for that reason, an utterly illegal vote. *Hornung v. State, Gamble* (Ind.) 510

4. Where the announcement is made that a township trustee who has voted for himself for the office of county superintendent of schools has been duly elected, and is made upon the mistaken assumption that he had a right to vote for himself, the failure of those who had not voted for him to interpose further objection is not such an acquiescence in and tacit consent to the announcement of his election as amounted to an appointment of him to such office. *Id.*

#### NOTES AND BRIEFS.

Exercising appointing power in his own behalf. 510

**OPINIONS.** See EVIDENCE, VI.  
2 L. R. A.

**PARTITION.** See also EXECUTION AND JUDICIAL SALE; MINES AND MINING, 4.

1. A suit for partition brought by a tenant in common will be defeated by a valid adverse claim to the premises, made by his cotenant, under a tax title. *Hurley v. Hurley* (Mass.) 173

2. A suit in the nature of a partition cannot be maintained where there has been an ouster of the complainants by the defendant tenant in common, by acts so overt and notorious as to imply notice to his cotenants. *Rich v. Bray* (C. C. W. D. Mo.) 225

#### NOTES AND BRIEFS.

Right to entry; trust among cotenants; trial of title; cotenant paying taxes. 172

Sale; rights of purchaser; record. 465

**PARTNERSHIP.** See also GUARANTY, 1.

1. Though a firm or partnership is not a person, it is a legal entity, and, for some purposes, is recognized as a quasi person having powers and functions exercisable by one of the partners severally or all of them jointly. It may be a debtor or a creditor, within the meaning of a statutory enactment. *Drucker v. Wellhous* (Ga.) 328

2. The majority of partners in a limited partnership, in Pennsylvania, for the manufacture and sale of steel, have no authority to change the location of their works against the will of the minority. *Jennings's Appeal* (Pa.) 43

3. Notice of dissolution, as in the case of a general partnership, is not necessary where a person attempting to become a special partner has, by virtue of the Pennsylvania Act of March 21, 1836 (Pub. Laws, 148), become liable as a general partner by reason of noncompliance with the provisions of that statute. *Tilge v. Brooks* (Pa.) 796

#### NOTES AND BRIEFS.

See also INSOLVENCY AND ASSIGNMENT FOR CREDITORS.

Limited; authority of partner; disposal of property; place of business. 43

Special; liability under; notice of dissolution. 797

Assignment for creditors. 328

**PASSENGER.** See CARRIERS.

**PATENTS.** See also CONTRACTS, 9.

1. One having taken out two patents,—the first for a novel composition of matter, the second for a combination of this composition with another article,—who brings suit for infringement on the second patent alone, in which it is held that the mere combination is not patentable, cannot be aided by the first patent, at least where it is not alleged or shown that he is still the owner thereof, but, on the contrary, such first patent may be set up as a prior patent to defeat his claim under the second. *Underwood v. Gerber* (C. C. E. D. N. Y.) 357

2. The principle that an infringing article or machine made before the expiration of a patent cannot be used after such expiration does not apply to a combination of parts which, on being held to infringe the patent covering such com-

bination merely, is *bona fide* broken up, and, after the expiration of the patent, recombined. *Johnson v. Brooklyn & O.R. Co.* (C. C. E. D. N. Y.) 489

**PAYMENT.** See ASSUMPSIT, 1; BANKS AND BANKING, 8; PLEADING, 14.

#### NOTES AND BRIEFS.

See also TAXES.

What agent can accept. 491

**PENALTY.** See COURTS, SHIPPING, NOTES AND BRIEFS; CORPORATIONS, 14.

#### PENSION.

No person is entitled to demand or receive greater compensation for services rendered as agent or attorney to another in procuring for him a pension from the United States than that provided by the statutes of the United States, although such person is not recognized by the commissioner of pensions as a pension agent or attorney. *Caterly v. Robbins* (Mass.) 745

#### NOTES AND BRIEFS.

Fee for procuring. 745

**PHYSICIAN AND SURGEON.** See also EVIDENCE, 11, 12.

1. The words "suitable graduate in medicine," in the California Act providing for the appointment of a county physician, include one legally licensed to practice medicine and surgery under the laws of the State, although he was never graduated at any college, school, or university which confers the degree of doctor of medicine. *People, Johnson, v. Eichelroth* (Cal.) 770

2. If physicians attending a woman deem it necessary, for the preservation and prolongation of her life, to perform an operation, they are justified in doing so if she consents, whether her husband consents or not. *State, Janney, v. Housekeeper* (Md.) 587

3. The degree of care and skill required of physicians is that reasonable degree of care and skill which physicians ordinarily exercise in the treatment of their patients. *Id.*

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Care and skill required; liability. 587

**PIERS.** See WHARFAGE AND WHARVES, 2-5.

#### PLATTING.

#### NOTES AND BRIEFS.

Of cities, towns, and additions. 62

**PLEADING.** See also EVIDENCE, 51.

1. Under the Texas Act of March 31, 1885, in an action against a foreign corporation it is not necessary to allege that it had an agent or representative in the county, and that its principal office was also in the county; but it is enough to allege, either that it had an agent or representative in the county, or that its principal office was there. *Bradstreet Co. v. Gill* (Tex.) 405

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2. Where a suit is brought for libel, it is unnecessary for plaintiff to characterize the suit by averment in his complaint. *Id.*

3. If a libel consisted in reporting plaintiff's standing as a merchant "in blank," the complaint should inform the court and the defendant of that fact, with such explanations as to what was meant by the report as may be necessary to show that it was injurious and defamatory. A complaint in such case, which undertakes to state the substance of the language used, or its meaning, is bad on general demurrer. *Id.*

4. A complaint in an action for libel is not insufficient because it does not state whether plaintiff asks for actual or exemplary damages. *Id.*

5. In an action in a Circuit Court of the United States, founded upon contract, brought by an assignee of the contract, the declaration should show that the suit could have been maintained by the assignor, if no assignment had been made. *Republic Iron Min. Co. v. Jones* (C. C. N. D. Ga.) 748

6. A complaint for injuries sustained by a traveler on a highway, alleging that she was without any fault or negligence on her part, sufficiently avers her freedom from contributory negligence, although it states that she was riding on an embankment thrown up by a railroad company alongside the track, for which an excavation had been dug in a highway, where such embankment was the only place of passage. *Evansville & T. H. R. Co. v. Crist* (Ind.) 450

7. In an action for damages for causing the death of a person, a general averment that his widow and child, for whom the action is prosecuted, sustained damages in a specified sum, is not insufficient in respect to their pecuniary loss, where the complaint alleges that deceased was in the employ of the defendant, which was a railroad company, as a brakeman, and that he left a widow and one child four years old, as it is an unavoidable inference that he was in the vigor of manhood and at the time engaged in earning money for their support. *Louisville, N. A. & O. R. Co. v. Buck* (Ind.) 520

8. In an action for injuries to an employé of a railroad company, a complaint alleging that they were received in consequence of the negligence of the master mechanic having sole control of the switch-yard where the accident took place, but without stating the size of the yard, the amount or responsibility or vastness of the business entrusted to him, or the extent of his control,—is not sufficient to show that he was such a representative of the company as to make his negligence that of the company, instead of that of a fellow servant. *Muhlman v. Union Pac. R. Co.* (C. C. D. Colo.) 192

9. A complaint based on the sole ground of the nonexistence of a corporation cannot sustain a judgment by which that question is left wholly undetermined, but which decrees that plaintiffs recover certain franchises of the defendants, which the latter are thereby enjoined from exercising. *People, Attorney-General, v. Stanford* (Cal.) 92

10. Where the defendants are charged by the complaint with usurping the rights of a

corporation, an answer specifically denying that they, or any of them, have unlawfully claimed or unlawfully exercised such franchise, etc., is sufficient without affirmatively justifying their right to exercise such franchise, although they affirmatively allege the existence of a corporation, as the latter allegation may be properly treated as mere surplusage, and the answer still contains a complete defense. *People, Attorney-General, v. Stanford* (Cal.) 92

11. Where the existence of a corporation is expressly averred or admitted, it is not sufficient to allege that it has ceased to exist. The facts showing that its existence has terminated must be set forth. *Id.*

12. In an application for an injunction against the consolidation of a corporation with another, an answer alleging that the consolidation had been made and ratified by the stockholders, if not denied, will not be construed as meaning that the stockholders applying for the injunction assented thereto, where the Act under which the consolidation was attempted allowed a consolidation by a majority vote. *Botts v. Simpsonville & B. C. Turnp. Co.* (Ky.) 594

13. In an action against an individual for fraudulent representations made for the purpose of inducing the purchase of property, if the evidence shows the sale to have been made by a firm, an amendment will be allowed at any time. *Deming v. Darling* (Mass.) 743

14. The defenses of payment in advance need not be pleaded and proved as payment, but may be raised by the general issue. *Starratt v. Mullen* (Mass.) 697

15. The failure of defendant in an action on a benefit certificate to deny an explicit averment of the declaration that there was duly prepared a paper in the usual form, assuring to plaintiff the sum demanded on the occurrence of death, etc., is an admission of the execution of the certificate, for the purpose of the trial, under Rule 79 of the Michigan Circuit Court. *Loracher v. Supreme Lodge, Knights of Honor* (Mich.) 206

16. In an action to compel a conveyance of land in performance of a contract, where the defense set up is the insolvency of the vendee and of plaintiff, his widow, and an abandonment by her of all claim to the land, a reply alleging that the vendor agreed with her to take back the lot and pay her the value of the improvements, and demanding payment of a sum due her under such agreement, is not such a departure from the Code system of pleading as to defeat the action. *Houston v. Sledge* (N. C.) 487

17. A defense of the Statute of Limitations properly arises under a demurrer when the facts creating the bar are shown by the complaint. *Attrill v. Huntington* (Md.) 779

18. The question whether or not the beneficiary in a policy issued by a mutual benefit association has mistaken his remedy in bringing an action at law to compel an assessment to pay his claim may be raised by demurrer. *Jackson v. Northwestern Mut. Relief Assn.* (Wis.) 786

19. General averments of negligence are sufficient as against a demurrer. *Anderson v. East* (Ind.) 712

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## NOTES AND BRIEFS.

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## PLEDGE AND COLLATERAL SECURITY. See BANKS AND BANKING, 10, 11.

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Relation of parties. 471

## POLICE. See MUNICIPAL CORPORATIONS, 1, 2.

## POLICE POWER. See CONSTITUTIONAL LAW, 7; RELIGIOUS SOCIETIES, NOTES AND BRIEFS.

## POSTOFFICE.

1. Where the quarterly returns of a postmaster, in which are reported receipts for sale of stamps, etc., and amount of commissions claimed for cancellation of stamps, have been regularly rendered to the department and have been passed upon by the auditor, and the balances therein found to be due the Government have been each quarter carried into a general account, such action by the auditor is a complete allowance of the commissions claimed and adjustment of such quarterly returns. *United States v. Hutcheson* (C. S. D. Ga.) 805

2. Where the credits in the general account kept by the auditor against the postmaster, and made up as above stated, show that the postmaster has fully paid all balances so charged, so that a complete balance could be struck upon such general account, in such case there is a complete settlement of the account, and thereafter the commissions covered by such adjusted accounts were not within the power of allowance by the Postmaster General so as to give him the right to "withhold" the same, within the meaning of the Act of Congress of June 17, 1878 (20 U. S. Stat. at L. 141). There was nothing to "withhold." *Id.*

3. If the Postmaster General, in the exercise of the power conferred upon him by the Act of June 17, 1878, before the allowance of credit for commissions is made, directs that it shall not be made, and it is not made, but, in lieu thereof, credit is given on the account kept with the postmaster for the amount of the allowance deemed reasonable by the Postmaster General, the balance shown due the Government by such an account would be *prima facie* sufficient, but not conclusive, evidence against the postmaster. *Id.*

4. Where an account of a postmaster, regular on its face, has been adjusted and allowed by the proper accounting officers and fully paid, such officers cannot, after the term of office of the postmaster has expired, evolve *ex parte* a balance in favor of the Government, founded solely upon a general and vague allegation of fraud in accounts formerly passed upon, so as to make such balance *prima facie* evidence against the postmaster and his sureties. Such allegations must be specific and sustained by competent evidence. *Id.*

## POWERS. See TRUSTS, 3; WILLS, 13.

**PRINCIPAL AND AGENT.** See also **BROKERS; ESTOPPEL, 3, 4; EVIDENCE, 9, 43, 48; INTOXICATING LIQUORS, 2, 8; NOTICE, 1-3, 5, 7; TRIAL, 25.**

1. If relations exist which will constitute an agency, it will be an agency, whether the parties understand it to be, or not. Their private intention will not affect it. *Bradstreet Co. v. Gill* (Tex.) 405

2. An agent placed in charge of a retail store to conduct the business, with express authority to use money especially deposited for that purpose, and the cash receipts of the business in purchasing goods, is a general agent in conducting the business of the store, with special powers to purchase, and cannot bind the principal by a purchase on credit. *Wheeler v. McGuire* (Ala.) 808

3. In order to bind a principal by ratification, assent, or acquiescence in prior acts of his agent in excess of authority actually given, a knowledge of the material facts must be brought home to him. *Id.*

4. Where an agent authorized by a principal to purchase supplies for the use of the principal, and instructed to purchase only for cash, purchases in his own name, upon credit, of a seller who supposes the agent to be buying for himself only, and the principal pays or settles with the agent for the supplies in good faith, supposing that the agent had purchased them for cash or upon his personal credit, he is not liable over again to the seller for the price of the supplies. *Fradley v. Hyland* (C. C. S. D. N. Y.) 749

5. The rule that a seller who deals with the agent of an undisclosed principal can, upon discovering the principal, resort to the latter for payment, unless by his conduct he has led the principal in the meanwhile to pay or settle with the agent, does not apply to a case in which the agent bought contrary to his instructions, and the seller gave credit to the agent supposing him to be the only principal, and the principal has in the mean time paid the agent. *Id.*

6. If an agent is put forward to conduct a separate business in his own name, but with the property and for the benefit of his principal, the latter cannot escape liability for the purchase price of goods by a secret limitation upon the agent's authority to purchase. *Hubbard v. Tenbrook* (Pa.) 828

#### NOTES AND BRIEFS.

See also **BANKS AND BANKING; PAYMENT.**

Notice to agent. 735

Liability of principal when credit is given to agent. 749

General and special agent; authority; estoppel; ratification; liability for agent's acts and contracts. 808

Private restrictions on authority; special instructions; estoppel; liability of principal. 828

**PRINCIPAL AND SURETY.** See also **EXECUTORS AND ADMINISTRATORS, 5, 6; GUARANTY, 2.**

Where a man gives his note jointly with his sons, who sign as a firm and as individuals, to raise money for the use of the firm, and he executes a mortgage to secure a compliance with the terms of the note, all the parties are bound as principals, although, as between the borrowers, he may be merely a surety for his sons. *Harmon v. Lehman* (Ala.) 589

#### NOTES AND BRIEFS.

Taking security from principal; agreement for indemnity; effect of decree against or discharging principal; vacating or setting aside decree. 644

**PRIVATE BUSINESS.** See **CONSTITUTIONAL LAW, NOTES AND BRIEFS.**

#### PROCEEDINGS IN REM.

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**PROXIMATE CAUSE.** See **NEGLIGENCE, 4, NOTES AND BRIEFS.**

**PROXY.** See **BENEFIT SOCIETIES, 4.**

**PUBLICATION.** See **WRIT AND PROCESS.**

#### RAILROAD COMMISSIONERS.

See also **CONSTITUTIONAL LAW, 2; JUNCTION, 1, 2; STATE, 2.**

A power conferred by the Legislature upon a board of commissioners, required to be exercised with reference to the affairs of certain corporations, will not be extended by implication; and the acts which the board attempts to do under the power will not be upheld, unless the authority to do them is affirmatively shown to be included in it. *Oregon R. Comrs v. Oregon R. & Nav. Co.* (Or.) 195

#### NOTES AND BRIEFS.

Authority of. 195

**RAILROADS.** See also **CARRIERS; CORPORATIONS, 28, 29; COVENANT, 2; CUSTOM AND USAGE, 2; DAMAGES, 3; Eminent Domain, 2-5; HIGHWAYS, 13, 14; MASTER AND SERVANT, 8, 4; MORTGAGE, 1, 2; SUNDAY; TAXES, 14, 15; TRIAL, 20.**

1. Mont. Comp. Stat. p. 826, § 718, making every railroad corporation liable to the owner for damages sustained by injuring or killing an animal by running trains, is unconstitutional as attempting to create the liability without reference to any violation of law or omission of duty. *Bielenberg v. Montana Union R. Co.* (Mont.) 813

2. A statute attempting to make a railroad liable for all damages to animals by running trains cannot, in order to prevent its condemnation as being unconstitutional, be construed to mean that the killing shall be *prima facie* evidence of negligence. *Id.*

#### NOTES AND BRIEFS.

See also **DAMAGES; HIGHWAYS; TAXES.**

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**RAPID TRANSIT ACT.** See JUDGMENT, 4.

**RATIFICATION.** See PRINCIPAL AND AGENT.

## REAL PROPERTY.

1. Where the continuance of an estate depends upon the performance of a specific act which is to be done at a fixed time, no demand is necessary, because the party bound has equal knowledge of the thing to be done and of the time when it is to be done. *Royal v. Aultman-Taylor Co. (Ind.)* 526

2. A condition in a deed made upon the consideration of yearly payments during the life of the grantor, that, in default of payment for three consecutive years, the conveyance might be revoked by repaying the amount already paid and recording a written declaration revoking the deed,—is not opposed to public policy or repugnant to the estate granted. *Id.*

3. A demand of each annual payment on the day it becomes due is not necessary in order to make a forfeiture of an estate in accordance with a condition in the deed creating it, which provides that it may be forfeited by recording a written revocation and repaying the amounts received, in default of three consecutive annual payments. *Id.*

4. A devise of "all the tracts or parcels of land belonging to" the testator, to his son, is sufficient, without any words of inheritance, to pass a fee, where preceding clauses of the will have expressly stated that each of testator's other children and his wife should receive a certain specific portion of property, "and no more," thus expressly disinheriting the other heirs, and where the introductory clause of the will indicates a purpose to dispose of testator's entire estate. *Doe, Hitch, v. Patten (Del.)* 724

5. In construing a devise which assumes to give a life estate to the ancestor and the remainder in fee to "heirs,"—the word "heirs" being used in its technical sense as meaning all who are to take generally, and not as the equivalent of "children" or some other partial or restricted class of heirs,—the intention to give only a life estate will not control, but under the rule in *Shelley's Case*, which is in force in Illinois, the ancestor takes the fee. *Vanokinder v. Carpenter (Ill.)* 455

## NOTES AND BRIEFS.

See also LIFE ESTATE.

Forfeiture by breach of condition. 526

Use of word "heirs" in will; rule in *Shelley's Case*. 457

Devise of fee; words of inheritance. 724

**RECEIVERS.** See also CONSTITUTIONAL LAW, 9, 10.

1. The fact that the local statute provides that a creditor of an insolvent trader, or firm of traders, whose debt is mature, unpaid, demanded, and payment refused, may ask for a receiver, creates an exception to the rule making the existence of a lien a prerequisite to such an application in a court of the United States. *Fechheimer v. Baum (C. C. S. D. Ga.)* 153

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2. A receiver of the corporation being the representative of the debtor, a law which makes him a referee to take proof of claims against the corporation, and a judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. *People v. O'Brien (N. Y.)* 255

**REFORMATION OF INSTRUMENTS.** See INSURANCE, 1, 2.

**RELEASE.** See INSURANCE, 6.

**RELIEF ASSOCIATION.** See DAMAGES; EVIDENCE, 43, 53; INSURANCE, 12-14, NOTES AND BRIEFS; TRIAL, 11.

**RELIGIOUS SOCIETIES.** See CHARITABLE USES, 2, 4, 5.

Where a church organization not incorporated purchases real estate for the benefit of such congregation, and the purchase price is paid, the property improved, and possession retained by such congregation, and the property is conveyed to some person in trust for such church and congregation, a trust is thereby created that may be enforced, although not in writing; and it can make no difference that the person to whom the land is conveyed is the bishop of the denomination of which said church is part. *Fink v. Umscheid (Kan.)* 146

## NOTES AND BRIEFS.

Police power over. 110

## REMOVAL OF CAUSES.

1. A cause between citizens of different States, neither of whom is a resident or citizen of the State where the action is brought, may be removed into the Circuit Court of the United States for that district, although such court would not have jurisdiction of an original suit between the parties. *Sheffield First Nat. Bank v. Merchants Bank (C. C. N. D. Ga.)* 469

2. Irregularity in filing the affidavit and bond for removal the day before taking the formal order making the movant a party and removing the cause was cured by such order. *Id.*

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**RES GESTÆ.** See EVIDENCE, 44.

## SALE.

1. Where, upon a *bona fide* sale of seed wheat to be sown on the land of the purchaser, the amount of wheat specified in the seed-grain note or contract given therefor was contained in a particular bin containing a larger quantity, all of the same quality and value, out of which it was agreed the purchaser was then and there entitled to take away the number of bushels purchased, the sale and delivery of the wheat at the date of the note was sufficient as between the maker and payee. Weighing or measuring is not absolutely essential to a completed sale, except when necessary to define the subject matter. *Nash v. Brewster (Minn.)* 409

2. The words, in a contract for the sale of sugar to be shipped from a foreign port, "the

sugars to be thoroughly sampled and tested on arrival," will not imply a stipulation on the part of the sellers to assume any risk as to its condition or quality upon arrival at the port of destination. *Lord v. Edwards* (Mass.) 519

3. A contract for the sale of sugar of a certain standard of test and color, to be shipped from a foreign port, is performed by delivering sugar of the required standard on board the vessel at the port of shipment, if the title then passes to the purchaser and the seller does not expressly assume any risk of damage by the perils of the sea. *Id.*

4. A person not intending to pay, by inducing one to sell him goods on credit through the fraudulent concealment of his insolvency, is guilty of a fraud which entitles the vendor to disaffirm the contract, if no innocent third party has acquired an interest in the property. *Hochheimer v. Baum* (C. C. S. D. Ga.) 153

5. Where a firm of traders in May make a statement to a commercial news agency (Bradstreet's), showing entire solvency, which statement is intended to be circulated among merchants selling goods upon credit, and which states that there are no liens or mortgages upon their assets, and that they gave no security for borrowed money except farmers' notes as collateral; and in December it appears that they are in debt more than \$150,000 and utterly insolvent, and that, at the time of their statement, they had made a written promise to execute mortgages to a favored creditor upon their entire assets, which promise was withheld from the news agency, and that their entire stock was subsequently conveyed by mortgages to such favored creditor,—the entire transaction is fraudulent as to creditors who gave them credit on the faith of said statement. *Id.*

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**SALVATION ARMY.** See also MUNICIPAL CORPORATIONS, 1-3.

A member of the Salvation Army, playing on a musical instrument in a parade of that organization in the street, comes within the general phrase "itinerant musician." *Com. v. Plasted* (Mass.) 142

**SAVINGS BANKS.** See BANKS AND BANKING, 8.

#### NOTES AND BRIEFS.

Liability of directors. 534

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**SET-OFF AND COUNTERCLAIM.**

A bank holding a check for collection against, 2 L. R. A.

an insolvent bank, when sued by the assignee of the latter, may use such check as a set-off where no defense is shown against the check. *Farmers Deposit Nat. Bank v. Penn Bank* (Pa.) 273

#### NOTES AND BRIEFS.

'Equity rule as to cross demands; by debtor of insolvent bank; against assignee. 273

Of bank against depositor; paper held for collection. 275

#### SHELLEY'S CASE.

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#### SHIPPING. See also COMMERCE.

1. A ship owner who, to exonerate himself, has, as bailee of the cargo, recovered and received from the owner of another vessel, in a suit in admiralty for damages for a collision, the value of the cargo, as well as damages for injury to his ship, is answerable to the owner of the cargo, or to the insurer subrogated to such owner's right, for the whole value thereof so received, without deduction for the expenses of the litigation in which it was obtained. *Hardman v. Brett* (C. C. S. D. N. Y.) 173

2. The regulation contained in U. S. Rev. Stat. § 4465, forbidding a steamboat to carry more passengers than allowed in her certificate of inspection, applies to such boats engaged in carrying passengers on a navigable water of the United States between ports of the same State only. *The City of Salem* (D. C. D. Or.) 380

#### NOTES AND BRIEFS.

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#### SOCIAL CLUBS.

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**SPECIFIC PERFORMANCE.** See PLEADING, 16.

#### NOTES AND BRIEFS.

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**SPENDTHRIFT TRUST.** See TRUSTS, NOTES AND BRIEFS.

**STATE.** See also COSTS AND FEES, 2.

1. The rule which forbids suit against officers of a State, because, in effect, a suit against the State, seems to apply only where the interest of the State is through some contract or some property right of hers, or where her interest is in a suit in her own name, brought or threatened by her officers, to enforce some al-

leged claim of hers. *McWhorter v. Pensacola & A. R. Co.* (Fla.) 504

2. Railroad commissioners being authorized by statute to make reasonable rules and regulations for all railroads in the State as to charges for transportation of passengers and freights, and to furnish each company with a schedule of charges made for its observance, and having fixed certain rates for one of the companies which it deems not reasonable and just, said company filed a bill against the commissioners to enjoin them from promulgating said rates, or any other rates substantially the same. *Held*, that this is not, in effect, a suit against the State; but the statute having prescribed a penalty for violation of the rates fixed, and authorized the commissioners to institute action in the name of the State to recover the penalty, in so far as the bill seeks to enjoin them from doing this, it is in effect a suit against the State. *Id.*

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**STATUTE OF 'LIMITATIONS.** See **LIMITATION OF ACTIONS; PLEADING**, 17.

**STATUTES.** See also **RAILROADS**, 2; **STATUTES**, 12; **WILLS**, 3.

1. The constitutional provision as to the title of a statute does not require that provisions of the Act which are all germane to the subject expressed in the title should be specified or detailed in the title. *Minnesota Loan & Trust Co. v. Beebe* (Minn.) 418

2. The titles of statutes, —as "An Act to Charter" a railroad company, and "An Act to Amend an Act Entitled 'An Act to Charter'" such company, —are sufficient, under a constitutional provision that statutes shall relate to but one subject, which must be expressed in the title, to sustain a provision in the body of the Act giving authority to counties, townships, etc., to subscribe to the stock of such company, and declaring that such townships, etc., shall be bodies politic and corporate, invested with the necessary powers to carry out the statutory provisions. *Floyd v. Perrin* (S. C.) 242

3. A statute whose object as expressed in the title is to incorporate a city, which is substituted for a statute whose object as expressed in the title is to organize a new township, cannot be considered a new bill, so as to be invalid, under Mich. Const. art. 4, § 28, because not introduced within the first fifty days of the session, when the lands to be affected in both the bill and the substitute are shown to belong in the same county, and the body of the original bill does not appear in the legislative journals. *People, Hart, v. McElroy* (Mich.) 609

4. Although the courts of Michigan may take cognizance of legislative journals, for the purpose of determining whether constitutional methods have been followed in the passage of a law, they cannot act upon anything not found in the journal, or presume that any requirement of the Constitution has not been fulfilled, in determining the validity of a statute. *Id.*

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5. The legislative practice of reading a bill twice by title and only once at length, having long been maintained in Michigan, must be regarded by the courts as a substantial compliance with Mich. Const. art. 4, § 19, which provides that "every bill and joint resolution shall be read three times in each House before final passage thereof." *Id.*

6. The Illinois Warehouse Act of 1871, § 25, imposing a penalty for issuing receipts for property not actually in store, is germane to and embraced within the title, "An Act to Regulate Public Warehouses and the Warehousing and Inspection of Grain, and to Give Effect to Article 18 of the Constitution of this State." *Sykes v. People* (Ill.) 461

7. Under N. Y. Const. art. 3, § 16, providing that no private or local bill shall embrace more than one subject, which shall be expressed in the title, N. Y. Act 1873, chap. 105, the title to which indicates but one subject, and that the amendment of prior statutes relating to the transportation of passengers and property through pneumatic tubes by atmospheric pressure, but the provisions of which enlarge the powers of a corporation formed for such purposes by giving authority to operate a grand underground railway not less than 15 miles long, with two or more tracks through passages 18 feet in height and 31 feet in width, which could not be operated by atmospheric pressure, and with authority, by the consent of a board of engineer commissioners, to use horses, steam, or any other motive power, —is unconstitutional and void. *Astor v. New York Arcade R. Co.* (N. Y.) 789

8. The title to a statute must be such at least as fairly to suggest or give a clue to the subject dealt with in the Act, in order to comply with the constitutional provision that it shall embrace no more than one subject, which shall be expressed in the title. *Id.*

9. Under the New York Constitutional Amendment which went into effect January 1, 1875, prohibiting the passage of a private or local bill giving to any corporation any exclusive privilege or franchise, the New York Act of 1886 which gives to a corporation the right to a complete occupation of a street for railway purposes, providing a roof over the excavation is left to take the place of the street surface, and to use any motive power which would not permit of the emission of smoke, gas, or cinders, is unconstitutional and cannot be supported as an amendment of the Act of 1873 giving the corporation the right to construct a railway in tubes not more than 31 feet in width by 18 feet in height, exterior measurement, and which should not approach within 2 feet of the curb line or 18 feet of the building line of the street. *Id.*

10. When the enlargement of corporate powers becomes indistinguishable from a granting of new, substantive rights, a statute attempting to give such powers is within the purview of the New York Constitutional Amendment taking effect January 1, 1875, prohibiting any private or local statute granting any exclusive privileges or franchises to a corporation. *Id.*

11. The New York Act of June 10, 1885, taxing certain property given by will "after the

passage of this Act," is not an exception to the general provision of the New York Revised Statutes declaring that "every law, unless a different time shall be prescribed therein, shall begin to take effect only on the twentieth day after its final passage as certified by the Secretary of State." *Re Howd's Estate* (N. Y.) 825

12. The fact that local and special laws are in force in some cities at the time of the adoption of a Constitution prohibiting such laws, and are not affected thereby, will not justify the substitution of other local or special laws in their stead. *Ayars's Appeal* (Pa.) 577

13. Under a constitutional provision against local and special legislation, the classification of cities with the view of legislating for either class separately is essentially unconstitutional, unless a necessity therefor exists,—a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless and detrimental to the others. *Id.*

14. The Pennsylvania Act of May 24, 1887, dividing the cities of the State into seven classes, the charter powers of those between the fourth and seventh classes being precisely similar, with very few and quite unimportant exceptions,—is unconstitutional, as the only possible purpose of the classification is to evade the constitutional limitation in respect to local and special laws. *Id.*

15. The Pennsylvania Act of May 24, 1887, dividing cities into classes, cannot go into effect (even if valid) and become operative till the terms of all the members of a council in office at the time of the approval of the Act have fully expired. *Id.*

16. The Act of Congress to regulate commerce should be liberally construed in favor of commerce among the States; but when complaint is made or relief sought solely or mainly in the interest of common carriers, the act complained of or the right asserted must clearly appear to have been forbidden or conferred; and where the complaining carrier is not in a position to commend itself to the favorable consideration of a court of equity, no strained construction of the law will be made in its favor. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 289

17. The use of the word "of," in a statute, which is a manifest blunder, being intended for "off" will not be permitted to affect the plain meaning of the Legislature. *Com. v. Delaware Div. Canal Co.* (Pa.) 798

18. A long and inveterate usage for half a century, under express sanction of law, should be able to continue without further re-enactment, unless the legislative will is expressed to the contrary. There can be no presumption against it from mere silence, with no substituted rule on the subject. *Warren v. Board of Registration* (Mich.) 203

19. N. Y. Laws 1886, chap. 310, making it the duty of the attorney-general to bring a suit to wind up the affairs of any corporation dissolved by Act of Legislature, which does not purport in terms to have a retroactive operation, and in which there is nothing to show that the Legislature intended it to apply to a 2 L. R. A.

dissolution already accomplished,—does not apply to a corporation dissolved by legislative Act one week prior thereto. *People v. O'Brien* (N. Y.) 255

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**STEAMBOATS.** See SHIPPING.

**STOCK EXCHANGE.** See BOARD OF TRADE, 1-8.

**STOCKHOLDERS.** See CORPORATIONS, III.

**STREET RAILWAYS.** See also CONSTITUTIONAL LAW, 8-10; CONTRACTS, 23, 24; CORPORATIONS, 25-27; HIGHWAYS, 8, 9; STATUTES, 7, 9.

1. The resolution of the Common Council of the City of New York granting a street railroad franchise to the Broadway Surface Railroad, which expressly provided for traffic contracts by which another company should obtain a right to run cars over its tracks, with no condition with respect to the duration of such contract rights or otherwise, gave an estate in perpetuity in Broadway to the Broadway Surface Railroad Company, under the authority of the Constitution and laws of the State of New York. *People v. O'Brien* (N. Y.) 255

2. The provision of N. Y. Laws 1884, chap. 252, § 15, prohibiting leases by street railroad companies of parallel roads, does not prohibit traffic contracts between roads which are parallel for a certain portion of their length, for the partial use of their respective roads beyond the line of parallelism, where such contracts are not in terms or in effect leases, and do not surrender possession or control of the road by its original owner. *Id.*

## NOTES AND BRIEFS.

Right to construct, a franchise. 255

**STREETS.** See CONSTITUTIONAL LAW, 3-6; HIGHWAYS; MUNICIPAL CORPORATIONS.

**SUBROGATION.** See INSURANCE, 5.

**SUGAR TRUST.** See CORPORATIONS, 8-6.

**SUMMARY PROCEEDINGS.**

Parties cannot, by contract, ingraft upon the procedure prescribed for a summary proceeding a remedy or practice not warranted by statute. *French v. Willer* (Ill.) 717

**SUNDAY.**

A railroad company cannot defend against an action for negligently causing the death of a brakeman by failure to furnish safe appliances, on the ground that he was killed on

Sunday while working in violation of the Sunday law. *Louisville N. A. & C. R. Co. v. Buck* (Ind.) 520

#### NOTES AND BRIEFS.

Violation of Sunday Law as defense to action. 520

**TAXES.** See also CONSTITUTIONAL LAW, 12; CONTRACTS, 22; EVIDENCE, 64; JOINT TENANTS AND TENANTS IN COMMON.

1. The Minnesota Statute requiring, as a condition precedent to probate proceedings for the settlement of estates, the payment to the county treasurer of specified sums arbitrarily prescribed with reference to the value of the estate in question, is unconstitutional, being contrary to those clauses requiring equality of taxation and the dispensation of justice freely and without purchase. *State, Davidson, v. Gorman* (Minn.) 701

2. The landing place of Fulton Ferry, in the city of Brooklyn, which has been occupied and used as an incident to the ferry franchise for 260 years by the city of New York and its agents or lessees, being held and used for public purposes, is not taxable in Brooklyn, unless special authority to tax it is given by the Legislature. *People, New York, v. Assessors of Brooklyn* (N. Y.) 148

3. Property of a municipality acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject, within the purview of the tax laws, unless specially included. *Id.*

4. A railroad bridge over the Missouri River, which river, being navigable, can be bridged only by authority of Congress, and not of the State, is not a part of the roadbed or superstructure of the railroad, within the meaning of Neb. Comp. Stat. chap. 77, § 89, requiring the officers of the railroad corporation to return to the auditor of public accounts for assessment the roadbed and superstructure, depot buildings, and section and tool houses; and therefore the state board of equalization has no authority to levy a tax thereon, but such bridge is within the residue of the railroad property mentioned in the proviso to that section, which is liable to assessment and tax by the local officers of the county in which it is situated. *Cass County v. Chicago, B. & Q. R. Co.* (Neb.) 188

5. A statute authorizing assessments of property omitted from the assessment made by the regular assessor, or an additional assessment, where the first one has been made upon an inadequate valuation, is not unconstitutional. *South Nashville Street R. Co. v. Morrow* (Tenn.) 858

6. Taxation of shares of corporate stock in the hands of stockholders, as their individual property, is not unconstitutional as constituting double taxation because a tax has already been laid upon the property of the corporation, but from which the capital stock in the hands of the corporation is omitted. *Id.*

7. Shares of stock in a corporation have no actual situs, and may properly be made taxable at the place where the corporation has its situs. *Id.*

8. Bonds of a corporation can only be taxed by the government having jurisdiction of the owner, and are not taxable in a State where the owner does not reside. *Id.*

9. A citizen cannot be taxed on corporate bonds in a county where he does not reside, although that is the location of the corporation. *Id.*

10. An Act requiring a corporation to retain, from the interest due on its bonds having negotiable coupons the amount of state, county, and city taxes assessed against the owners of the bonds, is invalid, inasmuch as the tax is void as to nonresidents, and the corporation cannot be required to determine as to each coupon, whether it may lawfully reserve the tax from the interest, or not. *Id.*

11. A corporation may be compelled by statute to act as collector of a tax on its securities, by deducting it from the interest which has become due thereon and returning it into the state treasury, instead of paying it to the holders of the securities. *Com. v. Delaware Div. Canal Co.* (Pa.) 798

12. The constitutional provision requiring taxation to be uniform upon the same class of subjects is not violated by a statute, one section of which makes any scrip, bond, or certificate of indebtedness issued by a private corporation to the residents of the State on which interest is paid, taxable upon its nominal value; while a prior section provides that "all mortgages, money paid by solvent debtors, etc.," shall be taxable at a certain rate on their value. All interest-bearing indebtedness of private corporations is thus made a separate class for the purpose of taxation; and such classification is justified by the peculiar nature of corporate securities, the great fluctuations in their value, and the difficulty of reaching them by the general system of taxation. *Id.*

13. A corporation has a legal standing in court to contest the constitutionality of a law requiring it to deduct from the interest due on its obligations the amount of the tax on them, and pay it into the state treasury, instead of to the holders of the securities. *Id.*

14. An ordinance levying a tax of \$50 on every railroad running through the corporate limits does not violate the principle of uniformity of taxation. *Richmond & D. R. Co. v. Railsville* (N. C.) 284

15. A municipal ordinance levying a tax of \$50 upon every railroad running through the corporate limits, whether it be called a privilege tax or by some other name, being a tax imposed upon business in the town, if authorized by the state law, is not void as a tax on interstate commerce. *Id.*

16. By the Oregon Act of 1882 (Comp. 1887, § 2785), real property must be assessed to the owner thereof, unless it is unoccupied and the owner unknown; and an assessment made to a person not the owner of the property is invalid. *Tracy v. Reed* (U. C. D. Or.) 773

17. The owner of property for purpose of taxation is the person having the legal title or estate thereto or therein, and not one who, by contract or otherwise, has a mere equity therein, or a right to compel a conveyance of such legal title or estate to himself. *Id.*

18. The provision of Ohio Act April 5, 1859, § 8 (S. & C. 1488), that "no person shall be required to include in his statement as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, which he is required to list, any share or portion of the capital or property of any company or corporation which is required to list or return its capital and property for taxation in this State," does not apply to shares of a foreign corporation, although the capital of the corporation is taxed in the State where located, and although the corporation has substantial property in Ohio on which it pays taxes here; nor does it apply to shares of a railroad company which is formed by the consolidation of an Ohio company with companies of other States, notwithstanding such company pays taxes in Ohio on the portion of its property which is situated here. *Western Ins. Co. v. Ratterman* (Ohio) 558

19. An assessment on the property of an insurance company, which is attacked by certiorari on the ground that the net surplus of the company is assessed unlawfully because it is less than 10 per cent of the capital, cannot be sustained by the commissioners of taxes by showing that the net surplus as fixed by them is too small, and that unearned premiums deducted therefrom by them should not have been deducted. Having made the deduction they are bound by it, and the regularity of the assessment must be determined on the basis of the valuation which they fixed, and which they cannot, at that stage, either increase or diminish. *People, Com. Ins. Co. v. Coleman* (N. Y.) 773

20. One who redeems property in which he afterwards becomes a tenant in common, from a tax sale, is entitled to have the lien kept alive as against his cotenant, until the latter shall have paid his share of the taxes, if there are no special fiduciary relations between the parties, although he takes no steps to assert and preserve his lien, as prescribed by Mass. Pub. Stat. chap. 13, §§ 63-65. *Hurley v. Hurley* (Mass.) 172

21. The provision of the New York Act of June 10, 1835, that an estate valued at less than \$500 shall not be subject to the collateral inheritance tax applies, not to the whole estate left by a testator, but to the portion of property passing to the legatee or devisee. *Re Hove's Estate* (N. Y.) 825

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#### TELEGRAPH COMPANIES.

1. Delay in delivering a telegram stating the death and time of burial of a person referred to merely as "Willie," without notice of his relation to the person addressed, will not subject the company to an action for damages based solely on injury to fraternal feelings from inability to attend the funeral. Only such damages as might naturally result from a failure to receive the message will be considered as being within the contemplation of the parties to the contract. *Western U. Tele. Co. v. Brown* (Tex.) 766

2. A telegraph company which has, by mistake, changed the first name of the person to whom a message is sent from "Sam" to "Wm.," is not liable for damages consequent on the failure of a connecting line to deliver the message promptly, when, by the exercise of due diligence on the part of the latter company's agents, it would have been delivered to the proper person, who would have known that it was intended for him, and thus all damages would have been prevented. *Western U. Tele. Co. v. Mumford* (Tenn.) 601

3. A printed condition on a telegraph blank, "This company is hereby made the agent of the sender, without liability to forward any message over the lines of any other company when necessary to reach its destination," is reasonable. *Id.*

#### NOTES AND BRIEFS.

Reasonable regulations; connecting lines. 601

#### TELEPHONE COMPANIES.

1. A telephone company having special franchises and privileges, including the right of eminent domain, is subject to public regulations; and the State has power to fix and prescribe a maximum rate to be charged by it for telephone service. *St. Louis v. Bell Teleph. Co.* (Mo.) 273

2. The provision of a city charter giving power to license, tax, and regulate business of various kinds, including that of telephone companies, does not confer power to fix the rates to be charged by a telephone company, nor is such power included in the general police power of a municipal corporation. *Id.*

#### NOTES AND BRIEFS.

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TENANCY IN ENTIRETY. See HUSBAND AND WIFE, §, NOTES AND BRIEFS.

**TENDER AND PAYMENT INTO COURT.**

The tender of a deed, after verdict for a sum of money claimed as alternative relief by plaintiff in an action for specific performance of a contract, is too late to be effectual. *Houston v. Sledge* (N. C.) 487

**TICKETS.** See **CARRIERS.**

**TOWN.** See also **CONSTITUTIONAL LAW**, 11; **MASTER AND SERVANT**, 5; **OFFICERS**, 8, 4.

1. No acceptance by the public, or by the inhabitants of the town of Gloucester, for whose benefit a reservation in a town grant for landing places was principally designed, was necessary, other than that inferred from the reservation itself. *Attorney-General, Adams, v. Tarr* (Mass.) 87

2. A reservation, in an ancient town grant, of land "for landing places for the public use for the inhabitants of Gloucester forever," is to be construed as a reservation of a landing place for the public at large, and not merely for the inhabitants of the town. *Id.*

3. A town which maintains a farm for the support of its paupers, and from the surplus produce thereof boards paupers of other towns for pay, and also boards persons engaged to work upon its highways, is liable for injuries resulting to third persons from negligence in conducting it. *Neff v. Wellesley* (Mass.) 500

4. A township trustee is the agent of his township in the transaction of its business, and acts in a fiduciary as well as an official capacity, and is amenable to the rule which forbids an agent or trustee to place himself in such an attitude towards his principal or *cestus que trust* as to have his interest conflict with his duty. *Hornung v. State, Gamble* (Ind.) 510

**NOTES AND BRIEFS.**

Nature of; power to issue bonds or levy taxes. 242

**TRADE.** See **CONTRACTS**, **NOTES AND BRIEFS.****TRIAL.** See also **EMINENT DOMAIN**, 6.

1. Upon an issue *deviseavit vel non*, the proponents of the will have the affirmative of the issue and the right to open and conclude the argument. *Kerr v. Lunsford* (W. Va.) 668

2. It is within the discretion of the trial court to hear the testimony of a witness, although it is not offered until after the evidence has been closed. *McNutt v. McNutt* (Ind.) 872

3. Where the facts are indisputable, it is the province of the court to determine, as a matter of law, the reasonableness of a regulation by which a railroad company refuses to sell tickets or check baggage to a regular stopping place of a passenger train. *Pittsburgh, O. & St. L. R. Co. v. Lyon* (Pa.) 489

4. Whether or not the force used in regaining possession of property is excessive is a question for the jury. *Com. v. Donahue* (Mass.) 628

5. It is not improper for the court, when the 2 L. R. A.

jury has rendered inconsistent findings and has failed to observe the instructions of the court, to intimate that fact and give the liberty to hold further consultation, where he scrupulously avoids anything like dictation as to whether the finding should be in favor of one party or the other, but merely insists upon having the questions submitted determined, with a correct understanding of the instructions; and a request to poll the jury before the verdict is thus perfected is premature. *Wightman v. Chicago & N. W. R. Co.* (Wis.) 185

6. It is not error to refuse instructions asked after the argument is begun. *Evansville & T. H. R. Co. v. Crist* (Ind.) 450

7. In a proceeding to assess damages to a land owner for right of way appropriated for a railroad, in the absence of any evidence showing that the farm or tract of land has stock thereon or is adapted to stock purposes, an instruction to consider the increased risk or the probability of stock upon the premises being accidentally killed or injured in the operation of the railroad, is misleading and erroneous. *Leroy & W. R. Co. v. Ross* (Kan.) 217

8. In the absence of all evidence tending to show a decrease in the value or rental value of premises, caused by the construction of a railroad, or any increase in the cost of insurance on account of the danger from fire, an instruction to the jury to consider accidental danger from fire to the premises resulting from the operation of the road will be misleading and erroneous. *Id.*

9. Whether cider is vinous or spirituous is not a question of law to be decided by the court, but a question of fact to be determined by the jury. *Com. v. Reyburg* (Pa.) 415

10. Where there is some testimony to the effect that persons using cider felt the effects of it the same as if they had been drinking whiskey or beer, it is sufficient to carry to the jury the question whether the cider was a vinous or spirituous liquor. *Id.*

11. Instructions that the jury have no fixed rule to ascertain damages, but must do that which their consciences will approve of as an act of justice, are erroneous where the action is for weekly benefits, in which the measure of damages is the stipulated sum due under the charter and by-laws of the company, if plaintiff's membership is established. *Baltimore & O. Employees Relief Assn. v. Post* (Pa.) 44

12. It is improper to single out one witness, although he was the family physician, and instruct the jury that his evidence is entitled to great weight. *Kerr v. Lunsford* (W. Va.) 668

13. Where an instruction has already been substantially given, the court is not bound to repeat it. *Id.*

14. Where an instruction refers to a disease by a technical name, is confused in its parts, and assumes facts as proved, it is properly refused. *Id.*

15. An instruction was properly refused that assumed that the evidence raised in the minds of the jury a doubt of the testator's capacity. *Id.*

16. An instruction should not be given unless relevant, and it is not relevant unless there



was evidence tending to prove the facts on which the instruction is based. *Id.*

17. Submitting to the jury, under the statute, "particular questions of fact," is within the discretion of the trial court. This is a revisable discretion. *Id.*

18. The questions must be of such a character that the answers thereto, if contrary to the general verdict, would control the same and be conclusive of the issue. *Id.*

19. Under the statute, the court did not err in refusing to submit to the jury the following questions: "(1) Was the late Lewis Lunsford, in August, 1880, suffering from a disease known as senile dementia? (2) If so, is that disease curable? (3) Had that disease so far progressed in August, 1882, as to render him (Lewis Lunsford) imbecile and incapable of transacting business? (4) Does a person suffering from such disease have any lucid intervals?" *Id.*

20. Although a railroad corporation must be taken to have known at the time of a disaster the facts which subsequently pointed out the cause thereof, yet it is entitled to go to the jury on the question whether or not those facts would, before the accident, have indicated to a competent person, considering them with the care which is necessary when human life is involved, that the road was unsafe. *Littlejohn v. Fitchburg R. Co.* (Mass.) 502

21. Where a party's letters, coupled with testimony that he had made reports to a mercantile agency of the status of merchants, would support a finding that he was an agent, but there was other evidence from which the jury might conclude that he was not such agent, the question of agency should be left to the jury. *Bradstreet Co. v. Gill* (Tex.) 405

22. A charge to the jury on the question of damage to plaintiff's credit by a libel is not unauthorized where there is some evidence, though slight, tending to show that his credit was injured by the publication, and that he suffered some damage. *Id.*

23. Whether a corporation acting under a contract which declares it to be the agent of the insured only in obtaining insurance from a foreign corporation in any manner aids the foreign company in transacting its insurance business, within the prohibition of the Illinois Act of 1869, is a question for the jury. *People v. People's Ins. Co.* (Ill.) 840

24. When the evidence given, with all the inferences that the jury could justifiably draw from it, is so insufficient that a verdict based thereon must be set aside, the court is not bound to submit it to the jury, but may direct a verdict. *Id.*

25. Where a man gave an agent in charge of a retail store authority to purchase goods, when he was on the eve of leaving home to be absent for some months, which he revoked on his return, it is a question for the jury whether the parties dealing with the agent after such revocation had notice thereof. *Wheeler v. McGuire* (Ala.) 808

26. A general verdict must control special interrogatories, unless there is irreconcilable conflict. *Stringer v. Frost* (Ind.) 614

27. Failure of a special verdict to find some

facts in issue will not necessarily render it objectionable, if the failure to find the facts was not contrary to the evidence. *Louisville, N. L. & C. R. Co. v. Buck* (Ind.) 520

28. If a verdict is silent concerning any of the facts in issue, the court will assume, upon motion for a new trial, that the party upon whom rested the burden of proof in respect to those facts failed to prove them. *Id.*

29. Where the material facts to show the liability of a railroad company were a hidden or latent defect in a car by the absence of a reach rod from a brake beam, which increased the ordinary and obvious perils of the service of a brakeman, and its agency in producing an injury, a special verdict which shows the manner in which the accident and injury occurred, and the condition of the car and appliances, need not be required to describe the appliances. *Id.*

#### NOTES AND BRIEFS.

Question for jury as to agency; directing verdict; instructions. 840, 841

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Direction of court to modify or amend verdict; polling the jury. 185

Issue of *deviseavit vel non*; duty to determine sufficiency of evidence. 668

Question for jury as to cause. 695

#### TROVER.

A carrier is not guilty of conversion where he, in good faith, takes goods from the possession of the owner by direction of another having the apparent control of the goods and the present capacity of investing himself with actual possession, and delivers them to such other person in another place. *Gurley v. Armistead* (Mass.) 80

#### NOTES AND BRIEFS.

See also **BILLS AND NOTES; CARRIERS.**

Unlawful taking; direction of ostensible owner. 80

**TRUSTS.** See also **BANKS AND BANKING**, 5, 6, 10, 11; **CHARITABLE USES**, 1, 2, 7, 8; **CORPORATIONS**, 3-6; **EVIDENCE**, 5, 27; **INJUNCTION**, 4; **RELIGIOUS SOCIETIES**; **TOWN**, 4.

1. Minn. Gen. Laws 1883, chap. 107, authorizing the organization of annuity, safe deposit, and trust companies with power to act as trustee, guardian, etc., is not unconstitutional because it grants to a corporation the power to act in a fiduciary capacity, or because it does not require it to take an oath or give a bond, as in the case of natural persons. *Minnesota Loan & Trust Co. v. Beebe* (Minn.) 418

2. If a corporation to which property is devised in trust for the support of common schools is incapable of acting as a trustee, the trust does not thereby fail, but the proper court may appoint a new trustee. *Skinner v. Harrison* (Ind.) 187

3. Where a trustee held property in trust for a married woman for life, with power of appointment by will, and, in default thereof, for her child in fee, upon the death of the married

woman failing to exercise the power of appointment, the legal estate remains in the trustee; but a person to whom he devises it is a mere volunteer who takes it bound by the trust. *Lee v. Simpson* (C. C. D. S. C.) 659

4. If a bank, on receiving from another bank commercial paper "for collection and immediate return," makes the collection and mingles the money collected with its general funds, and thereafter becomes insolvent, having cash on hand sufficient to cover such collection, the fund collected must be held to have so lost its identity that the cash on hand will not be impressed with a trust lien in favor of the bank for which the collection was made, as against general creditors. *Philadelphia Nat. Bank v. Bond* (C. C. E. D. N. C.) 480

5. The doctrine that, when a trust fund has been wrongfully converted into another species of property, it can be followed and subjected to the preferential rights of the *cestui que trust*, is to be limited to cases where the identity of the fund can be traced, and is not to be extended to cases where it has been so mingled with other moneys or property that it can no longer be specifically ascertained. *Id.*

6. Where an assignee of a contract to construct a railway, for the payment of which certain securities of the railway are pledged, in order to pay the purchase money, borrows from another, and pledges him as consideration thereof part of the profits to arise under the contract, the lender becomes entitled to an equitable lien on the contract and securities pledged to secure payment; and one subsequently purchasing said contract and securities takes them subject to such lien; and the moneys and assets arising under the transfer constitute a trust as to the lender, enforceable in a court of equity. Especially is this so where the allegations of the bill present a strong case of fraud. *Langdon v. Central R. & Bkg. Co.* (C. C. S. D. Ga.) 190

7. Where a will gives property to trustees upon certain trusts, and directs that, "if at the expiration of ten years a majority of his children then living shall desire it, the trustees shall sell the real estate and shall divide the net proceeds," if necessity compels the sale of part of the real estate before the ten years expires, the proceeds of the sale will be held upon the same trusts as was the real estate, and will not be distributed upon petition of the children before the expiration of such time. *Re Chapin* (Mass.) 768

8. The limitation of the power of a *cestui que trust* to dispose of his interest in the income of property devised in trust for the use of testator's sons, to enjoy the rents, issues, and profits thereof during their natural lives, is valid; and an assignment by one son of his interest in such rents and profits is not valid either as to the rents already accrued or thereafter to accrue. *Lampert v. Haydel* (Mo.) 118

#### NOTES AND BRIEFS.

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**TURNPIKE COMPANIES.** See CORPORATIONS, 15-17.

**UNDUE INFLUENCE.** See WILLS, 9, 10.

**USAGE.** See CUSTOM AND USAGE.

#### USURY.

1. A note given for the repayment of money borrowed, with interest, stipulating in addition that, for every \$10 so advanced, the borrower bound himself to deliver to the lender for storage and sale on commission one bale of cotton, in default of which he should pay as liquidated damages storage for one month and commissions for selling,—is not usurious if the advance is made by a warehouseman or commission merchant with a reasonable expectation that the borrower can perform the stipulation as to delivering the cotton; but if there is no reasonable expectation of his being able to deliver it, the contract is usurious. *Harmon v. Lehman* (Ala.) 589

2. A lender of money on an agreement stipulating, not only for repayment, but for the delivery to him of cotton to be sold on commission, cannot charge a larger price for the service in selling and storing the cotton than he charges for the same service where no money is loaned. If he does, the contract is usurious. *Id.*

8. If a contract is usurious, no custom can legalize it. *Id.*

#### VENDOR AND PURCHASER.

1. A vendee can claim the benefit of no covenants contained in the deed to his vendor except such as attach to and run with the land,—namely, for quiet enjoyment and warranty. *Barry v. Guld* (Ill.) 334

2. Where a man who has made a deed with covenants, intending that an undivided part of the land conveyed should be held merely as security, obtains from a subsequent grantee a deed of such undivided part, made, at his request, to a stranger to the former deeds, the latter deed has the same legal effect as if made by the original grantor himself; and the vendee therein is not entitled to the benefit of any covenants contained in the original deed by the grantor. *Id.*

3. A purchaser of land through which a railroad runs is not bound by his vendor's agreement to fence the railroad, of which he had no actual notice and which was not recorded. *Pittsburg, C. & St. L. R. Co. v. Bonworth* (Ohio) 199

4. Relinquishing other security in consideration of a transfer of land by a deed absolute in form, but in reality as security, is sufficient to entitle the grantee to protection as a *bona fide* purchaser against defects in the grantor's title. *McClurey v. Wakefield* (Iowa) 629

5. A purchaser of land, although bound to take notice of the right under which one in possession of it claims, is not chargeable with notice of a right or claim not asserted, or one which may subsequently accrue. *Id.*

NOTES AND BRIEFS.

See also **BONA FIDE PURCHASER; COVENANTS; NOTICE.**

Right of purchaser to good title. 466

**VERDICT.** See **TRIAL.**

**VIEW.** See **EMINENT DOMAIN, 6.**

**VOTERS AND ELECTIONS.** See also **EVIDENCE, 8, 18-20, 24, 65, 66.**

A single man having no family relations in Detroit, or any household of his own of which he is a member, who lodges in one ward and boards in another, is a resident of the latter for the purposes of registration as an elector. All the former charters of the city having contained express provisions to this effect, which have been also incorporated by the Legislature into charters of other cities in the State in numerous instances, without adopting a contrary rule in any instance, the law in this respect must be held to remain the same, although the charter of 1887 is entirely silent on the subject, the changes made from former charters being on entirely distinct matters. *Warren v. Board of Registration* (Mich.) 208

NOTES AND BRIEFS.

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**WAIVER.** See also **EVIDENCE, 64.**

While a condition may be waived by a party who has the right to avail himself of it, mere indulgence or silent acquiescence in the failure to perform is never construed into a waiver unless some element of estoppel can be invoked. *Royal v. Aultman-Taylor Co.* (Ind.) 526

**WALL.** See **MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.**

**WAREHOUSEMEN.**

1. Warehousemen in Alabama, who deliver up cotton stored with them to a third person, producing their receipt therefor, may be held liable to the mortgagee of such cotton, whose mortgage is properly recorded in another county, although they have no actual notice of the mortgage. *Hudmon v. Du Boss* (Ala.) 476

2. That there was no intent to defraud the party to whom a warehouse receipt was issued in violation of the Illinois Warehouse Act of 1871, § 25, is immaterial on the question of guilt under that section; the only intent necessary to be found to constitute the offense relates only to whether the warehouseman intended to issue the receipt knowing it to be false. *Sykes v. People* (Ill.) 461

3. The Illinois Warehouse Act of 1871, § 25, was not repealed by implication by the passage of Ill. Crim. Code, §§ 124, 125, the provisions of the two Acts being distinct and not repugnant,—the offense created by the former consisting solely in issuing a receipt from which a fraudulent result may occur, and that created

by the latter consisting in the making or uttering of a receipt for a fraudulent purpose or with fraudulent intent. *Id.*

4. The Illinois Warehouse Act was intended for the protection of the public; and the issuance, by a warehouseman, to a bank, of receipts transferable by indorsement, purporting to be for property in store belonging to the bank, when in fact no such property was in store, and delivered by him to the bank as security for loans made by it to him, renders such warehouseman liable criminally, under § 25 of the Act, although he had no intent to thereby defraud the bank. *Id.*

**WATERS AND WATERCOURSES.**

See also **COMMERCE; NUISANCE, 4.**

1. The right of the city of New York to erect structures in the navigable waters of the State is subject to the sovereign authority over such highways. *Bedlow v. New York Floating Dry Dock Co.* (N. Y.) 629

2. A State Legislature may authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions, that its will must be obeyed so far as may be necessary to ensure free navigation. *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.* (Ky.) 540

3. The Green & Barren River Navigation Company, by the Kentucky Act of March 9, 1868, leasing to it the "Green & Barren River line of navigation and their tributaries, together with the grounds, houses, waterworks, rents, profits, tools, machinery, implements, and appurtenances, and all the franchises thereunto belonging or appertaining," acquires only the improvements belonging to the State in its corporate capacity, as distinguished from what was subject to public use under common right, and does not acquire any exclusive right of navigation. Therefore it has no right of action against a railroad company for the obstruction of navigation by repairing a bridge, where this was done under a license which was valid against the public, and the improvements included in the lease were not injured or interfered with. *Id.*

4. The obstruction of navigation by the repairing of a bridge over a river in replacing a draw span, which bridge is maintained under lawful authority, creates no right of action in favor of parties entitled to navigate the river, if the repairs are made in such a manner as not unreasonably to obstruct the navigation, although it was possible to have opened the draw and constructed the new one upon the edge of the river, thus avoiding all obstruction to navigation, but which would have involved unreasonable delay and expense. *Id.*

5. An adverse, exclusive, and uninterrupted use and enjoyment, by one person and those under whom he claims, of all the water of a creek, taken therefrom by means of a ditch and conveyed to certain mining grounds for mining purposes, for twelve years, or for any period beyond that of the Statute of Limitations prescribing the time in which entry shall be made upon real property, will bar the owner

of the land through which the creek runs, of his riparian rights; but where the ditch by means of which the water was originally appropriated was constructed under a license granted by the owner of the land, in which he reserved the right to use the water a part of each year for his own purposes, such adverse use by grantees from the original appropriator cannot be established unless it is shown that the use of the water by them has been in hostility to the use of it by the owner of the land under such reservation. *Huston v. Bybee* (Or.) 568

6. In order to establish adverse possession, the users of water under a license which reserved certain rights must show that their use of it was in defiance of any right upon the part of the owner to use it for any purpose, that they totally ignored his right to use it at all, and that he acquiesced therein for the statutory period. *Id.*

7. An agreement by a person through whose land a stream of water ran which he was accustomed to use for purposes of irrigation, for watering stock, and for domestic use, giving permission to another to dig a ditch across his land in order to conduct the water to certain mining grounds, upon the promise of the other that the former should have the exclusive use of the water flowing through the ditch at any point on his lands where he might desire to turn it for irrigating purposes, during the spring and summer months; and that the other would not sell or dispose of the ditch or water right to anyone else; but that they should revert and become the property of the owner of the land,—must be construed to give to such owner the use of the water whenever required for the use of his premises for the purposes mentioned, and to the other party the use of it at all other times, for the purpose of working his mining grounds. *Id.*

8. A person having the right to the exclusive use of water flowing through a ditch constructed across his land, at any point on said land where he may desire to turn it for irrigating purposes during the spring and summer months, has the preference during the season when the condition of his premises is such as to require the use of the water for the purposes mentioned, but has no right to waste it at any time, or to use it extravagantly or imprudently; and at other times the owner of the ditch has the full and free right to use it; and each is required to respect the rights and interests of the other regarding the matter in every particular. *Id.*

9. Where a right to construct a ditch across land of another who was to have the privilege of using water therefrom for irrigating purposes was on condition that the ditch should not be sold, use of the ditch by persons to whom it had been sold in violation of the condition is not adverse, where the owner of the land, during a portion of each year, continues to take water from the ditch in accordance with the right reserved to him. *Id.*

#### NOTES AND BRIEFS.

Navigable, what are; obstruction, right to abate. 288

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Navigable; power of Congress to regulate; legalizing bridge over; jurisdiction of courts. 540

Navigable waters; what are. 380

#### WHARFAGE AND WHARVES.

1. The authority of the city of New York to grant rights under water in the harbor to others than the littoral owners, on certain conditions, by necessary implication inhibits the granting of such rights to others except upon compliance with the conditions annexed to the exercise of such authority. *Bedlow v. New York Floating Dry Dock Co.* (N. Y.) 629

2. The authorities of the city of New York have power to grant the privilege of constructing piers in front of wharves and bulkheads to others than the owners of such structures, provided they comply with the conditions prescribed by the Act of 1806. *Id.*

3. Lessees of a wharf have a right to extend and improve it so as to increase its facilities, or to build a pier attached thereto for their use and occupancy, so far as their acts are not prohibited by the terms of the lease and do not constitute waste. *Id.*

4. Where tenants of a wharf obtained the right to build a pier attached thereto, upon their claim as "lessees having the same rights and privileges as the owners of the soil," they are estopped against setting up any right to the pier against their landlords, except under the lease. *Id.*

5. A pier erected by a tenant as an addition to a wharf, the effect of which, separately maintained, would be to destroy the essential and profitable use of the wharf, becomes an accretion to the wharf, belonging to the owners after the expiration of the tenancy, unless removed. *Id.*

**WILLS.** See also **CONTRACTS**, 8; **EVIDENCE**, 21-23, 36, 49, 50, 63, 68; **REAL PROPERTY**, 4, 5; **TRUSTS**, 7.

1. The statutory provision in reference to wills devising real estate in New York, executed by a nonresident and probated in another State, that an exemplified copy of such will or of the record thereof shall be presumptive evidence of the will and of the due execution thereof, does not render such will effectual to pass real estate in this State unless executed in accordance with the laws of this State. *Lockwood v. Lockwood* (N. Y.) 425

2. N. Y. Code Civ. Proc. § 1866, is to be construed as providing for an action to determine the validity of a devise in a will whose proper execution is assumed, and not for an action to determine the validity of the will itself. *Anderson v. Appleton* (N. Y.) 175

3. N. Y. Laws 1879, chap. 816, which provides that the validity of a devise or will may be determined by the supreme court in a proper action for that purpose, brought by any heir at law or devisee, was repealed by implication by N. Y. Code Civ. Proc. §§ 1866, 1867. *Id.*

4. It requires less capacity to make a will than it does to make a deed. *Kerr v. Lunsford* (W. Va.) 664

5. Old age is not of itself sufficient evidence of incapacity to make a will. *Id.*

6. The time to be looked to by the jury, in determining the capacity of a testator to make a will, is the time when the will was executed. *Id.*

7. It is not necessary that a person should possess the highest qualities of mind in order to make a will, or that he should have the same strength of mind he may formerly have had; the mind may be in some degree debilitated, the memory may be enfeebled, the understanding may be weak, the character may be eccentric, and he may even want capacity to transact many of the ordinary business affairs of life; it is sufficient if he have mind enough to understand the nature of the business in which he is engaged, to recollect the property which he means to dispose of, the objects of his bounty, and the manner in which he wishes to distribute it among them. *Id.*

8. In order to make a valid will it is not necessary that the testator should name all his children in it, or give each of them a portion of his estate. If he was mentally capable of understanding the disposition which he was making of his property, and acted freely, it is immaterial to whom he gives his property, whether all to one, or some, of his children, or to strangers. If he has a disposing mind and memory, he has a right to do as he pleases with his property. *Id.*

9. Although the testator may, perhaps, have been influenced by feelings of resentment or dislike to one or more of his children, and by feelings of affection and attachment towards others, and though these feelings may have influenced him to give his whole estate to the one part, and little or nothing to the others, this is not sufficient to make the will invalid. *Id.*

10. If the provisions of the will were induced by the extreme kindness and attention to the testator on the part of the principal devisees, that will not constitute undue influence which will invalidate the will. *Id.*

11. When a final decree is pronounced in favor of a will on the verdict of a jury rendered on an issue *devisavit vel non*, the functions of the suit are exhausted, and the bill should be dismissed. In such suit the construction of the will cannot be involved. *Id.*

12. A will giving property to a daughter, with power to dispose of it by her own will in case she die before her father, and directing payment in that case to the executors or trustees named in her will, operates, in case of her death leaving a will, to devise and bequeath the property, by its own force, in accordance with her will, although her power of appointment, considered as a power, could not be executed in her father's lifetime. *Re Piffard's Will* (N. Y.) 193

13. The word "surviving," in a will devising property to testator's wife for life, and adding: "But on her decease I give and devise the same to my surviving children to be divided equally between them,"—refers to the children surviving on the wife's decease. *Coveny v. McLaughlin* (Mass.) 448

14. A bequest or devise to a township in Indiana, although primarily to the civil township, will be held to be for the school township when the intention appears to create a fund for the support of common schools. *Skinner v. Harrison Twp.* (Ind.) 187

15. Where testatrix gives a university certain sums of money in trust for various purposes, to the fund of one of which the residue of the estate is given, and directs the estate to be converted into money or available securities as soon as it can be done having in view the best interest of the estate, it operates as an equitable conversion of the estate, and no real estate owned by her is thereby devised. *Re McGraw's Estate* (N. Y.) 887

16. A testator can disinherit his heirs or next of kin only by leaving his property to others. Mere words of exclusion will not suffice. The estate must be actually given to somebody else. *Coffman v. Heatnoll* (Va.) 848

17. A will which simply revokes all other wills theretofore made by the testator, and declares that a certain son shall be excluded from all participation in the estate because he has become the heir to certain other property, and testator is about to make a final settlement, giving him as much as the estate would pay to the other legal heirs, is not sufficient to exclude such son from participation in the estate, but is a nullity, where no provision is made for giving the estate to anybody else. *Id.*

18. The revocation of a will by intentionally destroying it will not revive a former will which was expressly revoked by the latter one. *Hawes v. Nicholas* (Tex.) 863

#### NOTES AND BRIEFS.

See also CORPORATIONS; COURTS; TRUSTS.

Lapse of legacy; power of appointment; re-execution by codicil; interpretation. 194

Intent of testator; meaning of word "heirs." 457

What is; interpretation of. 849

Issue of *devisavit vel non*; attesting witnesses; evidence; testamentary capacity; undue influence. 663

Revocation. 863

Probate; executors and administrators; grant of letters; citation; renunciation. 795

**WITNESSES.** See also CLAIMS, 8; EVIDENCE, 88, 89.

One who would inherit a part of the testator's property but for the will, under W. Va. Code, chap. 180, § 28, is incompetent to speak of the testator's capacity to make the will. *Kerr v. Lunaford* (W. Va.) 668

#### WRIT AND PROCESS.

1. An order for service of summons by publication should not be made by a court in New York against nonresident defendants in an action by a judgment creditor to reach property in copyrights and royalties thereon, which, for the purpose of defrauding creditors, have been assigned to one of the other defendants by the judgment debtor in another State, to which the debtor has gone, after execution has been issued on the judgment in the State of New

York, where it was rendered. The property being intangible, the defendants nonresidents, and the transfer having been made out of the State, there is no jurisdiction over the subject of the action or its cause. *Bryan v. University Pub. Co.* (N. Y.) 638

2. Where an order for publication of summons has been made in an action, over the

subject or cause of which the courts of the State have no jurisdiction, defendant is entitled to make a motion to set it aside, rather than submit to the hardship of coming in to defend the action. *Id.*

**YOUNG MEN'S CHRISTIAN ASSOCIATION.** See HIGHWAYS, 4, 5.

3 L. R. A.

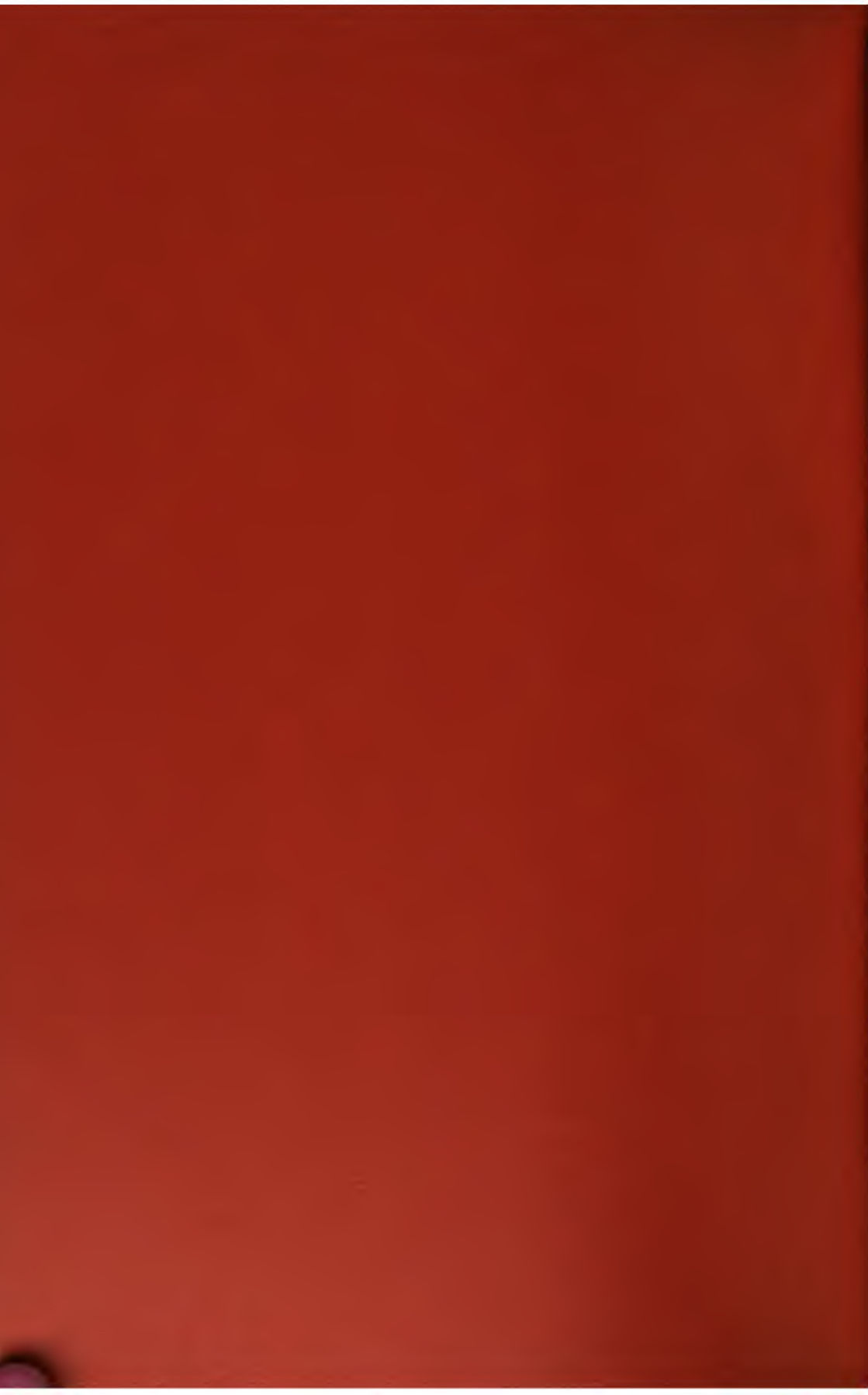
# L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-  
PLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY  
WAY AFFECTED BY LATER DECISIONS THAT HAVE  
CITED THESE CASES AS PRECEDENTS, WITH  
HOLDINGS OF CITING CASES; ALSO  
REFERENCES TO LATER AN-  
NOTATIONS CITING  
CASES OR NOTES

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Coermont, 1905.





# L. R. A. CASES AS AUTHORITIES.

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## CASES IN 2 L. R. A.

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2 L. R. A. 33, *PEOPLE v. NORTH RIVER SUGAR REF. CO.* 54 Hun, 355, note, 27 N. Y. S. R. 282, 3 N. Y. Supp. 401.

Affirmed in 54 Hun, 354, 5 L. R. A. 386, 7 N. Y. Supp. 406, which was affirmed in 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 24 N. E. 834.

### **Combinations affecting competition.**

Cited in *Rafferty v. Buffalo City Gas Co.* 37 App. Div. 623, 56 N. Y. Supp. 288, upholding purchase of stock of one corporation with stock of another to prevent ruinous competition; *Queen Ins. Co. v. State*, 86 Tex. 275, 22 L. R. A. 492, 24 S. W. 397, holding combination to fix insurance rates not one in restraint of trade; *Milwaukee Masons & Builders' Asso. v. Niezerowski*, 95 Wis. 135, 37 L. R. A. 130, 60 Am. St. Rep. 97, 70 N. W. 166, holding combination of contractors and masons to suppress competition and advance prices illegal; *Bailey v. Master Plumbers' Asso.* 103 Tenn. 107, 46 L. R. A. 563, 52 S. W. 853, holding illegal, master plumbers' association to prevent competition and restrict purchase of supplies and materials; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 487, 47 Am. St. Rep. 200, 41 N. E. 188, holding combination to stifle competition and control production and prices illegal; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 443, 57 L. R. A. 554, 90 Am. St. Rep. 126, 41 S. E. 553, holding combination to compel outsider to sell goods at prices fixed by it void; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 136, 29 C. C. A. 160, 54 U. S. App. 723, 85 Fed. 291, holding contract between iron-pipe manufacturers for purpose of restraining competition and maintaining prices void.

Cited in footnotes to *Texas Standard Cotton Oil Co. v. Adoue*, 15 L. R. A. 598, which holds combination to fix prices of cotton seed and seed cotton void; *Van Horn v. Van Horn*, 10 L. R. A. 184, which holds combination to drive trader out of business actionable; *More v. Bennett*, 15 L. R. A. 361, which holds association of stenographers to control prices for work illegal combination; *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance unlawful.

Cited in note (12 L. R. A. 196) on conspiracy.

### **— Agreements affecting trade.**

Cited in footnotes to *Chaplin v. Brown*, 12 L. R. A. 428, which holds grocer's agreement not to buy butter from makers for two years if firm opens butter store, void; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 12 L. R. A. 563, which holds agreement to prevent competition between corporations in manufacture of glue under patent valid; *State ex rel. Watson v. Standard Oil Co.* 15 L. R. A. 145, which holds agreement for transfer of corporate stock to trustees to vote and receive dividends void; *Clark v. Needham*, 51 L. R. A.

785, which holds void lease of manufacturing machinery, with agreement against lessor's engaging in business for five years; *Cummings v. Union Blue Stone Co.* 52 L. R. A. 262, which holds void agreement by persons controlling 90 per cent of sale of blue stone to sell through common agent, and maintain agreed prices.

Cited in notes (8 L. R. A. 498, 500) on contracts against public policy; (11 L. R. A. 437, 438) on contracts to regulate competition in trade; (11 L. R. A. 504) on contracts in general restraint of trade; (4 L. R. A. 157) on contracts in partial restraint of trade.

— **Monopolies.**

Cited in footnote to *Stockton v. Central R. Co.* 17 L. R. A. 97, which holds lease of railroad franchises and roads tends to monopoly.

Cited in notes (6 L. R. A. 457) on void contracts creating monopolies; (9 L. R. A. 38) on corporations and monopolies; (13 L. R. A. 771) on nature of monopolies; (12 L. R. A. 754) on restraining monopolies as public nuisances.

— **Fruits of illegal combinations or agreements.**

Cited in footnote to *Pittsburgh Carbon Co. v. McMillin*, 7 L. R. A. 46, which holds party to illegal trust combination not entitled to proceeds, as against receiver of trust assets.

**Necessary articles of commerce.**

Cited in *Queen Ins. Co. v. State*, 86 Tex. 270, 22 L. R. A. 494, 24 S. W. 397, holding insurance not a business of commerce, in which public has any right.

2 L. R. A. 43, *JENNINGS'S APPEAL*, 2 Monaghan (Pa.) 184, 16 Atl. 19.

**Limited partnerships.**

Cited in *Spencer Optical Mfg. Co. v. Johnson*, 53 S. C. 536, 31 S. E. 392, holding members of firm, not strictly complying with statute as to limited partnerships, liable as general partners.

Cited in footnotes to *Vanhorne v. Corcoran*, 4 L. R. A. 386, holding strict compliance with statute necessary to limit liability; *State, Tide Water Pipe Co., Prosecutor, v. State Board*, 27 L. R. A. 684, holding limited partnership taxable as corporation; *Edwards v. Warren Linoline & Gasoline Works*, 38 L. R. A. 791, which holds partnership association organized under laws of Pennsylvania regarded as partnership, instead of corporation, in Massachusetts.

Cited in note (8 L. R. A. 712) on limited partnerships.

2 L. R. A. 44, *BALTIMORE & O. EMPLOYEES' RELIEF ASSO. v. POST*, 122 Pa. 579, 15 Atl. 885.

**Presumption as to agent's authority.**

Cited in *Smith v. Crum Lynne Iron & Steel Co.* 208 Pa. 466, 57 Atl. 953, holding authority of superintendent to bind corporation by contract to give injured employee life employment will not be presumed; *Langenheim v. Anshutz-Bradberry Co.* 2 Pa. Super. Ct. 291, 38 W. N. C. 508, holding burden of showing extent of agent's authority is on party seeking to charge principal.

**Contracts of railway relief associations.**

Cited in footnotes to *Pittsburg, C. C. & St. L. R. Co. v. Moore*, 44 L. R. A. 638, which sustains contract allowing railroad employee option between action for damages or claim on relief fund; *Pittsburg, C. C. & St. L. R. Co. v. Cox*, 35

L. R. A. 507, which sustains contract that accepting relief from railroad relief association shall release employer from liability; *Oyster v. Burlington Relief Department*, 59 L. R. A. 292, which denies right to recover on certificate of railroad relief department, after recovering full statutory penalty for employee's death.

**Benefits recoverable.**

Cited in footnote to *Robinson v. Exempt Fire Co.* 24 L. R. A. 715, which holds recovery limited to benefits accrued at commencement of suit.

**Injuries covered by accident insurance.**

Cited in footnote to *Lord v. American Mut. Acci. Asso.* 26 L. R. A. 742, which holds question for jury, whether entire loss of hand, within meaning of accident policy, caused by injury without amputation above wrist.

2 L. R. A. 48, *GREEN v. RICK*, 121 Pa. 130, 6 Am. St. Rep. 670, 15 Atl. 497.

**Notice of pendency.**

Cited in *Hillside Coal & I. Co. v. Heermans*, 191 Pa. 119, 43 Atl. 76, holding *lis pendens* notice to one purchasing fourteen years after commencement of action; *Hovey v. Elliott*, 118 N. Y. 134, 23 N. E. 475, holding purchaser of bonds with knowledge of pending litigation bound by result; *Mansur & T. Implement Co. v. Beer*, 19 Tex. Civ. App. 313, 45 S. W. 972; holding action to recover vendor's lien notes does not create notice by *lis pendens* to subsequent lienor; *Noyes v. Crawford*, 118 Iowa, 18, 96 Am. St. Rep. 363, 91 N. W. 799, holding *lis pendens* no notice to bona fide purchaser from one not a party, holding by title antedating commencement of action.

Cited in note (2 L. R. A. 615) on divorce; rule of *lis pendens*.

2 L. R. A. 52, *HAWS v. ST. PAUL F. & M. INS. CO.* 130 Pa. 113, 15 Atl. 915, 18 Atl. 621.

**Effect on policy of removal of property.**

Cited in *British-America Assur. Co. v. Miller*, 91 Tex. 420, 39 L. R. A. 547, 66 Am. St. Rep. 901, 44 S. W. 60, holding insurance on property located in specified place, not covering the property when in another place.

Cited in note (26 L. R. A. 240) on location of movable property as affecting fire insurance thereon.

**Loss by lightning.**

Cited in note (26 L. R. A. 269) on insurance against loss by lightning.

2 L. R. A. 54, *SCHNEIDER v. DETROIT*, 72 Mich. 240, 40 N. W. 329.

**Appropriating private property for public use.**

Cited in *Vanderlip v. Grand Rapids*, 73 Mich. 536, 3 L. R. A. 253, 16 Am. St. Rep. 597, 41 N. W. 677, holding grading by raising 30-foot embankment in front of lot, taking of private property; *Harper v. Detroit*, 110 Mich. 429, 68 N. W. 265, holding gross damages should be awarded to abutting owner for carrying street over railroad; *Phelps v. Detroit*, 120 Mich. 448, 79 N. W. 640, holding city liable for damages to abutting owner for unauthorized construction of bridge across railroad.

**Powers, generally, of municipal corporations.**

Cited in notes (7 L. R. A. 760) on power of municipal corporations to borrow money ; (11 L. R. A. 124) on power of taxation.

2 L. R. A. 56, OSAGE CITY v. LARKINS, 40 Kan. 206, 10 Am. St. Rep. 186, 19 Pac. 658.

**Dedication of streets and alleys to public use.**

Cited in notes (9 L. R. A. 551) on dedication of land to public use a matter of intention; (11 L. R. A. 58) on effect of dedication for highway; (8 L. R. A. 829) on use of streets in cities and towns.

**Misuse of land dedicated to public as an abandonment.**

Cited in *McAlpine v. Chicago G. W. R. Co.* (Kan.) 64 L. R. A. 89, 75 Pac. 73, holding land dedicated to public as a levee does not revert because used for railroad tracks and other unauthorized purposes.

**Liability of city for defect in alley.**

Cited in *Fletcher v. Ellsworth*, 53 Kan. 763, 37 Pac. 115, holding city not maintaining alley in safe condition liable.

**Temporary obstruction of highway as nuisance.**

Cited in *Richmond v. Smith*, 101 Va. 168, 43 S. E. 345, holding large, temporary platform erected in street for carnival performances a nuisance *per se*.

**Liability for distinct, concurrent, negligent acts.**

Cited in *Brown v. Coxe Bros. & Co.* 75 Fed. 691, holding distinct acts of negligence, concurring to produce injury, create joint and several liability.

**Liability for maintaining dangerous appliances attractive to children.**

Cited in *Kinchlow v. Midland Elevator Co.* 57 Kan. 378, 46 Pac. 703, holding negligence of owner in leaving unguarded barrel of hot water on premises question for jury; *Ryan v. Towar*, 128 Mich. 483, 55 L. R. A. 317, 92 Am. St. Rep. 481, 87 N. W. 644 (dissenting opinion), majority holding landowner not liable for maintaining dangerous machine in building accessible to children.

Cited in footnotes to *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything; *Rome v. Cheney*, 55 L. R. A. 221, which denies city's liability for drowning of child in necessary sewer 4 feet wide and 2 feet deep; *Missouri, K. & T. R. Co. v. Edwards*, 32 L. R. A. 825, holding railroad company not liable for injuries to child climbing upon ties piled in yard inclosed by fence and tracks.

2 L. R. A. 59, OTTAWA, O. C. & C. G. R. CO. v. LARSEN, 40 Kan. 301, 19 Pac. 661.

Followed without discussion in *Ottawa, O. C. & C. G. R. Co. v. Peterson*, 40 Kan. 310, 19 Pac. 666; *Ottawa, O. C. & C. G. R. Co. v. Lindall*, 40 Kan. 310, 19 Pac. 666; *Ottawa, O. C. & C. G. R. Co. v. Hanson*, 40 Kan. 310, 19 Pac. 666.

**Liability to abutting lot owners for obstruction of street.**

Cited in *Wichita & C. R. Co. v. Smith*, 45 Kan. 269, 25 Pac. 623, holding abutting owner cannot recover unless virtually deprived of access to his property; *Inter-State Consol. Rapid Transit R. Co. v. Early*, 46 Kan. 201, 26 Pac. 422, holding railway company not liable to abutting owner for authorized change of street grade; *Ottawa, O. C. & C. G. R. Co. v. Peterson*, 51 Kan. 607, 33 Pac. 606, and *Chicago, K. & W. R. Co. v. Union Investment Co.* 51 Kan. 602, 33 Pac. 378, holding railroad company not liable for obstructing street where vehicle space

and access to abutting land is left; *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 236, 16 Am. St. Rep. 479, 21 Pac. 1051; *Leavenworth v. Douglass*, 59 Kan. 419, 53 Pac. 123, holding railroad company not liable for obstructing street if lot owner's access is not unreasonably abridged; *Ft. Scott, W. & W. R. Co. v. Fox*, 42 Kan. 494, 22 Pac. 583, holding railroad company liable for complete obstruction, although lot accessible from another street.

Cited in notes (9 L. R. A. 101) on use of streets in municipalities; (1 L. R. A. 856) on dedication of land to street uses by laying out and platting.

Distinguished in *Leavenworth, N. & S. R. Co. v. Curtan*, 51 Kan. 439, 33 Pac. 297, holding lot owner entitled to damages where railroad cuts off access to his lot.

**Consequential damages.**

Cited in *Garrett v. Lake Roland Elev. R. Co.* 79 Md. 282, 24 L. R. A. 398, 29 Atl. 830, holding authorized erection of stone abutment in street no taking of private property.

**Special injury to abutting owner.**

Cited in *Central Branch Union P. R. Co. v. Andrews*, 41 Kan. 379, 21 Pac. 276, holding measure of damages difference in value of land before and after street obstruction.

**Right to use public streets by railroads.**

Cited in footnotes to *Montgomery v. Santa Ana & W. R. Co.* 25 L. R. A. 654, which holds railroad on street not additional burden; *Chicago G. W. R. Co. v. First Methodist Episcopal Church*, 50 L. R. A. 488, which holds water tank in street, and station, at which bells constantly rung and whistles blown within a few rods of church, a nuisance.

Cited in notes (17 L. R. A. 477) on what use of a street or highway constitutes an additional burden; (10 L. R. A. 772) on duty of railroad to keep its right of way in safe condition.

2 L. R. A. 64, *HARTFORD F. INS. CO. v. HAAS*, 87 Ky. 531, 9 S. W. 720.

**Reformation of insurance policy.**

Cited in note (5 L. R. A. 712) on reformation of policy of insurance.

**Nature of proceeds of insurance policy.**

Cited in *Spalding v. Miller*, 103 Ky. 414, 45 S. W. 462, holding proceeds of policy do not take place of property, but indemnify for loss.

**Insurance company bound by agent's act.**

Cited in *Wright v. Northwestern Mut. L. Ins. Co.* 91 Ky. 213, 15 S. W. 242, holding erroneous description of risk by company's agent in application does not invalidate policy.

**Effect of knowledge of insurer's agent.**

Cited in note (16 L. R. A. 34, 35) on effect of knowledge, by insurer's agent, of falsity of statements in application.

**Conditions in insurance policy.**

Cited in note (11 L. R. A. 345) on conditions in insurance policy.

2 L. R. A. 67, *MISSOURI P. R. CO. v. LEWIS*, 24 Neb. 848, 40 N. W. 401.

**Enforcement of statutory liability in another state.**

Cited in *O'Reilly v. New York & N. E. R. Co.* 16 R. I. 396, 6 L. R. A. 720,

19 Atl. 244, and *Nelson v. Chesapeake & O. R. Co.* 88 Va. 976, 15 L. R. A. 587, 14 S. E. 838, holding right of action created by statute may be prosecuted in state having similar statute; *Huntington v. Attrill*, 146 U. S. 675, 36 L. ed. 1130, 13 Sup. Ct. Rep. 224, holding statute making officers of corporation signing false certificate liable for debts, enforceable in another state.

Cited in notes (56 L. R. A. 196, 203) on taking jurisdiction of cause of action for death or bodily injury arising outside of state,—similar statute in forum as condition; (15 L. R. A. 583) on enforceability of rights of action for causing death, accruing under foreign statutes; (56 L. R. A. 215) on right of representative appointed in forum to maintain action for death caused outside of state.

#### **Actions for negligence.**

Cited in footnote to *Moe v. Smiley*, 3 L. R. A. 341, which holds action for death does not survive against administrator.

Cited in notes (4 L. R. A. 261) on liability for death caused by negligence; (5 L. R. A. 172) on action for damages for death caused by negligence; (1 L. R. A. 798) on liability of master for neglect of duty; (2 L. R. A. 521) on master's duty to provide safe appliances.

#### **Negligence not presumed from fact of accident.**

Cited in *Sheets v. Chicago & I. Coal R. Co.* 139 Ind. 689, 39 N. E. 154; *Wabash R. Co. v. Ray*, 152 Ind. 398, 51 N. E. 920; *Lane v. Missouri P. R. Co.* 64 Kan. 758, 68 Pac. 626,—holding operation of railroad without blocking frogs not, as matter of law, negligence; *Lane v. Missouri P. R. Co.* 64 Kan. 758, 68 Pac. 626, holding, in action for injuries by faulty construction of switch, plaintiff must show it either defective or not of approved kind; *Lincoln Street R. Co. v. Cox*, 48 Neb. 810, 67 N. W. 740, holding jury may not infer negligence from mere fact of accident.

#### **Cause of action as basis for granting administration.**

Cited in *Missouri P. R. Co. v. Bradley*, 51 Neb. 600, 71 N. W. 283 (distinguished in dissenting opinion), holding cause of action for causing death, estate sufficient for granting administration where nonresident was injured; *Re Mayo*, 60 S. C. 415, 54 L. R. A. 666, 38 S. E. 634, holding cause of action for death enforceable only by administrator warrants granting administration on estate of nonresident without other assets.

Cited in footnote to *Re Mayo*, 54 L. R. A. 660, which authorizes appointment of administrator in county where nonresident killed, to bring action for his death.

Cited in note (24 L. R. A. 686) on right of action for wrongful death, giving jurisdiction for appointing administrator.

#### **Appointment of administrator, how assailable.**

Cited in *Bradley v. Missouri P. R. Co.* 51 Neb. 654, 66 Am. St. Rep. 473, 71 N. W. 282, holding appointment of administrator, regular on record, not assailable collaterally; *Missouri P. R. Co. v. Bradley*, 51 Neb. 605, 71 N. W. 283, holding one sued by administrator cannot institute proceedings to revoke appointment, showing no want of jurisdiction.

Distinguished in *Elgutter v. Missouri P. R. Co.* 53 Neb. 749, 74 N. W. 255, holding appointment of administrator may be collaterally attacked where record shows lack of jurisdiction.



**Judicial notice.**

Cited in footnotes to *Richardson v. Buhl*, 6 L. R. A. 458, holding courts will judicially notice illegality of contract; *Com. v. King*, 5 L. R. A. 536, which authorizes taking judicial notice that river not a public highway.

2 L. R. A. 75, *MISSOURI P. R. CO. v. FAGAN*, 72 Tex. 127, 13 Am. St. Rep. 776, 9 S. W. 749.

**Usage and custom as affecting contract liability.**

Cited in *American Cent. Ins. Co. v. Green*, 16 Tex. Civ. App. 540, 41 S. W. 74, holding insurance custom as to use of gasoline, not provable to vary policy.

Cited in note (13 L. R. A. 439) on custom and usage as law.

**Waiver of rights as condition of receiving and carrying freight.**

Cited in *Kirby v. Western U. Teleg. Co.* 4 S. D. 117, 30 L. R. A. 619, 46 Am. St. Rep. 765, 55 N. W. 759, holding carrier cannot compel shipper to waive rights as condition of carrying freight.

**Stipulation as to notice.**

Cited in *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 111, 17 S. W. 834, holding stipulation as to giving notice of damages only enforceable when pleaded and reasonable; *Missouri P. R. Co. v. Childers*, 1 Tex. Civ. App. 305, 21 S. W. 76, holding reasonableness of stipulation as to notice of loss question for jury; *Houston & T. C. R. Co. v. Davis*, 11 Tex. Civ. App. 28, 31 S. W. 308 holding burden upon carrier to allege and prove reasonableness of notice of loss stipulation.

Cited in footnote to *Good v. Galveston, H. & S. A. R. Co.* 4 L. R. A. 801, holding stipulation as to written notice of loss to be given to nearest station agent unreasonable.

**Measure of damages.**

Cited in *Galveston, H. & S. A. R. Co. v. Ball*, 80 Tex. 606, 16 S. W. 441, holding freight charges, if not paid, should be deducted from damages; *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 111, 17 S. W. 834, holding market value at place of destination should govern, cattle being shipped for immediate sale; *Taylor, B. & H. R. Co. v. Montgomery*, 4 Tex. App. Civ. Cas. (Willson) 401, suggesting, without deciding, that evidence as to value at time cattle were sold is admissible as to damages; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 618, 37 L. ed. 305, 13 Sup. Ct. Rep. 444, and *Baker v. Mims*, 14 Tex. Civ. App. 416, 37 S. W. 190, holding reduction of value of stock by premature loss of offspring proper measure of damages; *Gulf, C. & S. F. R. Co. v. Eddins*, 7 Tex. Civ. App. 121, 26 S. W. 161, holding value of injured animals at place of destination proper measure of damages on contract limiting liability to defendant's own line; *Missouri, K. & T. R. Co. v. Webb*, 20 Tex. Civ. App. 440, 49 S. W. 526, holding difference between value of property at time it was delivered and at time it should have been, proper measure of damages; *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 593, 45 S. W. 945, holding evidence of market value of goods where salable before and after fire admissible in proof of cash value; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 617, 618, 37 L. ed. 305, 13 Sup. Ct. Rep. 444, holding difference in market value of cattle on arrival but for and by reason of carrier's negligence proper measure of damages.

**Duties and responsibilities of carriers of stock.**

Cited in footnote to *Good v. Galveston, H. & S. A. R. Co.* 4 L. R. A. 801,

which holds carrier liable for needless delay, confinement, and bruising of live stock.

Cited in notes (9 L. R. A. 450, 452) on duty to furnish cars for transportation, and safe mode of delivery; (4 L. R. A. 545) on responsibility of carriers of live stock; (13 L. R. A. 262) on construction of contract for shipment of live stock.

2 L. R. A. 78, *DAVIS v. KLINE*, 96 Mo. 401, 9 S. W. 724.

**Attorney and client.**

Cited in *Aultman v. Loring*, 76 Mo. App. 70, holding attorney buying property on execution holds subject to client's election to take; *Eoff v. Irvine*, 108 Mo. 383, 32 Am. St. Rep. 609, 18 S. W. 907, holding attorney consulted about land title may not, though withdrawn from employment, purchase outstanding title.

Distinguished in *Stewart v. Perkins*, 110 Mo. 671, 19 S. W. 989, holding attorney taking no advantage of knowledge acquired in professional capacity may assert adverse title.

**Testimony of deceased witness, how proved.**

Cited in *Dwyer v. Bassett*, 1 Tex. Civ. App. 515, 21 S. W. 621, holding agreed statement of facts on appeal, its correctness being proved, admissible to prove testimony of deceased witness.

Distinguished in *Fisher v. Fisher*, 131 Ind. 464, 29 N. E. 31, holding bill of exceptions not admissible to prove evidence of deceased witness, without proof of correctness; *Simmons v. Spratt*, 26 Fla. 463, 9 L. R. A. 347, 8 So. 123, holding bill of exceptions not admissible of itself to prove testimony of deceased witness.

**Equity disregards incompetent evidence.**

Cited in *Bush v. Arnold*, 50 Mo. App. 17, holding court of equity must disregard incompetent evidence in deciding case.

**Sufficiency of sheriff's deed.**

Cited in *Hall v. Klepzig*, 99 Mo. 89, 12 S. W. 372, holding sheriff's deed sufficient where recitals conform to execution, though varying from judgment.

2 L. R. A. 80, *GURLEY v. ARMSTEAD*, 148 Mass. 267, 12 Am. St. Rep. 555, 19 N. E. 389.

**Conversion.**

Cited in *Robert C. White Live Stock Commission Co. v. Chicago, M. & St. P. R. Co.* 87 Mo. App. 336, holding possession of personal property prima facie evidence of ownership; *Steele v. Marsicano*, 102 Cal. 670, 36 Pac. 920, holding there must be a tortious act to establish conversion.

Cited in note (50 L. R. A. 652) on liability of servant or agent for conversion, trespass, or other positive act of wrongdoing against third parties under orders of his employer.

Distinguished in *Wright & C. Wire Cloth Co. v. Warren*, 177 Mass. 289, 58 N. E. 1082, holding notice of consignment to plaintiff, with words "Notify A.," not to authorize treatment of A. as consignee.

2 L. R. A. 81, *RIDEOUT v. KNOX*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390.

**Legislation to prevent nuisance.**

Cited in *Com. v. Parks*, 155 Mass. 532, 30 N. E. 174, holding that it was valid exercise of power for board of aldermen to forbid blasting without its written consent; *Townsend v. State*, 147 Ind. 632, 37 L. R. A. 299, 62 Am. St. Rep. 477, 47 N. E. 19, holding valid, act to prevent wasteful use of natural gas; *Com. v. Roberts*, 155 Mass. 283, 16 L. R. A. 401, 29 N. E. 522, holding act to regulate water closets was intended to apply to violations continuing after its passage; *Health Department v. Trinity Church*, 145 N. Y. 42, 27 L. R. A. 714, 45 Am. St. Rep. 579, 39 N. E. 833, holding act compelling use of water in tenements valid; *Horan v. Byrnes*, 72 N. H. 96, 62 L. R. A. 603, footnote, p. 602, 54 Atl. 945, upholding statute making private nuisance of boundary fence exceeding 6 feet, erected solely to annoy; *Brostrom v. Lauppe*, 179 Mass. 317, 60 N. E. 785, holding act relating to height of fences applies only to fence on or near division line; *Spaulding v. Smith*, 162 Mass. 544, 39 N. E. 189, holding act regulating height of fences does not apply to fence on opposite side of highway; *United States v. Douglas-Willan Sartoris Co.* 3 Wyo. 301, 22 Pac. 92 (dissenting opinion), majority holding act forbidding inclosure of public lands invalid so far as it forbids erection of fence wholly on owner's land; *Camfield v. United States* 167 U. S. 523, 42 L. ed. 261, 17 Sup. Ct. Rep. 864, holding owner cannot build fence on his own land so as to inclose public lands forbidden by Congress.

Cited in notes (36 L. R. A. 593) on power of municipal corporation to define, prevent, and abate nuisances; (52 L. R. A. 940) on constitutionality of retroactive statute creating right of action, or of set-off on account of past acts or transactions.

**Building structure on own land.**

Cited in *Metzger v. Hochrein*, 107 Wis. 270, 50 L. R. A. 307, 81 Am. St. Rep. 841, 83 N. W. 308, and *Bordeaux v. Greene*, 22 Mont. 256, 74 Am. St. Rep. 600 56 Pac. 218, holding owner can build on his own land fence to any height.

**Malevolence in maintaining nuisance.**

Cited in *Lord v. Langdon*, 91 Me. 222, 39 Atl. 552, holding building fence above legal height was malicious act; *Hunt v. Coggin*, 66 N. H. 141, 20 Atl. 250, holding structure for signboard for store not shown to have been erected for purpose of annoying; *Smith v. Morse*, 148 Mass. 409, 19 N. E. 393, holding illegal fence being maliciously allowed to stand, owner liable even if nothing done since passage of act.

Cited in notes (40 L. R. A. 178, 182) on liability for the malicious erection of a fence; (62 L. R. A. 686) on effect of bad motive to make actionable what would otherwise not be.

**Injunction to prevent nuisance.**

Cited in *Middlesex Co. v. McCue*, 149 Mass. 104, 14 Am. St. Rep. 402, 21 N. E. 230, holding owner will not be enjoined from cultivating his land, although solid matter carried into neighbor's pond; *Karasek v. Peier*, 22 Wash. 427, 50 L. R. A. 348, 61 Pac. 33, authorizing injunction against erection of fence where malevolence shown.

Cited in footnote to *Hague v. Wheeler*, 22 L. R. A. 141, which denies liability to adjoining owner for permitting escape of gas from well.

**Police restraint on business.**

Cited in *Com. v. Gilbert*, 160 Mass. 160, 22 L. R. A. 442, 35 N. E. 454, holding valid act forbidding catching and selling fish artificially propagated and maintained.

Cited in note (21 L. R. A. 794) on police restraints upon business.

**Declaration of wife against husband's interest.**

Cited in *Fourth Nat. Bank v. Nichols*, 43 Mo. App. 390, holding unsworn declaration by wife against husband's interest inadmissible.

**Damages for maintaining nuisance.**

Cited in *Taft v. Com.* 158 Mass. 547, 33 N. E. 1046, holding damages for quasi nuisance not allowable in taking land for sewer; *Miller v. Horton*, 152 Mass. 547, 10 L. R. A. 119, 23 Am. St. Rep. 850, 26 N. E. 100, holding horse cannot be condemned to be killed without compensation, unless it has a contagious disease.

2 L. R. A. 83, *DODGE v. BOSTON & B. S. S. CO.* 148 Mass. 207, 12 Am. St. Rep. 541, 19 N. E. 373.

**Beginning and ending of relation of carrier and passenger.**

Cited in *June v. Boston & A. R. Co.* 153 Mass. 82, 26 N. E. 238, holding person walking toward station intending to buy ticket not a passenger; *Seawell v. Carolina C. R. Co.* 132 N. C. 859, 44 S. E. 610, holding person waiting at station to take train entitled, as passenger, to protection from assault.

Distinguished in *Webster v. Fitchburg R. Co.* 161 Mass. 300, 24 L. R. A. 524, 37 N. E. 165, holding running to board train outside station not proper presentation for carriage; *Creamer v. West End Street R. Co.* 156 Mass. 322, 16 L. R. A. 491, 32 Am. St. Rep. 456, 31 N. E. 391, holding relation of passenger to carrier terminates as soon as he alights from street car in street.

**— Leaving and returning at intermediate points.**

Cited in *Alabama G. S. R. Co. v. Coggins*, 32 C. C. A. 5, 60 U. S. App. 140, 88 Fed. 459, holding person alighting at intermediate station for usual and reasonable purposes still a passenger; *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 640, 57 L. R. A. 892, 97 Am. St. Rep. 666, 90 N. W. 649, holding rule inapplicable where passenger leaves train at point not intended for such purpose.

Cited in footnote to *De Kay v. Chicago, M. & St. P. R. Co.* 4 L. R. A. 632, which holds that passenger leaving train at intermediate station assumes responsibility for his movements.

Cited in note (15 L. R. A. 399) on rights and liability of parties when passenger temporarily leaves vehicle before completing journey.

Distinguished in *Chicago, R. I. & P. R. Co. v. Sattler*, 64 Neb. 640, 97 Am. St. Rep. 666, 90 N. W. 649, holding one leaving train sidetracked at intermediate station to get water not entitled to protection as passenger.

**Degree of care, skill, and diligence due passenger.**

Cited in *Gilbert v. West End Street R. Co.* 160 Mass. 406, 36 N. E. 60, holding carrier not responsible for all accidents by any means preventable; *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 111, 64 S. W. 202; *Olds v. New York, N. H. & H. R. Co.* 172 Mass. 77, 51 N. E. 450; *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 215, 9 So. 363,—holding law requires carrier to use highest care, diligence, and skill

known to careful, diligent, and skilful carriers; *Central of Georgia R. Co. v. Johnston*, 106 Ga. 136, 32 S. E. 78, upholding charge that carrier should exercise "extra high degree of care" toward passengers; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 521, 30 Am. St. Rep. 65, 9 So. 722, upholding charge implying that law requires carrier to use "strict diligence;" *Galligan v. Old Colony Street R. Co.* 182 Mass. 215, 65 N. E. 48, holding street railway company bound to exercise highest degree of care to guard against landslide in cut on highway; *Nichols v. Lynn & B. R. Co.* 168 Mass. 530, 47 N. E. 427, holding it question for jury whether street car was started with due care.

Cited in notes (2 L. R. A. 252) on liability of railroads as carriers, as insurers of lives and safety of passengers; (6 L. R. A. 241) on care and diligence required of carrier of passengers; (8 L. R. A. 674) on duty of carriers to use care for safety of passengers; (12 L. R. A. 746) on duty of railroad company to furnish proper cars.

— In and about stations.

Cited in *Jordan v. New York, N. H. & H. R. Co.* 165 Mass. 347, 32 L. R. A. 102, 52 Am. St. Rep. 522, 43 N. E. 111, upholding recovery for injury received, by person intending to become passenger, in station toilet room; *Brooks v. Old Colony R. Co.* 168 Mass. 167, 46 N. E. 566, holding carrier not liable to passenger struck upon station platform by runaway horse; *Bethmann v. Old Colony R. Co.* 155 Mass. 354, 29 N. E. 587, holding carrier owes person alighting on station platform utmost care and diligence consistent with the business; *Daniel v. Petersburg R. Co.* 117 N. C. 610, 23 S. E. 327, holding carrier liable for wrongful shooting of traveler by depot agent; *Young v. New York, N. H. & H. R. Co.* 171 Mass. 34, 41 L. R. A. 193, 50 N. E. 455, holding person at station intending to take train entitled to safe access.

Cited in notes (6 L. R. A. 193) on duty of carrier to keep platforms and approaches in safe condition; (20 L. R. A. 521) on measure of care which a carrier must take to keep its platforms and approaches safe.

— Car platforms.

Cited in *Gilman v. Boston & M. R. Co.* 168 Mass. 455, 47 N. E. 193, holding carrier liable to passenger injured by slipping on snow on car platform.

— Passenger elevators.

Cited in footnote to *Goodsell v. Taylor*, 4 L. R. A. 673, which holds manager of passenger elevator to same degree of care as common carrier.

**Reasonableness of carrier's regulations.**

Cited in *Sweetland v. Lynn & B. R. Co.* 177 Mass. 579, 51 L. R. A. 784, 59 N. E. 443, holding rule forbidding use of platform by passengers may be waived or abandoned; *Jackson v. Grand Ave. R. Co.* 118 Mo. 220, 24 S. W. 192, holding passengers should learn carrier's reasonable regulations for their safety.

Cited in note (3 L. R. A. 134) on passenger's rights to proper treatment by carrier.

2 L. R. A. 87, *ATTY. GEN. ex rel. ADAMS v. TARR*, 148 Mass. 309, 19 N. E. 358.

**Rights in public waters.**

Cited in footnotes to *California Nav. & Improv. Co. v. Union Transp. Co.* 46 L. R. A. 825, which holds public use as landing place of shore of navigable waters outside municipality not included in dedication for highway; *Com. v. Man-*

chester, 9 L. R. A. 236, which holds state may regulate fishing in bay within its borders.

Cited in note (9 L. R. A. 807) on fishery rights.

**Title by custom.**

Cited in *Becker v. Hall*, 116 Iowa, 593, 56 L. R. A. 557, 88 N. W. 324, holding custom to appropriate ice in public stream insufficient to support title contrary to public right.

Cited in notes (2 L. R. A. 836) on usages and customs; (3 L. R. A. 860) on binding force of custom and usage; (13 L. R. A. 439, 440) on custom and usage as law; (6 L. R. A. 261) on estate created by dedication.

**Title by possession adverse to public right.**

Cited in *Atty. Gen. v. Vineyard Grove Co.* 181 Mass. 509, 64 N. E. 75, holding one year's possession insufficient.

Cited in note (53 L. R. A. 902) on prescriptive right to maintain public nuisance.

**Procedure by attorney general.**

Cited in *Atty. Gen. v. Williams*, 174 Mass. 484, 47 L. R. A. 319, 55 N. E. 77, holding information in equity by attorney general proper method to prevent violation of building regulations in Boston.

Cited in note (42 L. R. A. 823) on abatement of buildings, fences, etc., as nuisances by injunctions at suit of municipal authorities.

**Title to provincial settlements by royal grant.**

Cited in *Concord Mfg. Co. v. Robertson*, 66 N. H. 2, 18 L. R. A. 681, 25 Atl. 718, holding grant of township by provincial executive in name of King passed title to grantees as owners and tenants in common.

2 L. R. A. 92, *PEOPLE ex rel. ATTY. GEN. v. STANFORD*, 77 Cal. 360, 19 Pac. 693, 18 Pac. 85.

**Actions for usurpation of corporate powers.**

Cited in *People v. Reclamation Dist. No. 136*, 121 Cal. 529, 50 Pac. 1068, holding state not estopped from questioning validity of corporation by suffering, for twenty years, exercise of corporate rights; *People ex rel. Stone v. Jefferds*, 126 Cal. 302, 58 Pac. 704, holding dismissal of action for usurpation of franchise for laches in prosecution, no bar to subsequent action.

**Parties to action to test corporate existence.**

Cited in *People v. Gunn*, 85 Cal. 244, 24 Pac. 718, holding municipal corporation necessary party to proceeding to test validity of its charter; *State ex rel. Sanche v. Webb*, 97 Ala. 119, 38 Am. St. Rep. 151, 12 So. 377, holding alleged corporation not proper party to action for fraudulent usurpation of corporate powers; *People ex rel. Sels v. Reclamation Dist. No. 551*, 117 Cal. 117, 48 Pac. 1016, raising, without deciding, question whether action of quo warranto can be maintained against reclamation district whose corporate existence is questioned.

**Assignment of franchise to legally organized corporation.**

Cited in *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 575, 44 L. ed. 894, 20 Sup. Ct. Rep. 736, holding contract made by municipality at time when decisions established right of legislature to grant franchise by special legislation not affected by subsequent decisions or change of Constitution.

2 L. R. A. 96, ATLANTA NAT. BANK v. BURKE, 81 Ga. 597, 7 S. E. 738.

**Liability of bank paying forged paper.**

Cited in *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 145, 70 S. W. 173, holding bank liable to depositor for money paid out on forged checks.

Cited in footnotes to *Critten v. Chemical Nat. Bank*, 57 L. R. A. 529, which holds bank paying plainly altered check to clerk of drawer without asking explanation liable for loss from subsequent payment of similar checks; *Pickle v. People's Nat. Bank*, 7 L. R. A. 93, which holds acceptance of check necessary to give right of action against bank; *Janin v. London & S. F. Bank*, 14 L. R. A. 320, which holds depositor's delay in returning forged check no defense to bank not injured thereby.

Cited in notes (12 L. R. A. 793) on liability of bank paying on forged signature; (27 L. R. A. 428) on duty of depositor in respect to checks bearing forged indorsements charged against account; (50 L. R. A. 80) on loss in case of issue or indorsement of check or bill to impostor.

**Duty to know signature.**

Cited in footnotes to *Kummel v. Germania Sav. Bank*, 13 L. R. A. 786, which holds vigilance to detect forgery due to depositor by savings bank officers; *First Nat. Bank v. Northwestern Nat. Bank*, 26 L. R. A. 289, which holds genuineness of indorsement not admitted by drawee accepting or paying check.

Cited in notes (6 L. R. A. 724) on obligations of banker; (6 L. R. A. 626) on duty and obligation of bankers.

**Rights of payer of forged paper.**

Cited in footnotes to *Northwestern Nat. Bank v. Bank of Commerce*, 15 L. R. A. 102, which holds bank crediting forged draft to payee and forwarding for collection a bona fide holder; *Iron City Nat. Bank v. Ft. Pitt Nat. Bank*, 23 L. R. A. 615, which denies right of recovery by payer of forged check.

2 L. R. A. 99, BIRDSEYE v. BAKER, 82 Ga. 142, 14 Am. St. Rep. 142, 7 S. E. 863.

**Conflict of laws.**

Cited in notes (2 L. R. A. 328) on conflict of laws as affecting validity of contract; (6 L. R. A. 110) on conflict of laws in regard to validity of insolvent's assignment; (23 L. R. A. 34) on extraterritorial effect of voluntary assignment of personal property.

**Situs of debt.**

Cited in note (6 L. R. A. 109) on validity of assignment for benefit of creditors.

2 L. R. A. 102, WESTERN & A. R. CO. v. EXPOSITION COTTON MILLS, 81 Ga. 522, 7 S. E. 916.

Appeal from judgment sustaining demurrer to amended complaint in 83 Ga. 441, 10 S. E. 113.

**Liability of connecting roads.**

Cited in *Savannah, F. & W. R. Co. v. Commercial Guano Co.* 103 Ga. 597, 30 S. E. 555, holding railway using spur track of another company to obtain goods from warehouse, initial carrier, though compensation for trackage paid to another; *Kerr v. Georgia R. Co.* 105 Ga. 372, 31 S. E. 114, holding company not contem-



plated as connecting carrier not liable as such, though transporting goods to destination; *Atlanta Nat. Bank v. Southern R. Co.* 106 Fed. 628, holding carrier receiving cotton at way station for delivery to its compress not connecting carrier on through contract; *Susong v. Florida C. & P. R. Co.* 115 Ga. 364, 41 S. E. 566, holding burden is on connecting carrier receiving car without exception to show shipment was not then in good order.

**Conflict of laws.**

Cited in *Illinois C. R. Co. v. Beebe*, 174 Ill. 26, 43 L. R. A. 214, 66 Am. St. Rep. 253, 50 N. E. 1019, holding contract of carriage performable in more than one jurisdiction, governed by *lex loci celebrationis*.

Cited in note (63 L. R. A. 525) on conflict of laws as to carrier's contracts.

**Carrier's lien.**

Cited in note (4 L. R. A. 376) on lien of carrier.

2 L. R. A. 105, *STERNBERGER v. CAPE FEAR & Y. VALLEY R. CO.* 29 S. C. 510, 7 S. E. 836.

**Interstate commerce.**

Cited in *State ex rel. Railroad & W. Commission v. Chicago, St. P. M. & O. R. Co.* 40 Minn. 272, 3 L. R. A. 240, 12 Am. St. Rep. 730, 41 N. W. 1047, holding state commission cannot fix rates between two points in same state over route extending across another state; *Hanley v. Kansas City Southern R. Co.* 187 U. S. 621, 47 L. ed. 336, 23 Sup. Ct. Rep. 214, denying authority of state commissioners to fix rates between points within state over railroad passing in part through adjoining territory.

Cited in notes (60 L. R. A. 644, 646) on corporate taxation and the commerce clause; (17 L. R. A. 443) on whether shipments between points in the same state lose their character of domestic commerce by passing out of the state during transportation.

Disapproved in *State ex rel. Railroad Comrs. v. Western U. Teleg. Co.* 113 N. C. 223, 22 L. R. A. 571, 18 S. E. 389, holding telegraph messages between points in same state, although partially traversing another state, not interstate commerce.

2 L. R. A. 106, *LEE v. MOSELEY*, 101 N. C. 311, 7 S. E. 874.

**Residence as affecting homestead right.**

Cited in *Fulton v. Roberts*, 113 N. C. 427, 18 S. E. 510, holding instruction confounding "residence" and "domicil" harmless where jury understands homestead right is abandoned by removal; *Jones v. Alsbrook*, 115 N. C. 52, 20 S. E. 170, holding residence must be actual to entitle citizen to homestead; *Chitty v. Chitty*, 118 N. C. 654, 32 L. R. A. 396, 24 S. E. 117 (dissenting opinion), majority holding fugitive from justice not debarred from homestead right by absence from state.

Cited in footnote to *Bosquett v. Hall*, 9 L. R. A. 351, which refuses homestead exemption because of residence of children strangers in blood.

**Scope of homestead exemption.**

Cited in *Vanstory v. Thornton*, 112 N. C. 214, 34 Am. St. Rep. 483, 17 S. E. 566 (dissenting opinion), majority holding homestead right salable or assignable; *Hughes v. Hodges*, 102 N. C. 249, 9 S. E. 437, holding homestead right may be abandoned without wife joining in deed.

Cited in footnote to *Wilkinson v. Merrill*, 11 L. R. A. 632, which holds householder not deprived of homestead right by death of entire family.

Cited in notes (11 L. R. A. 705) on effect of judgment liens on homestead right; (6 L. R. A. 818) on homestead exemption.

2 L. R. A. 110, *ANDERSON v. WELLINGTON*, 40 Kan. 173, 10 Am. St. Rep. 175, 19 Pac. 719.

**Legislative power of cities.**

Cited in *Trotter v. Chicago*, 33 Ill. App. 210, holding ordinance making it misdemeanor to parade street without permit, not within powers; *Sioux Falls v. Kirby*, 6 S. D. 68, 25 L. R. A. 623, 60 N. W. 156, holding ordinance prohibiting building without permit of city inspector, not within powers; *Re Pryor*, 55 Kan. 727, 29 L. R. A. 400, 49 Am. St. Rep. 280, 41 Pac. 958, holding city of third class without power to regulate price of gas or water by ordinance.

Cited in notes (2 L. R. A. 142) on municipal corporations as agencies of government; (20 L. R. A. 722) on delegation of municipal power as to license; (36 L. R. A. 596) on extent of power of municipal corporation to define nuisance; (39 L. R. A. 672) on municipal power over nuisances relating to use of streets.

**Reasonableness and uniformity of ordinances and statutes.**

Cited in *Bennett v. Pulaski* (Tenn.) 47 L. R. A. 281, 52 S. W. 913, holding ordinances which are oppressive, repugnant to fundamental rights, or obnoxious to general laws, invalid; *State v. Tenant*, 110 N. C. 609, 15 L. R. A. 424, 28 Am. St. Rep. 715, 14 S. E. 387, holding ordinance prohibiting building without permission of aldermen void, because arbitrary; *Richmond v. Dudley*, 129 Ind. 116, 13 L. R. A. 589, 28 Am. St. Rep. 180, 28 N. E. 312, holding void an ordinance restricting keeping and storing of oils as not uniform; *Simrall v. Covington*, 90 Ky. 450, 9 L. R. A. 557, 29 Am. St. Rep. 398, 14 S. W. 369, holding statute imposing on agents of foreign insurance companies tax not required of local companies invalid; *Marshall & B. Co. v. Nashville*, 109 Tenn. 511, 71 S. W. 815, holding municipal ordinance requiring union label on city printing invalid; *State v. Gerhardt*, 145 Ind. 484, 33 L. R. A. 329, 44 N. E. 469 (dissenting opinion), majority holding conditions upon which license to sell liquors may issue sufficiently specified in statute.

Cited in note (2 L. R. A. 723) on reasonableness of ordinance subject of judicial inquiry.

Distinguished in *State v. White*, 44 Kan. 517, 25 Pac. 33, holding statute punishing mere fornication as rape not invalid.

**— Restricting use of streets.**

Cited in *Trotter v. Chicago*, 33 Ill. App. 210, holding ordinance making it misdemeanor to parade street without permit of police department unreasonable; *State ex rel. Garrabad v. Dering*, 84 Wis. 590, 19 L. R. A. 861, 36 Am. St. Rep. 948, 54 N. W. 1104, holding ordinance prohibiting parades, without permit, except by persons specified, unreasonable; *Re Gribben*, 5 Okla. 389, 47 Pac. 1074, holding ordinance prohibiting noise in streets by means of drums unreasonable; *Kansas City v. McDonald*, 60 Kan. 484, 45 L. R. A. 431, 57 Pac. 123, holding ordinance making fast driving misdemeanor unreasonable when applied to fire department; *Emporia v. Shaw*, 6 Kan. App. 812, 51 Pac. 237, holding ordinance prohibiting solicitation of patronage at railway depots, except by persons specified, not lacking in uniformity; *Re Flaherty*, 105 Cal. 570, 27 L. R. A. 533, 38

Pac. 981 (dissenting opinion), majority holding ordinance prohibiting beating of drum on street, without permit of officer named, not unreasonable.

Cited in note (19 L. R. A. 858, 860) on validity of ordinances as to street parades.

Distinguished in *Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 370, holding ordinance prohibiting beating of drum in street without permit of mayor valid.

Disapproved, in effect, in *Wilson v. Eureka City*, 173 U. S. 35, 43 L. ed. 605, 19 Sup. Ct. Rep. 317, holding ordinance requiring permit of mayor to move building through street not unreasonable.

2 L. R. A. 113, *LAMPERT v. HAYDEL*, 96 Mo. 439, 9 Am. St. Rep. 358, 9 S. W. 780.

**Trusts, when active.**

Cited in *Schoeneich v. Field*, 73 Mo. App. 455, holding, where estate is limited to trustee to pay rents and profits to another for life trustee takes legal estate.

**Restraint upon alienation by cestui que trust.**

Cited in *Seymour v. McAvoy*, 121 Cal. 442, 41 L. R. A. 547, 53 Pac. 946; *Roberts v. Stevens*, 84 Me. 333, 17 L. R. A. 270, 24 Atl. 873; *Brown v. Macgill*, 87 Md. 166, 39 L. R. A. 808, 67 Am. St. Rep. 334, 39 Atl. 613; *Leigh v. Harrison*, 69 Miss. 932, 935, 18 L. R. A. 51, 52, 11 So. 604; *Partridge v. Cavender*, 96 Mo. 456, 9 S. W. 785; *Bank of Commerce v. Chambers*, 96 Mo. 466, 10 S. W. 38; *Weller v. Noffsinger*, 57 Neb. 462, 77 N. W. 1075; *Schoeneich v. Field*, 73 Mo. App. 458,—holding limitation upon alienation to protect income from creditors and purchasers, valid.

Cited in footnotes to *Roberts v. Stevens*, 17 L. R. A. 266, which authorizes establishment of spendthrift trust free from rights of creditors; *Wales v. Bowditch*, 4 L. R. A. 819, which holds devise in trust for life with power of appointment not subject to devisee's debts; *Leigh v. Harrison*, 18 L. R. A. 49, which denies creditor's right to reach debtor's interest under spendthrift trust; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustee to pay certain portion of income absolutely to beneficiary; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary.

Cited in note (11 L. R. A. 565) on policy of law as to spendthrift trusts.

Distinguished in *Henson v. Wright*, 88 Tenn. 508, 12 S. W. 1035, holding joint deed of trustee and beneficiary valid as to life estate.

**Purchase for benefit of another.**

Cited in *Clark v. Cox*, 118 Mo. 659, 24 S. W. 221, holding purchase of property with intent to hold for enjoyment and benefit of former owner valid.

**Conveyance for benefit of grantor.**

Cited in *Brown v. Macgill*, 87 Md. 166, 39 L. R. A. 809, 67 Am. St. Rep. 334, 39 Atl. 613, holding conveyance to trustee, whereby grantor retains enjoyment of income, exempt from claims of creditors, invalid.

Cited in footnote to *Brown v. McGill*, 39 L. R. A. 806, which denies power to create trust placing one's property beyond reach of creditors while retaining full enjoyment of revenues.

**Intent of testator controlling.**

Cited in *Jarboe v. Hey*, 122 Mo. 348, 26 S. W. 968, and *Schoeneich v. Field*, 73

Mo. App. 458, holding due regard must be given direction of will and intent of testator in determining right of alienation.

Cited in note (10 L. R. A. 757) on creation of life estate by will.

2 L. R. A. 118, *GUNTHER v. NEW ORLEANS COTTON EXCH. MUT. AID ASSO.* 40 La. Ann. 776, 8 Am. St. Rep. 554, 5 So. 65.

**Forfeiture in benefit association.**

Cited in *Modern Woodmen v. Jameson*, 48 Kan. 721, 30 Pac. 460, holding forfeiture waived by benefit association, notice of reinstatement not having been given; *Elgutter v. Mutual Reserve Fund Life Asso.* 52 La. Ann. 1739, 28 So. 289, holding no forfeiture when notice was not given according to custom of company; *Maginnis v. New Orleans Cotton Exch. Mut. Aid Asso.* 43 La. Ann. 1138, 10 So. 180, holding death of member during suspension, after notice, created forfeiture.

Cited in footnote to *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which holds forfeiture of policy waived by retaining payment made after default without notice of any condition affixed.

Cited in note (9 L. R. A. 189) on forfeitures not favored in the law.

2 L. R. A. 120, *LANGDON v. CENTRAL R. & BKG. CO.* 37 Fed. 449.

**Consolidation of competing railroads.**

Cited in *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 422, holding transfer of one railroad to another void; *Louisville & N. R. Co. v. Com.* 97 Ky. 695, 31 S. W. 476, and *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 703, 40 L. ed. 860, 16 Sup. Ct. Rep. 714, enjoining the consolidation of competing railways; *Clarke v. Central R. & Bkg. Co.* 50 Fed. 339, 15 L. R. A. 684, restraining the voting power of stock of one railroad held by another railroad.

Cited in notes (45 L. R. A. 273) on restrictions on consolidation of parallel or competing railroads; (64 L. R. A. 694) on illegal trusts under modern anti-trust laws; (7 L. R. A. 606) on corporation's lack of power to deal in stock of other corporations; (8 L. R. A. 237) on foreign corporation; law of comity.

2 L. R. A. 129, *BYAM v. COLLINS*, 111 N. Y. 143, 7 Am. St. Rep. 727, 19 N. E. 75.

**Privileged communications.**

Cited in *Mattice v. Wilcox*, 147 N. Y. 636, 42 N. E. 270; *Sickles v. Kling*, 60 App. Div. 516, 69 N. Y. Supp. 944; *Stern v. Barrett Chemical Co.* 29 Misc. 613, 61 N. Y. Supp. 221,—holding privilege question of law; *Norfolk & W. S. B. Co. v. Davis*, 12 App. D. C. 328, holding privilege question for court where all disputed facts determined by jury; *Webber v. Vincent*, 29 N. Y. S. R. 606, 9 N. Y. Supp. 103, holding communication to interested person loses privileged character if made in presence of others; *Moore v. Manufacturers' Nat. Bank*, 123 N. Y. 432, 11 L. R. A. 757, 25 N. E. 1048 (dissenting opinion), majority holding irrelevant charges against teller in action on bond of defaulting cashier not privileged as charge in prosecution of action; *Knapp v. Campbell*, 14 Tex. Civ. App. 205, 36 S. W. 765, holding newspaper charge that candidate for public office had been indicted for keeping gambling house not privileged; *Reynolds v. Plumbers' Material Protective Asso.* 30 Misc. 713, 63 N. Y. Supp. 303, holding communication of refusal to pay debts, to other members of association, qualifiedly privileged where by-law provides therefor; *Howland v. Flood*, 160 Mass. 516, 36 N. E. 482,

holding report of public investigating committee charging plaintiff with dishonesty and insolvency qualifiedly privileged; *Henry v. Moberly*, 6 Ind. App. 494, 33 N. E. 981, holding school trustee's written protest in board meeting against employment of plaintiff as teacher qualifiedly privileged; *Hemmens v. Nelson*, 138 N. Y. 523, 20 L. R. A. 443, footnote p. 440, 34 N. E. 342, Affirming 36 N. Y. S. R. 906, 13 N. Y. Supp. 176, holding communication of defamatory matter to board of trustees, written by teacher about wife of principal of school, privileged; *Finley v. Steele*, 159 Mo. 305, 52 L. R. A. 853, 60 S. W. 108, holding charges in communication from school board to commissioner on removal of teacher qualifiedly privileged; *McCarty v. Lambley*, 20 App. Div. 267, 46 N. Y. Supp. 792, holding accusation of theft privileged when made by manager at time of plaintiff's discharge, in presence of others, after information of confession; *McClean v. New York Press Co.* 46 N. Y. S. R. 708, 19 N. Y. Supp. 262, holding publication, in interest of social order, of plaintiff's house, by typographical error, as disorderly, not privileged; *Ross v. Ward*, 14 S. D. 245, 86 Am. St. Rep. 746, 85 N. W. 182, holding charge to jury omitting question of privilege in action for libelous accusation of larceny erroneous.

Cited in footnotes to *Buisson v. Huard*, 56 L. R. A. 296, which holds privileged, answers to inquiries by interested persons as to defamatory remarks by others; *Fresh v. Cutter*, 10 L. R. A. 67, which holds voluntary communication in good faith to neighbor about to employ servant that he had stolen privileged; *Nissen v. Cramer*, 6 L. R. A. 780, which holds relevant words spoken by party to action during trial privileged.

Cited in notes (2 L. R. A. 405) on privileged communications; (4 L. R. A. 280) on communications in discharge of duty, privileged; (13 L. R. A. 98) on privilege of fair criticism of public men; (13 L. R. A. 420) on incidents of libel; (9 L. R. A. 621) on definition of libel.

#### **Malice.**

Cited in *Mattson v. Albert*, 97 Tenn. 235, 36 S. W. 1090, holding malice implied in publication of false statements concerning theater manager libelous *per se*; *St. James Military Academy v. Gaiser*, 125 Mo. 527, 28 L. R. A. 676, 46 Am. St. Rep. 502, 28 S. W. 851, holding malice implied in publication of charge of immoral and unreligious administration of institution of learning; *Hartman v. Morning Journal Asso.* 46 N. Y. S. R. 182, 19 N. Y. Supp. 399, holding malice implied from unprivileged publication of charge of immoral complicity in insurance swindle; *McDonald v. Nugent*, 122 Iowa, 655, 98 N. W. 506, holding malice in charging another with having venereal disease is presumed; *Lally v. Emery*, 59 Hun, 239, 12 N. Y. Supp. 785, holding actual malice question for jury, where communication *prima facie* privileged; *Davey v. Davey*, 22 Misc. 669, 50 N. Y. Supp. 161, holding substantial damages properly awarded on implied malice, where article libelous *per se*.

Cited in footnotes to *Pollasky v. Minchener*, 9 L. R. A. 102, which authorizes inference of malice from sending false statement as to mortgage, advising caution, to patrons of commercial agency; *Street v. Johnson*, 14 L. R. A. 203, which holds deliverer presumed to know that paper contains libel.

Cited in notes (6 L. R. A. 364) on malice as element in libel; (3 L. R. A. 69) on copies from other papers to disprove malice.

Distinguished in *Warner v. Press Pub. Co.* 15 Daly, 546, 8 N. Y. Supp. 341, holding evidence to show reporter's belief in truth of published love letter inadmissible to rebut presumption of malice.

2 L. R. A. 137, *SKINNER v. HARRISON TWP.* 116 Ind. 139, 18 N. E. 529.

**Charitable uses and trusts.**

Cited in footnotes to *Re John*, 36 L. R. A. 242, which sustains bequest for maintenance of free public schools; *People ex rel. Ellert v. Cogswell*, 35 L. R. A. 269, which sustains trust for educating boys and girls not confined to poor ones; *Crerar v. Williams*, 21 L. R. A. 454, which holds gift of free public library in great city charitable; *Kelly v. Nichols*, 19 L. R. A. 413, as to what constitutes charitable use or trust.

Cited in note (5 L. R. A. 107) on gifts to promote public good as charities.

**Trustees.**

Cited in *Rush County v. Dinwiddie*, 139 Ind. 134, 37 N. E. 795, holding board of commissioners capable to act as trustees under will establishing charitable home; *Re John*, 30 Or. 520, 36 L. R. A. 251, 47 Pac. 341, holding trust dependent upon appointment of trustees by court at stated periods not void for uncertainty.

**Removal of latent ambiguity in gift.**

Cited in *Indianapolis & V. R. Co. v. Reynolds*, 116 Ind. 359, 19 N. E. 141, holding parol evidence admissible to limit 100 feet right of way to 40 feet where width in original deed not defined, and only 40 feet fenced; *Chappell v. Missionary Soc.* 3 Ind. App. 359, 50 Am. St. Rep. 276, 29 N. E. 924, holding evidence admissible to show Church of Christ intended by bequest to "Christian Missionary Society;" *Daugherty v. Rogers*, 119 Ind. 259, 3 L. R. A. 851, 20 N. E. 779, holding notes to amount of \$6,000 extinguished by provision, in connection with small bequest, "in addition to what I have already given him;" *Pate v. Bushong*, 161 Ind. 540, 63 L. R. A. 597, 69 N. E. 291, holding error in description of land will not avoid bequest, where testator's intention appears with reasonable certainty, and extrinsic evidence admissible to remove ambiguity.

Distinguished in *Taylor v. Horst*, 23 Wash. 452, 63 Pac. 231, holding parol testimony inadmissible to add omitted land to devise of land adjoining in absence of ambiguity.

**Judicial notice.**

Cited in footnotes to *Com. v. King*, 5 L. R. A. 536, which authorizes taking judicial notice that river not a public highway; *Richardson v. Buhl*, 6 L. R. A. 458, taking notice *sua sponte* of contravention of public policy by contract in suit.

Cited in notes (4 L. R. A. 44) on rules applicable to judicial notice in particular states; (7 L. R. A. 765) on capacity of municipal corporation to administer public charity.

2 L. R. A. 139, *CRAWFORD v. HAZELRIGG*, 117 Ind. 63, 18 N. E. 603.

**Married woman's right of redemption.**

Cited in *Union Nat. Bank v. McConaha*, 14 Ind. App. 84, 42 N. E. 495, holding married woman redeeming from foreclosure of husband's mortgage can enforce against other owners their equitable share.

**Married woman's contract.**

Cited in *Heiney v. Lontz*, 147 Ind. 421, 46 N. E. 665, holding note by married woman to secure money advanced to husband void.

**Effect on mortgage of extension of time of payment of debt.**

Cited in *Wilson v. Pickering*, 28 Mont. 440, 72 Pac. 821, holding renewal of note secured presumptively renews mortgage lien.

**Mortgage foreclosure.**

Cited in notes (16 L. R. A. 468) on effect on mortgage of alteration of note secured by it; (21 L. R. A. 556) on effect of statutory bar of principal debt on the right to foreclose a mortgage or deed of trust securing the same; (10 L. R. A. 509) on limitation of action for foreclosure of mortgage.

2 L. R. A. 142, *COM. v. PLAISTED*, 148 Mass. 375, 12 Am. St. Rep. 566, 19 N. E. 224.

**Legislative control over municipalities.**

Cited in *Kingman*, Petitioner, 153 Mass. 573, 12 L. R. A. 421, 27 N. E. 778, holding apportionment of cost of sewerage system among benefited towns properly intrusted by legislature to commissioners appointed by court; *State ex rel. Bulkeley v. Williams*, 68 Conn. 149, 48 L. R. A. 491, 35 Atl. 24, holding city bound to pay assessment of expense of maintaining bridge outside municipal limits, levied by commissioners appointed by state; *Martin v. Tyler*, 4 N. D. 302, 25 L. R. A. 847, 60 N. W. 392, holding apportionment of benefits of drain by state commissioners final; *State ex rel. Caldwell v. Wilson*, 121 N. C. 470, 28 S. E. 554, holding statutory requirement of qualifications for railroad commissioner in addition to those provided by Constitution valid; *State ex rel. Hawes v. Mason*, 153 Mo. 46, 54 S. W. 524, holding statute creating and providing for state control of municipal police force supported by city constitutional; *Americus v. Perry*, 114 Ga. 878, 57 L. R. A. 234, 40 S. E. 1004, holding statute providing for municipal police board under control of governor constitutional, in spite of prior conflicting charter provisions; *Gooch v. Exeter*, 70 N. H. 416, 85 Am. St. Rep. 637, 48 Atl. 1100, and *Newport v. Horton*, 22 R. I. 208, 50 L. R. A. 338, 47 Atl. 312, holding statute creating municipal police board appointed by governor constitutional; *Mt. Hope Cemetery v. Boston*, 158 Mass. 520, 35 Am. St. Rep. 515, 33 N. E. 695, holding unconstitutional statute providing for transfer of municipal cemetery property without compensation or relief from obligation to bury dead; *State ex rel. Jameson v. Denny*, 118 Ind. 418, 4 L. R. A. 92, 21 N. E. 252 (dissenting opinion), majority holding statute creating board of public works, appointed by governor to control city streets, etc., unconstitutional.

Cited in footnotes to *State ex rel. McCausland v. Freeman*, 47 L. R. A. 67, which sustains statute arbitrarily establishing high school, and requiring its maintenance by people of county; *Davock v. Moore*, 28 L. R. A. 783, which sustains legislative power to provide for city board of health with power to incur expenses without city's consent; *Rathbone v. Wirth*, 34 L. R. A. 408, which holds void statute for bipartisan police board of four members to be selected by all members of common council voting for two members only.

Cited in note (48 L. R. A. 481) on power of legislature in respect to municipal officers, etc.

Distinguished in *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 518, 41 L. R. A. 636, 76 N. W. 175, holding statute providing for appointment of municipal board of fire and police commissioners by governor unconstitutional.

**Delegation of legislative authority.**

Cited in *Com. v. Page*, 155 Mass. 230, 29 N. E. 512, holding license regulation of hackney carriages by board of police valid; *Brodbin v. Revere*, 182 Mass. 601, 66 N. E. 607, upholding statute empowering park commissioners to make regulations for use of parkways, breaches of which shall be punishable as breaches of peace.



Cited in note (20 L. R. A. 722) on delegation of municipal power as to licenses.

**Abridgment of right of local self-government.**

Cited in *Goodrich v. Mitchell* (Kan.) 64 L. R. A. 948, 75 Pac. 1034, upholding statute giving veterans preference for appointment to public office over other persons of equal qualifications.

**Reasonableness of regulation.**

Cited in *Com. v. Mulhall*, 162 Mass. 499, 44 Am. St. Rep. 387, 39 N. E. 183, holding ordinance restricting weight of loads carried over streets of Boston reasonable and valid; *Com. v. Cutter*, 156 Mass. 56, 29 N. E. 1146, holding ordinance compelling removal of all filth from private passageway by abutting owner, irrespective of manner of accumulation, reasonable; *Com. v. Ellis*, 158 Mass. 556, 33 N. E. 651, holding ordinance forbidding unlicensed sales in streets refers only to sales at standstill or with frequent stops and is reasonable and valid; *Wilkes-Barre v. Garabed*, 11 Pa. Super. Ct. 374, holding ordinance prohibiting beating of drum in streets to collect crowd for religious purposes valid; *Chariton v. Simmons*, 87 Iowa, 233, 54 N. W. 146, holding ordinance punishing disobedience to order of city marshal in regard to processions or bands of music reasonable.

Cited in notes (19 L. R. A. 863) on validity of ordinances as to street parades; (39 L. R. A. 673) on municipal power over nuisances in streets; (21 L. R. A. 792) on constitutionality of class legislation.

**Impeachment of title of board of police to office.**

Cited in *Prince v. Boston*, 148 Mass. 287, 19 N. E. 218, holding quo warranto only proper proceeding to impeach title to office of board of police.

2 L. R. A. 146, *FINK v. UMSCHIED*, 40 Kan. 271, 19 Pac. 623.

**Effect of trust on land.**

Cited in *Baird v. Williams*, 4 Okla. 180, 44 Pac. 217, holding judgment against party holding land in trust in his own name not encumbrance; *Rayl v. Rayl*, 58 Kan. 589, 50 Pac. 501, holding trustee required to transfer title to beneficiary.

Cited in footnotes to *Cook v. Patrick*, 11 L. R. A. 573, which holds resulting trust in favor of one paying for land deeded to another extends only to life interest, when such his intent; *Edwards v. Culbertson*, 18 L. R. A. 204, which holds woman purchasing land with money fraudulently obtained by promise to marry, trustee on refusal to do so.

2 L. R. A. 148, *PEOPLE ex rel. NEW YORK v. BROOKLYN*, 111 N. Y. 505, 19 N. E. 90.

**Taxation of public property.**

Cited in *Board of Improvement v. School District*, 56 Ark. 360, 16 L. R. A. 421, 35 Am. St. Rep. 108, 19 S. W. 969, holding public-school property not assessable for local improvement; *Re Thrall*, 30 App. Div. 273, 51 N. Y. Supp. 595, holding legacy to city liable to transfer tax; *Croner v. Cowdrey*, 46 N. Y. S. R. 561, 19 N. Y. Supp. 909, holding sale of state land for nonpayment of city tax void; *Wells v. Johnston*, 55 App. Div. 487, 67 N. Y. Supp. 112, holding county-tax sale subject to prior vested rights of people; *Smith v. Buffalo*, 159 N. Y. 432, 54 N. E. 62, Affirming 90 Hun, 122, holding public streets not assessable for local improvements; *People ex rel. Amsterdam v. Hess*, 157 N. Y. 44, 51 N. E. 410, and *Rochester v. Coe*, 25 App. Div. 304, 49 N. Y. Supp. 502, holding city

property outside its limits liable to state and county tax; *People ex rel. Atkins v. Buffalo*, 63 App. Div. 565, 71 N. Y. Supp. 1145, Affirming 33 Misc. 172. 68 N. Y. Supp. 409, holding purchaser at city tax sale takes subject to prior tax liens held by city; *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 374, 94 Am. St. Rep. 301, 90 N. W. 1006, holding county liable for assessment for paving streets around courthouse square.

Cited in footnote to *Gate City Guards v. Atlanta*, 54 L. R. A. 806, which denies exemption, as public property, to armory owned by volunteer military force.

Cited in notes (19 L. R. A. 81) on power of state legislature to exempt from taxation; (48 L. R. A. 493) on power of legislature to impose burdens upon municipalities, and to control their local administration and property.

#### **Ferries.**

Cited in note (59 L. R. A. 523) on establishment, regulation, and protection of ferries.

2 L. R. A. 150, *HARNICKELL v. NEW YORK L. INS. CO.* 111 N. Y. 390, 18 N. E. 632.

#### **Conditions in contracts.**

Cited in *Travis v. Nederland L. Ins. Co.* 43 C. C. A. 656, 104 Fed. 488, holding no recovery on policy which had never taken effect through failure to accept proposal of insured; *Hartford F. Ins. Co. v. Wilson*, 187 U. S. 476, 47 L. ed. 265, 23 Sup. Ct. Rep. 189, holding operation of insurance policy may, by agent's oral agreement, be made to depend on company's acceptance of risk; *Key v. National L. Ins. Co.* 107 Iowa, 451, 78 N. W. 68, holding refusal by insurance company to loan on property insured, as condition precedent to application, authorized recovery of premium; *Shields v. Equitable Life Assur. Soc.* 121 Mich. 695, 80 N. W. 793, holding parol agreement between applicant and party advancing premium did not show conditional delivery; *Wilson v. Hartford F. Ins. Co.* 17 App. D. C. 25, holding insurance contract cannot be shown by verbal conditional delivery; *Blewitt v. Boorum*, 27 Jones & S. 329, 14 N. Y. Supp. 298, holding parol evidence of conditional delivery of contract under seal to manufacture patented article admissible; *Moore v. Farmers' Mut. Ins. Asso.* 107 Ga. 203, 33 S. E. 65, holding evidence admissible to show conditional delivery of policy.

Cited in footnote to *Hicks v. British America Assur. Co.* 48 L. R. A. 424, which holds rights of one whose property was destroyed after oral contract to insure it, but before policy issued, subject to provisions of standard policy prescribed by law.

Distinguished in *Westerfeld v. New York L. Ins. Co.* 129 Cal. 77, 61 Pac. 667, holding company not estopped to deny authority of agent to make an agreement as to conditional delivery.

2 L. R. A. 153, *FECHHEIMER v. BAUM*, 37 Fed. 167.

#### **Federal administration of equitable rights under state statutes.**

Cited in note (18 L. R. A. 267) on adoption by Federal courts of equitable remedies enlarged by state statutes.

#### **Fraud.**

Cited in 43 Fed. 719, decision on exceptions to master's report, holding agreement to prefer creditor not rendered fraudulent by failure to record;

Stein v. Hill, 100 Mo. App. 43, 71 S. W. 1107, holding evidence of purchaser's insolvency not conclusive as to fraudulent intent not to pay for goods.

Cited in notes (9 L. R. A. 609) on action for rescission of contract for fraud; (14 L. R. A. 265) on concealment of insolvency as fraud in obtaining credit.

2 L. R. A. 159, KEYSER'S APPEAL, 124 Pa. 80, 16 Atl. 577.

**Statute of limitations.**

Distinguished in Reber's Appeal, 125 Pa. 23, 17 Atl. 189, holding adjudication and allowance of claim against decedent's estate tolls statute of limitations.

2 L. R. A. 161, ALEXANDER v. NORTHWESTERN MASONIC AID ASSO. 126 Ill. 558, 18 N. E. 556.

**Who entitled to insurance payable to heirs or devisees.**

Cited in Lyons v. Yerex, 100 Mich. 217, 43 Am. St. Rep. 452, 58 N. W. 1112, holding widow of intestate entitled to share in proceeds of benefit certificate payable to heirs; People use of Brooks v. Petrie, 191 Ill. 508, 85 Am. St. Rep. 268, 61 N. E. 499, Affirming 94 Ill. App. 657, holding proceeds of beneficiary certificate payable to "legal heirs or devisees of holder" not estate assets.

Cited in notes (30 L. R. A. 596) on widow as "heir" within meaning of life insurance policies; (8 L. R. A. 114) on contract of mutual benefit association.

2 L. R. A. 164, JAMES v. STEERE, 16 R. I. 367, 16 Atl. 143.

**Illegal contracts and remedies on same.**

Cited in footnote to Och v. Missouri, K. & T. R. Co. 36 L. R. A. 442, which holds release of carrier by injured woman while dazed and nervous from recent shock, obtained by misrepresenting contents, which she did not read, voidable only, not void.

Cited in note (12 L. R. A. 122) on remedy of parties *in pari delicto*.

**Fiduciary relation between attorney and client.**

Cited in footnote to Elmore v. Johnson, 21 L. R. A. 366, which holds voidable, irrespective of fairness, contract between attorney and client pending litigation to give part of property involved as compensation for attorney's services.

2 L. R. A. 166, DEWIRE v. BOSTON & M. R. CO. 148 Mass. 343, 19 N. E. 523.

**Who are passengers.**

Cited in Jones v. Boston & M. R. Co. 163 Mass. 246, 39 N. E. 1019, holding one with ticket, endeavoring without knowledge of trainmen to board train where not customary to receive passengers, not passenger; Chattanooga R. & C. R. Co. v. Huggins, 89 Ga. 504, 15 S. E. 848, holding one in car switched, according to custom, to defendant's connecting line, a passenger, whether he has ticket or not; Chicago & E. I. R. Co. v. Jennings, 190 Ill. 498, 54 L. R. A. 835, 60 N. E. 818, Reversing 89 Ill. App. 349 (dissenting opinion), majority holding one with ticket, crossing railroad tracks on public highway to board train, not having reached platform, not passenger; Fitzgibbon v. Chicago & N. W. R. Co. 108 Iowa, 623, 79 N. W. 477 (dissenting opinion), majority holding one not an excursionist, knowingly boarding special excursion train, not presumed to have been passenger.

Cited in footnotes to Woolsey v. Chicago, B. & Q. R. Co. 25 L. R. A. 79, which holds person riding on freight locomotive without conductor's consent not a pas-

senger; *Atchison, T. & S. F. R. Co. v. Headland*, 20 L. R. A. 822, which holds presumption that person on train a passenger not applicable to caboose attached to freight train.

Cited in notes (7 L. R. A. 688) on who are passengers; (11 L. R. A. 483) on express company agents as passengers; (11 L. R. A. 486) on postal clerks as passengers; (24 L. R. A. 522) on when one who has started for train becomes passenger; (12 L. R. A. 340) on passengers; stipulation in contract of carriage.

**Riding on car platform as contributory negligence.**

Cited in *Kansas & A. V. R. Co. v. White*, 14 C. C. A. 484, 32 U. S. App. 192, 67 Fed. 483, holding one injured standing on car platform entitled to recover if such negligence did not contribute to injury; *Sickles v. Missouri, K. & T. R. Co.* 13 Tex. Civ. App. 436, 35 S. W. 493, holding passenger may pass from one car to another, assuming ordinary risks incident thereto; *Woods v. Southern P. Co.* 9 Utah, 153, 33 Pac. 628, holding whether act of one riding on car platform contributed to injury question for jury.

Cited in notes (34 L. R. A. 721) on assumption of incidental risk by passenger passing from one car to another; (24 L. R. A. 710) on liability of carrier for injuries to passenger riding on platform of crowded train; (11 L. R. A. 130) on contributory negligence of passenger, defeating recovery for injury; (22 L. R. A. 260) on right of passenger to seat.

2 L. R. A. 168, *CHEMICAL ELECTRIC LIGHT & P. CO. v. HOWARD*, 148 Mass. 352, 20 N. E. 92.

Second appeal, 150 Mass. 495, 23 N. E. 317.

**Note given for void patent.**

Cited in *Chemical Electric Light & P. Co. v. Howard*, 150 Mass. 497, 23 N. E. 317, holding note given for patent warranted "in full force and effect," but void in fact, not binding; *Clemshire v. Boone County Bank*, 53 Ark. 514, 14 S. W. 901, holding note given for interest in business valueless, because infringing on patent right, without consideration.

Cited in note (20 L. R. A. 605) on validity of notes given for invalid patents.

2 L. R. A. 172, *HURLEY v. HURLEY*, 148 Mass. 444, 19 N. E. 545.

**Partition, when maintainable.**

Cited in *Wilmot v. Lathrop*, 67 Vt. 680, 32 Atl. 861, holding cotenant not contributing to redeem from tax sale cannot maintain partition; *O'Brien v. Bailey*, 163 Mass. 326, 39 N. E. 1109, holding partition cannot be had of land in possession of mortgagee.

Cited in note (20 L. R. A. 627) on effect of adverse possession on right to partition.

**Rights of cotenants among themselves.**

Cited in *Barnes v. Boardman*, 152 Mass. 393, 9 L. R. A. 572, 25 N. E. 623, holding cotenant of reversion, acquiring life estate, cannot cut off others by foreclosure of mortgage without giving opportunity to contribute; *Kerse v. Miller*, 169 Mass. 47, 47 N. E. 504, holding life tenant of portion of mortgaged estate, redeeming the whole, entitled to possession until repaid amount advanced above his share; *Re Hagan*, 33 Pittsb. L. J. N. S. 51, holding presumption of payment of mortgage owned by one cotenant does not arise from lapse of time; *Mc*

*Pheeters v. Wright*, 124 Ind. 576, 9 L. R. A. 181, 24 N. E. 734, holding one cannot acquire title against cotenant at sale under encumbrance created by owner, through whom both claim; *Harris v. Lloyd*, 11 Mont. 401, 28 Am. St. Rep. 475, 28 Pac. 736, holding one cotenant under no obligation to disclose to others that upon sale he receives larger amount.

Cited in note (9 L. R. A. 740) on right of tenant in common, paying lien, to contribution among cotenants.

2 L. R. A. 173, *HARDMAN v. BRETT*, 37 Fed. 803.

**Right of common carrier to recover for injury to property in its possession.**

Cited in *Chicago v. Pennsylvania Co.* 57 C. C. A. 516, 119 Fed. 504, holding common carrier may maintain action for injury of cars of other companies temporarily in its possession.

2 L. R. A. 175, *ANDERSON v. APPLETON*, 112 N. Y. 104, 19 N. E. 427.

**Appealability of order.**

Cited in *Birge v. Berlin Iron Bridge Co.* 133 N. Y. 483, 31 N. E. 609, holding order vacating injunction because plaintiff not entitled to sue, reviewable; *Schneider v. Rochester*, 155 N. Y. 621, 50 N. E. 291, and *Kreizer v. Allaire*, 16 Misc. 7, 37 N. Y. Supp. 687, holding order which fails to state ground on which it was determined not appealable.

**Jurisdiction of equity to construe, establish, or invalidate wills.**

Cited in *Hemmje v. Meinen*, 20 N. Y. Supp. 621; *Whitney v. Whitney*, 63 Hun, 70, 18 N. Y. Supp. 3; *Bradhurst v. Field*, 32 N. Y. S. R. 432, 10 N. Y. Supp. 454, —holding power of equity to construe wills results from its jurisdiction over trusts; *Adams v. Becker*, 28 N. Y. S. R. 912, 8 N. Y. Supp. 261, holding action to construe will does not lie unless construction necessary; *Benner v. Benner*, 35 N. Y. S. R. 604, 12 N. Y. Supp. 474, holding action to construe will should be brought by all the executors; *Mellen v. Mellen*, 139 N. Y. 218, 34 N. E. 925, holding grantee of testator cannot sue to construe will; *Anderson v. Carr*, 65 Hun, 180, 19 N. Y. Supp. 992, holding equity without jurisdiction to establish will; *Nelson v. McDonald*, 61 Hun, 409, 16 N. Y. Supp. 273, holding action to correct mistake of decedent in signing wrong will not maintainable; *Delabarre v. McAlpin*, 71 App. Div. 593, 76 N. Y. Supp. 301, holding supreme court will not determine which of two wills should be probated; *Kalish v. Kalish*, 166 N. Y. 371, 59 N. E. 917, sustaining jurisdiction of suit to invalidate will involving trust; *Thomas v. Thomas*, 9 App. Div. 489, 41 N. Y. Supp. 276, and *Wallace v. Payne*, 14 App. Div. 600, 43 N. Y. Supp. 1119, holding heir at law may sue to set aside fraudulent will; *Cobb v. Hanford*, 88 Hun, 24, 34 N. Y. Supp. 511, sustaining jurisdiction of suit to enjoin probate of will made in violation of a promise; *Long v. Rodgers*, 79 Hun, 443, 29 N. Y. Supp. 981, holding next of kin cannot sue to invalidate probate after one year; *Higgins v. Union Trust Co.* 32 N. Y. S. R. 197, 10 N. Y. Supp. 389, holding heirs at law cannot sue to construe will for purpose of invalidating it; *Jones v. Richards*, 24 Misc. 627, 54 N. Y. Supp. 126, and *Kalish v. Kalish*, 45 App. Div. 530, 61 N. Y. Supp. 448, holding heir at law cannot sue to invalidate trust in will.

Cited in note (10 L. R. A. 766) on jurisdiction of suit for construction of will.

**Jurisdiction of equity over settlement of estates.**

Cited in *Weston v. Goodrich*, 86 Hun, 196, 33 N. Y. Supp. 382, holding equity has concurrent jurisdiction to settle estates; *Morse v. Smith*, 42 N. Y. S. R. 170, 17 N. Y. Supp. 386, holding action to compel delivery to and inventory of property by executor not maintainable; *Sanders v. Soutter*, 126 N. Y. 200, 27 N. E. 263, refusing to entertain action for executor's accounting; *Steinway v. Von Bernuth*, 59 App. Div. 269, 69 N. Y. Supp. 1146 (dissenting opinion), majority sustaining jurisdiction of executor's accounting.

Cited in note (3 L. R. A. 813) on jurisdiction of surrogate court as to accounting and distribution of estate.

**Repeal of statute.**

Cited in *Stack v. Brooklyn*, 150 N. Y. 345, 44 N. E. 1030; *Quinlan v. Welch*, 141 N. Y. 163, 36 N. E. 12; *Gabel v. Williams*, 39 Misc. 496, 80 N. Y. Supp. 489; *People ex rel. Ellett v. O'Grady*, 46 App. Div. 215, 61 N. Y. Supp. 577. —holding repeal by implication depends on legislative intent; *People ex rel. Fleming v. Dalton*, 24 Misc. 90, 53 N. Y. Supp. 291, holding general statute regarding tenure of office abrogates provisions of city charter; *Buffalo v. Neal*, 86 Hun, 83, 33 N. Y. Supp. 346, holding repugnant general act repeals prior local act; *Cromwell v. MacLean*, 123 N. Y. 485, 25 N. E. 932, holding prior statute repealed by subsequent act introducing new system; *Opinion of the Justices*, 66 N. H. 668, 33 Atl. 1076, holding prior act repealed by later act revising whole subject-matter; *Wallace v. Payne*, 9 App. Div. 35, 41 N. Y. Supp. 111, holding that Laws 1853, chap. 238, and Laws 1879, chap. 316, have been repealed; *Colby v. Colby*, 81 Hun, 223, 30 N. Y. Supp. 677, holding Laws 1879, chap. 316, repealed; *Casterton v. Vienna*, 17 App. Div. 109, note, 44 N. Y. Supp. 868 (dissenting opinion), majority holding special act not repealed by general statute.

2 L. R. A. 180, *PEOPLE ex rel. UNION INS. CO. v. NASH*, 111 N. Y. 310, 7 Am. St. Rep. 747, 18 N. E. 630.

**Effect of agreement to arbitrate.**

Cited in *New York, Lumber & W. Working Co. v. Schnieder*, 119 N. Y. 478, 24 N. E. 4, holding arbitrament binding; *Sartwell v. Sowles*, 72 Vt. 277, 82 Am. St. Rep. 943, 48 Atl. 11, holding submission to arbitration no bar to action after revocation; *New Jersey & P. Concentrating Works v. Ackermann*, 15 Misc. 609, 37 N. Y. Supp. 489, holding provision in employer's liability policy limiting right of action to one defendant unenforceable.

Cited in footnote to *Union Ins. Co. v. Central Trust Co.* 44 L. R. A. 227, which holds deposit to secure payment of award forfeited on revocation of arbitration.

Cited in notes (10 L. R. A. 560) on fire insurance; revocation of submission to arbitration; (11 L. R. A. 623) on arbitration and award.

2 L. R. A. 183, *KERNOCHAN v. MURRAY*, 111 N. Y. 306, 7 Am. St. Rep. 744, 18 N. E. 868.

**Effect on contract of death of contracting party.**

Cited in *Brown v. Cushman*, 173 Mass. 370, 53 N. E. 860, holding contract to manufacture, requiring personal supervision, terminated by death; *Chamberlain v. Dunlop*, 126 N. Y. 52, 22 Am. St. Rep. 807, 26 N. E. 966, holding contract in lease to rebuild binds executor; *Drummond v. Crane*, 159 Mass. 579, 23 L. R. A. 714, 38 Am. St. Rep. 460, 35 N. E. 90, holding obligation to take water for certain

time survived to administrator; *Kernochan v. Murray*, 53 Hun, 51, 5 N. Y. Supp. 869, holding guaranty not terminated by death of person to whom it ran; *Williams v. Williams*, 35 N. Y. S. R. 201, 12 N. Y. Supp. 601, sustaining action against administratrix of copartner upon agreement of dissolution; *Matteson v. Dent*, 176 U. S. 528, 44 L. ed. 574, 20 Sup. Ct. Rep. 419, holding allottees of deceased holder of bank stock liable to assessment for debts of insolvent corporation; *Wattengel v. Schultz*, 11 Misc. 168, 32 N. Y. Supp. 91, holding insurance policies were presumptively taken out by administratrix to execute covenant of deceased.

**Primary or secondary responsibility.**

Cited in *Wysong v. Meyer*, 58 App. Div. 426, 69 N. Y. Supp. 286, holding bond to procure discontinuance of foreclosure primary obligation; *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 645, 107 Fed. 788, holding railroads not discharged by change in contract with bridge company on ground that they were guarantors or sureties for its bonds; *De Remer v. Brown*, 165 N. Y. 419, 59 N. E. 129, holding agent contracting in own name personally bound.

Cited in footnote to *Staver & Walker v. Locke*, 17 L. R. A. 652, which holds payment of notes taken by agent for goods sold not covered by guaranty of full performance of agent's engagements.

Cited in notes (6 L. R. A. 383; 8 L. R. A. 381) on contract of guaranty.

2 L. R. A. 185, *WIGHTMAN v. CHICAGO & N. W. R. CO.* 73 Wis. 169, 9 Am. St. Rep. 778, 40 N. W. 689.

**Refusal to receive verdict.**

Cited in *Sherman v. Menominee River Lumber Co.* 77 Wis. 21, 45 N. W. 1079, holding court may decline to receive special verdict, and direct further consultation.

**Railroads, liability in respect to tickets.**

Cited in *Gulf, C. & S. F. R. Co. v. Rather*, 3 Tex. Civ. App. 78, 21 S. W. 951, holding, passenger entitled to stand on contract as made, although not contained in ticket through fault of agent; *Pennsylvania Co. v. Bray*, 125 Ind. 237, 25 N. E. 439; and *Northern P. R. Co. v. Pauson*, 30 L. R. A. 733, 17 C. C. A. 291, 44 U. S. App. 178, 70 Fed. 589, holding passenger's failure to have return coupon stamped does not deprive him of right to return passage, when he has done all he could to get it stamped; *Gulf, C. & S. F. R. Co. v. Wright*, 2 Tex. Civ. App. 469, 21 S. W. 399, holding railroad responsible for wrongful act of agent in unreasonably limiting time for return trip; *Missouri P. R. Co. v. Martino*, 2 Tex. Civ. App. 642, 18 S. W. 1066, holding right to transportation not lost by agent refusing to sign and stamp return ticket.

Cited in footnote to *Watson v. Louisville & N. R. Co.* 49 L. R. A. 454, which holds condition requiring return coupon of round-trip ticket to be stamped reasonable.

Cited in notes (12 L. R. A. 340) on effect of stipulation in contract of carriage; (15 L. R. A. 817) on right of railroad company to charge additional fare for neglect to procure ticket; (9 L. R. A. 688) on expulsion of passenger from train for want of ticket.

Distinguished in *Anderson v. Union Traction Co.* 7 Pa. Dist. R. 43, 4 Lack. Legal News, 10, holding street railway not responsible for error of conductor in issue of transfer ticket.



**Damages — For ejection of passenger.**

Cited in *Phettiplace v. Northern P. R. Co.* 84 Wis. 418, 20 L. R. A. 487, 54 N. W. 1092, holding verdict of \$300 for injury similar to that in principal case not excessive.

**— For injury to feelings.**

Cited in *Reinke v. Bentley*, 90 Wis. 459, 63 N. W. 1055, holding recovery for physical pain and suffering and mental suffering proper in action for personal injury.

Distinguished in *Summerfield v. Western U. Teleg. Co.* 87 Wis. 12, 41 Am. St. Rep. 17, 57 N. W. 973, holding mental anguish alone, from delay of telegram, not independent basis for compensatory damages.

2 L. R. A. 188, *CASS COUNTY v. CHICAGO, B. & Q. R. CO.* 25 Neb. 348, 41 N. W. 246.

**When property taxable.**

Followed without discussion in *Chicago, B. & Q. R. Co. v. School Dist. No. 1.* 25 Neb. 359, 41 N. W. 249.

Cited in *Chicago, B. & Q. R. Co. v. Nebraska City*, 53 Neb. 454, 73 N. W. 952, holding railroad bridge not within city limits cannot be taxed by city; *Cowen v. Aldridge*, 51 C. C. A. 676, 114 Fed. 50, holding railroad bridge a structure to be taxed locally.

Cited in footnote to *State v. Virginia & T. R. Co.* 35 L. R. A. 759, which holds earning capacity of railroad main consideration in determining taxable value; *Knoxville & O. R. Co. v. Harris*, 53 L. R. A. 921, which holds exemption from privilege tax not included in exemption from ad valorem tax; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 18 L. R. A. 729, which holds state tax on railroad track within state and proportionate part of its rolling stock not tax on interstate commerce.

Cited in note (29 L. R. A. 71) on jurisdiction as to taxation of bridge over river forming boundary of state or its divisions.

Overruled in *Chicago, B. & Q. R. Co. v. Richardson County*, 61 Neb. 525, 85 N. W. 532, holding railroad bridge part of its continuous line, taxable by state board only.

**Statute of limitations on note depending on bridge completion.**

Cited in *Garner v. Hall*, 122 Ala. 230, 25 So. 187, holding bridge not completed, so that statute of limitations ran against note depending upon completion of railroad.

**What included in roadbed of railroad.**

Cited in *Standard Ins. Co. v. Langston*, 60 Ark. 386, 30 S. W. 427, holding roadbed, in an accident insurance policy, does not include ends of ties of unusual length.

**Obstruction to navigation.**

Cited in note (59 L. R. A. 36) on right to obstruct or destroy rights of navigation.

2 L. R. A. 192, *MUHLMAN v. UNION P. R. CO.* 37 Fed. 189.

**Who are fellow servants.**

Cited in *Borgman v. Omaha & St. L. R. Co.* 41 Fed. 668, holding foreman in charge of, and having entire control of, all wrecking gangs, vice principal.

Cited in footnotes to *St. Louis, I. M. & S. R. Co. v. Rice*, 4 L. R. A. 173, which holds yard inspector and yard foreman fellow servants; *Fagundes v. Central Pacific R. Co.* 3 L. R. A. 824, which holds laborer removing snow from track fellow servant of track walker and conductor; *Elliot v. Chicago, M. & St. P. R. Co.* 3 L. R. A. 363, which holds section foreman and freight conductor fellow servants; *Louisville & N. R. Co. v. Martin*, 3 L. R. A. 282, which holds brakeman fellow servant of engineer; *Daniel v. Chesapeake & O. R. Co.* 16 L. R. A. 383, which holds conductor and brakeman on different trains not fellow servants; *Fisher v. Oregon Short Line & U. N. R. Co.* 16 L. R. A. 519, which holds section foreman and conductor not fellow servants; *Palmer v. Michigan C. R. Co.* 17 L. R. A. 637, which holds assistant road master not fellow servant of gang of men working under him; *Clarke v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants; *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, which holds conductor and engineer fellow servants of brakeman on other train.

Cited in notes (4 L. R. A. 795) on master and servant; fellow servants, who are; (7 L. R. A. 503) on master liable for acts of agent or representative; (51 L. R. A. 576) on limits of departmental control in vice principalship considered with reference to the superior rank of a negligent servant; (8 L. R. A. 818) on vice principals and agents; (6 L. R. A. 585) on employee not assuming risk of master's representative; (3 L. R. A. 560) on master not liable for negligence of fellow servant; (4 L. R. A. 852) on liability of master in case of contributing agencies.

2 L. R. A. 193, *Re PIFFARD*, 111 N. Y. 410, 18 N. E. 718.

**Power of appointment in will.**

Cited in *Condit v. De Hart*, 62 N. J. L. 81, 40 Atl. 776, holding will of son with power of appointment should be referred to in carrying out father's will.

2 L. R. A. 195, *RAILROAD COMRS. v. OREGON R. & NAV. CO.* 17 Or. 65, 19 Pac. 702.

**Governmental regulation of railroads.**

Cited in *State v. Rogers*, 22 Or. 357, 30 Pac. 74, holding indictment under railroad rate act quashed by repeal of act during pendency of prosecution.

Cited in footnote to *State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co.* 47 L. R. A. 569, which sustains railroad commissioner's authority to require building of depot.

2 L. R. A. 199, *PITTSBURG, C. & ST. L. R. CO. v. BOSWORTH*, 46 Ohio St. 81, 18 N. E. 533.

**Rights running with land.**

Cited in *Jones Fertilizing Co. v. Chicago, C. C. & St. L. R. Co.* 7 Ohio N. P. 251, holding right to crossing, in agreement with railroad, runs with land; *American Strawboard Co. v. Haldeman Paper Co.* 27 C. C. A. 640, 54 U. S. App. 416, 83 Fed. 624, holding restriction on use of leased land for a particular business attaches to and runs with leasehold.

Cited in footnotes to *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land agreement for party wall, expressly declared to run with land; *Mygatt v. Coe*, 11 L. R. A. 646, which holds covenants of warranty and quiet enjoyment by owner and husband do not run with land as against

husband; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds intention of parties controlling in determining whether covenant runs with land; *Brown v. Southern P. Co.* 47 L. R. A. 409, which holds covenant by grantors for railroad to build fences or not hold company for injury to stock personal only.

**Constructive notice from possession.**

Cited in footnotes to *Rock Island & P. R. Co. v. Dimick*, 19 L. R. A. 105, which holds open and exclusive possession of passageway through railroad embankment notice of rights to purchaser of railroad; *Brinser v. Anderson*, 6 L. R. A. 205, which holds purchaser required to inquire into rights of possessor, though he knows of lease to him.

Cited in note (8 L. R. A. 211) on title to land; constructive notice by possession.

2 L. R. A. 203, *WARREN v. BOARD OF REGISTRATION*, 72 Mich. 398, 40 N. W. 553.

**Effect of residence on elective franchise.**

Cited in *Beecher v. Detroit*, 114 Mich. 230, 72 N. W. 206, holding temporary abode not establishment or residence; *Powell v. Spackman*, 7 Idaho, 717, 54 L. R. A. 387, 65 Pac. 503 (dissenting opinion), majority holding inmate of soldiers' home gains no voting residence there.

Cited in notes (23 L. R. A. 216) on acquiring residence as a voter while attending school or public institution; (12 L. R. A. 364) on state citizenship.

Distinguished in *Wolcott v. Holcomb*, 97 Mich. 368, 23 L. R. A. 219, 56 N. W. 837, holding residence of elector not changed by presence and support in soldiers' home.

**— Schools.**

Cited in note (13 L. R. A. 162) on domicile as affecting common-school privileges.

**— Registration.**

Cited in notes (7 L. R. A. 99) on rights of voters to be registered for elections; (10 L. R. A. 226) on election law; registration.

**Impeachment of law by legislative journals.**

Cited in *Ritchie v. Richards*, 14 Utah, 353, 47 Pac. 670, holding enrolled bill duly signed, approved, and deposited unimpeachable.

**Usage and custom.**

Cited in note (13 L. R. A. 438) on custom and usage as law.

2 L. R. A. 206, *LORSCHER v. SUPREME LODGE, K. OF H.* 72 Mich. 316, 40 N. W. 545.

**Proof of death.**

Cited in *National Union v. Thomas*, 10 App. D. C. 289, holding beneficiary under no obligation to see that death report required by insurance association is made.

**Contract of insurance.**

Cited in *Wagner v. Supreme Lodge, K. & L. of H.* 128 Mich. 668, 87 N. W. 903, holding delivery of benefit certificate to subordinate lodge completes the contract.

Cited in footnotes to *McLendon v. Sovereign Camp of Woodmen*, 52 L. R. A. 444, which holds reasonable delay in delivering benefit certificate gives no right to recover on certificate delivered after death of insured; *Hicks v. British America Assur. Co.* 48 L. R. A. 424, which holds rights of one whose property destroyed after oral contract to insure it, but before policy issued, subject to provisions of standard policy prescribed by law.

Cited in notes (9 L. R. A. 189) on forfeiture of benefit certificate for nonpayment of assessment; (8 L. R. A. 114) on contract of mutual benefit association.

2 L. R. A. 212, *LOUISVILLE ASPHALT VARNISH CO. v. LORICK*, 29 S. C. 533, 8 S. E. 8.

**Written evidence of contract.**

Cited in *Atlantic Phosphate Co. v. Sullivan*, 34 S. C. 309, 13 S. E. 539, holding terms of a contract may be contained in several instruments of writing; *Freeland v. Ritz*, 154 Mass. 259, 12 L. R. A. 561, 26 Am. St. Rep. 244, 28 N. E. 226, holding parol evidence admissible to identify paper relating to contract.

**Sufficiency of memorandum under statute of frauds.**

Cited in *Melchers v. Springs*, 33 S. C. 282, 11 S. E. 788, holding private letter of agent to principal forwarding order not sufficient to bind principal.

Cited in footnotes to *Freeland v. Ritz*, 12 L. R. A. 561, which holds series of papers, only one of which signed, may constitute memorandum; *White v. Breen*, 32 L. R. A. 127, which authorizes reading different writings together as constituent parts of memorandum.

Cited in note (11 L. R. A. 143) on defective memorandum of contract.

2 L. R. A. 217, *LEROY & W. R. CO. v. ROSS*, 40 Kan. 598, 20 Pac. 197.

Followed without discussion in *Kansas City & S. W. R. Co. v. Baird*, 41 Kan. 71, 21 Pac. 227.

**Condemnation.**

Cited in footnote to *Jacksonville, T. & K. W. R. Co. v. Adams*, 14 L. R. A. 533, which authorizes condemnation of land irregularly entered upon.

**Full compensation.**

Cited in *Florence, E. D. & W. Valley R. Co. v. Shepherd*, 50 Kan. 440, 31 Pac. 1002; *Chicago, K. & W. R. Co. v. Woodward*, 47 Kan. 193, 27 Pac. 836; *Kansas C. R. Co. v. Jackson County*, 45 Kan. 719, 26 Pac. 394; *Chicago, K. & W. R. Co. v. Emery*, 51 Kan. 18, 32 Pac. 631; *Inter-State Consol. Rapid Transit R. Co. v. Simpson*, 45 Kan. 715, 26 Pac. 393,—holding owner's damages for right of way cannot be diminished by benefits.

Cited in footnotes to *Schroeder v. Joliet*, 52 L. R. A. 634, which authorizes consideration of benefit from improvement in assessing damages from cutting down street; *Beveridge v. Lewis*, 59 L. R. A. 581, which denies right to deduct benefits from damages in exercise of eminent domain by individual.

**Testimony as to value of, or injury to, land.**

Cited in *Ottawa, O. C. & C. G. R. Co. v. Fisher*, 42 Kan. 678, 22 Pac. 713, holding farmers in vicinity of farm, unacquainted with its market or productive value, incompetent to testify as to depreciation; *Kansas City & S. W. R. Co. v. Ehret*, 41 Kan. 26, 20 Pac. 538, holding farmers residing in vicinity of and acquainted with particular farm may give opinions as to its value; *Ottawa,*

*O. C. & C. G. R. Co. v. Adolph*, 41 Kan. 602, 21 Pac. 643, holding improper to give estimate of amount of damage to pasture and corrals injured, but not destroyed, by right of way for railroads.

Cited in note (3 L. R. A. 83) on evidence of value of land taken in condemnation proceedings.

**Damage from fire.**

Cited in *Kay v. Glade Creek & R. R. Co.* 47 W. Va. 475, 35 S. E. 973, holding danger, to affect damages, must be real and imminent.

**Measure of damages.**

Cited in *Chicago, K. & W. R. Co. v. Brunson*, 43 Kan. 374, 23 Pac. 495, holding erroneously received testimony as to amount of damage per acre harmless, being unobjected to as to competency; *Leavenworth, N. & S. R. Co. v. Herley*, 45 Kan. 536, 26 Pac. 23, discussing, but not deciding, whether witness can testify directly as to amount of damages sustained; *Chicago, K. & W. R. Co. v. Parsons*, 51 Kan. 413, 32 Pac. 1083, holding measure of damages difference in value of land before and after taking right of way; *Atchison, T. & S. F. R. Co. v. Wilkinson*, 55 Kan. 85, 39 Pac. 1043, holding witness may not state his opinion as to damages to be recovered.

Cited in footnotes to *Cameron v. Pittsburgh & L. E. R. Co.* 22 L. R. A. 443, which holds farm not divided for estimation of damages from construction of railroad by previous condemnation of strip for canal; *Becker v. Philadelphia & R. Terminal R. Co.* 35 L. R. A. 583, which holds diminution in profits and value of merchandise by removal of business from condemnation of land not element of damages.

Cited in note (11 L. R. A. 605) on market price as an element of damages in condemnation proceedings.

2 L. R. A. 223, *COM. ex rel. KEELY v. PERKINS*, 124 Pa. 36, 16 Atl. 525, 528.

**Contempt of court.**

Cited in *Re Garis*, 185 Pa. 501, 39 Atl. 1110, holding contempt proceedings rest upon the necessity of maintaining dignity and authority of courts; *Com. v. Green*, 185 Pa. 647, 40 Atl. 96, approving practice of granting special writ of certiorari ancillary to habeas corpus in proper cases; *Tolman v. Leonard*, 6 App. D. C. 235, holding jurisdictional facts need not be shown in commitment, if disclosed in record; *Jack v. Twyford*, 10 Pa. Super. Ct. 481, holding court's order to defendant to restore frame dwelling enforceable by attachment; *Leslie v. Mahoning R. Co.* 22 Pa. Co. Ct. 301, holding court of equity, having jurisdiction, can enforce by attachment its lawful orders; *Com. ex rel. Thornley v. Friends' Home for Children*, 22 Pa. Co. Ct. 62, 7 Pa. Dist. R. 653, holding it duty of one to whom writ of habeas corpus is issued to produce body of person detained if within his power.

Cited in note (8 L. R. A. 588) on contempt of court in presence of court.

**Protection of witness.**

Cited in note (11 L. R. A. 591) on protection of witness on examination.

2 L. R. A. 225, *RICH v. BRAY*, 37 Fed. 273.

**Equity jurisdiction of Federal courts.**

Cited in *Hale v. Tyler*, 115 Fed. 838, holding, in cases of fraud, state court administrator may be proceeded against in Federal court; *Hagge v. Kansas*

City S. R. Co. 104 Fed. 393, holding several landowners affected by same nuisance might unite in action, provided injury to each amounted to the \$2,000 limit.

Cited in note (18 L. R. A. 269) on adoption by Federal courts of remedies created by state statutes.

— **Disputed title to real estate.**

Cited in *Fuller v. Montague*, 8 C. C. A. 105, 16 U. S. App. 391, 59 Fed. 216; holding Federal chancery courts do not decide questions of controverted real-estate title; *American Asso. v. Eastern Kentucky Land Co.* 68 Fed. 722, holding Federal court of equity cannot entertain partition suit where plaintiff's title is denied; *Elder v. McClaskey*, 17 C. C. A. 265, 37 U. S. App. 199, 70 Fed. 543, holding actual notice of ouster not necessary to establish adverse possession; *Heinze v. Butte & B. Consol. Min. Co.* 61 C. C. A. 90, 126 Fed. 28, by Ross, J., dissenting, who holds Federal courts cannot try controverted questions of title in partition suit.

**When partition suit maintainable.**

Cited in note (20 L. R. A. 624, 628) on right of one out of possession to partition.

**Arranging parties.**

Cited in *Claiborne v. Waddell*, 50 Fed. 369, permitting withdrawal of action as to one defendant with interests identical to complainants' so as not to oust court of jurisdiction; *Cilley v. Patten*, 62 Fed. 500, holding court will arrange parties according to their actual interests on question of jurisdiction.

2 L. R. A. 229, *ERWIN v. UNITED STATES*, 37 Fed. 470.

**What fees allowable to United States officers.**

Cited in *Marvin v. United States*, 114 Fed. 227, holding charge for entering in minute book memorandum as to court business and adjournment proper. *Marvin v. United States*, 114 Fed. 227, holding charge for certified copy of mittimus allowable; *Marsh v. United States*, 88 Fed. 888, holding fees for entering orders approving accounts, and for certified copies, certificates, and seals, proper; *Puleston v. United States*, 85 Fed. 576, holding mileage in removing prisoners under order of court proper; *Van Hoorebeke v. United States*, 46 Fed. 459, holding presentation of accounts of district attorneys, etc., not condition precedent to action; *Taylor v. United States*, 45 Fed. 534, holding fees for certificates and seals to copies of orders allowable; *Davis v. United States*, 45 Fed. 163, holding fees disallowed by treasury proper; *Marvin v. United States*, 44 Fed. 407, stating amount of clerk's fees chargeable upon orders to pay accounts of officers, for administering oaths, and filing vouchers; *Goodrich v. United States*, 47 Fed. 268, holding charge for services of deputy clerk as jury commissioner proper; *United States v. King*, 147 U. S. 683, 37 L. ed. 330, 13 Sup. Ct. Rep. 439, holding charge for making separate reports of mileage fees of jurors and witnesses improper; *United States v. Harmon*, 147 U. S. 274, 37 L. ed. 167, 13 Sup. Ct. Rep. 327, Affirming 43 Fed. 563, holding circuit court has jurisdiction over claims disallowed by comptroller of treasury; *Goodrich v. United States*, 42 Fed. 395, holding costs of attachment proceedings chargeable to United States; *Goodrich v. United States*, 42 Fed. 394, holding clerk's fees for entering orders, etc., chargeable to United States; *Jones v. United States*, 39 Fed. 414, holding clerk of district court entitled to fees; *United States v. Warren*, 12 Okla. 300, 71 Pac. 685, holding clerk of territorial district court entitled to

statutory compensation for each day court was actually in session, whether business was transacted or not.

**Common-law procedure in United States courts.**

Cited in *Howard v. United States*, 75 Fed. 991, 34 L. R. A. 514, holding United States courts governed by rules of common law in imposing cumulative sentences; *Withaup v. United States*, 62 C. C. A. 328, 127 Fed. 534, raising, without determining question, whether, in absence of Federal statute or established rules of evidence in state when admitted, common-law rules of evidence would govern United States courts.

2 L. R. A. 242, *FLOYD v. PERRIN*, 30 S. C. 1, 8 S. E. 14.

**Township bonds.**

Cited in *Hicks v. Cleveland*, 45 C. C. A. 435, 106 Fed. 465, holding mandamus will lie to compel levy of tax to pay judgment recovered by holder of township bonds; *Massachusetts & S. Const. Co. v. Cherokee Twp.* 42 Fed. 752, holding bonds of township for railroad construction, held by trustee, should be delivered to owners; *Massachusetts & S. Const. Co. v. Cane Creek Twp.* 45 Fed. 336, holding bonds for railroad construction cannot be issued to an amount exceeding constitutional limit; *Granniss v. Cherokee Twp.* 47 Fed. 428, holding coupons on township bonds issued for construction of railroad prior to completion, invalid, and all subsequent thereto valid; *Finance Co. v. Charleston, C. & C. R. Co.* 52 Fed. 679, holding lawyers cannot recover for gratuitous services in obtaining legislation validating township bonds; *Jack v. Williams*, 113 Fed. 825, holding purchaser of railroad constructed on township bonds, whose franchise had been revoked by legislation, might remove rails; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 30 S. C. 583, 3 L. R. A. 777, 9 S. E. 661, holding mandamus will lie to compel county officer to indorse certificate of construction engineer authorizing issue of township bonds; *Holstein v. Edgefield County*, 64 S. C. 382, 42 S. E. 180, denying injunction against payment of railroad-aid bonds, adjudged legal by Federal court, contrary to determination of state courts.

Limited in *Darlington v. Atlantic Trust Co.* 16 C. C. A. 33, 25 U. S. App. 354, 68 Fed. 855, holding town bonds issued in construction of railway valid; *State ex rel. Dickenson v. Neely*, 30 S. C. 603, 3 L. R. A. 678, 9 S. E. 664, holding legislature may levy tax to aid in construction of railroad upon assent of territory to be taxed.

Distinguished in *Allen v. Adams*, 66 S. C. 356, 44 S. E. 938, holding incorporated town may issue bonds for school building.

Disapproved in *Pickens Twp. v. Post*, 41 C. C. A. 3, 99 Fed. 661, holding owner of township bonds a bona fide holder.

Overruled in *Folsom v. Township Ninety Six*, 159 U. S. 622, 40 L. ed. 282, 16 Sup. Ct. Rep. 174, holding township bonds issued in construction of railroad valid.

**Grant of corporate powers.**

Cited in *Folsom v. Township Ninety Six*, 159 U. S. 628, 40 L. ed. 284, 16 Sup. Ct. Rep. 174, holding legislature might grant corporate powers to cities, counties, towns, and townships; *Congaree Constr. Co. v. Columbia Twp.* 49 S. C. 537, 27 S. E. 570, holding statute authorizing townships to subscribe to stock of railroads, and making them corporations for that purpose, invalid; *White v. Rock*



Hill, 34 S. C. 245, 13 S. E. 416, holding license tax cannot be collected from one not shown to intend to engage in business for shorter period than one year.

Cited in footnote to *Dell Rapids v. Irving*, 29 L. R. A. 861, which holds township organized under state law not a "municipal corporation."

**Title of act.**

Cited in note (2 L. R. A. 789) on title of statute must fairly suggest subjects dealt with in the acts.

2 L. R. A. 252, *PALMER v. PENNSYLVANIA CO.* 111 N. Y. 488, 18 N. E. 859.

**Degree of care required to prevent injury from accident.**

Cited in *Palmer v. Delaware & H. Canal Co.* 120 N. Y. 177, 17 Am. St. Rep. 629, 24 N. E. 302, holding carrier must use utmost care and diligence to prevent defects in operative machinery, appliances, and apparatus; *Gulf, C. & S. F. R. Co. v. Shields*, 9 Tex. Civ. App. 656, 28 S. W. 709, and *Jensen v. Hamburg-American Packet Co.* 23 App. Div. 167, 48 N. Y. Supp. 630, holding rule as to highest care applies only to appliances and machinery; *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 111, 64 S. W. 202, holding rule as to highest care applies to operative machinery and appliances, roadbed, and tracks; *Kelly v. Manhattan R. Co.* 112 N. Y. 451, 3 L. R. A. 76, 20 N. E. 383, holding less degree of care required as to approaches to cars than in regard to roadbed, machinery, or car construction; *Conroy v. Chicago, St. P. M. & O. R. Co.* 96 Wis. 256, 38 L. R. A. 423, 70 N. W. 486, holding carrier not bound to use highest degree of care to prevent passenger awaiting train from exposure to danger; *Buck v. Manhattan R. Co.* 15 Daly, 552, 10 N. Y. Supp. 107, holding carrier only bound to use reasonable care to prevent injury to passenger getting on or off vehicles; *McKeon v. Chicago, M. & St. P. R. Co.* 94 Wis. 485, 35 L. R. A. 257, 59 Am. St. Rep. 909, 69 N. W. 175, holding wrongful instruction as to degree of care required of carrier harmless, when no care was shown; *Dochtermann v. Brooklyn Heights R. Co.* 32 App. Div. 21, 52 N. Y. Supp. 1051 (dissenting opinion), majority holding question for jury whether car was negligently started before passenger had taken seat.

Distinguished in *Cobb v. Lindell R. Co.* 149 Mo. 151, 50 S. W. 310, holding highest degree of care applies to service, as well as construction and equipment.

**— Approaches, platforms, car steps, etc.**

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Aldridge*, 27 Ind. App. 500, 61 N. E. 741, holding carrier not responsible for injury from snow on car steps, without reasonable opportunity to remove; *Gilman v. Boston & M. R. Co.* 168 Mass. 455, 47 N. E. 193, upholding finding of jury that carrier was negligent in not properly clearing car steps of ice and snow; *Proud v. Philadelphia & R. Co.* 64 N. J. L. 707, 50 L. R. A. 470, 46 Atl. 710, holding carrier not bound to know at each moment the condition of every part of the train.

Cited in footnote to *Proud v. Philadelphia & R. R. Co.* 50 L. R. A. 468, which denies liability for injury by slipping on filth on car step in nighttime, within half hour after car inspected.

Cited in note (3 L. R. A. 74) on duty of railroads, as carriers, to furnish safe approaches, platforms, etc.

**— Street railway companies.**

Cited in *Stierle v. Union R. Co.* 156 N. Y. 73, 50 N. E. 419, holding street car company not bound to exercise highest degree of care and skill in switching; *Leyh v. Newburgh Electric R. Co.* 41 App. Div. 220, 58 N. Y. Supp. 479, holding

electric railway company not bound to use highest care in respect to curtain rods.

Distinguished in *Stierle v. Union R. Co.* 13 Misc. 134, 34 N. Y. Supp. 185, holding rule as to highest degree of care and skill inapplicable to operation of street horse cars.

— **Steamship companies.**

Cited in *Bruswitz v. Netherlands American Steam Nav. Co.* 64 Hun, 266, 19 N. Y. Supp. 75, holding steamship company not bound to exercise highest care to prevent passenger from tripping on floor sockets in rolling sea.

— **Landlord and tenant.**

Cited in *Harkin v. Crumby*, 20 Misc. 570, 46 N. Y. Supp. 453, holding apartment owner only required to remove ice from courtyard within reasonable time.

— **Act of God as defense.**

Cited in note (11 L. R. A. 616) on act of God as defense for loss by carrier.

**Carrier's liability as to passenger riding on platform.**

Cited in *Cincinnati, L. & A. Electric Street R. Co. v. Lohe*, 68 Ohio St. 111, 67 N. E. 161, holding passenger injured while voluntarily riding on platform of inter-urban electric car, cannot recover damages.

**Contributory negligence.**

Cited in *Hanrahan v. Manhattan R. Co.* 53 Hun, 424, 6 N. Y. Supp. 395, holding passenger guilty of contributory negligence in stumbling on station platform known to her to have been higher than car platform.

2 L. R. A. 255, *PEOPLE v. O'BRIEN*, 111 N. Y. 1, 7 Am. St. Rep. 684, 18 N. E. 692.

**Nature of right created by corporate franchise — Railroads.**

Cited in *Ingersoll v. Nassau Electric R. Co.* 157 N. Y. 463, 43 L. R. A. 239, 52 N. E. 545; *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 591, 44 N. Y. Supp. 825; *Pape v. New York & H. R. Co.* 74 App. Div. 189, 77 N. Y. Supp. 725 (concurring opinion); *Roddy v. Brooklyn City & N. R. Co.* 32 App. Div. 314, 52 N. Y. Supp. 1025,—holding franchise to construct and operate street railway is property; *Herzog v. New York Elev. R. Co.* 37 N. Y. S. R. 569, 14 N. Y. Supp. 296, 59 N. Y. S. R. 343, holding grant of right to use streets for elevated railway gives grantee estate in street; *Southern Boulevard R. Co. v. North New York City Traction Co.* 16 Misc. 271, 39 N. Y. Supp. 266, holding railway franchise is in nature of easement in public highway; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 182, 5 L. R. A. 552, 22 N. E. 381, holding corporate rights and means of exercising them constitute single body, consisting of property, corporeal and incorporeal; *Africa v. Knoxville*, 70 Fed. 734, 737, and *Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co.* 101 Fed. 350, holding privileges in street-granted street railway company constitute contract, which cannot be impaired; *Mason v. Ohio River R. Co.* 51 W. Va. 187, 41 S. E. 418, holding municipal grant, accepted by railroad, of right to use street, a binding contract; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 673, 12 C. C. A. 370, 22 U. S. App. 570, 64 Fed. 634, Reversing 56 Fed. 883, holding street railway company capable of taking franchise for term beyond corporate life is not restricted by charter; *Parker v. Elmira, C. & N. R. Co.* 165 N. Y. 280, 59 N. E. 81, holding right of railroad, under statute, to charge fare at rate of 4 cents per mile, property entitled to protection.

Cited in footnote to *Belleville v. Citizens' Horse R. Co.* 26 L. R. A. 681, which holds consent to use streets for tracks of railway company is mere license.

Cited in notes (5 L. R. A. 371; 8 L. R. A. 453) on right of railroad to construct and operate line on street; (4 L. R. A. 624) on use of public streets for horse railroads; (8 L. R. A. 539) on electric railways in city streets; (9 L. R. A. 101) on use of streets in municipalities; (50 L. R. A. 143) on privilege of using streets as a contract, within constitutional provision against impairing obligation of contracts.

— **Water companies.**

Cited in *Re Long Island Water Supply Co.* 30 Abb. N. C. 52, 24 N. Y. Supp. 813, holding company organized under general statute exists by virtue of contract with town, and has exclusive franchise for full term of charter; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 167, 46 L. R. A. 691, 55 N. E. 562, holding reserved right to grant franchise to another corporation not authority for invasion of that first granted; *Re Water Comrs.* 71 App. Div. 552, 554, 76 N. Y. Supp. 11, holding franchise includes rights to collect and store water, and to convey same to consumers for compensation.

Cited in note (9 L. R. A. 196) on franchises of water companies.

Distinguished in *Re Brooklyn*, 143 N. Y. 616, 26 L. R. A. 277, 38 N. E. 983, affirming 73 Hun. 506, 26 N. Y. Supp. 198, holding grant of franchise, not exclusive in terms, does not preclude similar franchise to another company.

— **Gas companies.**

Cited in *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 11 App. Div. 176, 42 N. Y. Supp. 1071, holding franchise to lay mains in streets is property, and not affected by change in form of government from town to village; *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 532, 47 N. E. 787, holding franchise cannot be destroyed by village arbitrarily refusing to permit company to place conductors under streets.

— **Telegraph companies and other corporations.**

Cited in *Western U. Teleg. Co. v. Syracuse*, 24 Misc. 342, 53 N. Y. Supp. 690, holding franchise for construction of subway by telegraph company is property, which cannot be taken away or impaired by municipality; *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co.* 135 N. Y. 408, 17 L. R. A. 679, 31 Am. St. Rep. 838, 32 N. E. 148, holding telephone company has no easement in streets used by it, but franchise is property while it continues; *Andrus v. National Sugar Ref. Co.* 72 App. Div. 554, 76 N. Y. Supp. 530, holding franchise to erect docks is property capable of conveyance.

**Elements necessary to complete corporate franchise.**

Cited in *Re Union Elev. R. Co.* 112 N. Y. 74, 2 L. R. A. 362, 19 N. E. 664; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 520, 28 N. E. 525; *White v. Manhattan R. Co.* 139 N. Y. 26, 34 N. E. 887; *Detroit Citizens' Street R. Co. v. Detroit*, 64 Fed. 645,—holding municipal consent to construct street railway is muniment of title to enjoyment of rights acquired thereunder; *Andrews v. National Foundry & Pipe Works*, 10 C. C. A. 67, 18 U. S. App. 458, 61 Fed. 788, holding corporation organized to construct and operate waterworks acquires no complete franchise without grant from municipality; *Underground R. Co. v. New York*, 116 Fed. 957, holding street railroad company filing map of proposed line, failing to obtain city's consent, has no contract rights to be impaired by subsequent legislation; *People v. Adirondack R. Co.* 39 App. Div. 52, 55, 56, 56 N. Y.

Supp. 869 (dissenting opinion), majority holding railroad filing map and profile of proposed route, and giving requisite notice to answer, acquires right in route as against subsequent purchase by state.

**Franchises limited as to time.**

Cited in *Citizens' Street R. Co. v. City R. Co.* 64 Fed. 650, holding limitation of thirty years in city ordinance consenting to use of streets for operation of railway invalid.

**Rights and obligations incident to corporate franchises in general.**

Cited in *Opinion of the Justices*, 66 N. H. 630, 33 Atl. 1076, holding rights of corporate property under Constitution same as those of individuals; *New York Cement Co. v. Consolidated Rosendale Cement Co.* 38 Misc. 523, 77 N. Y. Supp. 1093, holding franchise of corporation and its property are inseparable, and grantee assumes obligations attaching to property; *Weatherly v. Capital City Water Co.* 115 Ala. 179, 22 So. 140, holding contract to furnish water runs with franchise, and is obligatory on assignee of recipient of grant; *Re Water Comrs.* 71 App. Div. 550, 76 N. Y. Supp. 11, holding reservation of right to purchase, in consent of municipal corporation to use of streets by water company, not lacking in mutuality; *Boyer v. Little Falls*, 5 App. Div. 7, 38 N. Y. Supp. 1114, holding purchaser of stock of business corporation may become substantial owner of its property.

Cited in footnotes to *Theobald v. Louisville, N. O. & T. R. Co.* 4 L. R. A. 735, which holds steam railroad cannot be operated in street without condemnation, or consent of abutting owner; *Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488, which holds that grant of right to operate railroad in street gives no authority to erect and maintain water tank therein.

**Regulation of use of franchises.**

Cited in *Re Seaboard Teleg. & Telep. Co.* 68 App. Div. 285, 74 N. Y. Supp. 15, holding city cannot destroy franchise of telegraph company by refusing permit to repair wires.

Distinguished in *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 367, 20 L. R. A. 129, 26 Atl. 510, holding street railway franchise for use of streets for double track may be restricted to single track.

**Leases and other contracts between railroads.**

Cited in *Tate v. Neary*, 52 App. Div. 84, 65 N. Y. Supp. 40, holding lease by corporation extending beyond term of its existence not invalid; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 214, 25 N. E. 332, holding agreement transferring railroad, and all rights, powers, and privileges appurtenant thereto, conveys leasehold carved out of fee; *Beveridge v. New York Elev. R. Co.* 112 N. Y. 21, 2 L. R. A. 652, 19 N. E. 489, and *Roddy v. Brooklyn Heights R. Co.* 23 Misc. 376, 52 N. Y. Supp. 885, holding street railway incorporated before 1874 entitled to contract with another railroad for use of respective roads; *Barnett v. Brooklyn Heights R. Co.* 53 App. Div. 441, 65 N. Y. Supp. 1068, and *Ingersoll v. Nassau Electric R. Co.* 157 N. Y. 459, 43 L. R. A. 239, 52 N. E. 545, holding *Laws 1839*, chap. 218, permitting contracts between railroads for use of respective roads, in force, and authority for traffic agreements and leases by both steam and street railways; *Roddy v. Brooklyn Heights R. Co.* 23 Misc. 377, 52 N. Y. Supp. 885, holding *Laws 1839*, chap. 218, not repealed by *Laws 1884*, chap. 252, prohibiting traffic agreements between parallel lines.

Cited in note (45 L. R. A. 273) on restrictions on consolidation of parallel or competing railroads.

Distinguished in *Ingersoll v. Nassau Electric R. Co.* 157 N. Y. 477, 43 L. R. A. 239, 52 N. E. 545 (dissenting opinion), majority holding street railway may operate cars on track of another company under contract, without consent of abutting property owners.

**Crossing of one railroad by another.**

Cited in *People's R. Co. v. Syracuse, B. & N. Y. R. Co.* 22 Abb. N. C. 438, 6 N. Y. Supp. 326, holding street railroad cannot construct road across track of steam railway until compensation and manner of crossing determined.

**Revocation or repeal of charter or franchise.**

Cited in *West Jersey Traction Co. v. Camden Horse R. Co.* 52 N. J. Eq. 482, 29 Atl. 333, holding legislature may, by repeal of charter, resume franchise of street railway, either in whole or in part; *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co.* 135 N. Y. 408, 17 L. R. A. 679, 31 Am. St. Rep. 838, 32 N. E. 148, holding legislative grant to telephone company to occupy streets is revocable at pleasure; *Barnes v. Arnold*, 23 Misc. 205, 51 N. Y. Supp. 1109, holding legislature may modify or repeal charter of bank incorporated by filing certificate under general law; *Ingersoll v. Nassau Electric R. Co.* 157 N. Y. 463, 43 L. R. A. 239, 52 N. E. 545; *Sandham v. Nye*, 9 Misc. 546, 30 N. Y. Supp. 552; *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 591, 44 N. Y. Supp. 825; *Roddy v. Brooklyn City & N. R. Co.* 32 App. Div. 314, 52 N. Y. Supp. 1025; *Pape v. New York & H. R. Co.* 74 App. Div. 189, 77 N. Y. Supp. 725; *Africa v. Knoxville*, 70 Fed. 734; *People v. Phyfe*, 48 N. Y. S. R. 350, 20 N. Y. Supp. 461, — holding franchise of railroad company is irrepealable and vested property; *Avoca v. Pittston, J. & A. Street R. Co.* 7 Kulp, 476, holding city cannot revoke street-railway franchise after acceptance and exercise of privileges granted; *Herzog v. New York Elev. R. Co.* 37 N. Y. S. R. 568, 14 N. Y. Supp. 296, Affirmed in 59 N. Y. S. R. 343, 27 N. Y. Supp. 1034, holding municipal consent to construction of elevated railway vests irrevocably in railroad right to use street for such purpose.

Cited in footnotes to *Milwaukee Electric R. & Light Co. v. Milwaukee*, 36 L. R. A. 45, which denies city's right to prevent relaying of street railway tracks by company whose franchise not declared forfeited; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 667, which holds express power to grant irrevocable consent to use street for street railway given city by statute.

Cited in notes (9 L. R. A. 37) on forfeiture of corporate franchises; (8 L. R. A. 498) on forfeiture and dissolution for misuser of franchise.

**Reservation of power to amend or repeal charter or franchise.**

Cited in *Hudson River Teleph. Co. v. Watervliet Turnp. & R. Co.* 135 N. Y. 408, 17 L. R. A. 679, 31 Am. St. Rep. 838, 32 N. E. 148, holding franchise of telephone company revocable at will of legislature; *Rochester & C. Turnp. Road Co. v. Joel*, 41 App. Div. 49, 58 N. Y. Supp. 346, holding statute depriving turnpike company of right to charge tolls previously authorized unconstitutional, although power of repeal reserved; *Citizens' Street R. Co. v. City R. Co.* 64 Fed. 651, holding, when charter of corporation repealed under power, provision must be made for disposition of property without confiscation.

**Effect of dissolution of corporation, or revocation of charter.**

Cited in *Sandham v. Nye*, 9 Misc. 546, 30 N. Y. Supp. 552, holding franchise

of street railway attaches to tracks, and not to right of corporation to exist; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 395, 46 L. ed. 610, 22 Sup. Ct. Rep. 410, holding corporation capable of taking extension of franchise beyond limit of corporate life; *Brown v. Schleier*, 55 C. C. A. 478, 118 Fed. 984, holding lease to corporation not invalid because for term outlasting lessee's corporate life; *Nelson v. Hubbard*, 96 Ala. 248, 17 L. R. A. 379, 11 So. 428, holding statute providing for dissolution of corporation, and administration of assets through trustee, does not impair obligation of contract; *Opinion of the Justices*, 66 N. H. 640, 33 Atl. 1076, holding property, on dissolution of corporation, held by stockholders as tenants in common; *People ex rel. New York Underground R. Co. v. Newton*, 26 Jones & S. 463, 11 N. Y. Supp. 782, holding only rights of third persons vested in contracts with corporation within rule that legislature cannot destroy by directing dissolution; *Berwind-White Coal Min. Co. v. Ewart*, 11 Misc. 494, 32 N. Y. Supp. 716, holding legislature may repeal or amend laws pertaining to business corporations organized under act 1875; *Dow v. Northern R. Co.* 67 N. H. 37, 36 Atl. 510, holding corporate property cannot be diverted from equitable owners by escheat or reverter upon repeal of charter; *New York v. Twenty-third Street R. Co.* 113 N. Y. 317, 21 N. E. 60, holding, under right to repeal charter, legislature cannot deprive corporation of property, or annul contracts; *Woodward v. Central Vermont R. Co.* 180 Mass. 604, 62 N. E. 1051, holding reservation of right to amend charter does not authorize requirement that company pay debts of corporation whose property it acquires.

Cited in note (9 L. R. A. 34) on dissolution of corporations.

#### **Taxation of corporate franchises.**

Cited in *People ex rel. Coney Island & B. R. Co. v. Neff*, 15 App. Div. 587, 44 N. Y. Supp. 810, holding, notwithstanding franchise of street railway is property, it is not subject to taxation.

Cited in note (57 L. R. A. 36, 37, 38) on taxation of corporate franchises.

#### **Taking property without compensation.**

Cited in *West Jersey Traction Co. v. Camden Horse R. Co.* 52 N. J. Eq. 482, 29 Atl. 333, and *Brooklyn Elev. R. Co. v. Brooklyn*, 2 App. Div. 99, 37 N. Y. Supp. 560, holding franchise of street railway cannot be abrogated without compensation; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 690, 43 L. ed. 861, 19 Sup. Ct. Rep. 565, holding state cannot take away or destroy property, or annul contracts of railroad with third persons; *Manhattan R. Co. v. New York*, 89 Hun, 432, 35 N. Y. Supp. 505, holding city cannot compel alteration in elevated railway station, to permit crossing of viaduct, without compensating railway for expense.

#### **Statutes impairing obligation of contract.**

Cited in *People ex rel. Reynolds v. Buffalo*, 140 N. Y. 307, 37 Am. St. Rep. 563, 35 N. E. 485, holding property right acquired by statute cannot be devested by repeal; *Re Long Island Water Supply Co.* 30 Abb. N. C. 52, 24 N. Y. Supp. 815, holding attempt to avoid corporate franchise by legislation impairs force and effect of contract; *People ex rel. Reynolds v. Buffalo*, 48 N. Y. S. R. 635, holding award under act for relief of relator not affected by subsequent repeal of act; *People ex rel. Long Island v. Dohling*, 6 App. Div. 90, 39 N. Y. Supp. 765, holding right under act authorizing religious corporation to acquire and hold lands exempt from taxation cannot be impaired by subsequent legislation repealing exemption; *Roddy v. Brooklyn City & N. R. Co.* 32 App. Div. 313, 52 N. Y. Supp. 1025,

holding right of railroad to lease tracks cannot be impaired in hands of lessee, either by legislation or change in Constitution, except under right of eminent domain.

Cited in footnotes to *International Bldg. & L. Asso. v. Hardy*, 24 L. R. A. 284, which denies legislative power to change remedy for enforcing trust deed; *Kirkman v. Bird*, 58 L. R. A. 670, which sustains, as to prior obligations, statute exempting wages for sixty days preceding levy.

Distinguished in *People ex rel. Schurz v. Cook*, 148 U. S. 410, 37 L. ed. 503, 13 Sup. Ct. Rep. 645, holding statute imposing tax on corporation organized to purchase property pursuant to authority previously conferred by legislature violates no contract.

#### **Retroactive operation of statutes.**

Cited in *Geneva & W. R. Co. v. New York C. & H. R. R. Co.* 163 N. Y. 232, 57 N. E. 498, holding procedure by which street railway may acquire right to cross steam railroad not affected by statute enacted after commencement of proceedings; *Walker v. Walker*, 155 N. Y. 82, 49 N. E. 663, holding statute authorizing change in decree of divorce as to alimony, after final judgment, not retroactive; *Re Delaware & H. Canal Co.* 129 N. Y. 112, 29 N. E. 237, holding statute providing fraudulent or defective assessment for taxation may be vacated or reduced by county judge, applicable to future assessments only; *Mahoney v. Bernhardt*, 27 Misc. 345, 58 N. Y. Supp. 748, holding statute requiring action to enforce individual liability of stockholders of dissolved bank to be brought by permanent receiver not applicable to action previously begun by creditors; *Barnes v. Arnold*, 23 Misc. 208, 51 N. Y. Supp. 1109, holding banking law, 1892, making bank stockholders individually liable for debts of corporation, not applicable to debts previously contracted.

Cited in footnote to *Jones v. German Ins. Co.* 46 L. R. A. 860, which sustains statute shortening time of insurance company's immunity from suit without extending period of limitations.

Distinguished in *Re Brooklyn*, 73 Hun, 506, 26 N. Y. Supp. 198, holding franchise of water company not increased by annexation act, requiring purchase of property before annexing city can extend waterworks into annexed territory.

#### **Due process of law.**

Cited in *Re Muehlfeld*, 16 App. Div. 403, 45 N. Y. Supp. 16, holding assignee of corporation not required to deliver property to receiver appointed in proceeding to which he was not party; *Brooks v. Tayntor*, 17 Misc. 539, 40 N. Y. Supp. 445, holding statute authorizing claimant of unpaid purchase money for monument to remove and sell same at auction, without legal process or hearing, unconstitutional; *People ex rel. Nisbet v. Amsterdam*, 90 Hun, 495, 36 N. Y. Supp. 59, holding investigation of claim against city by committee designated by law, without affording claimant opportunity to participate, not due process of law; *Buffalo v. Chadeayne*, 27 N. Y. S. R. 63, 7 N. Y. Supp. 501, Affirmed 134 N. Y. 165, 31 N. E. 443, holding rescission, after work commenced, and without notice, of permit to build frame houses within fire limit, is taking property without due process of law.

Cited in footnote to *Carleton v. Rugg*, 5 L. R. A. 193, which holds statute authorizing injunction against liquor nuisance does not unlawfully deprive of property or privileges.

Cited in notes (5 L. R. A. 359; 11 L. R. A. 224; 13 L. R. A. 68) on due process of law.



**Appointment of receiver.**

Cited in note (6 L. R. A. 792) on appointment of receivers in general.

**Powers of municipal corporations.**

Cited in *Mt. Hope Cemetery v. Boston*, 158 Mass. 512, 35 Am. St. Rep. 515. 33 N. E. 695, holding cities may have private ownership of property which cannot be wholly controlled by state government.

Distinguished in *New Orleans, City & Lake R. Co. v. New Orleans*, 44 La. Ann. 733, 11 So. 78, holding city without power to make exclusive grant of right to use streets for railway, unless expressly conferred by legislature; *Detroit v. Detroit City R. Co.* 56 Fed. 888, holding city council cannot grant vested right to build and operate street railway.

2 L. R. A. 270, *POWELL v. OREGONIAN R. CO.* 13 Sawy. 535.

**Stockholders' liability for corporate acts.**

Cited in *Kelly v. Clark*, 21 Mont. 343, 42 L. R. A. 635, 69 Am. St. Rep. 668. 53 Pac. 959, holding stockholders liable for tortious acts of company after judgment against it, coupled with insolvency.

Cited in footnotes to *Rider v. Fritchey*, 15 L. R. A. 513, which holds stockholder assigning to insolvent person not relieved from liability; *Powell v. Oregonian R. Co.* 3 L. R. A. 201, which holds judgment against corporation conclusive against stockholder.

2 L. R. A. 273, *FARMERS DEPOSIT NAT. BANK v. PENN BANK*, 123 Pa. 283, 16 Atl. 761.

**Set-off to claims of bank.**

Cited in *Salladin v. Mitchell*, 42 Neb. 863, 61 N. W. 127, holding certificate of deposit may be set off against mortgagee held by assignee of insolvent bank; *Stone v. Dodge*, 96 Mich. 516, 21 L. R. A. 284. 56 N. W. 75, holding certificate of deposit of debtor of insolvent bank could not be set off against action by receiver; *Thompson v. Union Trust Co.* 130 Mich. 510, 97 Am. St. Rep. 494. 90 N. W. 294, holding deposit may be set off against depositor's notes to insolvent bank, not due at time of insolvency.

Cited in footnotes to *Grissom v. Commercial Nat. Bank*, 3 L. R. A. 273, which holds bank has no right to pay to third party note made by depositor; *Henry v. Allen*, 36 L. R. A. 658, which holds cashier's check negotiable.

2 L. R. A. 277, *TURNER v. STEPHENSON*, 72 Mich. 409, 40 N. W. 735.

**How adverse possession shown.**

Cited in *Walsh v. Wheelwright*, 96 Me. 190, 52 Atl. 649, holding adverse occupation of part of land must be shown to extend that occupation to adjoining land.

Distinguished in *Clark v. Campau*, 92 Mich. 578, 52 N. W. 1026, holding adverse possession by occupation of part of land shown.

2 L. R. A. 278, *ST. LOUIS v. BELL TELEPH. CO.* 96 Mo. 623, 9 Am. St. Rep. 370, 10 S. W. 197.

**Power to prescribe rates for public-service corporations.**

Cited in *Re Pryor*, 55 Kan. 729, 29 L. R. A. 400, 49 Am. St. Rep. 280, 41 Pac. 958, holding ordinance fixing maximum gas rates to private consumers invalid:

*State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 39, 86 N. W. 657, holding power to regulate rates of telephone company is not included in power to regulate use of streets; *Wabaska Electric Co. v. Wymore*, 60 Neb. 202, 82 N. W. 626, holding city of second class without authority to regulate electric light charges to private consumers when not expressly conferred; *Crosby v. Montgomery*, 108 Ala. 504, 18 So. 723, holding ordinance fixing water rates under power granted subsequent to contract with water company does not take away vested right, nor deprive of due process of law; *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 345, 41 L. R. A. 427, 49 N. E. 121, holding electric lighting company with franchise from town cannot arbitrarily fix rates for lighting.

Cited in notes (5 L. R. A. 161) on state regulation of telephone companies; (33 L. R. A. 181) on legislative power to fix tolls, rates, or prices of public-service corporations; (31 L. R. A. 803) on police regulation of electric companies.

#### **Charter limitations of cities.**

Cited in Nevada use of Gilfillan *v. Eddy*, 123 Mo. 558, 27 S. W. 471; *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 574, 34 L. R. A. 374, 56 Am. St. Rep. 515, 34 S. W. 51 (supplemental opinion); *Markley v. Mineral City*, 58 Ohio St. 439, 65 Am. St. Rep. 776, 51 N. E. 28; *Union Depot R. Co. v. Southern R. Co.* 105 Mo. 575, 16 S. W. 920, — holding city can exercise only such powers as are expressly granted, necessarily implied, or essential to declared purposes of corporation; *State ex rel. Peck v. Hermann*, 84 Mo. App. 10, holding charter provisions for security to city for works of construction cannot be changed by ordinance; *Plattsburg v. Trimble*, 46 Mo. App. 461, holding city of fourth class may impose penalty upon keeper of billiard table for permitting minor to play without consent of parents.

#### **— Construction of powers.**

Cited in *Knapp v. Kansas City*, 48 Mo. App. 492, holding reasonable doubt concerning existence of power to be resolved against corporation; *Houstonia v. Grubbs*, 80 Mo. App. 437, holding doubt as to authority to create tax lien upon abutting property should be resolved against lien; *St. Paul v. Chicago, M. & St. P. R. Co.* 63 Minn. 346, 34 L. R. A. 188, 65 N. W. 649, holding doubt as to power to grant privileges in streets to be resolved against municipality; *Tacoma Gas & Electric Light Co. v. Tacoma*, 14 Wash. 291, 44 Pac. 655, holding delegation of power will not be presumed in favor of municipal corporation, unless necessary to corporate existence; *Carthage v. Carthage Light Co.* 97 Mo. App. 24, 70 S. W. 936, holding authorization of city to grant franchise to light streets by gas does not give power to grant electric lighting franchise.

#### **— Regulating use of streets.**

Cited in *State ex rel. St. Louis Underground Service Co. v. Murphy*, 134 Mo. 561, 34 L. R. A. 374, 56 Am. St. Rep. 515, 34 S. W. 51, holding, under power to regulate streets, city may permit erection of telegraph and telephone poles; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 588, 42 L. R. A. 126, 46 S. W. 981, holding use of street for telephone poles not private use; *St. Louis v. Western U. Teleg. Co.* 149 U. S. 471, 37 L. ed. 814, 13 Sup. Ct. Rep. 990, holding city of St. Louis may impose upon telegraph company charge for use of street for poles; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 574, 42 L. R. A. 126, 49 S. W. 981, holding city has no concern with right of telephone company to charge tolls, or making of agreements with other companies for the use of its subway.

Cited in note (24 L. R. A. 722) on telegraph or telephone poles as additional burden on highway.

**— Street improvements.**

Cited in *Guinotte v. Egelhoff*, 64 Mo. App. 367, holding proceedings for improvement of street at expense of abutting property must strictly conform to statute; *Sedalia Gaslight Co. v. Mercer*, 48 Mo. 651, holding ordinance providing indemnity fund from sewer tax for payment of damages from sewer construction not within powers; *Kansas City v. Bacon*, 147 Mo. 318, 48 S. W. 860 (dissenting opinion), majority holding Kansas City has power to condemn land for park, and assess cost to district.

**Revisory power of courts over ordinances.**

Cited in *Tarkio v. Cook*, 120 Mo. 9, 42 Am. St. Rep. 678, 25 S. W. 202, holding ordinances subject to revision in respect to existence of power, and whether reasonably exercised.

2 L. R. A. 281, *GULF, C. & S. F. R. Co. v. SMITH*, 72 Tex. 122, 9 S. W. 865.

**What covenants run with land.**

Cited in *Ft. Wayne Water Power Co. v. Allen County*, 24 Ind. App. 519, 57 N. E. 146, holding duty imposed upon trustees to keep bridges in repair over canal not covenant running with land; *Ruddick v. St. Louis, K. & N. W. R. Co.* 116 Mo. 30, 38 Am. St. Rep. 570, 22 S. W. 499, holding covenants in deeds to railroad to furnish passes, coupled with condition of forfeiture, run with the land.

Cited in footnotes to *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land agreement for party wall, expressly declared to run with land; *Doty v. Chattanooga Union R. Co.* 48 L. R. A. 160, which holds covenant for running certain trains binding on subsequent purchaser of railroad; *Brown v. Southern Pacific Co.* 47 L. R. A. 409, which holds covenant by grantors for railroad to build fences, or not hold company for injury to stock, personal only.

2 L. R. A. 282, *INNIS v. CEDAR RAPIDS, I. F. & N. W. R. CO.* 76 Iowa, 165, 40 N. W. 701.

**When nuisance abated.**

Cited in *Fogg v. Nevada C. O. R. Co.* 20 Nev. 435, 23 Pac. 840, holding public nuisance in construction of railroad will not be abated, unless special damage to complainant shown; *Redway v. Moore*, 3 Idaho, 320, 29 Pac. 104, holding house of prostitution will not be enjoined, unless special damage shown.

Cited in footnote to *State v. Stark*, 54 L. R. A. 910, which denies right of private person to abate liquor nuisance without process of law.

Cited in notes (9 L. R. A. 715) on abatement of nuisance by action; (6 L. R. A. 255) on improper use of street by railroad company; (59 L. R. A. 83) on right to obstruct or destroy rights of navigation.

2 L. R. A. 284, *RICHMOND & D. R. CO. v. REIDSVILLE*, 101 N. C. 404, 8 S. E. 124.

**Appeal.**

Cited in *Thornton v. Lambeth*, 103 N. C. 89, 9 S. E. 432, dismissing appeal, with opinion on new matter introduced.

**Power of municipality to require licenses.**

Cited in footnotes to *Perry v. Salt Lake City*, 11 L. R. A. 446, which holds city council has wide discretion as to granting of licenses; *Hoefling v. San Antonio*, 16 L. R. A. 608, which holds city cannot levy occupation tax on persons not similarly taxed by state; *State ex rel. Beek v. Wagener*, 46 L. R. A. 442, which sustains statute regulating business of commission merchants handling agricultural products; *State v. Robinson*, 6 L. R. A. 339, which construes charter provision as to licensing hackmen, etc., as not applying to one hiring rigs to persons using same; *Knoxville & O. R. Co. v. Harris*, 53 L. R. A. 921, which holds exemption from privilege tax not included in exemption from ad valorem tax.

Cited in notes (4 L. R. A. 810) on license fees, not taxes; (6 L. R. A. 509; 9 L. R. A. 787) on license of occupations and privileged taxes; (60 L. R. A. 340, 346, 355) on constitutional equality in the United States in relation to corporate taxation; (60 L. R. A. 687) on corporate taxation and the commerce clause.

2 L. R. A. 285, *BOWLING v. BURTON*, 101 N. C. 176, 7 S. E. 701.

**Rights passing with title.**

Cited in *Scheel v. Alhambra Min. Co.* 79 Fed. 825, holding grant of tunnel rights with appurtenances includes, by implication, every necessary incident and appurtenance thereto; *Scott v. Michael*, 129 Ind. 254, 28 N. E. 546, holding right to maintain milldam as when conveyed, part of thing sold.

**Defective statement of good cause of action.**

Cited in *Mizzell v. Ruffin*, 118 N. C. 71, 23 S. E. 927, holding insufficient statement of good cause of action cured if not demurred to.

2 L. R. A. 287, *HEYE v. NORTH GERMAN LLOYD*, 36 Fed. 705.

**General average.**

Cited in *Ralli v. Troop*, 157 U. S. 413, 39 L. ed. 753, 15 Sup. Ct. Rep. 657, Reversing 37 Fed. 894, holding claim of general average not sustained when fire put out by order of port commissioners.

2 L. R. A. 289, *KENTUCKY & I. BRIDGE CO. v. LOUISVILLE & N. R. CO.* 37 Fed. 567.

**Pleadings.**

Cited in *Farmers' Loan & T. Co. v. Northern P. R. Co.* 83 Fed. 251, holding rules of pleading and practice apply to equity proceeding to enforce commission order.

**Power of United States courts under Act to Regulate Commerce.**

Cited in *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* 50 Fed. 304; *Shinkle, W. & K. Co. v. Louisville & N. R. Co.* 62 Fed. 693; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 56 Fed. 935; *Interstate Commerce Commission v. Lehigh Valley R. Co.* 49 Fed. 180, — holding Interstate Commerce Commission's findings of fact not conclusive in Federal court; *Interstate Commerce Commission v. Southern P. Co.* 123 Fed. 601, holding court, in suit to enforce order of Interstate Commerce Commission, is not limited to issues of evidence before Commission; *United States v. Missouri P. R. Co.* 65 Fed. 907, defining district attorney's power to institute proceedings, under amendment, to enforce Interstate Commerce Act; *Detroit G. H. & M. R. Co. v. Inter-*

state Commerce Commission, 21 C. C. A. 141, 43 U. S. App. 308, 74 Fed. 841, holding court can only grant or refuse compulsory obedience to Commission's orders; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 47 Fed. 773, holding Federal court has jurisdiction of subject-matter arising under Interstate Commerce Act; *Tift v. Southern R. Co.* 123 Fed. 793, sustaining jurisdiction of United States circuit court, in cases arising under Interstate Commerce Act, irrespective of citizenship of parties.

Distinguished in *Central Stock Yards Co. v. Louisville & N. R. Co.* 112 Fed. 827, holding remedies under §§ 8, 9, of Interstate Commerce Act exclusive.

**What constitutes common carriers.**

Distinguished in *Covington & C. Bridge Co. v. South Covington & C. Street R. Co.* 93 Ky. 141, 15 L. R. A. 829, 19 S. W. 403, holding toll company cannot exclude from bridge horse cars offering fair toll.

**Requirement as to reasonable facilities.**

Cited in *Central Stock Yards Co. v. Louisville & N. R. Co.* 63 L. R. A. 217, 55 C. C. A. 68, 118 Fed. 118, holding carrier with reasonable facilities for delivery and care of stock may refuse delivery elsewhere.

**Unlawful regulation of commerce.**

Cited in *Hopkins v. United States*, 171 U. S. 592, 43 L. ed. 296, 19 Sup. Ct. Rep. 40, Reversing 82 Fed. 539, holding charges for facilities furnished not a regulation of commerce; *Minnesota v. Northern Securities Co.* 123 Fed. 700, holding corporation organized to hold stock of two competing railroads does not violate state law against combination in restraint of commerce.

Distinguished in *Inman v. St. Louis S. W. R. Co.* 14 Tex. Civ. App. 52, 37 S. W. 37, holding carrier bound, upon payment of freight, to deliver goods to connecting carrier chosen by him.

**Unforbidden discriminations and preferences.**

Cited in footnote to *Little Rock & M. R. Co. v. St. Louis & S. W. R. Co.* 26 L. R. A. 192, which holds not undue disadvantage to require prepayment of freight charges by connecting carriers without requiring from other shippers or carriers.

**Reasonable and just charges.**

Cited in *Farmers' Loan & T. Co. v. Northern P. R. Co.* 83 Fed. 259, holding reasonableness and justice sole requirements upon rates.

**Right to track connections.**

Cited in *Little Rock & M. R. Co. v. St. Louis S. W. R. Co.* 26 L. R. A. 195, 11 C. C. A. 422, 27 U. S. App. 380, 63 Fed. 778, Affirming 59 Fed. 402, and *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 51 Fed. 473, holding common carrier not required to furnish use of tracks or terminal facilities to another carrier.

Cited in footnote to *Re Stillwater & M. Street R. Co.* 59 L. R. A. 489, which holds electric railways entitled to track connections with intersecting steam roads.

**Through routes and through rates.**

Cited in *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 765, 41 Fed. 563, holding court has no power to compel railroad companies to make joint through rates.

Cited in footnote to *Jacobson v. Wisconsin, M. & P. R. Co.* 40 L. R. A. 389, which sustains making of joint rates for through shipments over connecting railroads.

Cited in notes (12 L. R. A. 437) on carriers as to through traffic rates; (12 L. R. A. 438) as to connection with bridge company.

**Discrimination in rates and charges.**

Cited in *Post v. Southern R. Co.* 103 Tenn. 207, 55 L. R. A. 487, 52 S. W. 301; *State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co.* 46 Neb. 699, 31 L. R. A. 53, 65 N. W. 766; *Gulf, C. & S. F. R. Co. v. Nelson.* 4 Tex. Civ. App. 349, 23 S. W. 732; *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 570, 48 L. ed. 569, 24 Sup. Ct. Rep. 339, Affirming 63 L. R. A. 217, 55 C. C. A. 68, 118 Fed. 119,—holding railroad having stock yards under no obligation to accept shipment from other states consigned to stock yards of physically connected railroad in same city; *Paxton & H. Irrig. Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* 45 Neb. 901, 29 L. R. A. 858, 50 Am. St. Rep. 585, 64 N. W. 343, and *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 154, 52 U. S. App. 132, 86 Fed. 419, holding carrier not bound to make similar through-rate contracts with connecting lines; *Chicago & N. W. R. Co. v. Osborne,* 3 C. C. A. 350, 10 U. S. App. 430, 52 Fed. 915, holding connecting companies not bound to abandon full control of separate roads or unite in joint tariff.

**Contracts with connecting lines for through rates.**

Cited in *Ft. Worth & D. C. R. Co. v. Whitehead,* 6 Tex. Civ. App. 598, 26 S. W. 172, holding receipt of out-of-state shipment from connecting line not alone an act of interstate commerce.

**Who may complain of discrimination.**

Cited in *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 9 C. C. A. 412, 15 U. S. App. 479, 61 Fed. 161, holding that discrimination as to freight prepayment against traffic and localities by one railroad company cannot be invoked by another company.

**Powers of Congress.**

Cited in *Ballard v. Northern P. R. Co.* 10 Mont. 179, 11 L. R. A. 249, 25 Pac. 120, holding constitutionality of act not affected because incidentally preventing enforcement of pre-existing contracts.

2 L. R. A. 328, *DRUCKER v. WELLHOUSE,* 82 Ga. 129, 8 S. E. 40.

**Partnership as legal entity.**

Cited in *Green v. Willingham,* 100 Ga. 226, 28 S. E. 42, holding judgment against partnership, erroneous where members are different from those alleged in complaint; *Page v. Citizens' Bkg. Co.* 111 Ga. 79, 51 L. R. A. 471, 78 Am. St. Rep. 144, 36 S. E. 418, holding partnership may be liable in action for malicious prosecution; *Marlow v. Hughes Lumber Co.* 92 Ga. 554, 17 S. E. 922, holding petition by partnership for certiorari properly dismissed where affidavit showing reason for dispensing with bond was made by partner as individual.

**When partnership deemed insolvent.**

Cited in *Ransom v. Wardlaw,* 99 Ga. 542, 27 S. E. 158, holding creditor's petition against partnership as insolvent lies, though member be solvent.

**Partnership assignments not including individual property.**

Cited in *Birdsall, W. & P. Mfg. Co. v. Schwarz*, 3 App. Div. 304, 38 N. Y. Supp. 368, holding judgment creditors, and not assignee of partnership, may attack conveyance of individual partner's property; *Wilson v. Sullivan*, 17 Utah, 348. 53 Pac. 994, holding partnership assignment need not include individual property of partners.

Distinguished in *McCord-Brady Co. v. Mills*, 8 Wyo. 265, 46 L. R. A. 741, footnote, p. 737, 56 Pac. 1003, holding partnership assignment for creditors, not including separate property, void.

**Effect on assignment of preference to attorney.**

Cited in *Bank of Little Rock v. Frank*, 63 Ark. 27, 58 Am. St. Rep. 65, 37 S. W. 400, holding preference in favor of attorney for services to be rendered in connection therewith will not avoid entire assignment; *Cortland Wagon Co. v. Gordy*, 98 Ga. 530, 25 S. E. 574, sustaining mortgage given by insolvent trader to attorneys for services to be rendered in litigation over winding up of his affairs.

2 L. R. A. 332, *Re CHAPMAN*, 37 Fed. 327.

**Enlistment of minor.**

Cited in *Re Falconer*, 91 Fed. 650, discharging enlisted minor on his father's application.

Cited as overruled in *United States v. Reaves*, 60 C. C. A. 680, 126 Fed. 132. Reversing 121 Fed. 850, holding minor's enlistment in Navy without father's consent voidable only, and at father's instance.

2 L. R. A. 334, *BARRY v. GUILD*, 126 Ill. 439, 18 N. E. 759.

**Covenants in deeds.**

Cited in *Cream City Mirror Plate Co. v. Swedish Bldg. & L. Asso.* 74 Ill. App. 366, holding no eviction where vendee's possession of fixture and title were undisturbed.

Cited in footnotes to *Mygatt v. Coe*, 11 L. R. A. 646, which holds covenants of warranty and quiet enjoyment by owner and husband do not run with land as against husband; *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land agreement for party wall expressly declared to run with land; *Wiggins v. Pender*, 61 L. R. A. 772, which holds assignee entitled to benefit of covenant of warranty not naming him, if assigns named in habendum clause of deed.

Cited in note (6 L. R. A. 107) on covenants defined and construed.

2 L. R. A. 336, *PERIN v. PARKER*, 126 Ill. 201, 9 Am. St. Rep. 571, 18 N. E. 747.

**Implied knowledge of usages and customs of the business.**

Cited in *Pardridge v. Cutler*, 68 Ill. App. 573, holding person dealing with board of trade intends business to be conducted according to its usage and custom.

**Implied undertaking to indemnify, and promise to pay.**

Cited in *Bibb v. Allen*, 149 U. S. 501, 37 L. ed. 827, 13 Sup. Ct. Rep. 950, holding employing broker to sell for future delivery implies undertaking to indemnify, and promise to reimburse; *Re Filer*, 125 Fed. 263, holding claim against



employee inducing employers, by pretended orders from customers, to purchase stocks for his benefit, provable in bankruptcy.

**Waiver.**

Cited in *Keller v. Robinson*, 153 Ill. 468, 38 N. E. 1072, holding stipulation as to nature of defense in replevin no waiver of demand; *Star Brewery Co. v. Primas*, 163 Ill. 662, 45 N. E. 145, holding proof must be clear to show waiver of covenant, verbally or by acquiescence.

**Harmless error in instructions.**

Cited in *Hayes v. Todd*, 34 Fla. 243, 15 So. 752, holding charge unobjected to as error of law harmless, judgment being only proper one.

2 L. R. A. 340, *PEOPLE v. PEOPLE'S INS. EXCHANGE*, 126 Ill. 466, 18 N. E. 774.

**Who are agents of insured.**

Cited in *United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 456, 34 C. C. A. 244, 92 Fed. 131, holding agent in fact of insured was not agent of insurer under statute; *Continental Ins. Co. v. Ruckman*, 127 Ill. 377, 11 Am. St. Rep. 121, 20 N. E. 77, holding clerk of general agent might insert, in policy, clause relating to nonoccupancy.

Cited in note (8 L. R. A. 129) on foreign insurance companies; conditions imposed by statute.

**Licensing insurance companies.**

Cited in *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 358, holding foreign insurance company can be prohibited from doing business without license.

**What questions are for jury.**

Cited in *Roberts v. Chicago & G. T. R. Co.* 78 Ill. App. 529, and *Groszewski v. Chicago Sugar Ref. Co.* 84 Ill. App. 587, holding instruction to find, error; *McClary v. Warner*, 69 Ill. App. 225, holding instruction to jury to find is error if evidence sufficient; *Finley v. West Chicago Street R. Co.* 90 Ill. App. 370, holding court may direct verdict if evidence insufficient; *Illinois C. R. Co. v. Meyer*, 65 Ill. App. 535, holding insufficiency of unsupported verdict question of law; *National Syrup Co. v. Carlson*, 155 Ill. 216, 40 N. E. 492, holding instruction to find for defendant should be refused if facts sustain verdict; *Goldie v. Werner*, 151 Ill. 555, 38 N. E. 95, holding case should have been submitted to jury; *Cohen v. Chicago & N. W. R. Co.* 104 Ill. App. 322, holding evidence for jury which tends to prove locomotive bell was not rung nor whistle sounded.

**Practice.**

Cited in *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 432, 32 L. R. A. 361, 34 S. W. 1029, holding demurrer to evidence proper practice when facts undisputed.

Cited in notes (20 L. R. A. 409) as to criminal prosecutions when the statutes regulating the business of foreign insurance companies have not been complied with; (10 L. R. A. 237) on directing verdict under scintilla doctrine; (4 L. R. A. 776, 778) on practice in trial directing verdict where municipal regulations of rate of speed of railroads is in question.

2 L. R. A. 343, *ARTMAN v. FERGUSON*, 73 Mich. 146, 16 Am. St. Rep. 572, 40 N. W. 907.

**Partnership between husband and wife.**

Cited in *Haggett v. Hurley*, 91 Me. 557, 41 L. R. A. 367, 40 Atl. 561; *Chamberlain v. Murrin*, 92 Mich. 365, 52 N. W. 640; *Vail v. Winterstein*, 94 Mich. 233, 18 L. R. A. 517, 34 Am. St. Rep. 334, 53 N. W. 932; *Board of Trade v. Hayden*, 4 Wash. 269, 16 L. R. A. 533, 31 Am. St. Rep. 924, 30 Pac. 87; *Fuller & F. Co. v. McHenry*, 83 Wis. 581, 18 L. R. A. 515, 53 N. W. 896; *Doolittle v. Gavagan*, 74 Mich. 14, 41 N. W. 846, — holding husband and wife cannot become copartners; *Hoffman v. Goldsmith*, 131 Mich. 295, 91 N. W. 158, denying liability of wife holding bill of sale as security for saloon fixtures furnished on husband's credit; *Suau v. Caffé*, 122 N. Y. 319, 9 L. R. A. 596, 25 N. E. 488 (dissenting opinion), majority holding wife liable upon debt contracted with husband in business carried on by them as partners.

Cited in notes (9 L. R. A. 593; 16 L. R. A. 527) on partnership between husband and wife.

Distinguished in *Hoaglin v. Henderson*, 119 Iowa, 725, 61 L. R. A. 756, 97 Am. St. Rep. 335, 94 N. W. 247, holding wife may become husband's business partner, under married woman's enabling acts.

**Joint contracts of husband and wife.**

Cited in *Caldwell v. Jones*, 115 Mich. 130, 73 N. W. 129, holding wife not liable on note given for property purchased jointly.

Cited in footnote to *Yerkes v. Hadley*, 2 L. R. A. 363, which holds married woman, executing mortgage with husband, estopped from setting up subsequently acquired title.

**Contracts of married women in relation to joint property.**

Cited in *Speier v. Opfer*, 73 Mich. 39, 2 L. R. A. 348, 16 Am. St. Rep. 556, 40 N. W. 909, holding wife not liable upon contract for improvement of property held jointly with husband.

**Contracts of married women as to separate property.**

Cited in *Chamberlain v. Murrin*, 92 Mich. 365, 52 N. W. 640, holding married woman may contract for purchase or sale of property.

Cited in footnote to *Vail v. Winterstein*, 18 L. R. A. 515, which holds married woman may enter firm in which husband not a partner.

Cited in note (2 L. R. A. 347) on statutes removing disability of married women to contract.

**Contracts between husband and wife.**

Cited in *Corcoran v. Corcoran*, 119 Ind. 140, 4 L. R. A. 783, 12 Am. St. Rep. 391, 21 N. E. 468, holding contract of wife to support husband in consideration of conveyance invalid.

**Action by married women for tort.**

Cited in *Bandfield v. Bandfield*, 117 Mich. 83, 40 L. R. A. 759, 72 Am. St. Rep. 550, 75 N. W. 287, holding action cannot be maintained against husband, after divorce, for tort committed during coverture.

2 L. R. A. 345, *SPEIER v. OPFER*, 73 Mich. 35, 16 Am. St. Rep. 556, 40 N. W. 909.

**Contracts of married women in general.**

Cited in footnotes to *Roop v. Real Estate Investment Co.* 7 L. R. A. 211, which

holds married woman not empowered to bind herself by judgment note; *Wilder v. Wilder*, 9 L. R. A. 97, which holds married woman estopped to claim vendor's lien by representing that one loaning to vendee should have first mortgage; *Hunt v. Reilly*, 59 L. R. A. 206, which holds wife's failure to notify purchaser of rights after learning of forgery of her name to husband's deed does not estop her to claim dower.

Cited in notes (7 L. R. A. 640) on wife's capacity to contract; (2 L. R. A. 343) on power of married woman to enter into partnership; (4 L. R. A. 334; 8 L. R. A. 407) on estoppel of married woman.

**Conveyance to husband and wife jointly, nature of estate.**

Cited in *Re Lewis*, 85 Mich. 345, 24 Am. St. Rep. 94, 48 N. W. 580, holding that husband and wife take as tenants by entireties; *Dickey v. Converse*, 117 Mich. 455, 72 Am. St. Rep. 568, 76 N. W. 80, holding crops grown on lands subject to same law as land, and exempt from execution against either tenant; *Michigan Beef & Provision Co. v. Coll*, 116 Mich. 262, 74 N. W. 475, holding that husband has no separable portion in estate so as to make his testimony competent against his half of land; *Fowles v. Hayden*, 130 Mich. 50, 89 N. W. 571, holding that wife cannot recover for trespass to land owned by entireties.

Cited in footnote to *Re Albrecht*, 18 L. R. A. 329, which denies tenancy by entirety in bond and mortgage to husband and wife.

**Contracts of married women in relation to joint property.**

Cited in *Doane v. Feather*, 119 Mich. 693, 78 N. W. 885, and *Curtis v. Crowe*, 74 Mich. 100, 41 N. W. 876, holding contract for erection of building on property owned jointly with husband invalid.

Cited in note (30 L. R. A. 329) on disposition or encumbrance of entirety property.

**Joint contracts of husband and wife.**

Cited in *Doane v. Feather*, 119 Mich. 692, 78 N. W. 884, and *Caldwell v. Jones*, 115 Mich. 130, 73 N. W. 129, holding wife not liable on note given with husband for property purchased jointly; *Kohn v. Collison*, 1 Marv. (Del.) 113, 27 Atl. 834, holding married woman not liable upon indorsement of husband's note, given for his debts.

Cited in footnotes to *Yerkes v. Hadley*, 2 L. R. A. 363, which holds married woman, executing mortgage with husband, estopped from setting up subsequently acquired title.

Disapproved, in effect, in *Schofield v. Jones*, 85 Ga. 823, 11 S. E. 1032, holding pledge of wife's separate property as security for joint lease, valid.

**Contracts between husband and wife.**

Cited in *Gilkerson-Sloss Commission Co. v. Salinger*, 56 Ark. 297, 16 L. R. A. 529, 35 Am. St. Rep. 105, 19 S. W. 747, holding married woman cannot form partnership with husband.

Cited in footnote to *National Granite Bank v. Tyndale*, 51 L. R. A. 447, which holds relief by way of estoppel not available to holders of notes of married woman who had received proceeds, against defense that they were void because payable to husband, who indorsed them.

Cited in note (16 L. R. A. 527) on partnership between husband and wife.

2 L. R. A. 349, *HARRIS v. CORLIES, CHAPMAN & DRAKE*, 40 Minn. 106, 41 N. W. 940.

**Effect on tenant's liability of untenable condition.**

Cited in *Railton v. Taylor*, 20 R. I. 283, 39 L. R. A. 248, 38 Atl. 980, holding lessor not exempted by term of lease from liability for his own negligence.

Cited in notes (53 L. R. A. 673) on what constitutes damage "by the elements" within the meaning of contracts with stipulations referring thereto; (9 L. R. A. 799) on agreement by landlord to keep premises in repair.

2 L. R. A. 350, *STATE, DARCY, PROSECUTRIX, v. DARCY*, 51 N. J. L. 140, 16 Atl. 160.

Affirmed, without opinion, in 52 N. J. L. 222, 20 Atl. 319.

**When property taxable.**

Cited in *Holland v. Silver Bow County*, 15 Mont. 462, 27 L. R. A. 798, 39 Pac. 575, holding mortgages on land within, but owned without, state not taxable; *State ex rel. Dwinnell v. Gaylord*, 73 Wis. 325, 41 N. W. 521, holding mortgages owned by resident, on nonresident lands and in hands of nonresident agent, not taxable; *Savings & Loan Soc. v. Multnomah County*, 169 U. S. 428, 42 L. ed. 805, 18 Sup. Ct. Rep. 392, holding act taxing nonresident mortgagee's interest in land as real estate valid; *State, Smith, Prosecutor, v. Ramsey*, 54 N. J. L. 548, 24 Atl. 445, holding assessment for taxes upon stock of foreign corporation held by resident void.

2 L. R. A. 353, *GRIFFIN v. MACON COUNTY*, 36 Fed. 885.

**Coupons as instruments distinct from bond.**

Cited in footnotes to *Internal Improvement Fund v. Lewis*, 26 L. R. A. 743, which holds interest coupons on negotiable bonds transferable separately by delivery; *Internal Improvement Fund v. Lewis*, 26 L. R. A. 743, which holds cancelation or payment of bond before maturity does not affect rights of bona fide holder of coupon.

Cited in note (6 L. R. A. 562, 563) on coupons as distinct and separate instruments.

2 L. R. A. 355, *BACON v. HORNE*, 123 Pa. 452, 16 Atl. 794.

**Transfer of title to personal property.**

Cited in *Loftus v. Farmers' & M. Nat. Bank*, 133 Pa. 112, 7 L. R. A. 315, 19 Atl. 347, holding state may regulate transfer of personal property within its borders; *Van Wyck v. Read*, 43 Fed. 718, and *De Turck v. Woefel*, 19 Pa. Super. Ct. 270, holding Maryland debt of Pennsylvania corporation passes to assignee of creditor, and not subsequently attachable in Pennsylvania; *Hilliard v. Enders & Co.* 196 Pa. 593, 46 Atl. 839, holding foreign general assignment passes title to assignor's personalty in sister state; *Swedish-American Nat. Bank v. First Nat. Bank*, 89 Minn. 115, 99 Am. St. Rep. 549, 94 N. W. 218, holding *obiter*, creditors residing in debtor's state cannot acquire lien by attaching grain in another state, as against assignee for creditors.

**Comity of states.**

Cited in *Wing v. Bradner*, 162 Pa. 77, 29 Atl. 291, and *Long v. Girdwood*, 150 Pa. 419, 23 L. R. A. 47, 24 Atl. 711, holding foreign creditor cannot obtain preference in Pennsylvania over foreign assignment for creditors; *Deni v. Penn-*

sylvania R. Co. 181 Pa. 529, 59 Am. St. Rep. 676, 37 Atl. 558, holding statutory cause of action not available to resident of foreign state; *E. F. Kirwan Mfg. Co. v. Truxton*, 2 Penn. (Del.) 60, 44 Atl. 427, holding foreign corporation in hands of foreign receiver cannot sue in its own name in Pennsylvania; *Gilman v. Ketcham*, 84 Wis. 68, 23 L. R. A. 57, 36 Am. St. Rep. 899, 54 N. W. 395, holding foreign creditor enjoined from suit in his own state cannot sue in Pennsylvania; *Lett v. Thurber Whyland Co.* 15 Pa. Co. Ct. 669, 4 Pa. Dist. R. 241, upholding claim of resident debtor as against foreign receiver.

Cited in notes (2 L. R. A. 328) on contract as to conflict of laws; (6 L. R. A. 108; 8 L. R. A. 170) on law of place as governing validity of contract; (17 L. R. A. 85) on supremacy of state or nation over devolution of property, as to law of domicile governing validity of assignment; (23 L. R. A. 38) on transfer of property out of the state by bankruptcy or insolvency proceedings or assignment for creditors.

2 L. R. A. 357, *UNDERWOOD v. GERBER*, 37 Fed. 682.

Motion to amend and leave to take proofs in 37 Fed. 796.

**Prior patent covering process alleged to be infringed.**

Cited in *Universal Winding Co. v. Willimantic Linen Co.* 82 Fed. 239, holding no infringement where there is a prior process patent of device alleged to be infringed.

**— Right to use of universal knowledge.**

Affirmed in 149 U. S. 224, 37 L. ed. 710, 13 Sup. Ct. Rep. 854, holding plaintiff's patent devoid of patentable novelty or invention.

Cited in *Bowman v. De Grauw*, 60 Fed. 910, holding application for patent must be read in light of all knowledge of the world.

2 L. R. A. 359, *Re UNION ELEV. R. CO.* 112 N. Y. 61, 19 N. E. 664.

**Condemnation proceedings.**

Cited in *Rochester & H. Valley R. Co. v. Rochester*, 17 App. Div. 260, 45 N. Y. Supp. 687, holding railroad lands cannot be taken for public street by general condemnation law; *Re Mt. Vernon*, 34 Misc. 231, 68 N. Y. Supp. 823, holding appointment of commissioners to condemn necessarily includes fact that improvement was allowed; *Re Buffalo*, 46 N. Y. S. R. 83, 18 N. Y. Supp. 771, Reversing 39 N. Y. S. R. 284, 15 N. Y. Supp. 858, holding city court had no jurisdiction of proceedings to take land outside of city for park purposes.

**Notice of public proceedings.**

Cited in *Re Mt. Vernon*, 34 Misc. 230, 231, 68 N. Y. Supp. 823, holding notice by publication effectual to confer jurisdiction in street opening; *Appleton v. Newton*, 178 Mass. 282, 59 N. E. 648, holding constructive notice by filing instrument taking land for public use, coupled with time to protect rights thereafter, sufficient; *Re Oneida Street Opening*, 22 Misc. 237, 49 N. Y. Supp. 828, holding mortgagee of land to be taken for street entitled to notice; *Hornellsville Electric R. Co. v. New York, L. E. & W. R. Co.* 83 Hun, 411, 31 N. Y. Supp. 745, holding jurisdiction acquired by service of petition with notice to extend surface railroad tracks; *Hennessey v. Volkening*, 30 Abb. N. C. 110, 22 N. Y. Supp. 533, holding notice essential in tax proceedings; *Robert v. Kings County*, 3 App. Div. 369, 38 N. Y. Supp. 521, holding statutory notice was complied with

in assessment proceedings; *Re Hirsh*, 14 Misc. 380, 36 N. Y. Supp. 19, holding legality of ballot established by requirement to have sample ballots open to public inspection, and giving due notice; *Colon v. Lisk*, 13 App. Div. 200, 43 N. Y. Supp. 364, holding act providing for forfeiture of oyster boat for trespassing provided sufficient notice.

**Elevated railways.**

Cited in *Nutting v. Kings County County Elev. R. Co.* 21 App. Div. 75, 47 N. Y. Supp. 327, holding elevated railroad bound by act of agent in settling claims; *Brooklyn Elev. R. Co. v. Nagel*, 75 Hun, 591, 27 N. Y. Supp. 669, holding valid the franchise to build and maintain elevated railroad.

**Rights acquired under municipal permission.**

Cited in *Buffalo v. Chadeayne*, 134 N. Y. 165, 31 N. E. 443, Affirming 27 N. Y. S. R. 63, 7 N. Y. Supp. 501, holding common council cannot rescind permit to construct wooden building after construction begun.

2 L. R. A. 363, *YERKES v. HADLEY*, 5 Dak. 324, 40 N. W. 340.

**Estoppel of married women.**

Cited in notes (8 L. R. A. 407) on estoppel of married women; (22 L. R. A. 781) on estoppel of married women, by covenant, from acquiring superior title.

2 L. R. A. 366, *ROBINSON v. ROHR*, 73 Wis. 436, 9 Am. St. Rep. 810. 40 N. W. 668.

**Liability of municipalities, public officers, and contractors for mistake or tort.**

Cited in *Gates v. Young*, 82 Wis. 276, 52 N. W. 178, holding lumber inspector not liable on bond for mistakes of judgment of himself or deputies; *Kempster v. Milwaukee*, 103 Wis. 423, 79 N. W. 411, holding if city common council is guilty of tort, its members individually are alone liable; *Bates v. Horner*, 65 Vt. 474. 22 L. R. A. 829, 27 Atl. 134, holding municipal officer not liable to individual for result of official acts; *Sells v. Dermody*, 114 Iowa, 348, 86 N. W. 325, holding road supervisor liable for negligence in keeping roads in repair.

Cited in footnotes to *Culver v. Streator*, 6 L. R. A. 270, which holds city liable for negligence of employee enforcing ordinance against unmuzzled dogs running at large; *Curran v. Boston*, 8 L. R. A. 243, which holds city not liable for negligence of workhouse officers.

Cited in notes (22 L. R. A. 824-826, 830, 834) on personal liability of highway officers for negligence; (9 L. R. A. 210) on drains and sewers, as to liability of municipality for neglect of its officers or agents; (5 L. R. A. 254) on liability of municipal corporations for injuries resulting from defective streets, bridges, etc.

Distinguished in *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 55, 29 Am. St. Rep. 856, 51 N. W. 84, holding water company not liable to individuals for breach of contract with municipality; *Lawton v. Waite*, 103 Wis. 254, 45 L. R. A. 620, 79 N. W. 321, holding liability to third person of sureties of subcontractor to carry mail, dependent solely upon contract of suretyship.

2 L. R. A. 368, *MEDFORD v. LEVY*, 31 W. Va. 649, 13 Am. St. Rep. 887, 8 S. E. 302.

**Nuisance.**

Cited in *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 808, 12 L. R. A. 55, 12 S. E. 1085, holding great caution should be used in restraining operation of factory because of noise.

Cited in footnote to *Pfingst v. Senn*, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden.

**Parties must come into court of equity with clean hands.**

Cited in *Barnes v. Starr*, 64 Conn. 155, 28 Atl. 980, holding agreement to destroy antenuptial contract, made to deceive husband's relatives, not enforceable.

Cited in footnote to *Duncan v. Flanagan*, 7 L. R. A. 412, which holds failure to set up joint debtor's discharge in bankruptcy defense to action against him for contribution.

Cited in note (11 L. R. A. 458) on valid trusts as to suitor coming into equity with clean hands.

2 L. R. A. 372, *McNUTT v. McNUTT*, 116 Ind. 545, 19 N. E. 115.

**Antenuptial contracts and marriage settlements.**

Cited in *Moore v. Harrison*, 26 Ind. App. 411, 59 N. E. 1077, and *Ragsdale v. Barnett*, 10 Ind. App. 485, 37 N. E. 1109, holding law favors antenuptial contracts; *Spurlock v. Brown*, 91 Tenn. 255, 18 S. W. 868, and *Carr v. Lackland*, 112 Mo. 463, 20 S. W. 624, holding marriage good consideration for agreement; *Alkire v. Alkire*, 134 Ind. 359, 32 N. E. 571, holding conveyance to children not shown to have been made in fraud of antenuptial agreement; *Wind v. Haas*, 8 Pa. Co. Ct. 648, holding antenuptial contract does not require formal words; *Thompson v. Tucker-Osborn*, 111 Mich. 478, 69 N. W. 730, holding antenuptial agreement can be enforced in equity; *Carr v. Lackland*, 112 Mo. 457, 20 S. W. 624, holding antenuptial agreement should be construed according to intention of parties and surrounding circumstances; *Bowen v. Swander*, 121 Ind. 168, 22 N. E. 725, holding intention of parties to antenuptial agreement was to deprive themselves of all rights in each other's property; *Kennedy v. Kennedy*, 150 Ind. 642, 50 N. E. 756, holding parties by antenuptial contract intended the provisions should be in lieu of wife's legal interest; *Buffington v. Buffington*, 151 Ind. 202, 51 N. E. 328, holding antenuptial contract to release all claims to property of intended husband had reference to disposition on death; *Ragsdale v. Barnett*, 10 Ind. App. 489, 37 N. E. 1109, holding antenuptial agreement intended only life estate in personal property; *Mannan v. Mannan*, 154 Ind. 12, 55 N. E. 855, holding acceptance of deed of land in lieu of interest in husband's estate at death barred such interest; *Leach v. Rains*, 149 Ind. 159, 48 N. E. 858, holding acceptance of deed by husband in lieu of interest in wife's land bars his right therein as survivor under statute.

Cited in footnotes to *Hunt v. Hunt*, 59 L. R. A. 306, which holds parol contract to convey land in consideration of marriage not validated by marriage; *Wright v. Wright*, 55 L. R. A. 261, which holds marriage sufficient to support promise by groom's father to maintain bride and child if groom fails to.

Cited in note (13 L. R. A. 712) on antenuptial settlement.

Limited in *Lamb v. Lamb*, 130 Ind. 277, 30 Am. St. Rep. 227, 30 N. E. 36, holding antenuptial agreement fraudulently procured should be set aside.



**How action to quiet title triable.**

Cited in *Puterbaugh v. Puterbaugh*, 131 Ind. 294, 15 L. R. A. 345, 30 N. E. 519, holding action to quiet title triable by jury.

**In what capacity widow takes interest in husband's estate.**

Cited in *Amos v. Amos*, 117 Ind. 39, 19 N. E. 543, holding under statute widow takes interest by virtue of marital rights, and not as heir.

**How judgment corrected.**

Cited in *Evans v. State*, 150 Ind. 656, 50 N. E. 820, holding form or substance of judgment must be first corrected by motion to modify in court below.

**Discretion in admission of evidence.**

Cited in *Roush v. Roush*, 154 Ind. 572, 55 N. E. 1017, holding admission of evidence discretionary; *Calkins v. Seabury-Calkins Consol. Min. Co.* 5 S. D. 306, 58 N. W. 797, holding discretionary to reopen case; *Re Devoe*, 113 Iowa, 11, 84 N. W. 923, holding secondary evidence of lost instrument admissible.

2 L. R. A. 380, *THE CITY OF SALEM*, 37 Fed. 846.

Adhered to on subsequent hearing, 4 L. R. A. 125, 13 Sawy. 614, 38 Fed. 762.

**Navigable waters.**

Cited in note (5 L. R. A. 687) on ownership of banks and shores of navigable waters.

2 L. R. A. 384, *BUFFALO EAST SIDE STREET R. CO. v. BUFFALO STREET R. CO.* 111 N. Y. 132, 19 N. E. 63.**Construction of contracts.**

Cited in *Grand v. Livingston*, 4 App. Div. 595, 38 N. Y. Supp. 490, construing release for negligence by *lex loci*, where contrary not intended by carrier or reasonable for shipper.

**Presumption of constitutionality.**

Cited in *Beardsley v. New York, L. E. & W. R. Co.* 17 Misc. 259, 40 N. Y. Supp. 1077, holding constitutionality of regulation of railroad fares presumed.

**Impairing contract obligations.**

Cited in *Blume v. Interurban Street R. Co.* 41 Misc. 174, 83 N. Y. Supp. 989, sustaining statute requiring railroad to give transfers over all lines of system within city; *Topham v. Interurban Street R. Co.* 42 Misc. 510, 86 N. Y. Supp. 295, holding corporation leasing street railroads receiving franchises before enactment of statute requiring free transfers liable for refusing transfers; *Budd v. New York*, 143 U. S. 531, 36 L. ed. 251, 12 Sup. Ct. Rep. 468, Affirming *People v. Budd*, 117 N. Y. 11, 5 L. R. A. 564, 15 Am. St. Rep. 460, 22 N. E. 670, upholding legislative regulation of elevator charges; *White v. Farmers' Highline Canal & Reservoir Co.* 22 Colo. 200, 31 L. R. A. 831, 43 Pac. 1028, holding legislature may regulate distribution of water by ditch companies for hire, without impairing existing contracts; *New York v. Herdje*, 68 App. Div. 374, 74 N. Y. Supp. 104, holding law destroying inchoate right to build tenement contracted for, within police power; *Regan v. Fosdick*, 19 Misc. 493, 43 N. Y. Supp. 1102, holding tenant quarantined under health laws not liable for penalty for holding over; *Coxe v. State*, 144 N. Y. 407, 39 N. E. 400, holding

legislative grant of land under tide waters revocable by subsequent legislature; *State ex rel. Payne v. Kinloch Teleph. Co.* 93 Mo. App. 358, 67 S. W. 684, holding that courts may compel telephone company to render service; *Board of Education v. Phillips*, 67 Kan. 552, 73 Pac. 97, holding change in statute so as to permit issuance of additional school bonds not unconstitutional as impairing contract of holder of former bonds.

Cited in notes (19 L. R. A. 571) on regulation of carriage by street railroad; (33 L. R. A. 180) on legislative power to fix tolls, rates, or prices.

Distinguished in *Bronk v. Barckley*, 13 App. Div. 80, 43 N. Y. Supp. 400, holding authorized contract for convict labor cannot be impaired by state.

2 L. R. A. 387, *Re McGRAW*, 111 N. Y. 66, 19 N. E. 233.

Affirmed *sub nom.* *Cornell University v. Fiske*, 136 U. S. 176, 34 L. ed. 434, 10 Sup. Ct. Rep. 775.

**Inclusion of "purchase."**

Cited in *Fosdick v. Hempstead*, 29 N. Y. S. R. 546, 8 N. Y. Supp. 772, holding town with power to purchase and hold personalty may take by bequest.

**General laws indicate policy as to mortmain.**

Cited in *Scott v. Ives*, 22 Misc. 755, 51 N. Y. Supp. 49, and *Amherst College v. Ritch*, 151 N. Y. 333, 37 L. R. A. 324, 45 N. E. 876, both holding such policy appears in few general and many special acts; *Re Lampson*, 33 App. Div. 59, 53 N. Y. Supp. 531, holding special enactment to be looked to in absence of general statute.

**Forfeiture for taking property over charter limit.**

Cited in *Lancaster v. Amsterdam Improvement Co.* 140 N. Y. 586, 24 L. R. A. 331, 35 N. E. 964, holding corporate deed presumed valid.

Cited in note (5 L. R. A. 109) on sustaining trust where purposes separable.

**Devise in excess of limitation upon corporate property.**

Cited in *Norton v. House of Mercy*, 41 C. C. A. 403, 101 Fed. 389, stating principle; *Wood v. Hammond*, 16 R. I. 118, 17 Atl. 324, holding corporation cannot take as devisee in excess of charter limit.

Cited in footnote to *Joseph Bancroft & Sons Co. v. Bloede*, 52 L. R. A. 734, which sustains power of cotton manufacturing company to purchase stock in company manufacturing dyes used by former.

Cited in note (21 L. R. A. 793) on constitutionality of statutes restricting contracts and business.

Distinguished in *Hornberger v. Miller*, 28 App. Div. 203, 50 N. Y. Supp. 1079, holding devise to corporation good as against objection of excess over power to take, where excess not shown; *Farrington v. Putnam*, 90 Me. 423, 38 L. R. A. 346, 37 Atl. 652, holding bequest to incorporated charitable institution in excess of statutory limit not void, but voidable.

**Review of surrogate's decision on undisputed facts.**

Cited in *Re Moulton*, 32 N. Y. S. R. 642, 10 N. Y. Supp. 717, reviewing questions of fact which were before surrogate.

**Who may question power to take devise.**

Cited in *House of Mercy v. Davidson*, 90 Tex. 523, 39 S. W. 924, holding that heirs may set up incapacity of devisee in will to accept devise; *South & North*

Ala. R. Co. v. Highland Ave. & Belt. R. Co. 119 Ala. 117, 24 So. 114, refusing specifically to enforce contract for property complainant incapacitated to hold.

Cited in note (32 L. R. A. 297) on right of private persons to contest corporate power to take or hold property.

Distinguished in *Heiskell v. Chickasaw Lodge*, No. 8, 1. O. O. F. 87 Tenn. 686, 4 L. R. A. 706, 11 S. W. 825, holding that state only can question legal capacity of corporation as trustee; *Moskowitz v. Hornberger*, 20 Misc. 562, 46 N. Y. Supp. 462, holding apparently legal devise to corporation not subject to attack by purchaser from intermediate grantee.

Disapproved in *Hanson v. Little Sisters of the Poor*, 79 Md. 440, 32 L. R. A. 298, 32 Atl. 1052, and *Re Stickney*, 85 Md. 106, 35 L. R. A. 697, 60 Am. St. Rep. 308, 36 Atl. 654, both holding capacity of corporation as devisee, in excess of charter limit, not to be questioned by heirs.

#### **Liability for interest.**

Cited as *obiter* in *People ex rel. Cornell University v. Davenport*, 117 N. Y. 563, 23 N. E. 664, holding state only obligated to pay income from safe investments.

2 L. R. A. 405, *BRADSTREET CO. v. GILL*, 72 Tex. 115, 13 Am. St. Rep. 768, 9 S. W. 753.

#### **How question of agency determined.**

Cited in *Walsh v. Peterson*, 59 Neb. 651, 81 N. W. 853, holding question of agency for jury under instructions of court, where evidence disputed and inference doubtful.

Distinguished in *Olsen & Walke v. California Ins. Co.* 11 Tex. Civ. App. 372, 32 S. W. 446, holding court to determine question of agency, where no plea filed, for determining jurisdiction to render default judgment.

#### **When agency exists.**

Cited in *English v. Mitchell Cattle Co.* 8 Wyo. 90, 55 Pac. 310, and *Harrison v. Legore*, 109 Iowa, 620, 80 N. W. 670, holding agency established by conduct, irrespective of assertions; *Norwood v. Alamo F. Ins. Co.* 13 Tex. Civ. App. 480, 35 S. W. 717, holding agency not within contract of appointment, only provable independently thereof, by showing acceptance.

Cited in note (23 L. R. A. 497) on who may be served with process in suit against foreign corporation.

#### **Sufficiency of allegation in libel suit.**

Cited in *Brown v. Durham*, 3 Tex. Civ. App. 250, 22 S. W. 868, holding petition should specify libelous words of exhibits by direct allegation; *Dunn v. State*, 43 Tex. Crim. 40, 63 S. W. 571 (dissenting opinion), majority holding indictment showing threatening notice, alleged to be sent to frighten recipient, sufficient without averments explanatory of drawings and language therein.

#### **Necessity of alleging damages.**

Cited in *Hirshfield v. Ft. Worth Nat. Bank*, 83 Tex. 456, 15 L. R. A. 641, 29 Am. St. Rep. 660, 18 S. W. 743, holding petition for libel, not alleging special damages, insufficient unless words actionable *per se*; *Burton v. O'Neill*, 6 Tex. Civ. App. 616, 25 S. W. 1013, holding special damages need not be alleged where alleged words libelous *per se*.

**Parol evidence as to writing.**

Cited in note (6 L. R. A. 43) on admissibility of parol evidence to show meaning of words and phrases.

**Privileged communications.**

Cited in *Mitchell v. Bradstreet Co.* 116 Mo. 239, 20 L. R. A. 142, 38 Am. St. Rep. 592, 22 S. W. 358, and *Pollasky v. Minchener*, 81 Mich. 286, 9 L. R. A. 105, and footnote p. 102, 21 Am. St. Rep. 516, 46 N. W. 5, holding commercial agency's false communications to subscribers generally not privileged; *Runge v. Franklin*, 72 Tex. 589, 3 L. R. A. 423, 13 Am. St. Rep. 833, 10 S. W. 721, holding all proceedings in civil courts privileged as against suit for libel; *Missouri P. R. Co. v. Behee*, 2 Tex. Civ. App. 109, 21 S. W. 384, holding employer's false statement in communication for own business privileged where without malice.

Cited in footnotes to *Douglass v. Daisley*, 57 L. R. A. 475, which denies privilege, as matter of law, to communication by commercial agency that assignor, to secure indorser, had made assignment for creditors; *Mitchell v. Bradstreet Co.* 20 L. R. A. 138, which holds voluntary publication by mercantile agency of false statement that firm has assigned not privileged; *Pollasky v. Minchener*, 9 L. R. A. 102, which holds false communication by commercial agency to uninterested members not privileged; *Woodruff v. Bradstreet Co.* 5 L. R. A. 555, which holds publication that judgment recovered against merchant or trader libelous; *Conroy v. Pittsburgh Times*, 11 L. R. A. 725, which holds privileged communication one properly made, on proper occasion, from proper motive, on probable cause; *Nissen v. Cramer*, 6 L. R. A. 780, which holds relevant words spoken by party to action during trial privileged.

Cited in note (9 L. R. A. 621) on definition of "libel."

**Inference of malice from publication.**

Cited in *Coles v. Thompson*, 7 Tex. Civ. App. 668, 27 S. W. 46, and *St. James Military Academy v. Gaiser*, 125 Mo. 527, 28 L. R. A. 676, 46 Am. St. Rep. 502, 28 S. W. 851, holding malice to be implied from false publication.

2 L. R. A. 408, *STATE v. INTOXICATING LIQUORS*, 76 Iowa, 243, 41 N. W. 6.

**Intoxicating liquors.**

Cited in *Com. v. Brelsford*, 161 Mass. 63, 36 N. E. 677, holding within power of legislature to define "intoxicating liquors."

Cited in footnotes to *Carl v. State*, 4 L. R. A. 380, which holds medicinal biters containing alcohol intoxicating or not, according to other ingredients; *Com. v. Reyburg*, 2 L. R. A. 415, which holds it question for jury whether cider vinous or spirituous.

Cited in notes (6 L. R. A. 669) on beer as intoxicating liquor; (7 L. R. A. 297) on construction of statutes forbidding manufacture and sale of spirituous liquors; (20 L. R. A. 645) on what liquors within statutory restrictions as to sale of "spirituous," "vinous," "fermented," and other intoxicating liquors.

2 L. R. A. 409, *NASH v. BREWSTER*, 39 Minn. 530, 41 N. W. 105.

**Sales; when title passes.**

Cited in *Rail v. Little Falls Lumber Co.* 47 Minn. 425, 50 N. W. 471, hold-  
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ing actual delivery not necessary to pass title to chattels designated in contract; *Mackellar v. Pillsbury*, 48 Minn. 401, 51 N. W. 222, holding title passes on sale of certain number of articles out of greater number, if parties so intend, without actual separation; *Loud v. Pritchett*, 104 Ga. 653, 30 S. E. 870, holding sale of standing timber, to be felled by vendee, passes title; *Jennison v. Thompson*, 68 Minn. 335, 71 N. W. 380, holding whether title passes before delivery of wheat to be taken from greater quantity question for jury.

Cited in footnote to *Tyler Lumber Co. v. Charlton*, 55 L. R. A. 301, which holds title does not pass by acceptance of offer to sell lumber piled at mill to be inspected by common employee.

**Seed-grain notes; rights of holder.**

Cited in *Scofield v. National Elevator Co.* 64 Minn. 531, 67 N. W. 645, holding owner of seed-grain note may, upon allegation of facts, maintain action for conversion against purchaser; *Warder-Bushnell & G. Co. v. Minnesota & D. Elevator Co.* 44 Minn. 391, 46 N. W. 773, holding payee of seed-grain note, furnishing grain covered by maker's chattel mortgage, has valid lien on crop; *Smith v. Roberts*, 42 Minn. 343, 46 N. W. 336, holding ante-dated seed-grain note given after grain delivered not valid lien on crop.

2 L. R. A. 411, *NEW YORK & C. GRAIN STOCK & EXCHANGE v. CHICAGO BD. OF TRADE*, 127 Ill. 153, 11 Am. St. Rep. 107, 19 N. E. 855.

**Compulsory service.**

Cited in *Willoughby v. Chicago Junction R. & U. S. Co.* 50 N. J. Eq. 695, 25 Atl. 277, holding private corporation charged with public duty obliged only to serve all alike, at uniform rate; *Board of Trade v. C. B. Thompson Commission Co.* 103 Fed. 903, and *Board of Trade v. Hadden-Krull Co.* 109 Fed. 706, holding "public interest," entitling applicants to receive quotations without unjust discrimination, does not deprive compiler of property right prior to publication; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 450, 48 L. R. A. 574, 75 Am. St. Rep. 184, 56 N. E. 822, holding private news gathering corporation, having devoted its business to public use, cannot discriminate against purchasers of news; *Board of Trade v. Riordan*, 94 Ill. App. 308, holding board, in disciplining member, cannot deprive him of use of market quotations.

Cited in footnote to *State v. Edwards*, 25 L. R. A. 504, which holds valid limitation of amount of toll for grinding.

Cited in notes (31 L. R. A. 804) on public regulation as to operation of electric lines; (15 L. R. A. 322) on compulsory service by party whose business it is to serve public.

Distinguished in *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 239, 18 L. R. A. 200, 36 Am. St. Rep. 385, 32 N. E. 274, holding courts will not interfere with private business affecting public interests through its magnitude, but never devoted to public use; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 463, 51 L. R. A. 169, 81 Am. St. Rep. 368, 60 S. W. 91, holding business of news gathering not impressed with public use, making indiscriminating service compulsory; *Re Renville*, 46 App. Div. 44, 61 N. Y. Supp. 549, holding telegraph company not required to furnish quotations furnished to it by stock exchange for specific purpose.

Limited in *Christie Street Commission Co. v. Board of Trade*, 92 Ill. App. 606, 94 Ill. App. 237, holding equity will not compel furnishing of market quotations, though impressed with public interest, for unlawful purpose; *Cen-*

tral Stock & G. Exchange v. Board of Trade, 196 Ill. 409, 63 N. E. 740, holding board of trade cannot be compelled to furnish quotations used in unlawful business.

2 L. R. A. 415, COM. v. REYBURG, 122 Pa. 299, 16 Atl. 351.

**Prosecutor's liability for costs; when question for court.**

Cited in Com v. Koher, 8 Del. Co. Rep. 574, 8 Northampton Co. Rep. 341, holding court may withdraw from jury matter of costs, whenever it appears prosecutor ought not to pay them.

**Liquor laws.**

Cited in notes (9 L. R. A. 814) on construction of Pennsylvania liquor laws; (20 L. R. A. 646, 649) on what liquors within statutory restrictions as to sale of "spirituous," "vinous," "fermented" and other intoxicating liquors.

2 L. R. A. 417, MONTROSE PICKLE CO. v. DODSON & H. MFG. CO. 76 Iowa, 172, 14 Am. St. Rep. 213, 40 N. W. 705.

**Garnishment.**

Cited in Shaver Wagon and Cart Co. v. Halsted, 78 Iowa, 736, 43 N. W. 623, holding relation of creditor and debtor does not exist between garnisher and assignee of defendant's insurance policies.

Cited in note (28 L. R. A. 602) on liability of carriers to garnishment of property in transit.

Distinguished, in effect, in German Bank v. American F. Ins. Co. 83 Iowa, 496, 32 Am. St. Rep. 316, 50 N. W. 53, holding courts of another state may acquire jurisdiction in garnishment of debt owing by nonresident.

2 L. R. A. 418, MINNESOTA LOAN & T. CO. v. BEEBE, 40 Minn. 7, 41 N. W. 232.

Followed without special discussion in Northern Trust Co. v. Jackson, 60 Minn. 116, 61 N. W. 908.

**Corporation as guardian, trustee, etc.; constitutionality of act.**

Cited in Roane Iron Co. v. Wisconsin Trust Co. 99 Wis. 275, 67 Am. St. Rep. 856, 74 N. W. 818, holding act authorizing trust company to act as assignee not unconstitutional as special or class legislation.

Cited in note (48 L. R. A. 588) on granting special or exclusive privileges to surety and trust companies.

**Constitutional requirement that subject of act be expressed in title.**

Cited in Ek v. St. Paul Permanent Loan Co. 84 Minn. 249, 87 N. W. 844, holding such provision to be construed liberally, with reference to purpose intended; Winters v. Duluth, 82 Minn. 132, 84 N. W. 788, holding act constitutional if subjects embraced therein are naturally connected with subject expressed in title; State *ex rel.* Olsen v. Board of Control, 85 Minn. 174, 88 N. W. 533, and Allen v. Pioneer Press Co. 40 Minn. 119, 3 L. R. A. 533, 12 Am. St. Rep. 707, 41 N. W. 936, holding provisions of act, germane to subject expressed and proper to accomplishment of purpose indicated in title, constitutional.

Cited in note (2 L. R. A. 789) on title of statute must fairly suggest subjects dealt with in act.

**Probate-court proceedings not collaterally assailable.**

Cited in *Lyon v. Gleason*, 40 Minn. 435, 42 N. W. 286, holding probate of will conclusive evidence in collateral action of testator's death and of devise; *Dennis v. Bint*, 122 Cal. 42, 68 Am. St. Rep. 17, 54 Pac. 378, holding letters of administration conclusive in collateral action as to qualification and authority of administrator.

**Necessity of guardian's bond.**

Cited in note (33 L. R. A. 765) on necessity of bond by domestic guardian appointed by court to make acts valid.

**Effect of inquisition as to insanity.**

Cited in note (19 L. R. A. 493) on effect of inquisition to establish insanity.

2 L. R. A. 420, *ROCKHOLD v. CANTON MASONIC MUT. BENEV. ASSO.* (Ill.) 19 N. E. 710.

**Ultra vires acts of corporations.**

Cited in *Corey v. Sherman* (Iowa) 32 L. R. A. 512, 60 N. W. 232, holding insurance contract not within terms of articles of incorporation of benefit association, void.

Cited in notes (6 L. R. A. 290) on corporate power to contract; doctrine of *ultra vires*; (12 L. R. A. 168) on estoppel of corporation to deny liability on its contracts.

**Mutual benefit associations.**

Cited in *Clark v. Schromeyer*, 23 Ind. App. 567, 55 N. E. 785, holding benefit certificate, unilateral contract of insurance, terminable at option of holder.

Cited in notes (4 L. R. A. 382) on benefit association; enlarged powers conferred by statute; (7 L. R. A. 189) on transfer of mutual benefit certificates; (38 L. R. A. 49, 50) as to whether a benefit association is an insurance company, under statutes exempting benevolent societies.

2 L. R. A. 422, *ATCHISON, T. & S. F. R. CO. v. SCHNEIDER*, 127 Ill. 144, 20 N. E. 41.

**Jurisdiction of appeal.**

Cited in *Metropolitan West Side Elev. R. Co. v. Siegel*, 181 Ill. 644, 44 N. E. 276, holding not necessary that freehold be involved to give supreme court jurisdiction of appeal.

**Damages in eminent domain.**

Cited in notes (8 L. R. A. 124) on measure of damages on condemnation for public use; (51 L. R. A. 330) on damages in eminent domain cases as affected by loss of profits from suspension of business while moving.

Distinguished in *Braun v. Metropolitan West Side Elev. R. Co.* 166 Ill. 438, 46 N. E. 974, holding only in exceptional cases cost of removal of business an element of damage.

**Right to possession in eminent domain on giving security.**

Cited in *Davis v. Northwestern Elev. R. Co.* 170 Ill. 605, 48 N. E. 1058, holding petitioner may, upon filing bond, enter into possession of land sought to be condemned pending appeal; *Johnson v. Metropolitan West Side Elev. R. Co.* 160 Ill. 479, 45 N. E. 680, holding where judgment for damages has been affirmed, court will not reverse decree dissolving injunction against possession



pending appeal; *Ex parte Reynolds*, 52 Ark. 338, holding act authorizing entry upon deposit of security fixed by court pending condemnation proceedings not in conflict with constitutional provision that no property be appropriated until compensation ascertained by jury.

**Personal view as basis of verdict.**

Cited in *Peoria Gaslight & Coke Co. v. Peoria Terminal R. Co.* 146 Ill. 383, 21 L. R. A. 377, 34 N. E. 550, holding jury in condemnation proceedings cannot base estimate solely upon view of premises, disregarding testimony; *Chicago v. Spoor*, 91 Ill. App. 488 (approved by dissenting judge in 190 Ill. 366, 60 N. E. 540), holding that verdict supported by personal view need not wholly harmonize with testimony; *Stockton v. Chicago*, 136 Ill. 436, 26 N. E. 1095; *Metropolitan West Side Elev. R. Co. v. Johnson*, 159 Ill. 439, 42 N. E. 871; *Sanitary District v. Loughran*, 160 Ill. 365, 43 N. E. 359,—holding verdict in condemnation proceedings, rendered upon conflicting evidence and view of premises, sustainable.

Cited in note (42 L. R. A. 389, 390) on nature and effect of view by jury; theory that view must be supported by evidence.

2 L. R. A. 425, *LOCKWOOD v. LOCKWOOD*, 51 Hun, 337, 3 N. Y. Supp. 887.

**Record of exemplified copy of probate of foreign will.**

Cited in *Meiggs v. Hoagland*, 68 App. Div. 187, 74 N. Y. Supp. 234, holding record of exemplified copy of probate of foreign will only creates rebuttable presumption of due execution; *Re Nash*, 37 Misc. 708, 76 N. Y. Supp. 453, holding foreign will and copy of probate proceedings, not conformed to state law, not entitled to be recorded; *Meiggs v. Hoagland*, 41 Misc. 7, 83 N. Y. Supp. 603, holding record of foreign will, not showing attestation in statutory manner, does not show title to land in devisee.

Cited in notes (48 L. R. A. 133) on effect in various states of probate of will in another state; (48 L. R. A. 133) on effect of probate in another state of will of real estate.

2 L. R. A. 426, *BARNARD v. KNOX COUNTY*, 37 Fed. 563.

**Indebtedness exceeding constitutional limit.**

Cited in *Rauch v. Chapman*, 16 Wash. 579, 36 L. R. A. 411, 58 Am. St. Rep. 52, 48 Pac. 253, holding county warrants issued to meet indebtedness imposed by Constitution or legislature in connection with maintenance of county government valid, though exceeding debt limit.

Cited in footnotes to *Barnard v. Knox County*, 13 L. R. A. 244, which holds limitation on county indebtedness applicable to books and stationery for county clerk's office; *Jay County v. Taylor*, 7 L. R. A. 160, which holds employment of legal adviser for term extending beyond terms of county commissioners employing him invalid.

Cited in notes (23 L. R. A. 403, 404) on what constitutes "indebtedness" within constitutional provision.

Disapproved in *Barnard v. Knox County*, 105 Mo. 387, 13 L. R. A. 246, 16 S. W. 917, holding county warrant issued for indebtedness in excess of constitutional limit void, though incurred for necessary stationery and supplies.

2 L. R. A. 428, *NATIONAL BANK v. DORSET MARBLE CO.* 61 Vt. 106, 17 Atl. 42.

**Indorsement in blank—Before issue.**

Cited in *Ballard v. Burton*, 64 Vt. 396, 16 L. R. A. 667, 24 Atl. 769, holding bank director indorsing in blank new certificate of deposit issued by bank on its request for time liable as joint maker; *Young v. Sehon*, 53 W. Va. 136, 62 L. R. A. 505, 97 Am. St. Rep. 970, 44 S. E. 136, holding person making loan on non-negotiable note, indorsed by promisee and another, may treat them as comakers or guarantors; *Salisbury v. First Nat. Bank*, 37 Neb. 876, 40 Am. St. Rep. 527, 56 N. W. 727, holding notice of nonpayment at maturity not necessary to hold indorsers in blank before issue.

**— After issue.**

Cited in *Bowler v. Braun*, 63 Minn. 35, 56 Am. St. Rep. 449, 65 N. W. 124, holding parol evidence inadmissible, as against subsequent holder, to vary liability as second indorser of party signing in blank below payee; *Lyndon Sav. Bank v. International Co.* 75 Vt. 232, 54 Atl. 191, holding indorser of note in blank, on back, after execution, assumes, prima facie, obligation of a maker.

**Negotiability.**

Cited in footnote to *Witty v. Michigan Mut. L. Ins. Co.* 8 L. R. A. 365, which holds note negotiable although blank in body as to amount and place of payment.

2 L. R. A. 429, *RANKIN'S APPEAL*, 1 Monaghan (Pa.) 308, 16 Atl. 82.

**Right of tenant for life to income from mines.**

Cited in *Koen v. Bartlett*, 41 W. Va. 567, 31 L. R. A. 130, 56 Am. St. Rep. 884, 23 S. E. 664, holding life tenant entitled to product of oil or gas wells open, or lawfully opened, during tenancy.

**Curtesy.**

Cited in note (7 L. R. A. 694) on entry to establish title as tenant by curtesy.

**Rights incidental to grant of mine.**

Cited in *Ingle v. Bottoms*, 160 Ind. 78, 66 N. E. 160, sustaining right of lessee of coal mine to construct railroad switch thereto.

2 L. R. A. 434, *BAKER v. STEWART*, 40 Kan. 442, 10 Am. St. Rep. 213, 19 Pac. 904.

**Tenancy by entirety.**

Approved in *Shinn v. Shinn*, 42 Kan. 7, 4 L. R. A. 226, 21 Pac. 813, holding judgment for alimony not encumbrance upon land held by parties thereto in entirety.

Cited in *Simons v. McLain*, 51 Kan. 160, 32 Pac. 919, holding estates by joint tenancy, with accompanying right of survivorship, to exist in Kansas prior to chap. 203, Laws 1891, abolishing survivorship; *Noble v. Teeble*, 58 Kan. 400, 49 Pac. 598, holding prior to 1891, devise to daughter-in-law "and her children," created joint tenancy; *Boyer v. Sims*, 61 Kan. 596, 60 Pac. 309, holding surviving trustee in joint tenancy entitled to maintain ejectment in his own name; *Wilson v. Johnson*, 4 Kan. App. 751, 46 Pac. 833, holding consent of husband to devise by wife of land held "as tenant in common" does not operate to create tenancy in common in land held in entirety; *Reynolds v.*

Strong, 82 Hun, 203, 31 N. Y. Supp. 329, holding widow entitled to whole estate as tenant by the entirety of property conveyed to husband and wife; *Re Lewis*, 85 Mich. 342, 24 Am. St. Rep. 94, 48 N. W. 580, holding tenancy by entirety unaffected by divorce; *Helvie v. Hoover*, 11 Okla. 694, 69 Pac. 958, holding husband and wife tenants in common of real estate conveyed to them; *McNeeley v. South Penn Oil. Co.* 52 W. Va. 627, 62 L. R. A. 569, 44 S. E. 508, holding conveyance to husband and wife does not create estate by entirety, under statutes abolishing survivorship in such estates, and relating to married women's separate property.

Cited in footnotes to *Mittel v. Karl*, 8 L. R. A. 655, which holds life estate with fee to survivor passes by deed to husband and wife, and to survivor in his own right; *Shinn v. Shinn*, 4 L. R. A. 224, which holds judgment for alimony encumbrance on land held by entirety; *Donahue v. Hubbard*, 14 L. R. A. 123, which holds husband's title as tenant by entirety may be conveyed to wife through third person; *Thornburg v. Wiggins*, 22 L. R. A. 42, which holds tenancy by entirety not created by conveyance to husband and wife "in joint tenancy;" *Re Albrecht*, 18 L. R. A. 329, which denies tenancy by entirety in bond and mortgage to husband and wife.

Cited in notes (12 L. R. A. 514) on definition of tenancy by entirety; (13 L. R. A. 326) on attitude of courts towards estates by entirety; (30 L. R. A. 314) on where and to what extent estate exists; (30 L. R. A. 324) on creation of estate by limitation to husband and wife as tenants in common; (30 L. R. A. 330) on disposition or encumbrance of entirety property.

#### **Effect of statutes on estate by entirety.**

Cited in *Howard v. Schneider*, 10 Kan. App. 139, 62 Pac. 435, holding statute abolishing "survivorship in joint tenancy" ineffectual as to estates by entirety; *Stewart v. Thomas*, 64 Kan. 514, 68 Pac. 70, holding statute abolishing "survivorship in joint tenancy" applies to tenancy by entirety, though not named in title of act; *Stilphen v. Stilphen*, 65 N. H. 139, 23 Atl. 79, holding statute enabling married woman to hold property as if single abolished only after-acquired estates by entirety.

Cited in notes (8 L. R. A. 407) on construction of Indiana Code, § 5119, in respect to married woman's rights; (30 L. R. A. 316) on construction of statutes as to existence and extent of estate.

2 L. R. A. 444, *UNITED STATES v. TOZER*, 37 Fed. 635.

Charge to jury in 39 Fed. 369.

Appeal from judgment of conviction in 4 Inters. Com. Rep. 245, 52 Fed. 917.

#### **Discriminations.**

Cited in footnote to *Fitzgerald v. Grand Trunk R. Co.* 13 L. R. A. 70, which holds no vested right in law existing when contract as to interstate transportation made.

Cited in notes (4 L. R. A. 332) on justification of discrimination by carrier; (12 L. R. A. 436) on rates of freight in long and short hauls.

#### **Liability of employee.**

Cited in *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 390, 54 Fed. 736, holding executive of engineers' union while employee bound by mandatory injunction to carry interstate freight.

2 L. R. A. 447, *BUTTERFIELD v. BOSTON*, 148 Mass. 544, 20 N. E. 113.

**Negligence.**

Cited in footnote to *Feeney v. Long Island R. Co.* 5 L. R. A. 544, which holds railroad company liable for negligence of gateman.

**Municipal Liability.**

Cited in *Lincoln v. Boston*, 148 Mass. 580, 3 L. R. A. 258, 12 Am. St. Rep. 601, 20 N. E. 329, holding city not liable for injuries resulting from firing of cannon on Boston Common under license of authorities; *Daly v. New Haven*, 69 Conn. 649, 38 Atl. 397, holding liability of city for negligence in maintenance or operation of bridge purely statutory.

Cited in note (9 L. R. A. 208) on municipal liability for acts or omissions of its agents.

Distinguished in *Stephani v. Manitowoc*, 89 Wis. 471, 62 N. W. 176, holding city liable for death resulting from unprotected drawbridge.

2 L. R. A. 448, *COVENY v. McLAUGHLIN*, 148 Mass. 576, 20 N. E. 165.

**Contingent remainders.**

Cited in *Hills v. Barnard*, 152 Mass. 72, 9 L. R. A. 217, 25 N. E. 96, holding devise to nephews living on son's death in equal shares, "the issue of any deceased legatee to take parent's share," vested *per capita* in nephews alive at son's death, and in issue of deceased nephews by right of representation; *Bigelow v. Clap*, 166 Mass. 91, 43 N. E. 1037, holding testamentary provision for equal division among nephews and grandnephews, "who may then be living," on death of daughter, entitles nephews and grandnephews to share *per capita* alone; *Pulse v. Osborn*, 30 Ind. App. 633, 64 N. E. 59, construing devise to surviving grandchildren should first taker die before them as meaning those surviving first taker.

Cited in note (3 L. R. A. 817) on contingent remainders.

2 L. R. A. 449, *HAAS v. SACKETT*, 40 Minn. 53, 41 N. W. 237.

**Contract of indorsement.**

Cited in *Hathway v. Rogers*, 112 Iowa, 640, 84 N. W. 674, holding memorandum, "sold half of this note to R.," signed by payee on back of note, not an indorsement; *Gregg v. Groesbeck*, 11 Utah, 320, 32 L. R. A. 269, 40 Pac. 202, holding oral evidence admissible to prove plaintiff's knowledge of agreement between payee and defendant for erasure of latter's name as indorser before negotiation.

**Conversion of negotiable instrument.**

Cited in *Nashville Lumber Co. v. Fourth Nat. Bank*, 94 Tenn. 381, 27 L. R. A. 522, 45 Am. St. Rep. 727, 29 S. W. 368, holding bank transferring negotiable paper to bona fide purchaser liable to party whose indorsement thereon had been forged to its knowledge.

Cited in footnote to *Griggs v. Day*, 18 L. R. A. 130, which holds pledgee liable for only actual value of notes converted.

**Measure of damages in conversion.**

Cited in footnote to *Woods v. Nichols*, 48 L. R. A. 773, which holds measure of recovery in trover by one retaining title as security for purchase price limited to balance due, less depreciation by use.

2 L. R. A. 450, EVANSVILLE & T. H. R. CO. v. CRIST, 116 Ind. 446, 9 Am. St. Rep. 865, 19 N. E. 310.

**Negligence in maintaining crossings of highway.**

Cited in Louisville, E. & St. L. Consol. R. Co. v. Pritchard, 131 Ind. 566, 31 Am. St. Rep. 451, 31 N. E. 358, holding railway company responsible for injuries received from jolt of wagon crossing tracks 15 inches above highway; Lake Shore & M. S. R. Co. v. McIntosh, 140 Ind. 278, 38 N. E. 476, holding railroad company liable for injury caused by washed-out crossing, negligently left in such condition; Cincinnati, H. & I. R. Co. v. Claire, 6 Ind. App. 394, 33 N. E. 918, holding railway company liable for injury due to failure to guard and light raised footway; Seybold v. Terre Haute & I. R. Co. 18 Ind. App. 379, 46 N. E. 1054, holding railway company liable for injury resulting from lack of guards beside highway necessarily raised to cross tracks; Terre Haute & I. R. Co. v. Clem, 123 Ind. 16, 7 L. R. A. 588, 18 Am. St. Rep. 303, 23 N. E. 965, holding no presumption of negligent construction or maintenance from mere fact of injury at crossing; Moundsville v. Ohio River R. Co. 37 W. Va. 105, 20 L. R. A. 170, 16 S. E. 514, and State *ex rel.* Muncie v. Lake Erie & W. R. Co. 83 Fed. 286, holding mandamus lies to compel railroad to maintain street crossing in suitable condition; Chicago, I. & L. R. Co. v. State, 158 Ind. 192, 63 N. E. 224, holding railroad company may be compelled to construct underground crossing, where surface crossing is dangerous; Chicago & S. E. R. Co. v. State, 159 Ind. 240, 64 N. E. 860, holding city may compel railroad company to lower track at street crossing to conform to street grade.

**Negligence, concurring acts.**

Cited in Cincinnati, I. St. L. & C. R. Co. v. Cooper, 120 Ind. 472, 6 L. R. A. 245, 16 Am. St. Rep. 334, 22 N. E. 340, holding company liable for death caused by sudden starting of one train throwing off plaintiff, and negligent failure of second train to stop before reaching place of fall.

**General allegation of negligence sufficient.**

Cited in Pennsylvania Co. v. Horton, 132 Ind. 192, 31 N. E. 45, holding statement of particulars of freedom from contributory negligence necessary only on demand of defendant; Lake Shore & M. S. R. Co. v. Kurtz, 10 Ind. App. 63, 35 N. E. 201, holding any facts to show negligence admissible under general averment.

**Specific averments control general averments.**

Cited in Queen Ins. Co. v. Hudnut Co. 8 Ind. App. 27, 35 N. E. 397, holding answer denying loss by tornado controlled by specific allegation that loss resulted from shock of boat blown by wind.

**Contributory negligence, knowledge of defect.**

Cited in Poseyville v. Lewis, 126 Ind. 82, 25 N. E. 593, holding knowledge of defective condition of sidewalk no bar to recovery; Hoggatt v. Evansville & T. H. R. Co. 3 Ind. App. 443, 29 N. E. 941, holding driver of team on highway parallel to railway not guilty of contributory negligence, though aware of horses' skittishness; Evansville & T. H. R. Co. v. Athon, 6 Ind. App. 298, 51 Am. St. Rep. 303, 33 N. E. 469, holding plaintiff not guilty of contributory negligence in alighting under directions of brakeman after signal rope pulled; Sledge v. Gayoso Hotel Co. 43 Fed. 464, holding it not negligence *per se* to enter elevator in conductor's absence; Morrison v. Shelby County, 116 Ind. 433, 19 N. E. 316.

holding plaintiff guilty of contributory negligence in driving loaded wagon upon defective bridge when long aware of condition, though used by public.

**— Averment of freedom from.**

Cited in *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 266, 19 N. E. 770, holding general averment that plaintiff without fault sufficient; *Pittsburgh, C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 95, 35 N. E. 1033; *Citizens' Street R. Co. v. Spahr*, 7 Ind. App. 26; 33 N. E. 446; *Louisville, N. A. & C. R. Co. v. Hobbs*, 3 Ind. App. 447, 29 N. E. 934; *Evansville & T. H. R. Co. v. Krapf*, 143 Ind. 652, 36 N. E. 901; *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 590, 23 N. E. 675; *Elkhart v. Witman*, 122 Ind. 540, 23 N. E. 796, — holding general averment that plaintiff was without fault sufficient, unless contradicted by facts specifically stated; *Romona Oolitic Stone Co. v. Tate*, 12 Ind. App. 62, 37 N. E. 1065, holding general allegation of freedom from fault overcome by facts pleaded showing contributory negligence.

**Opinion evidence.**

Cited in *Louisville, N. A. & C. R. Co. v. Hendricks*, 128 Ind. 463, 28 N. E. 58, holding opinion of nonexpert witness as to rate of train's speed competent; *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 423, 11 So. 262, holding plaintiff's testimony as to relative speed of car and man running competent, though indefinite; *Budd v. Salt Lake City R. Co.* 23 Utah, 520, 65 Pac. 486, holding opinion of physician as to percentage of patients recovering from similar injuries competent; *Alabama G. S. R. Co. v. Hall*, 105 Ala. 606, 17 So. 176, holding nonexpert character of opinion testimony of speed of engine goes to weight, not competency, of evidence.

Cited in note (4 L. R. A. 555) on expert opinions.

**Submission of special instructions.**

Cited in *Shelby County v. Blair*, 8 Ind. App. 588, 36 N. E. 216, and *Ransbottom v. State*, 144 Ind. 255, 43 N. E. 218, holding special instructions must be submitted to court before argument to jury commenced; *Cleveland, C. C. & St. L. R. Co. v. Ward*, 147 Ind. 257, 45 N. E. 325, holding failure to give requested instruction not considered on appeal, unless record shows request therefor at close of evidence; *Duckwall v. Williams*, 29 Ind. App. 654, 63 N. E. 232, holding error cannot be predicated upon refusal of instruction requested during closing argument.

2 L. R. A. 455, *VANOLINDER v. CARPENTER*, 127 Ill. 42, 11 Am. St. Rep. 92, 19 N. E. 868.

**Rule in Shelley's Case.**

Cited in *Hageman v. Hageman*, 129 Ill. 167, 21 N. E. 814, holding fee vested in sons under devise to them, with restriction against sale or mortgage during lives, and gift to "their heirs after them;" *Silva v. Hopkinson*, 158 Ill. 388, 41 N. E. 1013, holding devise to daughters "and their lawful heirs, but in the event of their death without lawful issue" then over, creates unconditional fee simple in daughters; *Wolfer v. Hemmer*, 144 Ill. 559, 33 N. E. 751, holding devise to wife, her heirs and assigns, carries fee in spite of subsequent clause providing for distribution among children of all realty undisposed of by wife at her death; *Ewing v. Barnes*, 156 Ill. 68, 40 N. E. 325, holding that fee created by devise to party and his heirs not affected by subsequent clause in will providing for disposition of property in case of death without heirs of his body;

*Palmer v. Cook*, 159 Ill. 303, 50 Am. St. Rep. 165, 42 N. E. 796, holding grant to daughters in fee creates tenancy in common, unaffected by subsequent clause in deed providing for reversion of interest of one first dying without heirs, to survivor; *Vangieson v. Henderson*, 150 Ill. 121, 36 N. E. 974, holding fee in daughter, under devise to wife for life, on her death to daughter during natural life, remainder to her heirs; *Fowler v. Black*, 136 Ill. 375, 11 L. R. A. 673, footnote p. 671, 26 N. E. 596, holding deed of vested remainder to grantee for life, on his death to his heirs in fee, vested fee in grantee; *Deemer v. Kessinger*, 206 Ill. 63, 69 N. E. 28, holding devise to son, and at his death to his lawful heirs, vests fee in son; *Grimes v. Shirk*, 169 Pa. 76, 32 Atl. 13, holding devisee of estate for natural life, remainder to lawful issue, if any; if not to testator's heirs, takes fee.

Cited in footnotes to *Grainger v. Grainger*, 36 L. R. A. 186, which holds rule in *Shelley's Case* not applicable to devise to one for life, and after his death to heirs of his body, if any survive him, with devise over otherwise; *Starnes v. Hill*, 22 L. R. A. 598, which holds indefeasible fee not vested in one to whom life estate given with estate in fee to his "heirs;" *Re Browning*, 3 L. R. A. 209, which gives first takers fee simple under devise to persons for life, and then to their children and their heirs; *Glover v. Condell*, 35 L. R. A. 360, which holds ownership of fund subject to limitation, given by bequest to son and over in case of death without living heirs.

Cited in notes (12 L. R. A. 723) on rule in *Shelley's Case*; (4 L. R. A. 117) on devise of life estate by will.

#### **Construction of instrument.**

Cited in *Gannon v. Peterson*, 193 Ill. 380, 55 L. R. A. 704, 62 N. E. 210, holding devise using "children" and "heirs" indiscriminately read interchangeably by courts to effect intention of testator; *Strain v. Sweeny*, 163 Ill. 607, 45 N. E. 201, holding devise to son "and his heirs, . . . but in case he die without issue" then over to mean "children," so as to effectuate executory devise; *Griswold v. Hicks*, 132 Ill. 502, 22 Am. St. Rep. 549, 24 N. E. 63, holding term "heirs," in habendum of deed, limited by following clause expressing intention to convey to children for life, "and at their death to go to their children."

#### **Execution of dry trust by statute.**

Cited in *Barclay v. Platt*, 170 Ill. 388, 48 N. E. 972, holding devise in trust for son and daughter and their children creates vested life estates in undivided half of property in son and daughter, remainder to children.

2 L. R. A. 461, *SYKES v. PEOPLE*, 127 Ill. 117, 19 N. E. 705.

Cited on second appeal in 132 Ill. 49, 23 N. E. 391, stating former judgment reversed for erroneous exclusion of evidence.

#### **Parol modification of receipt.**

Cited in *Thompson v. Thompson*, 78 Minn. 386, 81 N. W. 543, holding storage receipt for grain cannot be modified by parol.

#### **Intent to defraud.**

Cited in *Block v. Oliver*, 102 Ky. 277, 43 S. W. 238, to contention, intent to defraud by issuance of duplicate receipts immaterial.

Cited in note (19 L. R. A. 304) on estoppel by wording of warehouse receipt.

#### **Criminal liability.**

Cited in note (7 L. R. A. 532) on criminal liability of warehousemen.



2 L. R. A. 465, *TOOLE v. TOOLE*, 112 N. Y. 333, 8 Am. St. Rep. 750, 19 N. E. 682.

**Defective or doubtful title.**

Cited in *Moore v. Williams*, 115 N. Y. 586, 5 L. R. A. 656, 12 Am. St. Rep. 844, 22 N. E. 233, holding purchaser need not take defective or doubtful title; *Schwencke v. Haffner*, 18 App. Div. 185, 45 N. Y. Supp. 937, to point, purchaser at judicial sale need not take doubtful title; *Heller v. Cohen*, 154 N. Y. 306, 48 N. E. 527, holding purchaser at judicial sale need not take defective title requiring proceedings to cure it; *Correll v. Lauterbach*, 14 Misc. 473, 36 N. Y. Supp. 615, holding purchaser need not await result of action by vendor against strangers to perfect title; *Haggerty v. Wagner*, 148 Ind. 672, 39 L. R. A. 398, 48 N. E. 366 (dissenting opinion), to point that purchaser need not take doubtful title he may have to defend; *Moot v. Business Men's Invest. Asso.* 157 N. Y. 212, 45 L. R. A. 670, 52 N. E. 1, holding rejection of title for defect in record cured by corrected judgment roll on file unwarranted.

Cited in note (21 L. R. A. 46) as to objections on account of doubtful title.

**Alienage and escheat.**

Cited in notes (31 L. R. A. 85, 146, 177, 32 L. R. A. 177) as to disability of aliens and escheat of property.

2 L. R. A. 467, *GIBSON v. RICHMOND & D. R. CO.* 37 Fed. 743.

**Suit by pledgee or purchaser to invalidate transfer.**

Cited in *Elyea v. Lehigh Salt Min. Co.* 45 App. Div. 237, 60 N. Y. Supp. 1050, holding pledgee of stock cannot sue to set aside contract for sale of corporate property and stock; *McCaleb v. Goodwin*, 114 Ala. 623, 21 So. 967, holding purchaser of stock estopped to question deed of trust given to secure bonds issued with stockholder's consent.

Cited in notes (6 L. R. A. 566) on rights of bondholders; (6 L. R. A. 643) as to mortgage of railroad stock.

2 L. R. A. 469, *FIRST NAT. BANK v. MERCHANTS BANK*, 37 Fed. 657.

**Removal of action between nonresident parties.**

Cited in *Burck v. Taylor*, 39 Fed. 583; *Uhle v. Burnham*, 42 Fed. 3; *Koshland v. National Ins Co.* 31 Or. 214, 49 Pac. 845; *Craven v. Turner*, 82 Me. 389, 19 Atl. 864; *American Finance Co. v. Bostwick*, 151 Mass. 25, 23 N. E. 656; *Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co.* 130 Fed. 588,—holding cause removable, although neither party resides in district; *Duncan v. Associated Press*, 81 Fed. 421, holding action between nonresident parties of diverse citizenship removable; *Whitworth v. Illinois C. R. Co.* 107 Fed. 558 holding cause will not be remanded to state court because neither party resides within state; *Alley v. Edward Hines Lumber Co.* 64 Fed. 904, holding cause removable although one of the plaintiffs resides without state; *Sherwood v. Newport News & M. Valley Co.* 55 Fed. 5, holding suit by aliens against corporation not chartered in state removable.

Not followed in *Foulk v. Gray*, 120 Fed. 157, holding suit brought in courts of state where neither party resides not removable to Federal court, except by consent.

**Citizenship of stakeholder.**

Cited in *Reeves v. Corning*, 51 Fed. 778, holding citizenship of mere stakeholder does not defeat real party defendant's right of removal.

2 L. R. A. 471, *WELLES v. LARRABEE*, 36 Fed. 866.

**Statute rights and liabilities of real and apparent owners of corporate stock.**

Cited in *Lewis v. Switz*, 74 Fed. 382, holding person who knowingly permits name on national bank-stock books as owner cannot deny ownership as against creditors; *Hecht v. Phenix Woolen Co.* 121 Fed. 190, holding persons acquiescing in issuance of stock to them without consideration, transferred to another as collateral for loan to corporation, liable as stockholders; *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 152, 22 C. C. A. 120, 46 U. S. App. 281, 76 Fed. 175, holding stockholders by direct issue as collateral security for debt not liable to creditors; *Baker v. Old Nat. Bank*, 86 Fed. 1007, holding notice afforded on stock books by words "collateral," "in escrow," "trustee," or "agent," prevent liability by estoppel; *Houghton v. Hubbell*, 33 C. C. A. 575, 63 U. S. App. 31, 91 Fed. 454, holding real owner of stock in name of another person on stock books liable to creditors; *Geyser-Marion Gold Min. Co. v. Stark*, 53 L. R. A. 689, 45 C. C. A. 471, 106 Fed. 563, holding transfer of stock in name of trustee without inquiry for *cestui que trust* actionable negligence; *Morse v. Pacific R. Co.* 93 Ill. App. 39, holding legal, although not equitable, owner of corporate stock liable to creditors.

Cited in note (36 L. R. A. 139) on liability of pledgee of stock as a shareholder.

2 L. R. A. 475, *HUDMON BROS. v. DU BOSE*, 85 Ala. 446, 5 So. 162.

**Warehousemen.**

Cited in note (7 L. R. A. 530) on warehousemen as bailees.

**Lien of mortgagee.**

Cited in *Truss v. Harvey*, 120 Ala. 641, 24 So. 927, holding mortgage on crops, recorded in county where grown, notice to purchaser in another county; *Chapman v. First Nat. Bank*, 98 Ala. 532, 22 L. R. A. 80, 13 So. 764, holding lien of livery-stable keeper subordinate to prior recorded mortgage with law day passed and mortgagor in possession.

2 L. R. A. 476, *SIMMONS v. HILL*, 96 Mo. 679, 10 S. W. 61.

**Liability of owners of legal title to corporate stocks.**

Cited in *Bagley v. Tyler*, 43 Mo. App. 203, holding courts will not look beyond registered shareholders in fixing liability to respond to creditors.

2 L. R. A. 480, *PHILADELPHIA NAT. BANK v. DOWD*, 38 Fed. 172.

**Trusts and trust funds.**

Cited in *Merchants' & F. Bank v. Austin*, 48 Fed. 28, holding trust funds can only be pursued when clearly distinguishable from other property of trustee. *Wasson v. Hawkins*, 59 Fed. 237, holding deposit in insolvent bank a few moments before closing recoverable from receiver; *Independent District v. Beard*, 83 Fed. 11, holding rule not requiring deposit to be traced into any specific funds in insolvent bank receiver's hands binding on Federal courts in Iowa.

Cited in footnotes to *Ferchen v. Arndt*, 29 L. R. A. 664, which denies power of consignors to impress with trust lien funds of consignees in hands of receiver; *Indiana, I. & I. R. Co. v. Swannell*, 30 L. R. A. 290, which holds property purchased by trustee for bondholders under reorganization arrangement not discharged as to bondholders failing to pay assessments; *Central Stock & Grain Exchange v. Bendinger*, 56 L. R. A. 875, which holds broker liable to refund to principal money illegally taken from agent as margins on gambling transaction; *Bohle v. Hasselbroch*, 61 L. R. A. 323, which sustains right of *cestuis que trust* to elect remedy where trustee buys land in own name with trust funds mingled with own funds.

Cited in note (8 L. R. A. 789) on commingling of trust funds.

Distinguished or disregarded in *Massey v. Fisher*, 62 Fed. 960, holding money paid to insolvent bank to take up note recoverable from funds in hands of receiver.

#### **Banks and banking.**

Cited in *New Farmers' Bank v. Cockrell*, 106 Ky. 588, 51 S. W. 2; *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 55, 54 N. E. 97; *Hallam v. Tillinghast*, 19 Wash. 27, 52 Pac. 329,—holding collection of draft by bank establishes merely the relation of debtor and creditor between it and owner thereof.

Cited in footnotes to *First Nat. Bank v. Payne*, 3 L. R. A. 284, which holds partner of insolvent banking firm cannot pay checks received from collecting bank by charging to drawers and crediting to latter bank; *Pickle v. People's Nat. Bank*, 7 L. R. A. 93, which holds acceptance of check necessary to give right of action against bank.

Cited in notes (2 L. R. A. 699) on usages and customs as to bank collections; (7 L. R. A. 859) on bank collections; (32 L. R. A. 719) on trust in proceeds of collection made by bank when insolvent.

#### **Right of *cestui que trust* to preference.**

Cited in *Re Mulligan*, 116 Fed. 718, refusing preference where misappropriated funds could not be traced to particular stocks in hands of bankrupt's trustee; *St. Louis Brewing Assn. v. Austin*, 100 Ala. 322, 13 So. 908, holding collections and deposits induced by fraud not preferred, unless identified in bank receiver's hands; *Windstanley v. Second Nat. Bank*, 13 Ind. App. 548, 41 N. E. 956, holding person for whom insolvent collected and retained money not entitled to preference, without showing what was done with such money; *Evangelical Synod v. Schoeneich*, 143 Mo. 661, 45 S. W. 647, holding where trustee indistinguishably mixes trust money with his own, that *cestui que trust* will be preferred over creditors; *Pearson v. Haydel*, 90 Mo. App. 261, holding *cestui que trust* will be preferred so long as indistinguishably mixed property can be traced into trustee's estate; *Anheuser-Busch Brewing Assn. v. Clayton*, 6 C. C. A. 110, 13 U. S. App. 295, 56 Fed. 761, and *Freiberg v. Stoddard*, 161 Pa. 263, 28 Atl. 1111, Affirming 7 Kulp, 161, holding drawer of accepted draft charged as paid by drawee's bank not entitled to preference on bank's insolvency; *Richelieu Hotel Co. v. Miller*, 50 Ill. App. 393; *Drovers' & M. Nat. Bank v. Roller*, 85 Md. 500, 36 L. R. A. 769, 60 Am. St. Rep. 344, 37 Atl. 30; *Bishop v. Mahoney*, 70 Minn. 240, 73 N. W. 6; *Burnham v. Barth*, 89 Wis. 370, 62 N. W. 96; *Thuenmiller v. Barth*, 89 Wis. 389, 62 N. W. 94; *Union Nat. Bank v. Goetz*, 138 Ill. 136, 32 Am. St. Rep. 119, 27 N. E. 907; *Northern Dakota Elevator Co. v. Clark*, 3 N. D. 33,

53 N. W. 175, — holding owner not a preferred creditor where his property is indistinguishably mingled with another's in whose hands it was.

Cited in note (25 L. R. A. 547) on exceptions to the prohibition of preferences by insolvent national banks.

2 L. R. A. 487, *HOUSTON v. SLEDGE*, 101 N. C. 640, 8 S. E. 145.

**Pleadings.**

Cited in *Nims Mfg. Co. v. Blythe*, 127 N. C. 326, 37 S. E. 455, holding complaint might be amended to conform to facts proved; *Mayes v. Stephens*, 38 Or. 516, 63 Pac. 760, holding error to strike out new matter in reply.

2 L. R. A. 489, *JOHNSON v. BROOKLYN & C. R. CO.* 37 Fed. 147.

**Patent on combination.**

Cited in *Vermilya v. Erie R. Co.* 89 Fed. 96, holding injunction *pendente lite* should not be granted where patent is for combination of old parts.

Cited in note (12 L. R. A. 107) on patent for combination.

2 L. R. A. 489, *PITTSBURG, C. & ST. L. R. CO. v. LYON*, 123 Pa. 140, 16 Atl. 607.

**Reasonableness of railroad's regulations.**

Cited in *Muckle v. Rochester R. Co.* 79 Hun, 35, 29 N. Y. Supp. 732, holding reasonableness of street railroad's regulation as to time limit for transfers a question of law.

Cited in note (43 L. R. A. 363) on duties of master and servant with regard to rules promulgated for the safe conduct of a business.

**Exemplary damages.**

Cited in *Huling v. Henderson*, 161 Pa. 560, 29 Atl. 276, holding exemplary damages recoverable for wilfully killing trees; *Gallagher v. Burke*, 13 Pa. Super. Ct. 251, sustaining instruction that jury might award exemplary damages for malicious eviction of tenant; *Lynch v. Troxell*, 207 Pa. 172, 56 Atl. 413, holding question of exemplary damages for flooding land wrongfully submitted to jury, in absence of evidence that injury was wilful or malicious.

**Regulations as to baggage.**

Distinguished in *Howell v. Grand Trunk R. Co.* 92 Hun, 426, 36 N. Y. Supp. 544, holding railroad's rule against extending stop-over privilege to baggage reasonable.

**Powers of corporations.**

Cited in *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 379, 13 L. R. A. 831, 21 Atl. 1090, holding corporations may exercise only powers conferred expressly or by necessary implication.

2 L. R. A. 491, *FIFTH NAT. BANK v. ASHWORTH*, 123 Pa. 212, 16 Atl. 596.

**Duty of collecting agents.**

Cited in *American Exch. Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 457, holding bank receiving worthless check in payment of one sent to it for collection liable to sender; *National Bank v. American Exch. Bank*, 151 Mo. 330, 74 Am. St. Rep. 527, 52 S. W. 265, holding bank surrendering for check

draft sent for collection, liable to sender; *Gowling v. American Exp. Co.* 102 Mo. App. 372, 76 S. W. 712, holding agent to collect check, accepting draft, personally liable to principal; *Farmers' & M. Nat. Bank v. Cuyler*, 18 Pa. Super. Ct. 437, 9 Pa. Dist. R. 539, holding bank receiving check for collection, and taking another in payment, is liable for amount of deposited check; *Pepperday v. Citizens' Nat. Bank*, 183 Pa. 522, 39 L. R. A. 530, 63 Am. St. Rep. 769, 38 Atl. 1030, holding bank liable for receiving worthless check in payment on securities of depositor; *Irwin v. Reeves Pulley Co.* 20 Ind. App. 115, 48 N. E. 601, holding bank only bound to reasonable diligence to collect draft; *Lowenstein v. Bresler*, 109 Ala. 329, 19 So. 860, holding one receiving check in payment must duly present it and give notice of dishonor; *Industrial Trust, Title & Sav. Co. v. Weakley*, 103 Ala. 466, 49 Am. St. Rep. 45, 15 So. 854, holding delay in presentment of check received in payment by agent is at his risk; *National Bank v. Johnson*, 6 N. D. 186, 69 N. W. 49, holding owner of certificate of deposit, for which draft taken by bank collecting it, entitled to dividends on draft from receiver of drawer; *Kirkham v. Bank of America*, 26 App. Div. 121, 49 N. Y. Supp. 767, holding bank crediting the amount of draft for collection to sender cannot cancel the credit without returning draft; *Paul v. Grimm*, 165 Pa. 147, 44 Am. St. Rep. 648, 30 Atl. 721, holding agent liable to principal for amount for which lands sold received in bonds; *Anderson v. Gill*, 79 Md. 318, 25 L. R. A. 204, 47 Am. St. Rep. 402, 29 Atl. 527, holding drawer of check discharged by insolvency of bank on which it is drawn if check by it on third bank, accepted in payment, was not presented with diligence.

Cited in footnotes to *St. Nicholas Bank v. State Nat. Bank*, 13 L. R. A. 241, which holds collecting bank's duty not fulfilled by delivering correspondent's draft on third person to itself; *First Nat. Bank v. Payne*, 3 L. R. A. 284, which holds partner of insolvent banking firm cannot pay checks received from collecting bank by charging to drawers and crediting to latter bank; *Bank of Antigo v. Union Trust Co.* 23 L. R. A. 611, which holds bank takes risk of accepting check in payment of note received for collection; *State Bank v. Byrne*, 21 L. R. A. 753, which holds drawee's acceptance of draft presented by collecting bank not payment; *Corn Exch. Bank v. Farmers' Nat. Bank*, 7 L. R. A. 559, which holds only first of several banks receiving check for collection agent of payee; *Grisson v. Commercial Nat. Bank*, 3 L. R. A. 273, which holds bank has no right to pay to third party note made by depositor.

Cited in notes (4 L. R. A. 422) on bank receiving paper for collection; duty and liability; (7 L. R. A. 858) on duties, rights, obligations, and liabilities of bank for collection; (9 L. R. A. 109) on relations between depositor and bank; (8 L. R. A. 44) on liability of agent of collecting bank.

2 L. R. A. 494, *PEOPLE v. SOULE*, 74 Mich. 250, 41 N. W. 908.

**Who engaged in selling liquor.**

Cited in *State v. Austin Club*, 89 Tex. 26, 30 L. R. A. 503, 33 S. W. 113, holding social club not engaged in business of selling liquor; *People v. Adelphi Club*, 149 N. Y. 13, 31 L. R. A. 513, 52 Am. St. Rep. 705, 43 N. E. 410, holding social club does not require license to sell its liquor to members; *Mohrman v. State*, 105 Ga. 716, 43 L. R. A. 401, 70 Am. St. Rep. 80, 32 S. E. 143, holding social club a tippling house to be closed on Sunday; *State v. Boston Club*, 45 La. Ann. 592, 20 L. R. A. 187, 12 So. 895, holding the furnishing of drinks to members of social club, sales, within meaning of act requiring license; *Barden v. Montana*

Club, 10 Mont. 335, 11 L. R. A. 595, 24 Am. St. Rep. 27, 25 Pac. 1042, holding social club not liable to pay license tax for sale of liquor to members.

Cited in footnotes to State *ex rel.* Bell v. St. Louis Club, 26 L. R. A. 573, which holds valid, distribution of liquor among members by social club; People v. Adelphi Club, 31 L. R. A. 510, which holds distribution of liquor by social club to members not illegal sale; State *ex rel.* Stevenson v. Law & Order Club, 62 L. R. A. 884, holding social club cannot dispense liquors without license to members presenting checks delivered upon payment of special assessment; Barden v. Montana Club, 11 L. R. A. 593, which holds social club not subject to license tax; State v. Boston Club, 20 L. R. A. 185, which holds incorporated institutions selling liquor to members owe license; State v. Horacek, 3 L. R. A. 687, which holds officers and members of association selling drinks to members liable to prosecution.

Cited in notes (12 L. R. A. 413) on intoxicating liquors; social club; (6 L. R. A. 128) on social clubs; evasion of liquor law by.

Distinguished in State *ex rel.* Bell v. St. Louis Club, 125 Mo. 330, 26 L. R. A. 581, 28 S. W. 604, holding social club's charter not forfeited for furnishing liquor to members without license as dramshop.

#### **Who liable for selling liquors.**

Cited in State v. Neis, 108 N. C. 792, 13 S. E. 225, upholding conviction for furnishing liquor for pay to member of unorganized syndicate of owners; People v. De Groot, 111 Mich. 247, 69 N. W. 248, holding one who, without paying tax, sells liquor, as agent of brewing company, may be informed against as principal; Krnavek v. State, 38 Tex. Crim. Rep. 49, 41 S. W. 612, upholding conviction of steward of social club for selling liquor to members.

Cited in note (10 L. R. A. 82) on late decisions under liquor laws of Michigan.

2 L. R. A. 498, JOHN S. HANES & CO. v. WADEY, 73 Mich. 178, 41 N. W. 222.

#### **Remedial statutes.**

Cited in footnotes to International Bldg. & L. Asso. v. Hardy, 24 L. R. A. 284, which denies legislative power to change remedy for enforcing trust deed; Jones v. German Ins. Co. 46 L. R. A. 860, which sustains statute shortening time of insurance company's immunity from suit without extending period of limitations; Kirkman v. Bird, 58 L. R. A. 670, which sustains as to prior obligations statute exempting wages for sixty days preceding levy.

Distinguished in John Spry Lumber Co. v. Sault Sav. Bank, Loan & T. Co. 77 Mich. 202, 6 L. R. A. 205, 18 Am. St. Rep. 396, 43 N. W. 778, holding lien law of 1887 unconstitutional.

#### **Repeal of remedial statutes.**

Cited in Angell v. West Bay City, 117 Mich. 690, 76 N. W. 128, holding without saving clause repeal of law giving statutory right destroys such existing right; Orman v. Crystal River R. Co. 5 Colo. App. 500, 39 Pac. 434, holding proceedings in action to enforce lien must comply with statutes in force when right accrues; Barton v. Steinmitz, 37 Ill. App. 142, holding enforcement of mechanic's lien governed by laws in force when mechanic seeks benefit of lien; Wilson v. Simon, 91 Md. 9, 80 Am. St. Rep. 427, 45 Atl. 1022, holding change in statutory remedy does not impair obligation of contract; Mack v. Degraff & R. Quarries, 57 Ohio St. 483, 63 Am. St. Rep. 729, 49 N. E. 697, holding foreign material man has equal rights with state material man under lien laws.

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Disapproved in *Waters v. Dixie Lumber & Mfg. Co.* 106 Ga. 595, 71 Am. St. Rep. 284, 32 S. E. 636, holding material man's lien, when fixed and secured under statute, cannot be taken away; *Garneau v. Port Blakely Mill Co.* 8 Wash. 470, 36 Pac. 463, holding logger's lien for labor unaffected by repeal of statute pending enforcement.

2 L. R. A. 500, *NEFF v. WELLESLEY*, 148 Mass. 487, 20 N. E. 111.

**Overseers of poor as agents of municipality.**

Cited in *Fitzgerald v. Lewis*, 164 Mass. 500, 41 N. E. 687, holding overseers of poor in control of poor farm may exclude trespassers.

**Duties of corporation as affecting liability for acts of servants.**

Cited in *Howard v. Worcester*, 153 Mass. 428, 12 L. R. A. 161, 25 Am. St. Rep. 651, 27 N. E. 11, holding city engaged in building schoolhouse not liable for servant's negligence; *Fox v. Chelsea*, 171 Mass. 300, 50 N. E. 622, holding city liable for negligence of water commissioners acting as city's agents in laying water pipes; *Watson v. Needham*, 161 Mass. 411, 24 L. R. A. 288, 37 N. E. 204, holding question of plaintiff's fault, or nonliability of town for neglect of water commissioners, not raised; *Collins v. Greenfield*, 172 Mass. 81, 51 N. E. 454, holding town liable for negligence in connection with macadamizing done voluntarily as private enterprise; *Hughes v. Monroe County*, 79 Hun. 126, 29 N. Y. Supp. 495, holding county not liable for injuries to employee in insane asylum; *Chicago v. Selz, S. & Co.* 104 Ill. App. 381, holding municipality liable for damages in operation, partly for profit, of waterworks system; *Mt. Hope Cemetery v. Boston*, 158 Mass. 513, 35 Am. St. Rep. 515, 33 N. E. 695, holding legislature could not compel Boston to transfer title to cemetery to private corporation, without compensation; *Hall v. Concord*, 71 N. H. 373, 58 L. R. A. 460, 52 Atl. 864 (dissenting opinion), majority holding municipality not liable for negligence in repairing highway, although individual taxpayer bore part of expense.

Cited in footnotes to *Culver v. Streator*, 6 L. R. A. 270, which holds city liable for negligence of employee enforcing ordinance against unmuzzled dogs running at large; *Howard v. Worcester*, 12 L. R. A. 160, which holds city not liable for negligence in blasting for schoolhouse; *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall.

Cited in notes (23 L. R. A. 201) on liability of charitable institution for negligence; (9 L. R. A. 210) on drains and sewers, as to liability of municipality for its own negligence only; (5 L. R. A. 254) on liability of municipal corporations for injuries resulting from defective streets, bridges, etc.

Distinguished in *Taggart v. Fall River*, 170 Mass. 327, 49 N. E. 622, holding city not liable for negligence connected with work of opening street through its land; *Ulrich v. St. Louis*, 112 Mo. 144, 34 Am. St. Rep. 372, 20 S. W. 466, holding corporation not liable to prisoner in workhouse for negligence.

**Effect of contributory negligence.**

Cited in *Foy v. Winston*, 126 N. C. 384, 35 S. E. 609, holding it not, of itself, negligence for blind man to pass along street without a guide; *Robbins v. Springfield Street R. Co.* 165 Mass. 36, 42 N. E. 334, holding defendant not relieved from liability for unnoticed defects in plaintiff's eyesight, contributing to injury.

Cited in note (12 L. R. A. 281) on contributory negligence as defense to action for damages for personal injuries caused by negligence.



**Instruction as to part only of the evidence.**

Cited in *Shattuck v. Eldredge*, 173 Mass. 168, 53 N. E. 377; *Hicks v. New York, N. H. & H. R. Co.* 164 Mass. 428, 49 Am. St. Rep. 471, 41 N. E. 721; *Hopcraft v. Kittredge*, 162 Mass. 12, 37 N. E. 768; *Moseley v. Washburn*, 167 Mass. 362, 45 N. E. 753; *Com. v. Cosseboom*, 155 Mass. 301, 29 N. E. 463; *Murray v. Knight*, 156 Mass. 522, 31 N. E. 646,—holding trial judge not bound to single out particular part of evidence for special comment.

2 L. R. A. 502, *LITTLEJOHN v. FITCHBURG R. CO.* 148 Mass. 478, 20 N. E. 103.

**Statutory liability for killing passenger.**

Cited in *Worcester & S. Street R. Co. v. Travelers' Ins. Co.* 180 Mass. 266, 57 L. R. A. 630, 91 Am. St. Rep. 275, 62 N. E. 364, holding statute fixing penalty for negligent killing of passenger is new right of action to executor or administrator; *Boston & M. R. Co. v. Hurd*, 56 L. R. A. 208, 47 C. C. A. 619, 108 Fed. 120, holding section of statute fixing penalty for railroad company negligently killing passenger not strictly penal; *Doyle v. Fitchburg R. Co.* 162 Mass. 71, 25 L. R. A. 169, 44 Am. St. Rep. 335, 37 N. E. 770, holding intestate could not have released railroad company from liability for negligence resulting in death by accepting free ticket with such proviso.

**Liability of carrier to passenger riding on free pass.**

Cited in *Quimby v. Boston & M. R. Co.* 150 Mass. 368, 5 L. R. A. 848, 23 N. E. 205, holding valid, agreement to assume risks of travel on accepting free pass.

**Carrier's liability for other carrier's negligence.**

Approved in *Frazier v. New York, N. H. & H. R. Co.* 180 Mass. 429, 62 N. E. 731, holding railroad liable for injuries to passenger in terminal station of another railroad used by it.

Cited in footnote to *Murray v. Lehigh Valley R. Co.* 32 L. R. A. 539, which holds carrier liable to passenger for negligence of servant of other company over whose track train runs.

**Liability for defects.**

Cited in *Reynolds v. Merchants' Woolen Co.* 168 Mass. 504, 47 N. E. 406, holding mill owner not negligent in putting into his mill machinery made by reputable makers.

2 L. R. A. 504, *McWHORTER v. PENSACOLA & A. R. CO.* 24 Fla. 417, 12 Am. St. Rep. 220, 5 So. 129.

**Suit against state.**

Cited in *Bloxham v. Florida C. & P. R. Co.* 35 Fla. 712, 17 So. 902, holding suit against comptroller to recover taxes, suit against state, and cannot be brought.

**Delegation of power.**

Cited in *State ex rel. Godard v. Johnson*, 61 Kan. 843, 49 L. R. A. 675, 60 Pac. 1068 (dissenting opinion), majority holding that court of visitation has no legislative power to fix railroad rates; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 495, 42 L. ed. 252, 17 Sup. Ct. Rep. 896, holding Interstate Commerce Commission has no power to determine that railroad rates are reasonable; *Storrs v. Pensacola & A. R. Co.* 29 Fla. 623, 11 So. 296, holding act authorizing railroad commissioners to fix rates valid.

Cited in notes (33 L. R. A. 183) on legislative power to fix tolls, rates, or prices; (2 L. R. A. 195) on authority of railroad commissioners.

2 L. R. A. 510, *HORNUNG v. STATE*, 116 Ind. 458, 19 N. E. 157.

**Fiduciary capacity of county official.**

Cited in *McCullom v. Shaw*, 21 Ind. App. 68, 51 N. E. 488, holding county commissioners not entitled to compensation for services for which other persons might have been employed.

**Decision as to vote at election.**

Cited in note (47 L. R. A. 562) on decision of tie vote at election.

2 L. R. A. 512, *GAGE v. HAMPTON*, 127 Ill. 87, 20 N. E. 12.

**Who is a trespasser.**

Cited in *Mickey v. Barton*, 194 Ill. 456, 62 N. E. 802, holding one entering upon land rightfully held by another, who had cleared a part of it, mere trespasser; *Phelps v. Randolph*, 45 Ill. App. 494, holding entry with several men, taking away property, cutting wire fence, and threatening to shoot one attempting to enter, forcible; *Eichengreen v. Appel*, 44 Ill. App. 20, holding owner may peaceably eject tenant on sufferance; *Harding v. Sandy*, 43 Ill. App. 445, holding owner might take from another possession of his own land; *Prouty v. Tilden*, 164 Ill. 170, 45 N. E. 445, holding mere trespass upon land of one in possession under deed for twenty years not act of dispossession; *Wahl v. Laubersheimer*, 174 Ill. 343, 51 N. E. 860, holding violent entry on land not lawful, though breach of peace may not result.

Limited in *Bloomington v. Brophy*, 32 Ill. App. 403, holding city with title can take possession without actual force.

**When bar of statute of limitations complete.**

Cited in *Stalford v. Goldring*, 197 Ill. 166, 64 N. E. 395, holding bar of statute not complete by mere payment of taxes without possession before entry by paramount title; *Mickey v. Barton*, 194 Ill. 455, 62 N. E. 802, holding grantee from one who had been in possession under colorable title for sufficient time can remove cloud from title; *Keppel v. Dreier*, 187 Ill. 303, 58 N. E. 386, holding statutory title under color of title, with possession and payment of taxes, need not be pleaded if proved; *Coverdale v. Curry*, 48 Ill. App. 216, holding taking possession by removing and resetting fence sustains action of forcible entry and detainer; *Sexton v. Carley*, 47 Ill. App. 320, holding one claiming under lease, after attempted forfeiture of prior ninety-five-year lease with possession of forty years, does not acquire possession; *Mecartney v. Morse*, 137 Ill. 484, 24 N. E. 576, holding owner can maintain action to set aside tax deed, no possession under it being shown; *Travers v. McElvain*, 181 Ill. 385, 55 N. E. 135, holding possession under statute must be open, notorious, and exclusive to maintain ejectment; *McCauley v. Mahon*, 174 Ill. 388, 51 N. E. 829, holding ejectment will not lie if possession does not concur with bar of prior paid taxes; *Miller v. Stalker*, 158 Ill. 523, 42 N. E. 79, holding color of title, possession, and payment of taxes will maintain action to remove cloud on title; *Coward v. Coward*, 148 Ill. 274, 35 N. E. 759, and *Chicago v. Middlebrooke*, 143 Ill. 270, 32 N. E. 457, holding action to remove cloud on title, by one claiming under color of title, payment of taxes, and possession, maintainable; *Gage v. Smith*, 142 Ill. 195, 31 N. E. 430, holding possession must be coupled with color of title under tax deed and payment

of taxes for term of years, to bar true owner; *White v. Harris*, 206 Ill. 586, 69 N. E. 519, holding ejectment plaintiff, claiming under § 7, limitation law, must show payment of taxes for seven successive years after acquiring color of title, and possession thereafter taken.

Cited in footnotes to *Alexander v. Wilcox*, 9 L. R. A. 735, which holds title acquired as against lien of tax deed by ten years' adverse possession; *Sontag v. Bigelow*, 16 L. R. A. 326, which holds master's deed in partition proceedings sufficient color of title.

Cited in notes (9 L. R. A. 773, 774) on tax title; adverse possession under color of title; (13 L. R. A. 207) on defenses in actions of ejectment; (6 L. R. A. 433) on adverse possession; (4 L. R. A. 647) on adverse possession; statutory bar.

#### **Who may maintain action to quiet title.**

Distinguished in *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 27 Mont. 541, 71 Pac. 1005, holding equity suit to quiet title maintainable by possessor of apex of vein claiming extra-lateral rights.

2 L. R. A. 517, *McINTIRE v. LEVERING*, 148 Mass. 546, 12 Am. St. Rep. 594, 20 N. E. 191.

#### **Evidence of character.**

Cited in *Howland v. George F. Blake Mfg. Co.* 156 Mass. 569, 31 N. E. 656, holding evidence of good reputation of plaintiff in libel action properly excluded; *Glace v. Hummel*, 4 Dauphin Co. Rep. 7, 24 Pa. Co. Ct. 556; *Olson v. Trete*, 46 Minn. 226, 48 N. W. 914; *Bank of Miller v. Richmon*, 64 Neb. 113, 89 N. W. 627,—holding proof of plaintiff's general reputation admissible in first instance in action for malicious prosecution; *Hlubek v. Pinske*, 84 Minn. 365, 87 N. E. 939, holding evidence as to plaintiff's bad character may be given in action for malicious prosecution; *Stubbs v. Mulholland*, 168 Mo. 79, 67 S. W. 650, holding, in action for malicious prosecution, malice may be inferred from failure to inquire as to character of accused.

Distinguished in *Geary v. Stevenson*, 169 Mass. 32, 47 N. E. 508, holding evidence of plaintiff's good reputation inadmissible in action for false imprisonment; *Richard v. Boland*, 5 Misc. 554, 26 N. Y. Supp. 57, holding evidence as to plaintiff's good character inadmissible in action for malicious prosecution for act not involving moral turpitude.

2 L. R. A. 519, *LORD v. EDWARDS*, 148 Mass. 476, 12 Am. St. Rep. 581, 20 N. E. 161.

#### **Sales of personal property.**

Cited in *Alden v. Hart*, 161 Mass. 581, 37 N. E. 742, holding it unnecessary to decide question whether, in contract for sale and delivery, title to coal passes when put aboard vessel for shipment; *Mobile Fruit & Trading Co. v. McGuire*, 81 Minn. 235, 83 N. W. 833, holding buyer assumes risk of deterioration incident to course of transportation; *McKee v. Wild*, 52 Neb. 12, 71 N. W. 958, holding warranty of quality in sale of corn applied to corn when delivered for shipment.

Cited in footnotes to *Anderson v. Crisp*, 18 L. R. A. 419, which holds contract for sale of certain number of unsegregated brick to be taken from kiln does not pass title; *Tyler Lumber Co. v. Charlton*, 55 L. R. A. 301, which holds title does

not pass by acceptance of offer to sell lumber piled at mill to be inspected by common employee.

Cited in notes (5 L. R. A. 703) on sale of goods by sample; (17 L. R. A. 177, 180) on essentials of a valid sale of goods; (62 L. R. A. 798) on effect of contract to ship goods f. o. b.

Distinguished in *Carleton v. Lombard*, 149 N. Y. 604, 44 N. E. 1121, holding manufacturers liable for latent defects in goods corresponding in description to those ordered.

2 L. R. A. 520, *LOUISVILLE, N. A. & C. R. CO. v. BUCK*, 116 Ind. 566, 9 Am. St. Rep. 883, 19 N. E. 453.

#### **Pleading.**

Cited in *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 219, 46 N. E. 543, holding complaint insufficient because no allegation of want of knowledge of change in railroad roadbed making it unsafe to work in; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 286, 19 N. E. 770, holding allegation of ignorance of baggage master of defect in railroad bridge essential to recovery; *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 158, 33 N. E. 355, holding knowledge by master, actual or imputed, of defective condition of engine, must be alleged.

#### **When master liable.**

Cited in *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 308, 50 N. E. 988, holding train despatcher vice principal; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 444, 10 Am. St. Rep. 67, 20 N. E. 287, holding railroad company must provide and maintain in good condition brake handles; *Cincinnati, I. St. L. & C. R. Co. v. Roesch*, 126 Ind. 447, 26 N. E. 171, holding railroad company liable for putting cable used in unloading car to unusual strain; *Indiana, I. & I. R. Co. v. Snyder*, 140 Ind. 653, 39 N. E. 912, holding railway company liable for defective handle made by carpenter in its shops; *Indiana Natural & Illuminating Gas Co. v. Marshall*, 22 Ind. App. 124, 52 N. E. 232, holding master undertakes that appliance for electric-light-pole climbing is fit for that use; *Cincinnati, I. St. L. & C. R. Co. v. Lang*, 118 Ind. 583, 21 N. E. 317, holding servant sent on special order not bound to know of the running of irregular train; *Rogers v. Leyden*, 127 Ind. 58, 26 N. E. 210, holding servant can recover, although aware of unsafe place, if ignorant that peril is increased; *Pittsburgh, C. C. & St. L. R. Co. v. Woodward*, 9 Ind. App. 172, 36 N. E. 442, holding brakeman does not assume risk of latent defect in track and cars; *Salem Stone & Lime Co. v. Tepps*, 10 Ind. App. 519, 38 N. E. 229, holding quarry stripper not required to inspect machinery to discover latent defect; *Louisville, N. A. & C. R. Co. v. Howell*, 147 Ind. 270, 45 N. E. 584, holding employee not bound to discover broken coupling link when he had not used it, and break was not obvious; *Pennsylvania Co. v. Burgett*, 7 Ind. App. 346, 33 N. E. 914, holding that servant cannot recover when aware of defects; *Levey v. Bigelow*, 6 Ind. App. 694, 34 N. E. 128, holding minor with knowledge of danger of handling safe appliance takes risk of employment.

Cited in footnotes to *Sweet v. Ohio Coal Co.* 9 L. R. A. 861, which holds master may conduct business in own way, though other method less hazardous; *Minty v. Union P. R. Co.* 4 L. R. A. 409, which holds that it will be presumed, in case of derailment, that suitable instrumentalities provided; *Louisville & N. R. Co. v. Hall*, 4 L. R. A. 710, which holds company liable to brakeman for injury by low bridge; *Goodrich v. New York C. & H. R. R. Co.* 5 L. R. A. 750, which holds master liable for using foreign cars with defective coupling apparatus; *Lehigh & W.*

*Coal Co. v. Hayes*, 5 L. R. A. 441, which holds master furnishing ordinary appliances not liable for failure to furnish unusual one; *Tennessee Coal, I. & R. Co. v. Kyle*, 12 L. R. A. 103, which holds running freight train without cow-catcher negligence; *Pittsburg & L. E. R. Co. v. Henley*, 15 L. R. A. 384, which holds use of two coupling devices not negligence *per se*; *Philadelphia & R. R. Co. v. Huber*, 5 L. R. A. 439, which holds brakeman not negligent *per se* in using brake manifestly defective.

Cited in notes (17 L. R. A. 77) on action by parent for death of child caused by negligence; (41 L. R. A. 40) on actual knowledge as an element of an employer's liability to an injured servant; (41 L. R. A. 46) on liability of employer predicated on constructive knowledge as to the condition of machinery and apparatus; (41 L. R. A. 128) on obligation of master and servant as to inspection of instrumentalities in use; (5 L. R. A. 172) on action for damages for death caused by negligence; (4 L. R. A. 797) on duty of employer to provide safe machinery, tools, and appliances; (4 L. R. A. 261) on liability for death caused by negligence; (13 L. R. A. 375) as to when servant assumes risk of implements furnished; (5 L. R. A. 340) on the law of the land.

#### **Effect of Sunday law.**

Cited in *Gross v. Miller*, 93 Iowa, 80, 26 L. R. A. 608, 61 N. W. 385, holding Sunday hunting no bar to action for being shot; *Kansas City v. Orr*, 62 Kan. 68, 50 L. R. A. 786, 61 Pac. 397, holding city cannot defend for negligence on ground that work was performed on Sunday; *Solarz v. Manhattan R. Co.* 8 Misc. 658, 29 N. Y. Supp. 1123, holding Sunday law cannot be pleaded as defense; *Hoadley v. International Paper Co.* 72 Vt. 81, 47 Atl. 169, holding no defense that decedent was working on Sunday; *Western U. Teleg. Co. v. Yopst*, 118 Ind. 254, 3 L. R. A. 227, 20 N. E. 222, holding allegation of necessity essential to valid Sunday contract.

Cited in footnotes to *Gross v. Miller*, 26 L. R. A. 605, which holds violation of Sunday law by hunting no defense to action for negligent injury; *Dugan v. State*, 9 L. R. A. 321, which holds pilot on board, carrying pleasure parties on Sunday, punishable; *Handy v. Globe Pub. Co.* 4 L. R. A. 466, which holds it unnecessary to plead illegality of contract for publishing Sunday newspapers; *Van Auken v. Chicago & W. M. R. Co.* 22 L. R. A. 33, which holds riding home from station quietly on Sunday evening not labor.

#### **When action for damages maintainable.**

Cited in *Clore v. McIntire*, 120 Ind. 264, 22 N. E. 128, holding action by administrator for death by negligence of interstate maintainable.

Cited in footnote to *O'Reilly v. New York & N. E. R. Co.* 6 L. R. A. 719, holding action may be maintained in one state by personal representative of one killed by carrier in another state, where cause of action survives by statute of the two states.

(Cited in note (7 L. R. A. 154) on action for damages for death caused by negligence.

#### **Damages.**

Cited in *Hunt v. Conner*, 26 Ind. App. 50, 59 N. E. 50, holding damages to wife and children for loss of services of father might include value of personal services and paternal assistance; *Wabash R. Co. v. Oregon*, 23 Ind. App. 4, 54 N. E. 767, holding pecuniary loss not implied from decease of younger brother not bound to contribute to support of older brothers; *Tuteur v. Chicago & N. W. R.*

Co. 77 Wis. 509, 46 N. W. 897, holding jury can consider reasonable expectation of pecuniary benefit to children, from loss of mother, by way of support or otherwise; *Korraday v. Lake Shore & M. S. R. Co.* 131 Ind. 262, 29 N. E. 1069, holding presumption that father's services are of value to wife and infant children; *Pape v. Wright*, 116 Ind. 504, 19 N. E. 459, holding middleman can recover commission for procuring purchaser of patented articles, although sale by owner illegal.

Cited in footnotes to *Fordyce v. McCants*, 4 L. R. A. 296, which holds only nominal damages recoverable for death of child not shown to have assisted father; *Illinois C. R. Co. v. Slater*, 6 L. R. A. 418, which authorizes allowance to infant for loss, by injury, of earnings during minority.

#### Questions for jury.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Burton*, 139 Ind. 378, 47 Am. St. Rep. 274, 37 N. E. 150, holding jury should determine amount of damages for loss of services of husband by death; *Indiana, I. & I. R. Co. v. Bundy*, 152 Ind. 596, 53 N. E. 175, holding jury should decide whether rear-end brakemen knew of open wires over which he tripped in uncoupling car; *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 269, 38 N. E. 476, holding court, and not jury, should draw conclusion as to proximate cause of death from facts found; *Wabash & W. R. Co. v. Morgan*, 132 Ind. 440, 31 N. E. 661, holding instruction as to duty of master and servant to ascertain defects and look out for danger proper.

#### Special verdict.

Cited in *Sult v. Warren School Twp.* 8 Ind. App. 659, 36 N. E. 291, holding special verdict should have found facts upon which subscription to school was conditioned; *Cincinnati, I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 134, 34 N. E. 613, holding special verdict does not call for instructions on law; *Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 281, 4 L. R. A. 553, 21 N. E. 753, holding special verdict, silent as to condition and operation of locomotive, to be regarded as finding against plaintiff; *Rietman v. Stolte*, 120 Ind. 317, 22 N. E. 304, holding special verdict having found servant's knowledge of defect, he cannot recover; *Nicodemus v. Simons*, 121 Ind. 569, 23 N. E. 521, holding objection as to silence of verdict upon material fact waived; *O'Neal v. Chicago & I. Coal R. Co.* 132 Ind. 113, 31 N. E. 669, holding special verdict required finding of peril of notoriously uneven track as incident to service; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 567, 45 N. E. 108, holding special verdict did not find facts showing foreign car was not duly inspected; *Boyer v. Robertson*, 144 Ind. 607, 43 N. E. 879, holding special verdict defective which found evidence, but not inference from it; *Evansville & R. R. Co. v. Maddux*, 134 Ind. 579, 33 N. E. 345, holding special verdict silent as to manner of loading car, fact must be held to be found against one bound to prove it; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 242, 28 N. E. 443, holding *venire de novo* will not be granted when special verdict sustained by facts found; *Fisher v. Fisher*, 8 Ind. App. 666, 36 N. E. 296, holding illegality of consideration must be found in special verdict to sustain defense in action on note; *Lake Shore & M. S. R. Co. v. Kurtz*, 10 Ind. App. 63, 35 N. E. 201, holding complaint defective for lack of averment of knowledge of defect by master, not cured by special findings of jury.

#### Declaration as part of transaction.

Cited in *Slavens v. Northern P. R. Co.* 38 C. C. A. 158, 97 Fed. 262, holding declaration of deceased workman before accident, that he understood the danger

of place he was working in, admissible; *State v. Murphy*, 16 R. I. 531, 17 Atl. 998, holding declaration of deceased as to his assailants, made within fifteen minutes thereafter, admissible; *Ohio & M. R. Co. v. Stein*, 133 Ind. 253, 19 L. R. A. 749, 31 N. E. 180, holding declaration of engineer of locomotive drawing train, made within few minutes of accident, admissible; *Keyes v. State*, 122 Ind. 530, 23 N. E. 1097, holding remark made in quarter of a minute after shot fired admissible; *Green v. State*, 154 Ind. 658, 57 N. E. 637, holding exclamation of deceased, immediately after shot fired, admissible; *Louisville, E. & St. L. R. Co. v. Berry*, 2 Ind. App. 433, 28 N. E. 714, holding declaration of deceased, immediately after accident, admissible; *Cross Lake Logging Co. v. Joyce*, 28 C. C. A. 252, 55 U. S. App. 221, 83 Fed. 991, holding statement by injured man, accusing first man coming to his assistance of being indirect cause of accident, admissible; *Patterson v. Hochster*, 38 App. Div. 401, 56 N. Y. Supp. 467, holding declaration of deceased as to injury, while lying on sidewalk with leg in coal hole, admissible; *Peirce v. Van Dusen*, 24 C. C. A. 293, 47 U. S. App. 339, 78 Fed. 707, holding declaration of engineer of locomotive that backed the car by which hand injured admissible; *Washington & G. R. Co. v. McLane*, 11 App. D. C. 223, holding declaration of deceased boy of fourteen, while lying between tracks with legs severed, admissible as to cause of accident; *Metropolitan R. Co. v. Collins*, 1 App. D. C. 387, holding declaration of transfer agent of street car line, that conductor started car without his authority, inadmissible; *Hinchcliffe v. Koontz*, 121 Ind. 424, 16 Am. St. Rep. 403, 23 N. E. 271, holding letter in reference to hiring, written day before and received day after contract made, admissible.

Cited in note (19 L. R. A. 749) on declarations of injured party and third persons, when admissible.

Disapproved in *Chicago, B. & Q. R. Co. v. Johnson*, 36 Ill. App. 566, holding statement of injured woman, made to her daughter immediately after accident as to its cause, inadmissible.

#### **Public policy affecting action.**

Cited in *Levy v. Spencer*, 18 Colo. 538, 36 Am. St. Rep. 303, 33 Pac. 415, holding action to enforce illegal executory contract will not be sustained; *Winchester Electric Light Co. v. Veal*, 145 Ind. 511, 41 N. E. 334, holding county treasurer cannot recover on notes given for public money illegally loaned by him.

2 L. R. A. 526, *ROYAL v. AULTMAN-TAYLOR CO.* 116 Ind. 424, 19 N. E. 202.

#### **Demand of performance.**

Cited in *Van Horn v. Mercer*, 29 Ind. App. 283, 64 N. E. 531, holding demand unnecessary before suit for breach of agreement to support grantor in consideration of land conveyed, which grantee has sold.

Distinguished in *Bonniwell v. Madison*, 107 Iowa. 89, 77 N. W. 530, holding where there is an evident waiver of performance of condition subsequent demand is necessary before forfeiture.

#### **Conditions subsequent.**

Distinguished in *Van Horn v. Mercer*, 29 Ind. App. 280, 64 N. E. 531, holding estate upon condition subsequent not created by deed providing that grantee's agreement to support grantor should be a lien for certain sum.



2 L. R. A. 528, *ST. JOHNSBURY & L. C. R. CO. v. WILLARD*, 61 Vt. 134, 15 Am. St. Rep. 886, 17 Atl. 38.

**Ownership of improvements after foreclosure.**

Cited in *St. Louis, K. & S. W. R. Co. v. Nyce*, 61 Kan. 412, 48 L. R. A. 249, 59 Pac. 1040, holding owner of land by foreclosure cannot claim value of improvements by railroad, made before foreclosure.

Cited in notes (11 L. R. A. 727) on whatever is affixed to the soil belongs thereto; (16 L. R. A. 805) on value of improvements made by one taking property by eminent domain as an element of damages.

**How senior mortgage affected by foreclosure of junior.**

Cited in *Buzzell v. Still*, 63 Vt. 495, 25 Am. St. Rep. 777, 22 Atl. 619, holding senior mortgagee not barred by junior mortgagee's foreclosure, though party to action.

2 L. R. A. 529, *McCLEEREY v. WAKEFIELD*, 76 Iowa, 529, 41 N. W. 210.

**Parol authority to insert grantee's name in deed.**

Cited in *Lafferty v. Lafferty*, 42 W. Va. 789, 26 S. E. 262, holding agent with parol authority may fill blank in deed with grantee's name; *Exchange Nat. Bank v. Fleming*, 63 Kan. 142, 65 Pac. 213, upholding deed with grantee's name filled in by equitable owner under parol authority of legal owner.

**Estoppel.**

Cited in note (5 L. R. A. 121) on estoppel by deed.

**Effect of notice on purchaser's title.**

Cited in *Zuber v. Johnson*, 108 Iowa, 277, 79 N. W. 76, holding purchaser at execution sale bound to take notice of asserted claim to title by one in possession; *Mason Lumber Co. v. Collier*, 74 Mich. 249, 41 N. W. 913, holding holder of legal title with notice and in fraud of equitable title is trustee for equitable owner.

Cited in footnote to *Odom v. Riddick*, 7 L. R. A. 118, which holds bona fide purchaser's title not impaired by grantor's undeclared lunacy.

Cited in note (10 L. R. A. 677) on protection of bona fide holder of commercial paper.

2 L. R. A. 532, *WEEKS v. TRASK*, 81 Me. 127, 16 Atl. 413.

2 L. R. A. 534, *MARSHALL v. FARMERS & M. SAV. BANK*, 85 Va. 676, 17 Am. St. Rep. 84, 8 S. E. 586.

**Personal liability of corporation officer.**

Cited in *Prescott v. Haughey*, 65 Fed. 658, holding national bank directors individually liable for damages caused by false and fraudulent representations; *Toledo Sav. Bank v. Johnston*, 94 Iowa, 217, 62 N. W. 748, holding director responsible to bank for gross neglect or inattention to official duties; *Union Nat. Bank v. Hill*, 148 Mo. 391, 71 Am. St. Rep. 615, 49 S. W. 1012, holding directors chargeable with knowledge of illegal loans; *Campbell v. Watson*, 62 N. J. Eq. 440, 50 Atl. 120, holding bank directors failing to observe by-law requiring quarterly examination of banks, relying upon cashier's statements and state examination, liable to receiver for cashier's peculations; *Briggs v. Spaulding*, 141 U. S. 171, 35 L. ed. 677, 11 Sup. Ct. Rep. 924 (dissenting opinion), majority holding defendant directors not responsible for wrongful acts of other

directors or agents under the evidence; *Kemp v. National Bank*, 48 C. C. A. 220, 109 Fed. 54, referring to, but not deciding, question of individual liability of bank officer to depositor for fraud.

Cited in footnote to *Boyd v. Mutual Fire Asso.* 61 L. R. A. 918, which sustains right of directors to benefit of limitations in action for misfeasance or malfeasance in office.

Cited in notes (4 L. R. A. 747) on equitable suits against directors; (9 L. R. A. 652) on purchase of shares of stock of corporation by another corporation, as to liability of directors of corporation; (13 L. R. A. 371) on banking a legitimate object of copartnership as to relation between bank officials and depositors; (55 L. R. A. 756, 759, 760, 769) on liability of directors of corporation to corporation.

**Right to sue.**

Cited in *Union Nat. Bank v. Hill*, 148 Mo. 394, 71 Am. St. Rep. 615, 49 S. W. 1012, holding bank directors liable to shareholders and creditors for negligence on failure of assignee to sue.

Cited in footnote to *Pickle v. People's Nat. Bank*, 7 L. R. A. 93, which holds acceptance of check necessary to give right of action against bank.

**Degree of care required of bank officer.**

Cited in *Warren v. Robison*, 19 Utah, 318, 75 Am. St. Rep. 734, 57 Pac. 287, holding bank directors not excusable for ignorance, inexperience, or honesty of intentions; *Warren v. Robison*, 19 Utah, 308, 75 Am. St. Rep. 734, 57 Pac. 287, holding bank directors must exercise ordinary care, skill, and diligence.

Cited in note (15 L. R. A. 306) on care required of bank directors.

**Bank directors as trustees for depositors.**

Cited in *Foster v. Bank of Abingdon*, 88 Fed. 607, holding directors of a bank trustees for depositors.

2 L. R. A. 540, *GREEN & B. RIVER NAV. CO. v. CHESAPEAKE, O. & S. W. R. CO.* 88 Ky. 1, 2 Inters. Com. Rep. 515, 10 S. W. 6.

**Damages incidental to repair of bridge.**

Cited in *Rhea v. Newport News & M. Valley R. Co.* 50 Fed. 23, holding railroad company, in legally rebuilding bridge for benefit of public, not liable for obstructing navigation; *East Montpelier v. Wheelock*, 70 Vt. 398, 41 Atl. 432, holding municipality, in making required repairs to bridge, not liable for necessarily lowering ponded water.

Cited in notes (59 L. R. A. 39, 72) on right to obstruct or destroy rights of navigation; (8 L. R. A. 787) on *damnum absque injuria*.

**Navigable waters.**

Cited in footnote to *Olive v. State*, 4 L. R. A. 33, which holds non-navigable river not made public highway by statute declaring it to be such without providing for compensation to riparian owners.

Cited in notes (8 L. R. A. 92) on title to soil below ordinary high-water mark; (5 L. R. A. 62) on riparian rights of owners bounding on navigable streams.

2 L. R. A. 544, *CHISM v. SCHIPPER*, 51 N. J. L. 1, 14 Am. St. Rep. 668, 16 Atl. 316.

**When approval necessary in building contract.**

Cited in *Curley v. Hudson County*, 66 N. J. L. 408, 49 Atl. 471, holding claim

for work on building public road not allowable without engineer's approval; *Bernz v. Marcus Sayre Co.* 52 N. J. Eq. 282, 30 Atl. 21, holding architect's certificate or its waiver necessary to recover on building contract; *Welch v. Hubschmitt Bldg. & Woodworking Co.* 61 N. J. L. 64, 38 Atl. 824, holding certificate of architect not final, except as to matters specified in contract; *Crane Elevator Co. v. Clark.* 26 C. C. A. 102, 53 U. S. App. 257, 80 Fed. 707, holding jury should decide whether work had been accepted when architect expressed satisfaction with it; *Bowe v. United States.* 42 Fed. 780, holding discretion of umpire as to whether workmanship and materials were satisfactory should be exercised reasonably; *Bradner v. Roffsell,* 57 N. J. L. 416, 31 Atl. 387, Reversing 57 N. J. L. 33, 29 Atl. 317, holding refusal of architect to give certificate not fraudulent where there was deviation from contract.

Cited in footnote to *Arnold v. Bournique*, 20 L. R. A. 493, which holds contractor entitled to payment on delivery of architect's certificate handed back without presentation to owner.

Cited in note (17 L. R. A. 211) on contract, promise to give full satisfaction: subject to judgment of promisee.

2 L. R. A. 549, *CHICAGO MUT. LIFE INDEMNITY ASSO. v. HUNT*, 127 Ill. 257, 20 N. E. 55.

#### **Jurisdiction of court.**

Cited in *Wheeler v. Pullman Iron & Steel Co.* 143 Ill. 205, 17 L. R. A. 820, 32 N. E. 420, holding court of chancery without jurisdiction to dissolve corporation for cause other than specified in statute; *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 621, 38 N. E. 153, holding jurisdiction waived in suit brought by creditor of corporation; *Parmelee v. Price*, 208 Ill. 558, 70 N. E. 709, holding chancellor may determine questions of fact without jury in creditor's proceeding against stockholder for unpaid subscription; *Chicago Steel Works v. Illinois Steel Co.* 153 Ill. 17, 38 N. E. 1033, holding order appointing receiver of corporation not reviewable where franchise not involved; *Bixler v. Summerfield*, 195 Ill. 152, 62 N. E. 849, holding allegation that a finishing company used its funds to purchase real estate *ultra vires*, and praying for its dissolution, states a cause of action for relief in equity.

#### **Dissolution of benefit societies.**

Cited in *Robinson v. Raulston*, 33 Ill. App. 167, holding attaching stockholder not affected by bill to dissolve corporation and appoint receiver; *Hunt v. Le Grand Roller Skating Rink Co.* 143 Ill. 122, 32 N. E. 525, holding attorney general cannot file bill in equity to dissolve corporation for acts subjecting it to forfeiture of charter.

Cited in footnote to *Republic L. Ins. Co. v. Swigert*, 12 L. R. A. 328, which holds corporation, in suit to wind it up, entitled to object to order directing suits for unpaid stock subscriptions.

Cited in note (8 L. R. A. 858) on dissolution of corporation.

#### **Character of contract with benefit society.**

Cited in *Calkins v. Bump*, 120 Mich. 343, 79 N. W. 491, holding endowment insurance in excess of power of fraternal society; *Lehman v. Clark*, 174 Ill. 284, 43 L. R. A. 651, 51 N. E. 222, holding receiver of benefit society cannot recover assessment made by him under order of court, for contract is unilateral; *L'Union St. Jean Baptiste v. Ostigny*, 25 R. I. 481, 64 L. R. A. 159, 56 Atl. 681,

holding mutual benefit society cannot sue ex-member for dues, for nonpayment of which he was expelled.

Cited in footnotes to *Re Globe Mut. Ben. Asso.* 17 L. R. A. 547, which holds receiving infants as members of assessment insurance company unlawful; *Shaw v. Davis*, 23 L. R. A. 294, which denies minority stockholder's right to enjoin legal contract.

Cited in notes (9 L. R. A. 275) on restraining exercise of corporate franchise; action by one in behalf of others; (46 L. R. A. 620) on charter restrictions on eligibility to become a shareholder in a corporation; (57 L. R. A. 504) on insurance on the life of a minor; (23 L. R. A. 436) on liability of member of benefit society to action for assessment; (7 L. R. A. 189) on mutual benefit certificate; transfer of; (4 L. R. A. 382) on benefit association; enlarged powers conferred by statute.

Distinguished in *Re Globe Mut. Ben. Asso.* 63 Hun, 264, 17 N. Y. Supp. 852, holding co-operative insurance company cannot insure infants.

#### **Tontine fund.**

Distinguished in *Wheeler v. Mutual Reserve Fund Life Asso.* 102 Ill. App. 57, holding foreign corporation not required to conform to provisions of statute relating to tontine accumulations.

#### **Penalty for failure to pay dues.**

Cited in *Betts v. Connecticut Indemnity Asso.* 71 Conn. 753, 44 Atl. 65, holding assets of benefit association in proceeding to dissolve would not include assessments not already levied; *Gray v. Daly*, 40 App. Div. 42, 57 N. Y. Supp. 527, holding resigned member, not in arrears, not liable for assessment by receiver of dissolved accident association.

2 L. R. A. 556, *LEE v. STURGES*, 46 Ohio St. 153, 19 N. E. 560.

#### **What should be included in taxable list.**

Cited in *State Board v. Holliday*, 150 Ind. 250, 42 L. R. A. 838, 49 N. E. 14, holding prior omission from list of taxable property no excuse for continued omission; *Lee v. Dawson*, 8 Ohio C. C. 371, holding appearance before auditor of owner's agent sufficient to authorize him to make additions to return; *Christian Moerlein Brewing Co. v. Hagerty*, 8 Ohio C. C. 335, holding act valid providing that return by manufacturer for taxation shall be based on average monthly value of material, determined on last day of month; *Lander v. Burke*, 65 Ohio St. 541, 63 N. E. 69, holding "capital stock" includes personal property which corporations must return for taxation; *Hubbard v. Brush*, 61 Ohio St. 262, 55 N. E. 829, holding foreign corporation with business and property wholly in state must list capital stock for taxation; *Gager v. Prout*, 48 Ohio St. 107, 26 N. E. 1013, holding act providing for additions to taxes for false return of property valid; *Western U. Teleg. Co. v. Poe*, 61 Fed. 455, holding that telegraph plant in one state has added value for taxation because it is part of a large system; *Western U. Teleg. Co. v. Poe*, 61 Fed. 461, holding act providing that value of shares of capital stock should be used in determining value of property of corporation, invalid; *Bacon v. State Tax Comrs.* 126 Mich. 27, 80 L. R. A. 333, 86 Am. St. Rep. 524, 85 N. W. 307, holding stock in foreign corporation, owned by resident, subject to taxation; *Lander v. Burke*, 65 Ohio St. 542, 63 N. E. 69, holding shares of resident stockholder in domestic corporation with property out of state not exempt from taxation; *Western Assur.*

*Co. v. Halliday*, 61 C. C. A. 275, 126 Fed. 261, holding municipal bonds, deposited as security by foreign insurance company with superintendent of insurance, taxable by state.

Cited in notes (58 L. R. A. 613) on practice and procedure of assessors in taxation of capital stock of corporations in United States; (58 L. R. A. 579) on taxation of capital stock of stockholders in foreign corporations.

**Collection of back taxes.**

Cited in *Adams v. Kuykendall*, 83 Miss. 595, 35 So. 830, holding back taxes may be assessed upon property theretofore omitted from tax rolls.

**Equal protection and privileges.**

Cited in *Humphreys v. State*, 70 Ohio St. 87, 70 N. E. 957, holding statute subjecting legacies to foreign charitable institutions to inheritance tax, from which domestic charities are exempt, constitutional.

**Consolidation of railroads.**

Cited in *Ashley v. Ryan*, 49 Ohio St. 529, 31 N. E. 721, holding act requiring fee upon filing articles of agreement of consolidation of railways not invalid because consolidation included companies out of state; *Robison v. Cleveland City R. Co.* 5 Ohio N. P. 301, holding consolidation of railway companies abolished them in creation of new corporation.

2 L. R. A. 564. *STATE ex rel. LEESE v. CHICAGO, B. & Q. R. CO.* 25 Neb. 156, 41 N. W. 125.

Followed without discussion in *State ex rel. Leese v. Missouri P. R. Co.* 25 Neb. 165, 41 N. W. 127; *State ex rel. Leese v. Chicago, St. P. M. & O. R. Co.* 25 Neb. 166, 41 N. W. 128.

**Eminent domain.**

Cited in *Trester v. Missouri P. R. Co.* 33 Neb. 178, 49 N. W. 1110, holding new railway company by consolidation of companies organized in different states, can acquire property by eminent domain; *Koenig v. Chicago, B. & Q. R. Co.* 27 Neb. 704, 43 N. W. 423, holding foreign railway company cannot acquire real estate until it becomes a domestic corporation; *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 32, 63 L. R. A. 311, 73 S. W. 453, holding foreign bridge corporation cannot exercise power of eminent domain without authority from legislature.

Cited in note (24 L. R. A. 328) on right of foreign corporations to own real estate.

**Consolidation of corporations.**

Cited in *Walters v. Chicago, B. & Q. R. Co.* 104 Fed. 379, holding foreign corporation formed by consolidation of railways, and becoming a domestic corporation, was determined as to citizenship by that of its constituents; *Chevra Bnai Israel v. Chevra Bikur Cholin*, 24 Misc. 190, 52 N. Y. Supp. 712, holding religious corporations cannot consolidate without legislative authority.

Cited in notes (3 L. R. A. 435, 436) on corporations; consolidation and its effect; (8 L. R. A. 500) on consolidation of corporations creating a trust is *ultra vires*; (15 L. R. A. 85) on consolidated interstate corporation as domestic corporation of one of the states; (52 L. R. A. 391) on right of corporations to consolidate; (52 L. R. A. 377) on interpretation, application, and construction of statutes restrictive of the right of corporations to consolidate; (8 L. R. A. 239) on foreign corporations, law of comity.

2 L. R. A. 568, *HUSTON v. BYBEE*, 17 Ct. 140, 20 Pac. 51.

**Prescription and adverse user.**

Cited in *Wimer v. Simmons*, 27 Or. 19, 50 Am. St. Rep. 685, 39 Pac. 6, holding use of water under license or permission not prescription or adverse user; *Carson v. Hayes*, 39 Or. 107, 65 Pac. 814, holding invasion of right of owner of water necessary to create prescriptive right to use; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 91, holding adverse use of water must be open, notorious, peaceable, continuous, and under claim or color of right.

**Vested rights under parol license.**

Cited in *Ewing v. Rhea*, 37 Or. 586, 52 L. R. A. 142, 82 Am. St. Rep. 783, 62 Pac. 790; *Lavery v. Arnold*, 36 Or. 86, 57 Pac. 906; *Bowman v. Bowman*, 35 Or. 281, 57 Pac. 546,—holding parol license irrevocable after licensee has expended money or made valuable improvements on faith thereof.

Cited in note (49 L. R. A. 511) on revocability of license to maintain a burden on land after the licensee has incurred expense in creating the burden.

2 L. R. A. 571, *LOPEZ v. UNITED STATES*, 24 Ct. Cl. 84.

**Transfer of claims against United States.**

Cited in *Howes v. United States*, 24 Ct. Cl. 182, 5 L. R. A. 67, holding transfer of specific claim to receiver by decree of state court invalid.

**Power of attorney to collect moneys due from United States.**

Cited in *Hitchcock v. United States*, 27 Ct. Cl. 204, holding power given to collect last instalment due contractor for erection of public buildings void.

2 L. R. A. 576, *DONAHUE v. STATE*, 112 N. Y. 142, 19 N. E. 419.

**Presumption of grant.**

Cited in *Deshong v. New York*, 176 N. Y. 484, 68 N. E. 880, holding grant of permanent right to construct sidewalk vault will not be presumed.

**Owner's duty to mere licensee to prevent injury.**

Cited in *Cusick v. Adams*, 115 N. Y. 59, 60, 61, 12 Am. St. Rep. 772, 21 N. E. 673, holding owner not liable to bare licensee for injury through mere defect in premises; *Wells v. Brooklyn Heights R. Co.* 34 Misc. 46, 68 N. Y. Supp. 305, holding owner liable for neglect to use reasonable vigilance to prevent killing licensee.

Cited in note (42 L. R. A. 69) on claims constituting valid demands against a state.

2 L. R. A. 577, *AYARS'S APPEAL*, 122 Pa. 266, 16 Atl. 356.

**Title to act.**

Cited in note (8 L. R. A. 858) on dissolution of corporation, as to construction of title to statute.

**Special legislation.**

Cited in *Larimer & L. Street R. Co. v. Larimer Street R. Co.* 137 Pa. 546, 20 Atl. 570, holding corporation without right to occupy street cannot question validity of street franchise of rival; *Clark's Estate*, 195 Pa. 525, 48 L. R. A. 594, 46 Atl. 127. Reversing 10 Pa. Super. Ct. 436, holding act authorizing trustees to include cost of bond in expenses of administration of trust valid;

Com. *ex rel.* Darte v. Reichard, 5 Kulp, 542, 8 Pa. Co. Ct. 563, holding section of act constituting each city of the third class a single school district unconstitutional; Frain v. Lancaster County, 11 Lanc. L. Rev. 158, holding act concerning constable's fees, excluding certain counties, local; Com. v. Lackawanna County, 7 Pa. Co. Ct. 174, holding act providing for non-uniform method of collecting taxes unconstitutional; Miller v. Cunningham, 7 Pa. Co. Ct. 502, holding act making taxes liens on real estate, except in cities of the first, second, and fourth classes, unconstitutional; *Re* Reading's Constables, 8 Pa. Co. Ct. 102, holding act providing for election of constables in cities of second and third classes constitutional; School District v. School District, 22 Pa. Co. Ct. 236, holding act relating to education of nonresident soldiers' children only, unconstitutional; Com. v. Clark, 14 Pa. Super. Ct. 440, holding act prohibiting corporations from discharging employees because of membership in lawful organizations unconstitutional; Baker v. McKee, 6 Pa. Dist. 600, 20 Pa. Co. Ct. 11, holding sections of act requiring voucher for school district of city to be countersigned by comptroller unconstitutional.

Cited in footnotes to Stockton v. Powell, 15 L. R. A. 42, which holds courts without power to inquire as to notice of application to legislature for local legislation; Milwaukee County v. Isenring, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county local.

— Object and scope of classification.

Cited in *Re* Wyoming Street, 137 Pa. 503, 21 Atl. 74; Safe Deposit & T. Co. v. Fricke, 152 Pa. 240, 25 Atl. 530; Philadelphia v. Westminster Cemetery Co. 162 Pa. 108, 29 Atl. 349; Van Loon v. Engle, 171 Pa. 165, 33 Atl. 77; *Re* Ruan Street, 132 Pa. 275, 7 L. R. A. 196, 19 Atl. 219, — holding classification should be for municipal purposes only; Com. v. Gilligan, 195 Pa. 510, 46 Atl. 124, Reversing 8 Kulp, 568, holding public convenience proper reason for classification, in upholding act classifying school districts; Com. v. Moir, 199 Pa. 561, 53 L. R. A. 848, 85 Am. St. Rep. 801, 49 Atl. 351 (dissenting opinion), majority holding steady tendency of court has been to broaden applicability of earlier rules of classification; Darcy v. San José, 104 Cal. 646, 38 Pac. 500, and Edmonds v. Herbrandson, 2 N. D. 273, 274, 14 L. R. A. 727, 50 N. W. 976, holding classification must not be arbitrary; Allentown v. Gross, 132 Pa. 323, 19 Atl. 269, holding rule as to classification inapplicable to question as to right to license under constitutional act.

Cited in notes (7 L. R. A. 193, 195) on constitutional statutory classification of cities.

— Acts declared constitutional.

Cited in State *ex rel.* Atty. Gen. v. Miller, 100 Mo. 449, 13 S. W. 677, upholding act fixing number, and prescribing qualifications and manner of election, of school directors in cities of over 300,000 inhabitants; Philadelphia & R. Coal & I. Co.'s Petition, 200 Pa. 356, 49 Atl. 797, upholding classification of townships into two classes according to population; Com. *ex rel.* Jones v. Blackley, 198 Pa. 374, 52 L. R. A. 368, 47 Atl. 1104, Affirming 30 Pittsb. L. J. N. S. 376, upholding act classifying townships according to density of population; Com. use of Titusville v. Clark, 195 Pa. 639, 57 L. R. A. 350, 86 Am. St. Rep. 694, 46 Atl. 286, Affirming 21 Pa. Co. Ct. 500, 10 Pa. Super. Ct. 512, upholding ordinance of city of third class classifying wholesale and retail merchants for license tax; Bennett v. Norton, 171 Pa. 238, 32 Atl. 1112, Affirming 7 Kulp,



460, holding for some purposes law for coextensive county and city, and a different law for other counties, constitutional; *Com. v. Winkelman*, 12 Pa. Super. Ct. 517, holding act making dying declarations competent in prosecutions for abortion constitutional. *Com v. Hanley*, 15 Pa. Super. Ct. 280, holding undertakers' license act applicable to cities of first, second, and third classes constitutional; *Shenk v. McKennan*, 11 Pa. Super. Ct. 88, Affirming 28 Pittsb. L. J. N. S. 464, 11 Pa. Super. Ct. 86, holding building act relating to cities of the second class constitutional; *Richardson v. Mehler*, 111 Ky. 426, 63 S. W. 957, holding statute providing what shall be prima facie evidence in actions by cities of first class to enforce liens for cost of street improvements valid.

Cited in footnote to *Com. ex rel. Jones v. Blackley*, 52 L. R. A. 367, which sustains classification of townships by density of population.

— **Acts declared unconstitutional.**

Cited in *Meadville v. Dickson*, 129 Pa. 7, 8, 18 Atl. 513, holding no part of specified acts sustainable, because interwoven with unnecessary and excessive classification; *Pittsburgh's Petition*, 138 Pa. 435, 27 W. N. C. 468, 21 Atl. 761, holding classification of cities with reference to collections of municipal liens unconstitutional; *Perkins v. Philadelphia*, 156 Pa. 564, 27 Atl. 356, holding classification intended to support legislation that could only apply to one city unconstitutional; *Costello v. Wyoming*, 49 Ohio St. 209, 30 N. E. 613, holding act authorizing villages in any county containing city of first grade to construct sidewalks unconstitutional; *Wilkes-Barre v. Ricketts*, 5 Kulp, 430, and *Wilkes-Barre v. Felts*, 134 Pa. 531, 19 Atl. 676, holding classification act of May 24, 1887, wholly unconstitutional; *Bradford City v. Pennsylvania & N. Y. Teleg. & Teleph. Co.* 26 Pa. Co. Ct. 335, holding act relating to telegraph wires, exempting cities of the first class, unconstitutional; *Com. ex rel. United Presby. Women's Asso. v. Heckert*, 28 Pittsb. L. J. N. S. 297, 7 Pa. Dist. R. 187, holding act regulating cemeteries and hospitals in cities of second class unconstitutional; *Re Coal Twp.* 23 Pa. Co. Ct. 591, declaring act classifying townships of county into two classes, for purposes of government, unconstitutional; *Groves v. County Court*, 42 W. Va. 594, 595, 26 S. E. 460, declaring unconstitutional, act general in terms, but which could never apply except to a single place.

Cited in footnotes to *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes, not applying to all parts of state, unconstitutional; *State v. Elizabeth*, 23 L. R. A. 525, which holds invalid, special statute discriminating between municipalities already having, and those not having, race course; *Sutton v. State* 33 L. R. A. 589, which holds classification of counties according to previous census, without respect to actual population, void.

**Consequences of unconstitutional acts and remedial legislation.**

.Cited in *Berghaus v. Harrisburg*, 122 Pa. 291, 16 Atl. 365, and *Shoemaker v. Harrisburg*, 122 Pa. 288, 16 Atl. 366, holding municipal lien depending solely on unconstitutional classification act invalid; *Chester v. Cunliffe*, 7 Del. Co. Rep. 98; *Chester v. Bullock*, 187 Pa. 551, 41 Atl. 452; *Chester v. Black* 132 Pa. 570, 6 L. R. A. 804, 19 Atl. 276; *Chester v. Pennell*, 169 Pa. 303, 32 Atl. 408,—upholding assessment under unconstitutional act cured by subsequent legislation; *Com. v. Smoulter*, 126 Pa. 138, 17 Atl. 532, holding *Wilkes-Barre* city of third class because of unconstitutionality of classifications of 1876 and 1877; *Barber Asphalt Paving Co. v. Harrisburg*, 29 L. R. A. 402, 12 C. C. A. 101,

28 U. S. App. 108, 64 Fed. 284, holding city liable for street paving, although contractor agreed to accept payment in property assessments only, afterwards declared invalid; *Gable v. Altoona*, 200 Pa. 20, 49 Atl. 367, holding city liable on bonds payable out of property assessments afterwards declared illegal; *Com. v. La Bar*, 5 Lack. Legal News, 230, 7 Northampton Co. Rep. 86; *Dunbar v. Williamsport*, 9 Pa. Co. Ct. 451; *Melick v. Williamsport*, 35 W. N. C. 39,—holding acts of council under unconstitutional act of May 24, 1887, validated by acts of May 13 and 23, 1889; *Devers v. York City*, 150 Pa. 211, 24 Atl. 668, holding city assessor under unconstitutional act of May 24, 1887, entitled to salary under curative statute of May 13, 1889; *Lancaster County v. Stormfeltz*, 8 Lanc. L. Rev. 195, holding tax lien under act not applicable to whole state invalid; *Easton v. Drake*, 9 Kulp, 324, 6 Northampton Co. Rep. 122, holding provisions in act as to registration of tax lien merely directory; *Trach v. McCauley*, 6 Northampton Co. Rep. 195, holding unconstitutionality of act of 1876 not affecting rights of holder of bond issued in 1886; *Ellis v. Kies*, 1 Dauphin Co. Rep. 202, holding lien act applicable to cities of fourth class nullity, there never having been cities of fourth class; *Melan v. McNulty*, 6 Kulp, 524, holding acts of May 17, 1887, and May 24, 1887, relating to tax liens, inapplicable to case because declared unconstitutional.

**Act partly good and partly bad.**

Cited in *Re Morrellville*, 7 Pa. Super. Ct. 543, as to validity of part of statute though other part void.

**Acts passed prior to constitutional prohibition.**

Cited in *Hulsizer v. Northampton County*, 6 Northampton Co. Rep. 136, holding act passed before constitutional prohibition protected from its operation.

2 L. R. A. 586, *INSURANCE CO. OF N. A. v. FIDELITY TITLE & T. CO.* 123 Pa. 523, 10 Am. St. Rep. 546, 16 Atl. 791.

**Subrogation of insurer to rights of insured.**

Cited in *Fidelity Title & T. Co. v. People's Natural Gas Co.* 150 Pa. 14, 24 Atl. 339, holding that insurer may recover loss from one whose negligence caused fire, notwithstanding release by insured of all claims except against insurers; *Packham v. German F. Ins. Co.* 91 Md. 526, 50 L. R. A. 831, 80 Am. St. Rep. 461, 46 Atl. 1066, holding that destruction of remedy of subrogation against wrongdoer by insured relieves insurer; *Stoughton v. Manufacturers' Natural Gas Co.* 165 Pa. 433, 35 W. N. C. 521, 30 Atl. 1001, holding that verdict against one causing loss presumptively represents entire loss, and insurer entitled under statute to entire amount of insurance paid; *Phenix Ins. Co. v. Pennsylvania R. Co.* 134 Ind. 218, 20 L. R. A. 410, 33 N. E. 970, holding insurer subrogated to rights of owner against one causing loss, to extent of loss paid; *Packham v. German F. Ins. Co.* 91 Md. 528, 50 L. R. A. 832, 80 Am. St. Rep. 461, 46 Atl. 1066, holding surety cannot demand subrogation before discharging liability.

Distinguished in *Sims v. Mutual F. Ins. Co.* 101 Wis. 592, 77 N. W. 908, holding release to one causing fire, of all claims arising from loss, releases insurance company.

2 L. R. A. 587, *STATE USE OF JANNEY v. HOUSEKEEPER*, 70 Md. 162, 14 Am. St. Rep. 340, 16 Atl. 382.

**Negligence; physicians and surgeons.**

Cited in *Pettigrew v. Lewis*, 46 Kan. 82, 83, 26 Pac. 458, holding plaintiff must affirmatively prove lack of care or skill.

Cited in notes (11 L. R. A. 701) on physician's liability for negligent treatment and want of skill; (37 L. R. A. 832) on degree of care and skill required from physician or surgeon.

2 L. R. A. 589, *HARMON v. LEHMAN*, 85 Ala. 379, 5 So. 197.

**Usury; loans by commission merchants.**

Cited in *Patillo v. Allen-West Commission Co.* 47 C. C. A. 644, 108 Fed. 730, holding whether contract to pay constructive commissions in default of cotton delivered, besides interest on loan, is usurious, question for jury; *Blackburn v. Hayes*, 59 Ark. 369, 27 S. W. 240, holding constructive commissions on cotton not delivered, besides interest on loan, not usurious device, but liquidated damages.

**Stipulation for payment of attorneys' fees on foreclosure.**

Cited in *Lehman v. Comer*, 89 Ala. 583, 8 So. 241, holding stipulation to pay attorneys' fees and other expenses in collecting sums secured by mortgage extends to fees on foreclosure; *Ginn v. New England Mortg. Secur. Co.* 92 Ala. 138, 8 So. 388, holding stipulation for payment of attorneys' fees on foreclosure does not render mortgage usurious; *Boyd v. Jones*, 96 Ala. 309, 38 Am. St. Rep. 100, 11 So. 405, holding stipulation for payment of attorneys' fees and reasonable storage not illegal.

2 L. R. A. 594, *BOTTS v. SIMPSONVILLE & B. C. TURNP. CO.* 88 Ky. 54, 10 S. W. 134.

**Consolidation of corporations.**

Cited in *Cherva Bnai Israel v. Chevra Bikur Cholim*, 24 Misc. 190, 52 N. Y. Supp. 712, holding corporations cannot consolidate without legislative authority.

Cited in notes (8 L. R. A. 500) on consolidation of corporations, creating trust; (52 L. R. A. 391) on right of corporations to consolidate; (52 L. R. A. 381) on necessity of stockholder's consent to corporate consolidation; (52 L. R. A. 388) on rights and remedies of stockholders upon unauthorized consolidation; (3 L. R. A. 437) on rights, duties, and obligations of consolidated corporations.

**Right of stockholder to enjoin illegal act of directors.**

Cited in *Forrester v. Boston & M. Consol. Copper & S. Min. Co.* 21 Mont. 549, 55 Pac. 229, holding minority stockholders may enjoin illegal act without proof of exhaustion of remedies within corporation.

2 L. R. A. 596, *HARTMAN v. YOUNG*, 17 Or. 150, 11 Am. St. Rep. 787, 20 Pac. 17.

**Election contest not retriable on appeal.**

Cited in *Breding v. Williams*, 33 Or. 393, 54 Pac. 206, and *Hughes v. Holman*, 23 Or. 483, 32 Pac. 298, holding election contests tried by court without jury not equity cases retriable on appeal.

**Contested election; ballots as evidence.**

Cited in *Dent v. Taylor County*, 45 W. Va. 758, 32 S. E. 250, holding ballots highest evidence of result when identity as cast established; *Fenton v. Scott*, 17 Or. 190, 11 Am. St. Rep. 801, 20 Pac. 96, holding genuineness of ballots sought to be recounted question of fact for trial court; *Davenport v. Olerich*, 104 Iowa, 196, 73 N. W. 603, holding ballots must be shown safely kept by proper custodian before allowed in evidence against official return; *Farrell v. Larsen*, 26 Utah, 291, 73 Pac. 227, holding ballots in unsealed packages, kept in place to which unauthorized persons had access, inadmissible.

**Burden of proof.**

Cited in *Fenton v. Scott*, 17 Or. 191, 11 Am. St. Rep. 801, 20 Pac. 96, holding burden of proof on one seeking to overthrow official count, to show ballots genuine.

2 L. R. A. 601, *WESTERN U. TELEG. CO. v. MUNFORD*, 87 Tenn. 190, 10 Am. St. Rep. 830, 10 S. W. 318.

**Common carrier; connecting lines.**

Cited in *Western U. Teleg. Co. v. Stratemeier*, 6 Ind. App. 128, 32 N. E. 871, and *Bird v. Southern R. Co.* 99 Tenn. 722, 63 Am. St. Rep. 856, 42 S. W. 451, holding initial carrier may limit liability to own line; *Post v. Southern R. Co.* 103 Tenn. 206, 55 L. R. A. 487, 52 S. W. 301, holding carrier, not shipper, has right to designate route of through shipments at special rates.

**Duty to deliver telegrams.**

Cited in footnote to *Western U. Teleg. Co. v. Adams*, 6 L. R. A. 844, which holds ignorance of relations between parties to message does not excuse neglect in delivering.

Cited in note (15 L. R. A. 130) on duty of telegraph company to find person addressed.

2 L. R. A. 603, *O'HARA v. STATE*, 112 N. Y. 146, 8 Am. St. Rep. 726, 19 N. E. 659.

**Claims against state.**

Cited in *People v. Corner*, 59 Hun, 302, 12 N. Y. Supp. 936, holding in action by state, defendant not entitled to set up counterclaim, since state can be prosecuted only by its consent; *American Bank Note Co. v. State*, 64 App. Div. 227, 71 N. Y. Supp. 1049, holding act conferring jurisdiction upon court of claims to audit claim virtually ratifies unauthorized contract.

Cited in notes (42 L. R. A. 38) on what claims, arising on contracts, constitute valid demands against state; (42 L. R. A. 56, 57) on validity of claims against state on contracts on public buildings and improvements.

**— As affected by statute of limitations.**

Cited in *Parmenter v. State*, 135 N. Y. 163, 31 N. E. 1035, holding claim against state not barred by lapse of time during which no tribunal existed in which it could be prosecuted; *Cayuga County v. State*, 153 N. Y. 292, 47 N. E. 288, raising, without deciding, question whether doctrine that statute of limitations runs against claim from date of ratification by legislature, is applicable.

Cited in note (42 L. R. A. 40) on validity of claims against state affected by statute of limitations.

**Constitutional prohibition of allowance of claims by legislature.**

Cited in *Cayuga County v. State*, 153 N. Y. 291, 47 N. E. 288, holding act giving authority to board of claims to hear and adjust claim not allowance thereof by legislature.

Distinguished in *Roberts v. State*, 30 App. Div. 111, 51 N. Y. Supp. 691, holding legislature cannot authorize allowance of claim for wrongful imprisonment, thereby invalidating unreversed conviction; *Re Greene*, 166 N. Y. 494, 60 N. E. 183, Affirming 55 App. Div. 481, 67 N. Y. Supp. 291, holding act virtually reversing judgment on merits, granting new trial, and authorizing tax levy, unconstitutional.

**Extent of exemption.**

Cited in *Coxe v. State*, 144 N. Y. 410, 39 N. E. 400, holding exemption of existing claims from constitutional prohibition against allowing barred claims cannot apply to subsequent claim.

2 L. R. A. 606 *PROTESTANT EPISCOPAL CHURCH v. ANAMOSA*, 76 Iowa, 538, 41 N. W. 313.

**Exercise of municipal power to change street grade.**

Cited in *McManus v. Hornaday*, 99 Iowa, 511, 68 N. W. 812, holding power conferred on city to change street grade must be exercised in manner prescribed; *Richardson v. Webster City*, 111 Iowa, 429, 82 N. W. 920; *Paine v. Lettsville*, 103 Iowa, 483, 72 N. W. 693; *Blanden v. Fort Dodge*, 102 Iowa, 444, 71 N. W. 411,—holding municipal corporation not exercising power to change street grade in manner prescribed by statute liable for damages occasioned thereby; *Eckert v. Walnut*, 117 Iowa, 630, 91 N. W. 929, holding municipality changing grade of street before passing ordinance establishing it liable for damages to abutting owner; *Caldwell v. Nashua*, 122 Iowa, 181, 97 N. W. 1000, holding city reducing sidewalk to level of street without adopting ordinance establishing grade liable to abutter.

Cited in note (9 L. R. A. 210) on municipality, when liable for neglect of officers or agents.

Distinguished in *Cooper v. Cedar Rapids*, 112 Iowa, 370, 83 N. W. 1050, holding law requiring ordinance to authorize construction of sewer does not apply to construction of temporary gutter; *Reilly v. Ft. Dodge*, 118 Iowa, 640, 92 N. W. 887, denying liability to abutting owner of city filling street to established grade before passing resolution ordering the work; *Wilber v. Ft. Dodge*, 120 Iowa, 557, 95 N. W. 186, denying liability of city bringing street to grade without adopting resolution ordering work done, to abutter not alleging or proving special damage from such failure.

2 L. R. A. 608, *McCARTHY v. BOSTON & L. R. CO.* 148 Mass. 550, 20 N. E. 182.

**Circumstantial evidence of intent.**

Cited in *O'Brien v. Cunard S. S. Co.* 154 Mass. 273, 13 L. R. A. 331, 28 N. E. 266, holding consent of passenger to vaccination determinable only by overt acts; *Norton v. Brookline*, 181 Mass. 364, 63 N. E. 930, holding employee's consent to temporary stoppage of pay is presumed by continuance in office after notice; *Hobbs v. Massasoit Whip Co.* 158 Mass. 197, 33 N. E. 495, holding re-

tention of skins sent in accordance with standing offer, for an unreasonable time, amounts to acceptance.

**Emancipation or adoption of child.**

Cited in *Nugent v. Powell*, 4 Wyo. 200, 20 L. R. A. 205, 63 Am. St. Rep. 17, 33 Pac. 23, holding mother only necessary party to adoption proceedings where father deserted family in destitute condition.

2 L. R. A. 609, *PEOPLE ex rel. HART v. McELROY*, 72 Mich. 446, 40 N. W. 750.

**Presumption of validity of statute.**

Cited in *People ex rel. Atty. Gen. v. Burch*, 84 Mich. 413, 47 N. W. 765, holding mistake in journal as to nature of vote taken in senate corrected by *errata* does not invalidate bill; *Detroit v. Dertoit*, 91 Mich. 81, 16 L. R. A. 63, 51 N. W. 787, holding record of passage of bill as printed in official bound journal amending mistake in current issue presumptively authorized; *Ritchie v. Richards*, 14 Utah, 371, 47 Pac. 670, holding mere silence of journals as to compliance with mandatory requirement of Constitution insufficient to overcome presumption of validity, where no record required.

Cited in footnote to *Norman v. Kentucky B. of Managers*, 18 L. R. A. 556, which holds presumption that statute constitutionally enacted not conclusive.

Cited in note (23 L. R. A. 344) on conclusiveness of general expressions in enrolled bill as to fact of passage.

**Passage of act.**

Cited in *Detroit v. Chapin*, 108 Mich. 143, 37 L. R. A. 398, 66 N. W. 587, holding bill passed by legislature prior to last five days of session and approved by governor within ten days, but not until after adjournment, valid.

Cited in note (11 L. R. A. 491) on passage of bill through legislature.

**Journals as evidence of proceedings of legislature.**

Cited in *Auditor General v. Menominee County*, 89 Mich. 579, 51 N. W. 483, holding affidavits of senators entered "present" in journal incompetent, though entered in journal, to rebut prior entry; *Sackrider v. Saginaw County*, 79 Mich. 66, 44 N. W. 165, holding parol evidence of representatives as to contents of bill, inadmissible; *People v. Dettenthaler*, 118 Mich. 599, 44 L. R. A. 166, 77 N. W. 450, holding parol evidence inadmissible to show amendment of act by supplying omitted enacting clause before presenting to governor for approval.

Cited in note (11 L. R. A. 492) on printed journals as evidence.

**Judicial cognizance of legislative journals.**

Followed in *Rode v. Phelps*, 80 Mich. 609, 45 N. W. 493, holding void duly certified law containing material proviso appearing from journals to have been stricken out by both branches of legislature.

Cited in *State v. Wray*, 109 Mo. 598, 19 S. W. 86; and *Ritchie v. Richards*, 14 Utah, 371, 47 Pac. 670, holding journals admissible to determine validity of act duly authenticated and approved; *Union Bank v. Oxford*, 119 N. C. 214, 34 L. R. A. 489, 25 S. E. 966, holding failure of journals to show mandatory requirement of reading and vote by yea and nay renders certified and enrolled act, void.

Cited in note (8 L. R. A. 326) on passage of bills by legislature.

**Title of statute.**

Cited in footnotes to *Judson v. Bessemer*, 4 L. R. A. 742, which holds provision authorizing issue of municipal bonds within title; *Wardle v. Townsend*, 4 L. R. A. 511, which holds provision for winding up corporation within title; *Thomas v. Wabash, St. L. & P. R. Co.*, 7 L. R. A. 145, which holds provision limiting rights in water to railroad companies owning landings not within title; *State v. Snow*, 11 L. R. A. 355, which holds prohibition of article intended for use as lard, containing other ingredients than swine's flesh, within title; *Winona v. School Dist. No. 82*, 3 L. R. A. 46, which holds mention in title of all other acts repealed or altered unnecessary; *Millvale v. Evergreen R. Co.* 7 L. R. A. 369, which holds act chartering freight and passenger railway sufficiently entitled where shows purpose to charter passenger railway only; *State v. Burgdoerfer*, 14 L. R. A. 846, which holds regulation of "bookmaking" within title to "prohibit" same.

Cited in note (8 L. R. A. 858) on construction of title to statute.

**Amendments after fifty-day limit.**

Followed in *Caldwell v. Ward*, 83 Mich. 18, 46 N. W. 1024, and *Davock v. Moore*, 105 Mich. 134, 28 L. R. A. 788, 63 N. W. 424, holding germane amendment of bill in material point valid after expiration of fifty days; *Toll v. Jerome*, 101 Mich. 471, 59 N. W. 816, holding bill providing by title for vacation of judicial circuit amendable after limit by provision for reorganization of circuit; *Detroit v. Schmid*, 128 Mich. 384, 92 Am. St. Rep. 468, 87 N. W. 383, holding substitution of bill amending another section of city charter than one originally introduced not obnoxious to provision against introduction of bill after fifty days; *Brake v. Callison*, 122 Fed. 724, holding call of senate not necessary, under Florida Constitution, on substitute bill sent up by house.

Distinguished in *Atty. Gen. v. Detroit & S. Pl. Road Co.* 97 Mich. 592, 56 N. W. 943, holding substitution of bill not germane to the object expressed in original title invalid; *Sackrider v. Saginaw County*, 79 Mich. 65, 44 N. W. 165, holding bill providing by title for discontinuance of specific road not amendable by substitution of provision for maintenance of other roads.

2 L. R. A. 614, *STRINGER v. FROST*, 116 Ind. 477, 9 Am. St. Rep. 875, 19 N. E. 331.

**Care requisite in use of street.**

Cited in *Green v. Eden*, 24 Ind. App. 592, 56 N. E. 240, holding pedestrian crossing street not required to look and listen for ambulance rapidly driven without gong; *Eaton v. Cripps*, 94 Iowa, 181, 62 N. W. 687, holding woman preparing to take car on crowded thoroughfare not negligent in failing to see rapidly approaching train; *Scofield v. Myers*, 27 Ind. App. 376, 60 N. E. 1005, holding party driving on street entitled to presume that train rapidly approaching from rear is under control and in competent hands; *Henry v. Grand Ave. R. Co.* 113 Mo. 536, 21 S. W. 214, holding greater care requisite when crossing street at unusual place; *Pittsburgh, C. O. & St. L. R. Co. v. Martin*, 157 Ind. 223, 61 N. E. 229, holding engineer entitled to presume that employees of another company, using common tracks in union station, will observe usual signals; *Schwartz v. New Orleans & C. R. Co.* 110 La. 545, 34 So. 667, holding person standing between car tracks not bound to anticipate lateral movement bringing cars passing on curve close together.



Cited in footnote to *State v. Lauer*, 20 L. R. A. 61, which holds it contributory negligence to leave surveyor's transit set up in street.

Cited in notes (7 L. R. A. 678) on contributory negligence as defense; (11 L. R. A. 35) on excessive speed in streets; (17 L. R. A. 124) on deviation from usual thoroughfare as negligence in pedestrian.

Distinguished in *Evans v. Adams Exp. Co.* 122 Ind. 366, 7 L. R. A. 680, 23 N. E. 1039, holding party standing still in conversation in street not entitled to recover for injuries inflicted by wagon driven inattentively.

**General and special verdicts.**

Cited in note (6 L. R. A. 574) on when special verdict controls general.

**Objections and exceptions.**

Cited in note (8 L. R. A. 609) on insufficiency of general exception.

**Liability of infant for tort.**

Cited in note (57 L. R. A. 674) on general liability of infant for torts.

2 L. R. A. 615, *POWELL v. CAMPBELL*, 20 Nev. 232, 19 Am. St. Rep. 350, 20 Pac. 156.

***Lis pendens.***

Cited in *Wilkinson v. Elliott*, 43 Kan. 594, 19 Am. St. Rep. 158, 23 Pac. 614, holding *lis pendens* ineffectual where divorce petition file-marked but not left on file, nor issued with summons.

Cited in note (4 L. R. A. 718) on *lis pendens* generally.

Distinguished in *Sun Ins. Co. v. White*, 123 Cal. 202, 55 Pac. 902, holding bona fide mortgage of separate property by husband pending divorce suit valid, where no intent to prevent enforcement of decree.

**Jurisdiction of equity.**

Cited in footnote to *Ada County v. Bullen Bridge Co.* 36 L. R. A. 367, which denies right to maintain equitable action to cancel county warrants.

Cited in note (11 L. R. A. 69) on equity jurisdiction where remedy at law available.

**Alimony.**

Cited in footnote to *Hooper v. Hooper*, 44 L. R. A. 725, which sustains allowance of gross sum from husband's estate in addition to monthly alimony.

2 L. R. A. 621, *PENNSYLVANIA R. CO. v. BOWERS*, 124 Pa. 183, 16 Atl. 836.

**Acceptance of statute.**

Distinguished in *Gloninger v. Pittsburgh & C. R. Co.* 139 Pa. 35, 21 Atl. 211, holding railway whose charter authorized increase of indebtedness not limited by legislation of 1874 where its benefits not taken advantage of.

2 L. R. A. 623, *COM. v. DONAHUE*, 148 Mass. 529, 12 Am. St. Rep. 591, 20 N. E. 171.

**Forcible retaking of property.**

Cited in *Heminway v. Heminway*, 58 Conn. 445, 19 Atl. 766, holding secretary justified in forcibly regaining possession of letter file from director using same for purposes hostile to corporation; *State v. Hartley*, 75 Conn. 108, 52 Atl. 615,

holding owner may reasonably resist officer attempting to attach exempt property; *State v. Dooley*, 121 Mo. 593, 26 S. W. 558, holding recovery of possession of horses at point of revolver excessive force; *State ex rel. Rhodes v. Saunders*, 66 N. H. 80, 18 L. R. A. 653, 25 Atl. 588, holding statute authorizing injunction against maintenance of liquor nuisance valid exercise of governmental right of self-protection.

Cited in notes (14 L. R. A. 317, 318) on assault in recapture of property; (45 L. R. A. 687) on plea of self-defense in prosecution of crime.

#### **Larceny by fraud.**

Cited in *Com. v. Lannan*, 153 Mass. 289, 11 L. R. A. 451, 25 Am. St. Rep. 629, 26 N. E. 858, holding attorney guilty of larceny, who, through trickery, retains money handed him by client for transfer to third party; *Trecy v. Jefts*, 149 Mass. 212, 21 N. E. 360, holding debtor double paying creditor by latter's fraud may maintain action to recover particular money so paid.

2 L. R. A. 625, *BARTLETT v. STANCHFIELD*, 148 Mass. 394, 19 N. E. 549.

#### **Substitution of oral for written contract.**

Cited in *McNeil v. Boston Chamber of Commerce*, 154 Mass. 280, 13 L. R. A. 560, 28 N. E. 245, holding "notice to bidders" on submitted plans and specifications, retaining right to reject any and all bids, may be varied by parol agreement to accept lowest bid; *Thomas v. Barnes*, 156 Mass. 584, 31 N. E. 683, holding evidence admissible to show oral warranty of refrigerator built under bilateral written contract; *Goodhue v. Hartford F. Ins. Co.* 175 Mass. 190, 55 N. E. 1039, holding stipulation of insurance policy against removal of goods without written consent may be varied by oral agreement; *Leverone v. Arancio*, 179 Mass. 448, 61 N. E. 45, allowing recovery for extras ordered with defendant's consent, though architect's certificate not given as per contract; *The Sappho*, 36 C. C. A. 400, 94 Fed. 550, Reversing 89 Fed. 370, holding corporation accepting benefit bound by oral contract for extra work in repair of vessel entered into by master with knowledge and consent of directors and officers; *Copeland v. Hewett*, 96 Me. 529, 53 Atl. 36, holding builder entitled to extras supplied in pursuance of alterations and additions agreed upon, though not reduced to writing and signed by parties as required by contract; *Crowley v. United States Fidelity & G. Co.* 29 Wash. 274, 69 Pac. 784, holding owner orally directing and contractor acting upon changes waive contract provision requiring written authority for deviations from plans.

Distinguished in *Merritt v. Peninsular Constr. Co.* 91 Md. 466, 46 Atl. 1013, disallowing claim for extra work not reduced to writing in pursuance of contract, though oral contract entered into for payment therefor at time of execution of original contract; *Stillman v. Wickham*, 106 Iowa, 599, 76 N. W. 1008, holding sureties on builder's contract not liable for failure to perform oral contract substituted therefor.

2 L. R. A. 626, *PHELPS v. NEW YORK*, 112 N. Y. 216, 19 N. E. 408.

Followed without discussion in *Van Nest v. New York*, 113 N. Y. 652, 21 N. E. 414, and *Vaughn v. Portchester*, 115 N. Y. 637, 21 N. E. 1116.

#### **Recovery of money paid under mistake of law.**

Cited in *People ex rel. Edison Electric Illuminating Co. v. Wemple*, 69 Hun,

372, 23 N. Y. Supp. 661, holding comptroller not authorized to readjust account against corporation for illegal taxes where same voluntarily paid; *Baker v. Bucklin*, 43 App. Div. 337, 60 N. Y. Supp. 294, holding payment of liquor tax under mistake of law not recoverable; *Pooley v. Buffalo*, 122 N. Y. 601, 26 N. E. 16, holding payment of assessment void on face not recoverable; *Redmond v. New York*, 125 N. Y. 638, 26 N. E. 727, holding payment of void paving assessment, made to secure loan on property, not recoverable; *Vanderbeck v. Rochester*, 122 N. Y. 289, 25 N. E. 408, holding assessment on land subject to dower voluntarily paid by widow not recoverable, though purpose of assessment not fulfilled; *Boston Mfrs. Mut. F. Ins. Co. v. Hendricks*, 41 Misc. 489, 85 N. Y. Supp. 44, holding tax illegal on face, paid by foreign insurance company in apprehension of suit, cannot be recovered; *Smyth v. New York*, 26 Jones & S. 359, 11 N. Y. Supp. 583, holding assessment paid after order vacating same not recoverable; *Pennock v. Douglas County*, 39 Neb. 301, 27 L. R. A. 125, 42 Am. St. Rep. 579, 58 N. W. 117, and *Budge v. Grand Forks*, 1 N. D. 316, 10 L. R. A. 168, footnote p. 165, 47 N. W. 390, holding purchaser at sale for void tax cannot recover purchase money from city; *Converse v. Sickles*, 74 Hun, 431, 26 N. Y. Supp. 590, holding money paid in satisfaction of valid judgment, not appealed, not recoverable; *Harrington v. New York*, 40 Misc. 169, 81 N. Y. Supp. 667, holding fine imposed by magistrate without jurisdiction, voluntarily paid, cannot be recovered.

Cited in footnotes to *Walser v. Board of Education*, 31 L. R. A. 329, which denies right to recover back school taxes paid by mistake to district not entitled to same; *Rogers v. St. Paul*, 47 L. R. A. 537, which denies right to recover back money paid on assessment for uncompleted street improvement; *McConville v. St. Paul*, 43 L. R. A. 584, which authorizes property owner to recover back assessments which he has been compelled to pay city for improvement wholly abandoned without completion.

#### **What is "voluntary" payment.**

Cited in *New v. New Rochelle*, 91 Hun, 217, 36 N. Y. Supp. 211, holding payment after issuance of distress warrant for collection of tax void on face voluntary, and not recoverable; *State ex rel. Sanborn v. Stonestreet*, 92 Mo. App. 220, holding payment of illegal fee bill after notice of impending enforcement against property voluntary where no threat of immediate seizure; *Van Hise v. Rensselaer County*, 21 Misc. 576, 48 N. Y. Supp. 874, holding issuance of tax warrants enforceable against assessed property not sufficient to render payment of illegal tax involuntary; *Tripler v. New York*, 125 N. Y. 631, 26 N. E. 721, holding payment of void sewer assessment voluntary where the only coercion proved is running of interest and imposition of lien; *Palmer v. Syracuse*, 26 Misc. 567, 57 N. Y. Supp. 600, holding provision for addition of interest and fees to unpaid local assessments does not render payment involuntary; *Matthews v. William Frank Brewing Co.* 26 Misc. 48, 35 N. Y. Supp. 241, holding fact of protest at time of payment does not save right to contest tax subsequently.

Cited in footnote to *St. Anthony & D. Elevator Co. v. Soucie*, 50 L. R. A. 262, which sustains right to recover illegal taxes paid under protest to prevent tax collector's sale of personal property constructively.

Cited in note (4 L. R. A. 304) on recovery of money paid under mistake of law.

#### **Delegation of discretionary powers.**

Cited in *Greater New York Athletic Club v. Wurster*, 19 Misc. 447, 43 N. Y.

Supp. 703, holding power of common council to regulate and license theaters, etc., cannot be delegated to mayor; *Bolton v. Gilleran*, 105 Cal. 248, 45 Am. St. Rep. 33, 38 Pac. 881, holding sewer assessment based on contract leaving matters of construction and resultant expense to discretion of engineer invalid; *Chase v. Scheerer*, 136 Cal. 252, 68 Pac. 768, holding tax sale based upon assessment for improvement of street under contract permitting change of plans and allowance for "settling" by city engineer void.

Distinguished in *Loughry v. Pittsburgh*, 29 Pittab. L. J. N. S. 431, holding selection of material to be used in paving may be delegated by council to director of public works; *Burchell v. New York*, 30 N. Y. S. R. 419, 9 N. Y. Supp. 196, holding assessment not invalid where evidence does not show its levy for pavements the reconstruction of which is irregularly left to discretion of commissioners.

#### **Right to equitable relief.**

Distinguished in *Pooley v. Buffalo*, 124 N. Y. 208, 26 N. E. 624, holding party entitled to equitable relief against assessment presumptively valid by statute, but void by matter *dehors* record.

2 L. R. A. 629, *BEDLOW v. NEW YORK FLOATING DRY DOCK CO.* 112 N. Y. 263, 19 N. E. 800.

#### **Regulation and control of public ways.**

Cited in *Sun Printing & Pub. Asso. v. New York*, 8 App. Div. 281, 40 N. Y. Supp. 607, holding construction of municipal rapid transit works proper subject of municipal enterprise; *People v. Baltimore & O. R. Co.* 117 N. Y. 156, 22 N. E. 1026, holding statute authorizing erection of sheds upon piers or bulkheads, after obtaining license, constitutional.

Cited in note (59 L. R. A. 45) on extent of sovereign's right, as against subject generally, to obstruct navigation.

#### **Riparian rights.**

Cited in *Kerr v. West Shore R. Co.* 127 N. Y. 278, 27 N. E. 833, holding owner of upland not entitled to compel draw in railroad bridge cutting off access to docks in river bay; *Re New York*, 168 N. Y. 145, 56 L. R. A. 504, 61 N. E. 158, Reversing 60 App. Div. 125; 69 N. Y. Supp. 994, holding municipality not authorized to construct driveway on tideway, cutting off riparian easements, without compensation.

#### **Adverse possession by tenant.**

Cited in *Church v. Wright*, 4 App. Div. 315, 38 N. Y. Supp. 701, holding Code, § 373, applicable to tenant continuing in possession under deed recognizing lease, after unexecuted judgment in ejectment for nonpayment of rent; *Bissing v. Smith*, 85 Hun, 569, 33 N. Y. Supp. 123, holding grantee of tenant returning after eviction in adverse possession so as to render conveyance of owner within twenty years champertous; *Lewis v. New York & H. R. Co.* 162 N. Y. 222, 56 N. E. 540, holding party in possession under conflicting instruments, one hostile, the other consistent, with title in true owner, presumptively tenant of latter; *Merritt v. Smith*, 27 Misc. 370, 58 N. Y. Supp. 851, holding attornment by tenant to stranger does not destroy tenancy; *Shneider v. Mahl*, 84 App. Div. 6, 82 N. Y. Supp. 27, holding mortgagee not chargeable with notice of rights of prior equitable mortgagee in possession as tenant.

Cited in footnote to *Davis v. Williams*, 54 L. R. A. 749, which sustains agent's right to acquire adverse title to principal's property occupied as part of contract of service.

Cited in notes (53 L. R. A. 945) on power of tenant to initiate adverse possession during term; (53 L. R. A. 949) on presumption as to possession of tenant holding over; (40 L. R. A. 605) on upland owner's right of access to navigable water as against private individual.

**Landlord's title to fixtures.**

Cited in notes (6 L. R. A. 249) on what constitute fixtures; (9 L. R. A. 701) on tenant's right to remove fixtures after expiration of term; (11 L. R. A. 498) on what operates at law as surrender of leasehold estate.

**Riparian owner's estate in pier erected under municipal authority.**

Cited in *Bedlow v. Stillwell*, 91 Hun, 385, 36 N. Y. Supp. 129, Affirmed on appeal, 158 N. Y. 298, 53 N. E. 26, holding widow entitled to dower in husband's interest in pier.

Cited in note (40 L. R. A. 647) on effect of constructing wharf in front of property.

**Authority to maintain pier.**

Cited in *Bell v. New York*, 77 App. Div. 452, 79 N. Y. Supp. 347, holding common council could give consent to construction of pier on lands under East river owned by state; *Bell v. New York*, 77 App. Div. 452, 79 N. Y. Supp. 347, holding prescriptive right to maintain pier on state lands acquired from twenty-year use; *Bell v. New York*, 77 App. Div. 452, 79 N. Y. Supp. 347, holding ordinance vesting right to grant lands under water in commissioners of sinking fund has no application to pier constructed by abutting owner with common council's consent.

**Description of riparian boundary of property.**

Cited in *People ex rel. Burnham v. Jones*, 112 N. Y. 605, 20 N. E. 577, holding conveyance "to the beach" not to include beach itself, where boundary is described as straight line.

**Review on appeal of exceptions to findings of fact.**

Followed in *Morris v. Wells*, 26 N. Y. S. R. 11, 7 N. Y. Supp. 61, holding refusal to find material fact established by undisputed proof reviewable on appeal; *Styles v. Tyler*, 64 Conn. 474, 30 Atl. 165 (dissenting opinion), holding to the same effect.

Cited in *Naser v. First Nat. Bank*, 116 N. Y. 497, 22 N. E. 1077, holding sufficiency of evidence to support finding of fact not subject to review in absence of exception; *Halpin v. Phenix Ins. Co.* 118 N. Y. 172, 23 N. E. 482, holding certificate that case on appeal contains all the evidence not essential to review unsupported finding of fact duly excepted to; *Larkin v. McMullin*, 120 N. Y. 212, 24 N. E. 447, holding exceptions to findings of fact not reviewable on appeal, where it does not appear that judgment was reversed and new trial granted on questions of fact; *Woodman v. Penfield*, 2 Silv. Sup. Ct. 248, 6 N. Y. Supp. 803, holding refusal of referee to respond to request for findings not ground of reversal, where not prejudicial to appellant; *Rehberg v. Grierser*, 24 Mont. 493, 63 Pac. 41, holding specification of errors in findings of fact requisite to review by court of appeals as question of law.

2 L. R. A. 636, *ROBINSON v. OCEAN STEAM NAV. CO.* 112 N. Y. 315, 19 N. E. 625.

**Residence as affecting jurisdiction.**

Cited in *O'Reilly v. New Brunswick, A. & N. Y. S. S. Co.* 28 Misc. 116, 59 N. Y. Supp. 261, holding averment of plaintiff's residence, essential to complaint against foreign corporation in action, not available to nonresident; *Hoes v. New York, N. H. & H. R. Co.* 173 N. Y. 441, 66 N. E. 119, Reversing 73 App. Div. 370, 77 N. Y. Supp. 117, holding administrator of nonresident, whose assets were brought into state for purpose of obtaining letters of administration, cannot prosecute cause of action arising in another state for causing intestate's death, against foreign corporation; *Gurney v. Grand Trunk R. Co.* 37 N. Y. S. R. 561, 13 N. Y. Supp. 645, holding complaint by local administrators of foreign decedent against foreign corporation for injuries received out of state not demurrable where plaintiff's nonresidence not apparent from complaint; *Gundlin v. Hamburg-American Packet Co.* 8 Misc. 296, 28 N. Y. Supp. 572, upholding judgment rendered on general verdict where plaintiff's residence submitted to jury.

Cited in notes (66 L. R. A. 215, 218) on right of local representative to sue on foreign cause of action; (14 L. R. A. 583) on constitutional equality as to privileges in litigation.

Distinguished in *Smith v. Crocker*, 14 App. Div. 249, 43 N. Y. Supp. 427, retaining jurisdiction in action of contract between nonresidents; *Hopper v. Hopper*, 125 N. Y. 400, 12 L. R. A. 238, 26 N. E. 457, holding foreign executor taking out local ancillary letters subject to suit as resident; *Herbert v. Montana Diamond Co.* 81 App. Div. 214, 80 N. Y. Supp. 717, holding complaint against foreign corporation, not alleging plaintiff's residence, not demurrable.

**Jurisdiction over subject-matter of suit.**

Cited in *Monda v. Wells, F. & Co.* 20 Misc. 687, 46 N. Y. Supp. 682, Affirmed in 21 Misc. 309, 47 N. Y. Supp. 182, nolding court without jurisdiction of action between nonresidents on through contract of shipment made and performable out of state; *Perry v. Erie Transfer Co.* 28 Abb. N. C. 432, 19 N. Y. Supp. 239, 22 N. Y. Civ. Proc. Rep. 181, dismissing complaint between nonresidents on contract made and broken in another state though performable in part within jurisdiction; *Hatfield v. Sisson*, 28 Misc. 256, 59 N. Y. Supp. 73, dismissing complaint for slander between nonresidents where words spoken outside state; *Smith v. Empire State Idaho Min. & Development Co.* 127 Fed. 465, holding nonresident widow may sue foreign corporation negligently causing husband's death in another state, in courts of state where it maintains principal office; *Ferguson v. Neilson*, 33 N. Y. S. R. 815, 11 N. Y. Supp. 524, dismissing action between nonresidents for tort outside state; *Anglo-American Provision Co. v. Davis Provision Co.* 50 App. Div. 275, 63 N. Y. Supp. 987, Affirmed in 169 N. Y. 513, 88 Am. St. Rep. 608, 62 N. E. 587, holding foreign judgment not enforceable between nonresidents, since it is not a cause of action arising within state; *Selser Bros. Co. v. Potter Produce Co.* 77 Hun, 314, 28 N. Y. Supp. 428, holding attachment in proceeding between non-residents erroneously granted where affidavit fails to show contract made or broken in jurisdiction; *Potter v. New York City Baptist Mission Soc.* 23 Misc. 680, 52 N. Y. Supp. 294, holding appearance of parties insufficient to cure complaint failing to state cause of action; *Dayton v. Board of Equalization*, 33 Or. 136, 50 Pac. 1009, holding jurisdiction of board not dependent upon appearance in record of fact of due preparation of tax rolls; *Barker v. Cunard S. S. Co.* 91

Hun, 501, 36 N. Y. Supp. 256 (concurring opinion), majority holding jurisdiction of court of general jurisdiction in action against foreign corporation presumed, where contrary is not shown on trial or by record on appeal.

Distinguished in *Flynn v. Central R. Co.* 2 Misc. 510, 27 Abb. N. C. 33, 15 N. Y. Supp. 328, retaining jurisdiction of action by resident against foreign corporation for injuries received outside state; *Colorado State Bank v. Gallagher*, 76 Hun, 311, 27 N. Y. Supp. 688, holding action by nonresident corporation against nonresident on foreign contract, within court's jurisdiction; *Ladenburg v. Commercial Bank*, 24 N. Y. Civ. Proc. Rep. 235, 32 N. Y. Supp. 873, holding failure of affidavit in attachment against foreign corporation to show facts bringing case within Code provisions not void where defect supplied by affidavit filed *nunc pro tunc*; *Wertheim v. Clergue*, 53 App. Div. 124, 65 N. Y. Supp. 750, holding nonresident entitled to trial of action arising out of state for fraudulent breach of contract; *Barrow S. S. Co. v. Kane*, 170 U. S. 110, 42 L. ed. 968, 18 Sup. Ct. Rep. 526, holding right of citizens of diverse residence to sue in Federal courts not controlled by state legislation.

**Taking of objection to jurisdiction.**

Cited in *Gillin v. Canary*, 19 Misc. 599, 44 N. Y. Supp. 313, holding party consolidating claims not estopped to object on appeal that amount of consolidated claims exceeds jurisdiction of court; *Tyroler v. Gummersbach*, 28 Misc. 158, 59 N. Y. Supp. 266, reversing judgment on appeal where record failed to show jurisdiction of inferior court over defendant; *Baird v. Sheehan*, 38 App. Div. 15, 56 N. Y. Supp. 228, where appellate court *ex mero motu* refused relief on contract void as against public policy; *Miller v. Sunde*, 1 N. D. 4, 44 N. W. 301, reversing *sua sponte* on appeal judgment rendered after transfer of cause to Federal court; *Levy v. Swick Piano Co.* 17 Misc. 147, 39 N. Y. Supp. 409, holding party not estopped to attack validity of order in supplementary proceedings against corporation by institution of like proceeding himself.

2 L. R. A. 638, *BRYAN v. UNIVERSITY PUB. CO.* 112 N. Y. 382, 19 N. E. 825.

**Propriety of order for publication.**

Cited in *Von Hesse v. Mackaye*, 55 Hun, 370, 8 N. Y. Supp. 894, Reversing 5 N. Y. Supp. 791, holding publication against nonresident claimant of bond not within state unauthorized; *Paget v. Stevens*, 143 N. Y. 177, 38 N. E. 273, Reversing 8 Misc. 238, 28 N. Y. Supp. 549, holding publication unauthorized in action by plaintiffs, of whom one alien, for nonresident's foreign misconduct; *Montgomery v. Boyd*, 60 App. Div. 136, 70 N. Y. Supp. 139, holding publication against nonresident unauthorized unless complaint shows that plaintiff has a cause of action against defendant; *Chesley v. Morton*, 9 App. Div. 463, 41 N. Y. Supp. 463, holding publication authorized in suit to enforce partner's lien upon dissolved partnership's domestic assets; *Hartzell v. Vigen*, 6 N. D. 132, 35 L. R. A. 458, 66 Am. St. Rep. 589, 69 N. W. 203, holding that "subject of action," of which affiant must show that the court has jurisdiction to warrant publication, relates to the controversy, and not property attached; *Foster v. Electric Heat Regulator Co.* 16 Misc. 148, 37 N. Y. Supp. 1063, holding publication unauthorized without plaintiff's residence alleged in verified complaint; *Scharmann v. Schoell*, 23 App. Div. 402, 48 N. Y. Supp. 306, holding cause of action stated in action upon bond of administrator not made party, where his absconding or concealment after collecting property alleged; *O'Reilly v. New Brunswick, A. & N. Y. S. S. Co.* 28 Misc. 118, 59 N. Y.



Supp. 261, holding no cause of action stated against foreign corporation unless plaintiff's residence alleged.

Distinguished in *Taylor v. Security Mut. L. Ins. Co.* 38 Misc. 577, 77 N. Y. Supp. 1012, holding publication good against foreign pledgee of insurance policy payable within state in action to ascertain payee; *Bragg v. Gaynor*, 85 Wis. 488, 21 L. R. A. 168, 55 N. W. 919, holding debt authorized basis for publication in action to reach nonresident's domestic property.

**Remedy for improper order.**

Cited in *Everett v. Everett*, 22 App. Div. 475, 47 N. Y. Supp. 994, holding defendant may appear specially for substantial objection to jurisdiction, before general appearance.

2 L. R. A. 642, *HONDURAS v. SOTO*, 112 N. Y. 310, 8 Am. St. Rep. 744, 19 N. E. 845.

**Inclusion of "person."**

Cited in *West Coast Mfg. & Invest. Co. v. West Coast Improv. Co.* 25 Wash. 642, 62 L. R. A. 771, 66 Pac. 97, holding the state within warranty of title generally against all persons; *Giddings v. Holter*, 19 Mont. 267, 48 Pac. 8, holding United States a person within covenant of warranty.

Cited in note (19 L. R. A. 223) on nature of a sovereignty as a person.

**Requirement of security for costs statutory.**

Cited in *Bonnett v. Townsend*, 63 Hun, 47, 17 N. Y. Supp. 566, holding authority to require security for costs must be found in statute, if existent.

**Requiring additional security.**

Cited in *Newhall v. Appleton*, 25 Jones & S. 164, 6 N. Y. Supp. 4, holding where money paid into court in lieu of undertaking, additional undertaking cannot be required; *Dunk v. Dunk*, 177 N. Y. 267, 69 N. E. 539, Affirming 88 App. Div. 298, 85 N. Y. Supp. 25, holding court cannot order additional security where undertaking for costs was voluntarily given, after service of motion, therefor; *United States Land & Invest. Co. v. Bussey*, 53 Hun, 519, 6 N. Y. Supp. 416, holding court cannot order additional undertaking in replevin; *McHugh v. Astrophe*, 1 Misc. 219, 20 N. Y. Supp. 878, holding defendant, substituted by order of interpleader, cannot be required to furnish security for costs as condition for asserting claim.

Cited as changed by statute and distinguished in *Brewster v. Wooster*, 9 Misc. 692, 30 N. Y. Supp. 546, sustaining authority to require of nonresident additional undertaking for costs where sum in original insufficient.

2 L. R. A. 644, *DEOBOLD v. OPPERMANN*, 111 N. Y. 531, 684, 7 Am. St. Rep. 760, 19 N. E. 94.

**Privy of sureties.**

Cited in *Altman v. Hofeller*, 152 N. Y. 503, 46 N. E. 961, holding judicial settlement of administrator's account conclusive upon sureties; *Greer v. McNeal*, 11 Okla. 531, 69 Pac. 893, holding sureties on administrator's bond concluded by probate court decree rendered upon final accounting, to which they were not parties; *Re Gall*, 42 App. Div. 257, 59 N. Y. Supp. 254, holding administrator's surety bound by certificate establishing claim against estate; Judge of Probate.

*v. Sulloway*, 68 N. H. 515, 49 L. R. A. 349, 73 Am. St. Rep. 619, 44 Atl. 720. holding sureties liable for executor's personal debt to testator, made asset by statute; *Re Gall*, 47 App. Div. 494, 62 N. Y. Supp. 420, holding sureties and administrator liable, after distribution duly presented, to person not notified of final accounting.

Cited in note (7 L. R. A. 745) on suretyship and bearing of loss by one who causes it.

— **Notice.**

Cited in *Botkin v. Kleinschmidt*, 21 Mont. 6, 69 Am. St. Rep. 641, 52 Pac. 563. holding sureties bound by judgment, without notice to them, against guardian.

Cited as modified by statute in *McMahon v. Smith*, 24 App. Div. 28, 49 N. Y. Supp. 93, holding surety liable for administrator's failure to obey lawful order upon compulsory accounting without notice.

Distinguished in *Thomson v. American Surety Co.* 170 N. Y. 114, 62 N. E. 1073, holding surety for money which "shall come" into trustee's hands, not liable for previous infidelity.

**Liability of sureties.**

Cited in *Beckett v. Place*, 12 Misc. 327, 33 N. Y. Supp. 634, holding non-compliance with order for administrator personally to pay expense of second reference of accounts, official default within bond; *Chard v. Hamilton*, 56 Hun, 267, 9 N. Y. Supp. 575, holding mere surety, known as such by obligee and unsecured by principals, discharged of all liability by death before principals; *Johnson v. Ayres*, 18 App. Div. 500, 46 N. Y. Supp. 132, holding sureties for moneys legally received not estopped to question decree making principal liable for moneys wrongfully received.

Cited in footnotes to *Probate Judge v. Sulloway*, 49 L. R. A. 347, which holds sureties on insolvent executor's bond liable for his personal debt to testator; *Abshire v. Salyer*, 56 L. R. A. 936, which holds sureties on guardian's bond given to obtain silence from future liabilities of surety on prior bond liable for past defalcations.

Cited in note (52 L. R. A. 188) on effect, against surety on official bond, of judgment against officer.

Distinguished in *Cook v. Shull*, 35 App. Div. 123, 54 N. Y. Supp. 696, holding sureties may retain loan payable upon discharge of bond for money paid committee, until such discharge.

**Use of administration funds.**

Cited in *Dutcher v. Dutcher*, 88 Hun, 225, 34 N. Y. Supp. 653, holding administrator's personal agreement, not by way of adjustment, invalid; *Lawyers' Surety Co. v. Reinach*, 25 Misc. 157, 54 N. Y. Supp. 205, Affirming 23 Misc. 246, 51 N. Y. Supp. 162, holding false representations of administrator no defense to conversion of assets paid by mistake; *Moss v. Cohen*, 158 N. Y. 253, 53 N. E. 8. Reversing 11 Misc. 187, 32 N. Y. Supp. 1078, holding legatee liable upon agreement to repay unauthorized advancement by executor.

Cited in note (4 L. R. A. 746) on trust funds as impressed with trust obligations.

— **Business purposes.**

Cited in *Re Myers*, 131 N. Y. 415, 30 N. E. 135, holding that the use of trust funds in stock brokerage is unauthorized; *Re Cozzens*, 2 Connoly, 630, 39 N. Y. S.

R. 391, 15 N. Y. Supp. 771, holding knowing employment of trust fund in business, with only promissory note for security, *devastavit*; *English v. McIntyre*, 29 App Div. 447, 51 N. Y. Supp. 697, holding trustee's fund not for speculation when expenses discretionary and trustee residuary legatee upon *cestui's* prior death; *Warren v. Union Bank*, 157 N. Y. 268, 43 L. R. A. 260, 68 Am. St. Rep. 777, 51 N. E. 1036, holding general guardian cannot engage ward's capital or credit in business.

— **Trust nature.**

Cited in *Wiggins v. Stevens*, 33 App. Div. 88, 53 N. Y. Supp. 90, holding *cestui que trust* may follow trust moneys into bank's assets, where received with knowledge of trust.

Distinguished in *Washburn v. Benedict*, 46 App. Div. 489, 61 N. Y. Supp. 387, holding executor with unrestricted management of personalty may sell and transfer security in which invested.

**Essentiality of damage to action of deceit.**

Cited in *Aron v. De Castro*, 36 N. Y. S. R. 718, 13 N. Y. Supp. 372, holding damage essential in equity to rescinding sale fraudulently procured; *Hewlett v. Saratoga Carlsbad Spring Co.* 84 Hun, 252, 32 N. Y. Supp. 697, holding evidence of no loss competent upon right to equitable relief for fraud.

Cited in notes (6 L. R. A. 573, 8 L. R. A. 787) on *damnum absque injuria*.

2 L. R. A. 648, *BEVERIDGE v. NEW YORK ELEV. R. CO.* 112 N. Y. 1, 19 N. E. 489.

**When judgment not *res judicata* between defendants.**

Cited in *Warren v. Boston & M. R. Co.* 163 Mass. 486, 40 N. E. 895, and *O'Connor v. New York & Y. Land Improv. Co.* 8 Misc. 245, 28 N. Y. Supp. 544, holding judgment not *res judicata* as to defendants not joined in interest, and between whom no issue litigated.

**Railroad corporation, right to lease.**

Cited in *Prospect Park & C. I. R. Co. v. Brooklyn B. & W. E. R. Co.* 84 Hun, 518, 32 N. Y. Supp. 857; *Re Brooklyn Elev. R. Co. v. Nagel*, 75 Hun, 591, 27 N. Y. Supp. 669; *Roosa v. Brooklyn Heights R. Co.* 28 Misc. 387, 69 N. Y. Supp. 664, holding power of railroad corporation to contract for use of road involves right to lease; *Ingersoll v. Nassau Electric R. Co.* 157 N. Y. 477, 43 L. R. A. 245, 52 N. E. 545 (dissenting opinion), majority holding right to contract for use of tracks not subject to consent of abutting owners.

Cited in footnote to *Van Steuben v. Central R. Co.* 34 L. R. A. 577, which holds unauthorized lease of railroad void.

Distinguished in *Durfee v. Johnstown, G. & K. Horse R. Co.* 71 Hun, 282, 24 N. Y. Supp. 1016, holding power of railroad corporation to lease to another does not authorize lease to individual.

**Stockholder without title to undivided earnings.**

Cited in *Spooner v. Phillips*, 62 Conn. 73, 16 L. R. A. 467, 24 Atl. 524, holding one entitled to income from stock has no title to undivided earnings for which increased stock issued.

**Action on agreement by one not party.**

Cited in *Carrier v. United Paper Co.* 73 Hun, 290, 26 N. Y. Supp. 414, holding L. R. A. AU.—VOL. I.—17.

mortgagee cannot recover from grantee assuming mortgage when grantor not liable.

Distinguished in *Merritt v. Booklover's Library*, 89 App. Div. 456, 85 N. Y. Supp. 797, holding assignee of contract to supply horses and wagons to deliver merchandise may enforce it.

**— Beneficial intent must appear.**

Cited in *O'Beirne v. Allegheny K. R. Co.* 151 N. Y. 384, 45 N. E. 873, holding bondholder may enforce mortgage made to trustee for his benefit; *Spingarn v. Rosenfeld*, 4 Misc. 525, 24 N. Y. Supp. 733, holding partnership agreement to assume indebtedness for merchandise contributed by partner enforceable by creditor; *Riordan v. First Presby. Church*, 6 Misc. 87, 26 N. Y. Supp. 38, holding agreement to "pay for attendance in case of illness" inures to benefit of one thereafter furnishing it; *Street v. Goodale*, 77 Mo. App. 321, holding promise by bank to customer to pay checks will not support action by payee; *Ireland v. United States Mortg. & T. Co.* 72 App. Div. 100, 76 N. Y. Supp. 177, holding agreement by lessee's agent to pay rent out of income not intended for benefit of lessor; *Martin v. Peet*, 92 Hun, 138, 36 N. Y. Supp. 554, holding agreement "to indemnify" not "to pay debts," does not inure to benefit of creditor; *Feist v. Schiffer*, 79 Hun, 277, 29 N. Y. Supp. 423, holding promise to indemnify defendant not intended for benefit of judgment creditor.

Distinguished in *Anthony v. American Glucose Co.* 49 N. Y. S. R. 862, 21 N. Y. Supp. 667, holding action maintainable by stockholder on consolidation agreement providing for issuance of stock to stockholders of constituent companies.

**Corporate powers exercisable by directors.**

Cited in *Flynn v. Brooklyn City R. Co.* 9 App. Div. 275, 41 N. Y. Supp. 566, holding power of railroad company to lease exercisable by directors without assent of stockholders; *Vanderpoel v. Gorman*, 140 N. Y. 576, 24 L. R. A. 552, 37 Am. St. Rep. 601, 35 N. E. 932, holding assignment corporate act performable under authority of directors in absence of statute or by-law providing otherwise; *Schaefer v. Scott*, 40 App. Div. 439, 57 N. Y. Supp. 1035, holding general assignment by president invalid, power of management being committed to directors; *Skinner v. Walter A. Wood Mowing & Reaping Mach. Co.* 47 N. Y. S. R. 507, 20 N. Y. Supp. 251, holding corporation can terminate contract only by action of trustees; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 395, 43 U. S. App. 550, 75 Fed. 449, holding power to guarantee bonds may be exercised by directors without stockholders' consent; *Bayles v. Vanderveer*, 11 Misc. 211, 32 N. Y. Supp. 1117, holding directors not bound to comply with request because made by majority stockholders.

**— What justifies intervention of equity.**

Cited in *Small v. Minneapolis Electro Matrix Co.* 32 N. Y. S. R. 889, 10 N. Y. Supp. 456, holding equity will not enjoin exercise of lawful power by directors in good faith; *Lewisohn Bros. v. Anaconda Copper Min. Co.* 26 Misc. 625, 56 N. Y. Supp. 807, holding only fraud or adverse personal interest of directors justifies interference in determining propriety of which wishes of majority stockholders entitled to great weight.

Distinguished in part in *Farmers' Loan & T. Co. v. New York & N. R. Co.* 130 N. Y. 432, 34 L. R. A. 84, 55 Am. St. Rep. 689, 44 N. E. 1043, holding equity will

not permit majority stockholders to manipulate corporate affairs to injury of minority.

Limited in *Hennessy v. Muhleman*, 27 Misc. 233, 57 N. Y. Supp. 114, holding stockholder may enjoin lease involving practical abandonment during its term of corporate purposes.

2 L. R. A. 655, *KUNTZ v. SUMPTION*, 117 Ind. 1, 19 N. E. 474.

Followed without special discussion in *Cleveland, C. C. & St. L. R. Co. v. Marion County*, 19 Ind. App. 66, 49 N. E. 51.

#### **Due process of law.**

Cited in *Walsh v. State*, 142 Ind. 363, 33 L. R. A. 394, 41 N. E. 65, with statement that constitutional defect in statute from nonrequirement of notice had been remedied by amendment; *Loesch v. Koehler*, 144 Ind. 282, 35 L. R. A. 683, 41 N. E. 326, holding act authorizing humane society to kill injured animal, not providing for notice to owner, unconstitutional; *McGavock v. Omaha*, 40 Neb. 79, 58 N. W. 543, holding law giving city power to change grades must provide for notice, which must be given as prescribed; *Evansville & I. R. Co. v. Hays*, 118 Ind. 218, 20 N. E. 736, holding assessments, without notice by board of equalization, invalid; *Campbell v. Monroe County*, 118 Ind. 120, 20 N. E. 772, holding notice essential in reassessment proceedings; *Scudder v. Jones*, 134 Ind. 551, 32 N. E. 221, holding assessment, without statutory notice, of abutting property for improvement, ineffective; *Kirsch v. Braun*, 153 Ind. 261, 53 N. E. 1082, holding opportunity for hearing of parties interested necessary to sustain assessments for improvement; *Power v. Larabee*, 2 N. D. 153, 49 N. W. 724, holding omission of equalization board to meet at time fixed by law for hearing defeats assessment.

Cited in footnotes to *Gulf, C. & S. F. R. Co. v. Ellis*, 17 L. R. A. 286, which holds valid act authorizing attorneys' fees against railroad corporations in suits on claims; *Carleton v. Rugg*, 5 L. R. A. 193, which holds statute authorizing injunction against liquor nuisance does not unlawfully deprive of property or privileges; *State v. Sponaule*, 43 L. R. A. 727, which sustains forfeiture of land for five years' failure to enter for taxation; *Davis v. St. Louis County*, 33 L. R. A. 432, which holds void act authorizing location and marking of section corners without notice to persons to be assessed for cost of same; *Branson v. Gee*, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice for highway repairs valid.

Cited in notes (3 L. R. A. 194, 11 L. R. A. 296) on constitutional protection of property rights; (4 L. R. A. 724, 5 L. R. A. 359, 11 L. R. A. 224) on due process of law; (11 L. R. A. 225) on due process of law; necessity of opportunity for hearing.

#### **Assessment proceedings, what notice sufficient.**

Cited in *Tucker v. Sellers*, 130 Ind. 519, 30 N. E. 531, holding notice of original assessment does not validate second assessment; *Eaton v. Union County Nat. Bank*, 141 Ind. 163, 40 N. E. 693, holding appearance of one subpoenaed as witness before tax board not waiver of statutory notice; *Adams v. Shelbyville*, 154 Ind. 545, 49 L. R. A. 825, 57 N. E. 114, 77 Am. St. Rep. 484 (dissenting opinion), majority holding act providing for hearing of persons aggrieved impliedly authorizes assessment for improvements conforming to benefits; *Pulaski County v. Senn*, 117 Ind. 413, 20 N. E. 276; *Hubbard v. Goss*, 157 Ind. 487, 62 N. E. 36, holding

requirement of special notice of change of assessment of individual does not apply to general order of equalization; *Klein v. Tuhey*, 13 Ind. App. 76, 40 N. E. 144, holding general notice by publication, as prescribed by statute, of hearing on proposed improvement, validates assessment; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 463, 25 N. E. 436, holding substantial compliance with statute requiring notice of proposed improvement validates assessment of abutting owners; *McEneney v. Sullivan*, 125 Ind. 409, 25 N. E. 540, holding notice to abutting owners to make objection to street improvement authorizes assessment therefor.

Distinguished in *Hyland v. Brazil Block Coal Co.* 128 Ind. 340, 26 N. E. 672, holding no notice to corporation required of meeting of board directed by law to value and assess corporation property; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 538, 18 L. R. A. 741, 33 N. E. 421, and *Smith v. Rude Bros. Mfg. Co.* 131 Ind. 153, 30 N. E. 947, holding law requiring statement by corporation to be presented to board directed to assess capital stock sufficient notice.

— **Notice not authorized by law, no notice.**

Cited in *Cummings v. Stark*, 138 Ind. 101, 34 N. E. 444, holding notice by state tax board, not authorized by law, not legal notice validating assessment; *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 441, 24 N. E. 83, holding notice not authorized by law cannot give court jurisdiction; *United States v. American Lumber Co.* 80 Fed. 313, holding service of subpoena outside of court's jurisdiction no notice.

— **Constitutionality of law not expressly providing for notice of assessment.**

Disapproved, in effect, in *Allman v. District of Columbia*, 3 App. D. C. 25, holding notice necessary to validate assessment for street need not be provided for in act; *Carroll v. Alsup*, 107 Tenn. 277, 64 S. W. 193, holding statute fixing time and place of meeting of equalization board sufficient notice to validate change in individual assessment.

**Powers of board of equalization.**

Cited in *Satterwhite v. State*, 142 Ind. 20, 40 N. E. 654 (dissenting opinion), majority holding that equalization board may require witness to testify in preliminary examination before giving notice of assessment to taxpayer; *Jones v. Rushville Natural Gas Co.* 135 Ind. 598, 35 N. E. 390, holding board of equalization quasi-judicial tribunal whose assessment of corporation stock is binding.

**Legislature cannot confer judicial powers.**

Cited in *State ex rel. Hovey v. Noble*, 118 Ind. 355, 4 L. R. A. 105, 10 Am. St. Rep. 143, 21 N. E. 244, holding legislature cannot confer judicial powers; *Smythe v. Boswell*, 117 Ind. 366, 20 N. E. 263, holding powers of courts derived from Constitution, not from legislature; *State v. Runyan*, 130 Ind. 209, 29 N. E. 779, holding town trustee not judicial officer; therefore presentation of false affidavit to him not perjury; *Langenberg v. Decker*, 131 Ind. 480, 16 L. R. A. 113, 31 N. E. 190, holding board of tax commissioners quasi-judicial body, on which power to punish for contempt not conferrable; *Ellis v. Steuben County*, 153 Ind. 92, 54 N. E. 382, holding statute requiring exercise of judgment and discretion by ministerial officer not unconstitutional as imposing judicial functions.

2 L. R. A. 659, *LEE v. SIMPSON*, 37 Fed. 12.

Final hearing. 39 Fed. 235, which was affirmed in 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631.

**Execution of power of appointment.**

Cited in *Lee v. Simpson*, 39 Fed. 240, holding power of appointment by will executed by reference thereto followed by general bequest.

**Right to follow trust funds.**

Cited in footnote to *Central Stock & Grain Exchange v. Bendinger*, 56 L. R. A. 875, which holds broker liable to refund to principal money illegally taken from agent as margins on gambling transaction.

2 L. R. A. 662, *GILPATRICK v. GLIDDEN*, 81 Me. 137, 10 Am. St. Rep. 245, 16 Atl. 464.

Second appeal, 82 Me. 202, 19 Atl. 166.

**Resulting trusts.**

Cited in *Cross v. Bean*, 83 Me. 64, 21 Atl. 752, holding legal title of land subject to trust in favor of vendee, except in hands of bona fide purchaser for value; *Von Trotha v. Bamberger*, 15 Colo. 10, 24 Pac. 883, holding resulting trust may be established by parol where legal title held in fraud of equitable owner; *Ahrens v. Jones*, 169 N. Y. 561, 88 Am. St. Rep. 620, 62 N. E. 666, holding property conveyed on promise of grantee to pay sum to third person impressed with trust; *Grant v. Bradstreet*, 87 Me. 596, 33 Atl. 165, holding promise to pay annuity inducing decedent not to make will enforceable in equity; *Ransdel v. Moore*, 153 Ind. 408, 53 L. R. A. 759, 53 N. E. 767, holding property impressed with trust where heir, by promising to convey, prevents disposal by decedent; *Lawrence v. Oglesby*, 178 Ill. 129, 52 N. E. 945, holding promise by beneficiary in will previously made to pay sum of money, enforceable; *Amherst College v. Ritch*, 151 N. Y. 323, 37 L. R. A. 321, 45 N. E. 876, Affirming 10 Misc. 523, 31 N. Y. Supp. 885, holding promise to dispose of bequest as indicated by testator creates trust.

Cited in footnote to *Western U. Teleg. Co. v. Shepard*, 58 L. R. A. 115, which holds implied trust arises in favor of grantor reserving right of action against elevated railroad for damages to property, against subsequent purchaser recovering such damages.

Cited in note (20 L. R. A. 467) on gifts by will as affected by promises made to testator.

Distinguished in *Whitehouse v. Bolster*, 95 Me. 463, 50 Atl. 240, holding assent of heir to proposed disposition of property creates no trust where decedent did not rely thereon; *Orth v. Orth*, 145 Ind. 197, 32 L. R. A. 306, 57 Am. St. Rep. 185, 42 N. E. 277, holding parol promise by beneficiary of will to carry out testator's wishes does not create trust.

Not followed in *Moore v. Campbell*, 102 Ala. 450, 14 So. 780, holding parol trust not enforceable against real property devised.

**Enforceability of verbal agreements within statute of frauds.**

Cited in *Hallowell Nat. Bank v. Marston*, 85 Me. 493, 27 Atl. 529, holding indorser estopped by conduct to assert invalidity of waiver of protest not in writing.

Cited in note (5 L. R. A. 245) on enforceability of verbal contract for exchange of lands.

**Facts found by trial court prevail in appellate.**

Cited in *Gardiner Sav. Inst. v. Emerson*, 91 Me. 539, 40 Atl. 551, and *Cross v.*

Bean, 83 Me. 63, 21 Atl. 752, holding findings of fact by trial judge prevail, unless clearly shown erroneous.

2 L. R. A. 667, PHENIX INS. CO. v. FIRST NAT. BANK, 85 Va. 765, 17 Am. St. Rep. 101, 8 S. E. 719.

**Right of subrogated insurer.**

Cited in footnote to New Hampshire F. Ins. Co. v. National L. Ins. Co. 57 L. R. A. 692, which denies right of insurer, subrogated to mortgagee's claims against mortgagor, to insist on charging mortgagee, retaining more than its share from other policy, with amount paid to mortgagor.

2 L. R. A. 668, KERR v. LUNSFORD, 31 W. Va. 659, 8 S. E. 493.

**Burden of proof.**

Cited in Seebrook v. Fedawa, 30 Neb. 433, 46 N. W. 650, holding burden of proving testator's sanity is upon proponent; Eakin v. Hawkins, 52 W. Va. 126, 43 S. E. 211, holding burden is on attacking parties to show insanity of grantor in deed.

**Interest of witness.**

Cited in Trowbridge v. Stone, 42 W. Va. 458, 26 S. E. 363, holding testimony of interested nonexpert witnesses inadmissible as to mental capacity to do valuable labor.

Distinguished in Coffman v. Hendrick, 32 W. Va. 125, 9 S. E. 65, holding witness unprovided for in will, who would inherit in its absence, may testify in its support.

**Opinion of witness.**

Cited in State v. Musgrave, 43 W. Va. 684, 28 S. E. 813, holding opinion of witness on question within common knowledge or experience inadmissible; Shepherd v. Snodgrass, 47 W. Va. 83, 34 S. E. 879, holding opinion of nonexpert witness of slight value unless coupled with facts sustaining it; Aultman Co. v. Ferguson, 8 S. D. 464, 66 N. W. 1081, holding expert witness cannot state value of article based on description of it.

Cited in notes (36 L. R. A. 70) on opinions as to testamentary capacity; (38 L. R. A. 729) as to who may give testimony as to mental capacity; (36 L. R. A. 68) on testimony of expert witness as to testator's sanity; (42 L. R. A. 766) on weight of expert testimony.

**Hypothetical questions.**

Cited in State v. Privitt, 175 Mo. 226, 75 S. W. 457, sustaining hypothetical question, in accordance with counsel's theory, leaving out essential ingredients in case.

Cited in note (39 L. R. A. 313, 314) on hypothetical statements or questions.

**Error in excluding evidence.**

Cited in Tower v. Whip, 53 W. Va. 162, 63 L. R. A. 945, 44 S. E. 179, holding rejection of admissible evidence error.

**Reversal for illegal evidence.**

Cited in Taylor v. Baltimore & O. R. Co. 33 W. Va. 58, 10 S. E. 29, holding erroneous admission of evidence not prejudicial not ground for reversal; Bartlett v. Patton, 33 W. Va. 83, 5 L. R. A. 529, 10 S. E. 21, holding improper evidence



does not justify reversal when other testimony requires verdict given; *Michaelson v. Cautley*, 45 W. Va. 542, 32 S. E. 170, holding judgment will be reversed if illegal evidence admitted may have been prejudicial.

**Evidence of attesting witnesses as to testator's sanity.**

Cited in notes (38 L. R. A. 746) as to evidence of attesting witnesses as to testamentary capacity; (39 L. R. A. 720) as to weight of opinion of attesting witness as to testamentary capacity.

Distinguished in *Ward v. Brown*, 53 W. Va. 255, 44 S. E. 488, holding instruction that evidence of attesting witnesses, testifying against testator's sanity, is entitled to peculiar weight, erroneous.

**Capacity to make deed.**

Cited in *Dean v. Dean*, 42 Or. 298, 70 Pac. 1039, holding greater degree of mental capacity required to make deed than to execute will; *Eakin v. Hawkins*, 52 W. Va. 127, 43 S. E. 211, holding feebleness of mind will not invalidate deed of grantor understanding nature of act.

**Time of evidence as to capacity.**

Cited in *Martin v. Thayer*, 37 W. Va. 52, 16 S. E. 489, holding testamentary capacity determined by testator's mental condition when will was executed; *Bever v. Spangler*, 93 Iowa, 597, 61 N. W. 1072, holding testimony as to mental soundness for six years after execution of will admissible.

**Old age not proof of incapacity.**

Cited in *Buckey v. Buckey*, 38 W. Va. 173, 18 S. E. 383, and *Bowdoin College v. Merritt*, 75 Fed. 488, holding old age does not disqualify one to execute deed.

**Testamentary capacity.**

Cited in *Roller v. Kling*, 150 Ind. 164, 49 N. E. 948, to contention that testamentary capacity depends on ability to know and understand, and not on actual knowledge; *Perkins v. Perkins*, 116 Iowa, 260, 90 N. W. 55, holding testamentary capacity consists in understanding nature of will and ability to recollect property, objects of bounty, and manner of distribution.

Cited in notes (4 L. R. A. 738) as to testamentary capacity; (12 L. R. A. 162) on testamentary capacity as affected by insane delusion.

**Inference of undue influence.**

Cited in footnote to *Re Shell*, 53 L. R. A. 387, which holds undue influence in procuring will not inferable from motive and opportunity alone.

**Repetition in instructions.**

Cited in *State v. Bingham*, 42 W. Va. 240, 24 S. E. 883; and *State v. Sheppard*, 49 W. Va. 611, 39 S. E. 676, holding instruction properly refused if already substantially given.

**Instruction must not assume facts.**

Cited in *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 101, 24 L. R. A. 55, 19 S. E. 571; *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 373, 23 L. R. A. 761, 19 S. E. 578; *Bentley v. Standard F. Ins. Co.* 40 W. Va. 747, 23 S. E. 584; *Oliver v. Ohio River R. Co.* 42 W. Va. 723, 26 S. E. 444, — holding instructions must be based on facts in evidence.

**Control of verdict by special findings.**

Cited in *Bess v. Chesapeake & O. R. Co.* 35 W. Va. 499, 29 Am. St. Rep. 820, 14

S. E. 234, holding inconsistent special findings control general verdict; *Gillingham v. Ohio River R. Co.* 35 W. Va. 601, 14 L. R. A. 803, 29 Am. St. Rep. 827, 14 S. E. 243, holding immaterial special finding does not control general verdict; *Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.* 35 W. Va. 669, 14 S. E. 237, holding special interrogatories properly refused if immaterial.

**Interrogatories consistent with verdict.**

Cited in *Wheeling Bridge Co. v. Wheeling & Bridge Co.* 34 W. Va. 170, 11 S. E. 1009, sustaining refusal of interrogatories calling for special findings consistent with general verdict; *Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.* 35 W. Va. 669, 14 S. E. 237, holding interrogatories should be propounded if findings would be inconsistent with general verdict.

**Review of discretion.**

Cited in *McKelvey v. Chesapeake & O. R. Co.* 35 W. Va. 508, 14 S. E. 261, holding court's discretion in submitting interrogatories reviewable.

**Joining incompatible prayers for relief.**

Cited in *Mathews v. Tyree*, 53 W. Va. 301, 44 S. E. 526, holding probate cannot be affirmed in suit to construe will, to which heirs, as devisees, are parties; *Ward v. Brown*, 53 W. Va. 232, 44 S. E. 488, holding alleged invalidity of bequest does not affect legatee's right to appeal from decree declaring will void; *Day v. National Mut. Bldg. & L. Asso.* 53 W. Va. 554, 44 S. E. 779, holding borrower from building association cannot include in bill to have his stock declared void a demand for appointment of receiver in interests of shareholders.

**Newspaper comment.**

Cited in *Copeland v. Wabash R. Co.* 175 Mo. 683, 75 S. W. 106, holding reading by jurors, pending trial of negligence case, of newspaper account of former trial no ground for reversal.

2 L. R. A. 680, *PITTSBURG, W. & K. R. CO. v. BENWOOD IRON WORKS*, 31 W. Va. 710, 8 S. E. 453.

**Eminent domain.**

Cited in *Great Western Natural Gas & Oil Co. v. Hawkins*, 30 Ind. App. 567. 66 N. E. 765, holding gas company cannot condemn land for pipe line without showing it is furnishing gas for public use; *F. B. R. Cemetery Asso. v. Redd*. 33 W. Va. 265, 10 S. E. 405, holding application to condemn land for cemetery must distinctly state that it is needed for public use; *Board of Health v. Van Hoesen*, 87 Mich. 539, 14 L. R. A. 116, also footnote p. 114, 49 N. W. 894, which holds power of eminent domain not conferrable on rural cemetery corporation.

Cited in notes (4 L. R. A. 785, 789, 792) on right of eminent domain; (7 L. R. A. 152) on exercise of right of eminent domain a political, not a judicial, question; (3 L. R. A. 176) on title to land taken for public use; (11 L. R. A. 286) on constitutional protection of property rights.

**What constitutes "public use."**

Cited in *Kyle v. Texas & W. O. R. Co.* (Tex. App.) 4 L. R. A. 279, denying railroad's right to condemn land for spur track running to private mills and wharves.

Cited in footnotes to *Re Barre Water Co.* 9 L. R. A. 195, which holds running of motors for light manufacturing not a public purpose for which water

of stream may be appropriated; *Bridal Veil Lumbering Co. v. Johnson*, 34 L. R. A. 368, which sustains right of railroad built through timbered region for few miles to sawmill to exercise of eminent domain; *Paxton v. H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* 29 L. R. A. 853, which holds condemnation of land for irrigating ditches to be "for" public purpose; *Wisconsin Water Co. v. Winans*, 20 L. R. A. 662, which denies water-supply company's right to condemn land for pipe line.

Cited in note (20 L. R. A. 438) on power to condemn right of way for railroad sidings to private establishments; (14 L. R. A. 480) on public purposes for which money may be appropriated or raised by taxation.

Distinguished in *Chicago & N. W. R. Co. v. Morehouse*, 112 Wis. 7, 56 L. R. A. 243, 88 Am. St. Rep. 918, 87 N. W. 849, sustaining railroad's right, under statute, to condemn land for spur track to single industry, open to all desiring service.

Disapproved in *Ulmer v. Lime Rock R. Co.* 98 Me. 590, 57 Atl. 1001, sustaining railroad's right to condemn land for branch track to lime quarry.

#### **Appeal in condemnation proceedings.**

Cited in *Wheeling Bridge & T. R. Co. v. Wheeling Steel & I. Co.* 41 W. Va. 752, 24 S. E. 651, holding writ of error to interlocutory order in condemnation proceedings, that applicant has right to take property upon paying compensation improperly allowed.

#### **Private corporations, what are.**

Cited in *State v. Peel Splint Coal Co.* 36 W. Va. 845, 17 L. R. A. 399, 15 S. E. 1000, by English, J., dissenting, who holds coal mining company a private corporation.

2 L. R. A. 691, *McCOULL v. MANCHESTER*, 85 Va. 579, 8 S. E. 379.

#### **Duty to keep streets in safe condition.**

Cited in notes (10 L. R. A. 737) as to duty of city to keep streets in safe condition; (8 L. R. A. 829, 10 L. R. A. 474) on obstruction of street for building purposes.

2 L. R. A. 694, *LOUISVILLE & N. R. Co. v. BALLARD*, 88 Ky. 159, 10 S. W. 429.

#### **Punitive damages.**

Cited in *Memphis & C. Packet Co. v. Nagel*, 97 Ky. 15, 29 S. W. 743, holding carrier liable in punitive damages for insulting and wrongfully taking passenger past her destination.

2 L. R. A. 695, *SMETHURST v. INDEPENDENT CONG. CHURCH*, 148 Mass. 261, 12 Am. St. Rep. 550, 19 N. E. 387.

#### **Use of highway by adjoining owner.**

Cited in *Morris v. Whipple*, 183 Mass. 29, 66 N. E. 199, raising without deciding, question whether carpet and canopy across sidewalk to street is a reasonable use by adjoining owner.

#### **Negligence.**

Cited in *Shepard v. Creamer*, 160 Mass. 498, 36 N. E. 475, holding it negligence to maintain building so constructed that snow or ice is liable to fall

upon travelers; *Cork v. Blossom*, 162 Mass. 333, 26 L. R. A. 258, 44 Am. St. Rep. 382, 38 N. E. 495, holding one liable for injury due to fall of high chimney in a not unusual gale; *Manning v. West End Street R. Co.* 166 Mass. 231, 44 N. E. 135, holding one momentarily stopping on street not negligent if struck by switch stick flying from hands of car conductor.

Cited in footnote to *Davis v. Niagara Falls Tower Co.* 57 L. R. A. 545, which sustains right to injunction against maintaining tower so that ice forming on it falls on adjoining property.

Cited in note (12 L. R. A. 322) on duty as essential element of negligence: (12 L. R. A. 190) as to liability of owner for injury caused by materials falling into street.

#### **Proximate cause.**

Cited in *McCauley v. Norcross*, 155 Mass. 587, 30 N. E. 464, holding leaving beams where they might fall on some one below proximate cause of injury, although careless person toppled them over.

Cited in footnotes to *Schumaker v. St. Paul & D. R. Co.* 12 L. R. A. 257, which hold master's neglect to furnish transportation proximate cause of injury in walking to find shelter; *McClain v. Garden Grove*, 12 L. R. A. 482, which holds narrowness of bridge and insufficiency of railings not proximate cause of injury from horse falling on account of disease or choking; *Vallo v. United States Exp. Co.* 14 L. R. A. 743, which holds throwing trunk from delivery wagon in highway proximate cause of traveler falling over another trunk; *Herr v. Lebanon*, 16 L. R. A. 106, which holds want of barrier not proximate cause of omnibus going over wall, horse attempting to rise; *Southwestern Teleg. & Teleph. Co. v. Robinson*, 16 L. R. A. 545, which holds telephone company liable for injury by electricity generated by thunder storm in low hanging telephone wire; *Kieffer v. Hummelstown*, 17 L. R. A. 217, which holds borough not liable for injury to one thrown on stone pile on roadside by fall of horse, due to struggles of other horse frightened by shooting; *McKenna v. Baessler*, 17 L. R. A. 310, which holds original fire proximate cause of destruction of property by back fire; *Gibney v. State*, 19 L. R. A. 365, which holds unsafe bridge cause of drowning of father trying to save child falling into water through defect; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *Mueller v. Milwaukee Street R. Co.* 21 L. R. A. 721, which holds sudden stopping of street car in front of funeral procession cause of injury to first carriage by pole of second; *Wood v. Pennsylvania R. Co.* 35 L. R. A. 199, which holds failure to give warning of approach of train not proximate cause of injury to one struck by body of other person hit by train.

Cited in notes (12 L. R. A. 280, 17 L. R. A. 38) as to proximate cause of injury; (45 L. R. A. 87) on rule of proximate cause in malicious torts; (7 L. R. A. 132, 13 L. R. A. 733) as to proximate and remote cause of injury; (12 L. R. A. 283) as to concurrent or co-operative cause of injury; (8 L. R. A. 85) as to effect produced by intervening cause; (8 L. R. A. 82) as to liability for consequential injuries due to negligent act.

#### **Rights of traveler.**

Cited in *Nead v. Roscoe Lumber Co.* 54 App. Div. 622, 66 N. Y. Supp. 419, holding one run into while tightening canvas cover to his cart a traveler.

Cited in note (10 L. R. A. 737) as to who is protected as traveler.

**Nature of rejected testimony.**

Cited in *Com. v. Smith*, 163 Mass. 429, 40 N. E. 189, and *Shinners v. Locks & Canals*, 154 Mass. 169, 12 L. R. A. 557, 26 Am. St. Rep. 226, 28 N. E. 10, holding exclusion of testimony not reviewable unless bill of exceptions shows its nature; *Boykin v. State*, 40 Fla. 492, 24 So. 141, holding exclusion of testimony not reviewable unless its nature is indicated by the question or an offer made.

2 L. R. A. 697, *STARRATT v. MULLEN*, 148 Mass. 570, 20 N. E. 178.

**Evidence disproving fact or contract alleged.**

Cited in *Lansky v. West End Street R. Co.* 173 Mass. 20, 53 N. E. 129, holding defendant's proof that injury happened at place other than alleged does not make new case plaintiff entitled to meet; *Frost v. Sumner*, 149 Mass. 100, 21 N. E. 231, holding evidence of agreement to accept legacy in payment of services sued for admissible; *Stewart v. Thayer*, 170 Mass. 562, 49 N. E. 1020, holding defendant, to disprove contract alleged, may show he made different one; *Cargill v. Atwood*, 18 R. I. 308, 27 Atl. 214, holding defendant may show goods charged to him were furnished in payment of debt due him.

**Burden of proof.**

Cited in *Hunting v. Downer*, 151 Mass. 278, 23 N. E. 832, to point that plaintiff must show that note sued on was given for loan as alleged; *Johnson v. Kimball*, 172 Mass. 401, 52 N. E. 386, holding plaintiff must show that money paid and services rendered were furnished as consideration for a legal obligation; *Milliken v. Randall*, 89 Me. 207, 36 Atl. 75, holding plaintiff must show performance of agreement to care for ice until shipment, in action for purchase price; *Johnson v. Wanamaker*, 17 Pa. Super. Ct. 306, holding plaintiff in *quantum meruit* must show facts from which law will infer promise to pay.

2 L. R. A. 698, *DELANO v. BRUERTON*, 148 Mass. 619, 20 N. E. 308.

**Inheritance by adopted child.**

Cited in *Fiske v. Pratt*, 157 Mass. 84, 31 N. E. 715, to point that adopted son in absence of will, inherits the estate; *Stearns v. Allen*, 183 Mass. 410, 97 Am. St. Rep. 441, 67 N. E. 349, holding adopted daughter inherits as sister, from son of one of adopting parents.

Cited in footnote to *Van Matre v. Sankey*, 23 L. R. A. 665, which authorizes descent of land to child adopted in other state.

Cited in note (17 L. R. A. 436) as to effect of adoption on relationship to others.

Distinguished in *Re Reel*, 33 Pittsb. L. J. N. S. 130, holding adopted grandchild may share in adopting father's estate as child and grandchild.

2 L. R. A. 699, *MANUFACTURERS NAT. BANK v. CONTINENTAL BANK*, 148 Mass. 553, 12 Am. St. Rep. 598, 20 N. E. 193.

**Credit.**

Cited in *Beal v. Somerville*, 17 L. R. A. 295, 1 C. C. A. 601, 5 U. S. App. 14, 50 Fed. 650, holding bank bailee of checks deposited, although immediately credited to depositor and bank; *National Bank of Commerce v. Johnson*, 6 N. D. 185, 69 N. W. 49, holding indorsement for credit creates, on collection,

relation of creditor and debtor between depositor and bank; *Fifth Nat. Bank v. Armstrong*, 40 Fed. 49, holding title to uncollected paper before provisional credit is drawn against depends on intent.

Distinguished in *Franklin County Nat. Bank v. Beal*, 49 Fed. 607, holding collecting and forwarding banks debtor and creditor after collection and credit of amount.

**Indorsement "for account of."**

Cited in *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 534, 54 Am. St. Rep. 59, 17 So. 728, holding indorsement "for account of" gives notice of ownership in indorser.

**Indorsement "for collection."**

Cited in *First Nat. Bank v. Armstrong*, 42 Fed. 197; *Citizens' Nat. Bank v. City Nat. Bank*, 111 Iowa, 215, 82 N. W. 464; *National Bank of Commerce v. Johnson*, 6 N. D. 184, 69 N. W. 49,—holding indorsement for collection passes no title; *Bank of Clarke County v. Gilman*, 81 Hun, 491, 30 N. Y. Supp. 1111, holding paper, until paid, remains the property of the owner, who indorses it for collection; *Freeman's Nat. Bank v. National Tube Works Co.* 151 Mass. 417, 8 L. R. A. 46, 21 Am. St. Rep. 461, 24 N. E. 779, holding owner after indorsement for collection may control paper until paid, and intercept proceeds in hands of intermediate agent.

Cited in footnotes to *Tyson v. Western Nat. Bank*, 23 L. R. A. 161, which holds title does not pass by "indorsing for collection;" *Corn Exchange Bank v. Farmers' Nat. Bank*, 7 L. R. A. 559, which holds only first of several banks receiving check for collection agent of payee.

Cited in notes (7 L. R. A. 845) as to receiving paper for collection; (4 L. R. A. 422) as to agency of bank receiving paper for collection.

**Insolvency.**

Cited in *Exchange Bank v. Sutton Bank*, 78 Md. 586, 23 L. R. A. 176, 28 Atl. 563, holding insolvent concern cannot make transfer of credit; *Nash v. Second Nat. Bank*, 67 N. J. L. 267, 51 Atl. 727, holding insolvency terminates agency of bank to collect; *Stevenson v. Fidelity Bank*, 113 N. C. 488, 18 S. E. 695, holding collecting bank cannot, after forwarding bank's assignment, credit latter with proceeds; *Bruner v. First Nat. Bank*, 97 Tenn. 546, 34 L. R. A. 535, 37 S. W. 286, holding depositor in insolvent bank may recover sums collected and credited to it after its failure; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 57, 37 L. ed. 366, 13 Sup. Ct. Rep. 533, holding receiver of insolvent bank liable for proceeds of paper indorsed to it for collection and received by him.

Cited in footnotes to *Armstrong v. Boyertown Nat. Bank*, 9 L. R. A. 553, which denies right of receiver or creditors of bank crediting owner with draft received for collection to demand proceeds from collecting bank; *First Nat. Bank v. Payne*, 3 L. R. A. 284, which holds partner of insolvent banking firm cannot pay checks received from collecting bank by charging to drawers and crediting to latter bank.

Cited in notes (7 L. R. A. 859) as to effect of insolvency of collecting bank; (25 L. R. A. 547) as to preference by insolvent bank because of trust character of deposit; (2 L. R. A. 482) as to following trust fund in the hands of third person; (32 L. R. A. 717) as to trust in proceeds of collection made by insolvent bank.

**Acceptance of check.**

Cited in footnote to *Pickle v. People's Nat. Bank*, 7 L. R. A. 93, which holds acceptance of check necessary to give right of action against bank.

**Application of money due depositor.**

Cited in footnote to *Grissom v. Commercial Nat. Bank*, 3 L. R. A. 273, which holds bank has no right to pay to third party note made by depositor.

Cited in note (4 L. R. A. 111) as to application of money due depositor.

2 L. R. A. 701, *STATE ex rel. DAVIDSON v. GORHAM*, 40 Minn. 232, 41 N. W. 948.

**Constitutionality of inheritance tax.**

Cited in footnote to *Ferry v. Campbell*, 50 L. R. A. 92, which holds succession tax void for want of notice of proceedings to fix amount of tax.

**— Uniformity of taxation.**

Cited in *Drew v. Tift*, 79 Minn. 182, 47 L. R. A. 527, 79 Am. St. Rep. 446, 81 N. W. 839, holding constitutional provision requiring equality of taxation applies to inheritance tax; *State ex rel. Sanderson v. Mann*, 76 Wis. 480, 45 N. W. 526, holding tax on estates of stated value or over, in counties having more than given population, invalid for want of uniformity.

Cited in footnotes to *Drew v. Tift*, 47 L. R. A. 525, which requires uniformity and equal application in exemption from inheritance tax; *State ex rel. Garth v. Switzler*, 40 L. R. A. 280, which holds succession tax at different rates on legacies of different amounts invalid; *Billings v. People*, 59 L. R. A. 807, which sustains transfer tax on lineal descendants to whom life estate given with remainder to lineal descendants, but exempting lineal descendants taking fee; *Re Swift*, 18 L. R. A. 709, as to what is subject to succession tax.

Distinguished in *Drew v. Tift*, 79 Minn. 183, 47 L. R. A. 527, 79 Am. St. Rep. 446, 81 N. W. 839, holding principal case not authority for or against right to levy inheritance tax.

Disapproved, in effect, in *Knowlton v. More*, 178 U. S. 58, 44 L. ed. 976, 20 Sup. Ct. Rep. 747, 9 Pa. Dist. R. 309, holding greater privilege of taxation exists as to state inheritance taxes than as to tax on property; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 291, 292, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594, holding inheritance tax based on classification of legatees and devisees, and value of estate transmitted, not in conflict with United States Constitution; *State v. Alston*, 94 Tenn. 684, 28 L. R. A. 181, 30 S. W. 750, holding inheritance tax making discrimination between direct descendants and collateral heirs and strangers not unconstitutional; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 493, 84 N. W. 1101, holding inheritance tax is tax on privilege, and not subject to constitutional provision requiring uniformity.

**Recovery of probate tax paid county treasurer.**

Cited in *Mearkle v. Hennepin County*, 44 Minn. 547, 47 N. W. 165, holding tax paid under void statute to secure probate of will may be recovered back; *Rand v. Hennepin County*, 50 Minn. 392, 52 N. W. 901, holding, payment cannot be recovered back unless made under compulsion; *De Graff v. Ramsey County*, 46 Minn. 320, 48 N. W. 1135, holding under facts, payment of tax was voluntary, and could not be recovered back.

2 L. R. A. 703, *PENNEGAR v. STATE*, 87 Tenn. 244, 10 Am. St. Rep. 648, 10 S. W. 305.

**Validity of marriages prohibited by local law.**

Cited in *Stull's Estate*, 183 Pa. 625, 39 L. R. A. 542, 63 Am. St. Rep. 776, 39 Atl. 16, holding intended evasion of local law may be ground for declaring marriage performed in another state invalid; *McLennan v. McLennan*, 31 Or. 486, 38 L. R. A. 864, 65 Am. St. Rep. 835, 50 Pac. 802, holding marriage by divorced resident of Oregon, in another state, within time for taking appeal, which is prohibited by laws of Oregon, is void; *State use of Newman v. Kimbrough* (Tenn. Ch. App.) 52 L. R. A. 670, 59 S. W. 1061, holding marriage between divorced man and paramour in another state, contrary to local law, invalid, although intention to evade statute not shown; *State v. Tutty*, 41 Fed. 760, 7 L. R. A. 53, holding marriage of white person with negro, prohibited by law of Georgia, is invalid in that state, although good where contracted; *Re Wilbur*, 8 Wash. 37, 40 Am. St. Rep. 886, 35 Pac. 407, holding marriage of white man with Indian woman on reservation, contrary to statute of Washington, void in that state.

Cited in footnotes to *Jackson v. Jackson*, 34 L. R. A. 773, which sustains marriage valid in other state where contracted; *Re Stull*, 39 L. R. A. 539, which holds invalid marriage between man and paramour in other state to avoid laws of domicile; *Norman v. Norman*, 42 L. R. A. 343, which holds marriage on high seas, by parties leaving land to evade laws of residence, invalid.

Cited in notes ( 57 L. R. A. 161, 162, 166, 169) on conflict of laws as to validity of marriage; (24 L. R. A. 834) on effect of statutes forbidding remarriage of guilty party after divorce upon remarriage in another state.

Distinguished in *Jackson v. Jackson*, 82 Md. 30, 34 L. R. A. 775, 33 Atl. 317, holding marriage valid where contracted, will be recognized in another state, if not in contravention of declared policy of state.

Disapproved, in effect, in *State v. Shattuck*, 69 Vt. 403, 40 L. R. A. 429, 60 Am. St. Rep. 936, 38 Atl. 81, holding intended evasion of local law not sufficient to invalidate marriage good where celebrated, unless statute expressly so provides.

**Evidence of marriage.**

Cited in *Jackson v. Jackson*, 82 Md. 30, 34 L. R. A. 775, 33 Atl. 317, holding proof of marriage in another state by general reputation only, sufficient, in absence of local statute to contrary.

2 L. R. A. 708, *ROWE v. FOGLE*, 88 Ky. 105, 10 S. W. 426.

**Attorney's lien on land.**

Cited in *Keehn v. Keehn*, 116 Iowa, 471, 88 N. W. 957, holding attorney's lien did not attach at common law to land in controversy.

Cited in footnote to *Loofbourow v. Hicks*, 55 L. R. A. 874, holding attorneys' fees allowed by judgment on foreclosure of mortgage is lien on land.

2 L. R. A. 709, *LINDLEY v. FIRST NAT. BANK*, 76 Iowa, 629, 14 Am. St. Rep. 254, 41 N. W. 381.

**Variance between agreement and demand for performance.**

Cited in *Tansey v. Peterson*, 88 Iowa, 548, 55 N. W. 577, holding agreement to "indorse draft as heretofore" does not require indorsement of draft bearing



interest; *Garrettson v. North Atchison Bank*, 47 Fed. 870, holding bank agreeing to accept check for stated sum cannot refuse payment because check presented concludes with words "with exchange."

Cited in notes (7 L. R. A. 209) on acceptance of bill of exchange or draft; (23 L. R. A. 836) on liability of bank as accommodation indorser.

**Admissibility of evidence of custom or usage.**

Cited in *McKee v. Wild*, 52 Neb. 14, 71 N. W. 958, holding custom relied on to prove meaning other than ordinary significance of words used in contract must be pleaded; *Lewis v. Metcalf*, 53 Kan. 227, 36 Pac. 345, holding local usage in stock market, of placing money to credit of shipper, must be pleaded in action to recover proceeds of shipment; *Eller v. Loomis*, 106 Iowa, 280, 78 N. W. 686, holding custom of bricklayers to build their own scaffolds not available in action for injury from fall of scaffold unless pleaded.

Cited in note (13 L. R. A. 440) on admissibility of evidence of custom to vary written contract.

2 L. R. A. 711, *STEWART v. GORTER*, 70 Md. 242, 16 Atl. 644.

**Redemption of leases.**

Cited in *Swan v. Kemp*, 97 Md. 689, 55 Atl. 441, holding statute permitting lessee for more than fifteen years to redeem lease applies to lease of improved land.

2 L. R. A. 712, *ANDERSON v. EAST*, 117 Ind. 126, 10 Am. St. Rep. 35, 19 N. E. 726.

**Municipal corporation, liability for wrongful acts of officers.**

Cited in *Vaughtman v. Waterloo*, 14 Ind. App. 652, 43 N. E. 476, and *Monticello v. Fox*, 3 Ind. App. 488, 28 N. E. 1025, holding city liable for omission or negligent performance of ministerial duty, but not for failure to exercise discretionary powers; *Funke v. St. Louis*, 122 Mo. 140, 26 S. W. 1034, holding city not liable for damage to land resulting from acceptance and approval of plat of adjoining property; *Laurel v. Blue*, 1 Ind. App. 131, 27 N. E. 301, holding city not liable for illegal arrest by marshal without warrant, and under void ordinance; *Simpson v. Whatcom*, 33 Wash. 405, 63 L. R. A. 820, 99 Am. St. Rep. 951, 74 Pac. 577, denying municipality's liability for arrest and prosecution of person under invalid ordinance.

Cited in footnotes to *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall; *Howard v. Worcester*, 12 L. R. A. 160, which holds city not liable for negligence in blasting for schoolhouse; *Culver v. Streator*, 6 L. R. A. 270, which holds city liable for negligence of employee enforcing ordinance against unmuzzled dogs running at large.

Cited in notes (9 L. R. A. 209, 210) on nonliability of municipal corporations for acts or omissions of officers or agents; (19 L. R. A. 454) on distinction between public and private functions of municipal corporations in respect to liability for negligence; (5 L. R. A. 254) on liability of municipal corporations for injuries from defective streets, bridges, etc.; (44 L. R. A. 801) on liability of municipal corporations for false imprisonment and unlawful arrest.

**Owner of falling wall liable for injury.**

Cited in *Ainsworth v. Lakin*, 180 Mass. 400, 57 L. R. A. 135, 91 Am. St. Rep. 314, 62 N. E. 746, holding owner liable for injury from fall of wall of burned building.

Cited in footnotes to *Dettmering v. English*, 48 L. R. A. 106, which holds person constructing wall liable for failure to use due care to prevent its fall; *Cork v. Blossom*, 26 L. R. A. 256, which holds one maintaining high chimney liable for fall on adjoining building.

Cited in notes (34 L. R. A. 558) on liability of owner or occupant for falling wall; (5 L. R. A. 795) on damages for injury caused by defective premises.

**Allegations as to negligence.**

Cited in *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. 349, and *Lafayette v. Ashby*, 8 Ind. App. 218, 34 N. E. 238, holding general averment of negligence sufficient to withstand demurrer.

Cited in note (59 L. R. A. 218) on sufficiency of general allegations of negligence.

**— As to freedom from contributory negligence.**

Cited in *Pennsylvania Co. v. Horton*, 132 Ind. 192, 31 N. E. 45, holding general averment sufficient, in absence of motion for more specific statement; *Ohio & M. R. Co. v. Levy*, 134 Ind. 344, 32 N. E. 815, holding ignorance of excavation into which plaintiff fell need not be pleaded, in action for injury, when alleged plaintiff was without fault.

2 L. R. A. 715, *DOOLEY v. MONTGOMERY*, 72 Tex. 429, 10 S. W. 451.

**Conveyance of community property.**

Cited in *Stiles v. Japhet*, 84 Tex. 95, 19 S. W. 450, holding husband may convey community property without wife's joining in deed.

2 L. R. A. 716, *RICHARDSON v. LOUISVILLE & N. R. CO.* 85 Ala. 559, 5 So. 308.

2 L. R. A. 717, *FRENCH v. WILLER*, 126 Ill. 611, 9 Am. St. Rep. 651, 18 N. E. 811.

**Confession of judgment on warrant of attorney.**

Cited in note (13 L. R. A. 796) on conclusiveness of judgments confessed on warrants of attorney.

**Statutory rights and remedies.**

Cited in *Fitzgerald v. Quinn*, 165 Ill. 360, 46 N. E. 287, holding statutory jurisdictional facts must exist, and statutory procedure be followed, to sustain forcible entry and detainer action; *Fay v. Seator*, 88 Ill. App. 421, holding appeal statutes must be strictly complied with.

2 L. R. A. 721, *PEOPLE v. ARMSTRONG*, 73 Mich. 288, 16 Am. St. Rep. 578. 41 N. W. 275.

**Test of reasonableness in determining validity of ordinance.**

Cited in *People v. Wagner*, 86 Mich. 600, 13 L. R. A. 289, 24 Am. St. Rep. 141, 49 N. W. 609, holding bread ordinance clearly authorized by charter not

subjectable to test of reasonableness; *Re Smith*, 143 Cal. 373, 77 Pac. 180, holding conditions and circumstances may be considered in determining whether ordinance is a valid exercise of police power; *Grand Rapids v. Powers*, 89 Mich. 114, 14 L. R. A. 507, 28 Am. St. Rep. 276, 50 N. W. 661, holding legislature cannot infringe individual rights by authorizing municipality to declare that a purpresture or nuisance is not so in fact; *Bennett v. Pulaski* (Tenn. Ch. App.) 47 L. R. A. 281, holding ordinance regulating saloon screens and admission and egress of persons during certain hours void for unreasonableness.

Cited in footnotes to *Simrall v. Covington*, 9 L. R. A. 556, which holds ordinance requiring license from agents representing nonresident insurance companies only, void; *Kosciusko v. Slomberg*, 12 L. R. A. 528, which holds ordinance restricting importation of second-hand clothing in absence of epidemic void; *Beiling v. Evansville*, 35 L. R. A. 272, which refuses to hold void ordinance prohibiting maintenance of slaughterhouse within city when authorized by statute; *Slaughter v. O'Berry*, 48 L. R. A. 442, which holds void ordinance that city may provide materials and do work of making sewer connections to within 3 feet of building; *Philadelphia v. Brabender*, 58 L. R. A. 220, which sustains ordinance against casting advertisements, etc., into vestibules of dwellings.

Cited in note (6 L. R. A. 268) on powers of municipalities to be exercised impartially.

Distinguished in *People v. Baker*, 115 Mich. 200, 73 N. W. 115, upholding ordinance requiring hawkers and peddlers to pay weekly license fee of \$5; *Grand Rapids v. Braudy*, 105 Mich. 678, 32 L. R. A. 121, 55 Am. St. Rep. 472, 64 N. W. 29, upholding ordinance providing for licensing pawnbrokers, junk and secondhand dealers; *Wettengel v. Denver*, 20 Colo. 555, 39 Pac. 343, upholding ordinance prohibiting distribution of hand bills etc., tending to litter streets and frighten horses; *Philadelphia v. Brabender*, 201 Pa. 577, 58 L. R. A. 221, 51 Atl. 374, Affirming 17 Pa. Super. Ct. 337, upholding ordinance forbidding casting hand bills etc., upon streets and in vestibules of houses.

#### **Partial invalidity of ordinance.**

Cited in *St. Ignace v. Snyder*, 75 Mich. 652, 42 N. W. 1130, holding defendant can only complain of invalidity of ordinance as to particular part under which he was convicted.

2 L. R. A. 724, *DOE ex dem. HITCH v. PATTEN*, 8 Houst. (Del.) 334, 16 Atl. 558.

2 L. R. A. 734, *CONSTANT v. UNIVERSITY OF ROCHESTER*, 111 N. Y. 604, 7 Am. St. Rep. 769, 19 N. E. 631.

Second appeal in 133 N. Y. 641, 4 Silv. Ct. App. 285, 31 N. E. 26.

#### **Mortgagees for value.**

Cited in note (13 L. R. A. 390) on chattel mortgage, novation.

#### **When agent's knowledge imputable to principal.**

Cited in *Slattery v. Schwannecke*, 118 N. Y. 548, 23 N. E. 922, holding mortgagee not chargeable with knowledge of attorneys conducting foreclosure, of unrecorded deed, not shown to have been then in attorneys' minds; *McCutcheon v. Dittman*, 164 N. Y. 357, 58 N. E. 97, holding attaching creditor, purchasing collateral at sale conducted by his attorney acted for lender, chargeable with

attorneys' knowledge of want of due notice to debtor; *Melms v. Pabst Brewing Co.* 93 Wis. 167, 57 Am. St. Rep. 899, 66 N. W. 518, holding attorneys' knowledge of invalidity of sale by interested executor, gained while acting for parties, not imputable to client subsequently buying land; *Equitable Securities Co. v. Shepard*, 78 Miss. 234, 28 So. 842, holding knowledge acquired by attorney six years before, not shown to have been in mind when conducting client's business not imputable to client; *Sweeney v. Pratt*, 70 Conn. 282, 66 Am. St. Rep. 101, 39 Atl. 182, holding knowledge gained by attorney in client's business imputable to client; *Brinkerhoff v. Sartwell*, 85 Hun, 560, 33 N. Y. Supp. 162, holding agent's knowledge of corporation's condition at time of selling stock imputable to vendor; *German American Mut. Life Asso. v. Farley*, 102 Ga. 740, 29 S. E. 615, holding agent's knowledge of facts material to risk, gained before employment, present in mind when effecting insurance, imputable to insurer; *Re Plankinton Bank*, 87 Wis. 383, 58 N. W. 784, holding bank not chargeable with knowledge of ownership of funds deposited by president to private account; *George v. Butler*, 16 Utah, 116, 50 Pac. 1032, holding husband's knowledge of prior lien gained shortly before lending wife's money on mortgage, imputable to wife; *Anderson v. Hernandez*, 8 Misc. 644, 29 N. Y. Supp. 1027, holding knowledge gained by agents in investigating property imputable to purchaser; *Anderson v. Blood*, 86 Hun, 251, 33 N. Y. Supp. 233 (dissenting opinion) majority holding knowledge of suspicious circumstances, coming to agent at moment of closing sale, not imputable to purchaser; *Crooks v. People's Nat. Bank*, 72 App. Div. 338, 76 N. Y. Supp. 92 (dissenting opinion), majority holding bank chargeable with knowledge of intent of president, acting for it and for his insolvent firm, to give preference.

Cited in footnotes to *Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank*, 20 L. R. A. 600, which holds cashier's notice imputable to savings company; *Wittenbrock v. Parker*, 24 L. R. A. 197, which holds knowledge by one member of firm of lawyers while transacting firm business imputed to other members.

Distinguished in *Bienenstok v. Ammidown*, 155 N. Y. 59, 49 N. E. 321, Reversing 11 Misc. 82, 32 N. Y. Supp. 1138, holding partner's knowledge of fraud committed by him in individual transaction not imputable to his firm, with which proceeds were deposited; *Scott v. Scott*, 2 App. Div. 243, 38 N. Y. Supp. 613, holding principal chargeable with agent's knowledge of want of consideration, acquired in purchasing note; *Wiegmann v. Morimura*, 12 Misc. 39, 33 N. Y. Supp. 39, holding notice to attorney of rights of third persons in property sold under attachment not imputable to client receiving proceeds.

**Burden of showing agent's knowledge chargeable to principal.**

Cited in *Sergeant v. Liverpool & L. & G. Ins. Co.* 66 App. Div. 51, 73 N. Y. Supp. 120, holding burden of proof is on one seeking to charge insurer with agent's knowledge, acquired before employment; *Denton v. Ontario County Nat. Bank*, 150 N. Y. 137, 44 N. E. 781, holding burden of proof is on person seeking to charge client with knowledge of attorney, gained in another transaction.

**Possession as notice of rights in real property.**

Cited in footnotes to *Brinser v. Anderson*, 6 L. R. A. 205, which holds purchaser required to inquire into rights of possessor, though he knows of lease to him; *Rock Island & P. R. Co. v. Dimick*, 19 L. R. A. 105, which holds open and exclusive possession of passageway through railroad embankment notice of rights to purchaser of railroad.

Cited in note (8 L. R. A. 211, 212) on title to land; construction notice by possession.

2 L. R. A. 741, *STULL v. HARRIS*, 51 Ark. 294, 11 S. W. 104.

Action for assignment of dower by appellant's widow, in *Stull v. Graham*, 60 Ark. 468, 31 S. W. 46.

**Statute of limitations.**

Cited in *Fox v. Drewry*, 62 Ark. 319, 35 S. W. 533, holding married women's act does not, by implication, repeal saving clause in their favor in statute of limitations.

**Return of consideration as prerequisite of rescinding transfer of title.**

Cited in *State v. Morgan*, 52 Ark. 157, 12 S. W. 243, holding state, to recover title to land in possession of citizen under void patent, must return consideration.

Cited in note (26 L. R. A. 183) on necessity of returning consideration in order to disaffirm infants' contracts.

2 L. R. A. 743, *DEMING v. DARLING*, 148 Mass. 504, 20 N. E. 107.

**Opinions, and estimates, and representations, as basis for action for deceit.**

Cited in *Lilienthal v. Suffolk Brewing Co.* 154 Mass. 188, 12 L. R. A. 823, 26 Am. St. Rep. 234, 28 N. E. 151, holding seller's statement as to market value, to experienced dealer in article sold, not actionable; *Burns v. Dockray*, 156 Mass. 137, 30 N. E. 551, holding false statement, absolutely made, that title to real estate was good, deceiving buyer, actionable; *Lynch v. Murphy*, 171 Mass. 308, 50 N. E. 623, holding representations largely of future value, of stock as an investment not actionable; *People's Sav. Bank v. James*, 178 Mass. 325, 59 N. E. 807, holding false representations as to means and ability to raise money, inducing transfer of property, not actionable against execution-sale purchaser; *Handy v. Waldron*, 18 R. I. 570, 49 Am. St. Rep. 794, 29 Atl. 143, holding false and fraudulent warranty of value of bonds and stocks, deceiving purchaser, actionable; *Mosher v. Post*, 89 Wis. 605, 62 N. W. 516, holding false statement of value of goods by seller not actionable; *Ansley v. Bank of Piedmont*, 113 Ala. 479, 59 Am. St. Rep. 122, 21 So. 59, holding mere representations as to present pecuniary value of lot not actionable; *Andrews v. Jackson*, 168 Mass. 269, 37 L. R. A. 403, 60 Am. St. Rep. 390, 47 N. E. 412, holding false representations as to value of notes, deceiving vendor of land, actionable.

Cited in notes (15 L. R. A. 795) on effect of representing things sold to be "good;" (35 L. R. A. 426) on expression of opinion as fraud; (37 L. R. A. 610) on right to rely upon representations made to effect contract as a basis for a charge of fraud.

Distinguished in *Roberts v. French*, 153 Mass. 63, 10 L. R. A. 657, 25 Am. St. Rep. 611, 26 N. E. 416, holding false representations as to measurement of land, deceiving buyer, actionable.

**Requisites of action for deceit.**

Cited in *Ruohs v. Third Nat. Bank*, 94 Tenn. 74, 28 S. W. 303, holding right of action for deceit may be lost by laches.

Cited in footnote to *Nash v. Minnesota Title Ins. & T. Co.* 28 L. R. A. 753, which requires intent to deceive to sustain action for false representations inducing execution of contract.

Cited in notes (6 L. R. A. 149, 151) on right of action for deceit.

2 L. R. A. 745, *CAVERLY v. ROBBINS*, 149 Mass. 16, 20 N. E. 450.

2 L. R. A. 746, *REPUBLIC IRON MIN. CO. v. JONES*, 37 Fed. 721.

**Suit by assignee in Federal court on ground of diverse citizenship.**

Cited in footnote to *Wonderly v. Lafayette County*, 45 L. R. A. 386, which sustains suit in state court, to set aside Federal judgment obtained by fraudulent pretense of diverse citizenship.

Cited in note (12 L. R. A. 692) on suits by assignee of choses in action.

2 L. R. A. 749, *FRADLEY v. HYLAND*, 37 Fed. 49.

**Principal's liability for agent's acts.**

Cited in notes (2 L. R. A. 810) on liability of principal for acts of agent; (2 L. R. A. 811) as to when principle as to liability applied; (2 L. R. A. 824) on private restrictions on agent's authority as affecting third persons.

2 L. R. A. 751, *BRADY v. NEW YORK*, 112 N. Y. 480, 20 N. E. 390.

**Effect of delivery of architect's certificate.**

Cited in footnote to *Arnold v. Bournique*, 20 L. R. A. 493, which holds contractor entitled to payment on delivery of architect's certificate handed back without presentation to owner.

2 L. R. A. 753, *MANNIX v. PURCELL*, 46 Ohio St. 102, 19 N. E. 572.

**Petition in error.**

Cited in *Wade v. Kimberley*, 5 Ohio C. C. 35, holding filing of petition in error properly styled a proceeding.

**Trusts.**

Cited in *Dillenbeck v. Pinnell*, 121 Iowa, 203, 96 N. W. 860, holding no trust exists in favor of heir in proceeds of property sold by devisee for life.

**Parol evidence to establish trust.**

Cited in *Vance v. Park*, 15 Ohio C. C. 716, holding parol evidence admissible to establish trust as to deed absolute on its face.

**Vagueness and uncertainty of trust.**

Cited in *O'Neal v. Caulfield*, 5 Ohio N. P. 151, holding bequests to charity will be upheld if objects intended can be ascertained.

**Gifts for religious and charitable purposes.**

Cited in notes (32 L. R. A. 626) on validity of gift to unincorporated charity; (5 L. R. A. 107) on bill for construction of will and for directions to trustee.

**Creditor's rights in assigned estates.**

Cited in *State Nat. Bank v. Esterly*, 69 Ohio St. 36, 68 N. E. 582, holding creditor realizing on security after proving claim entitled to dividend only on unpaid balance.

**Bona fide purchaser for value.**

Cited in *Adlard v. Stockstill*, 5 Ohio N. P. 489, holding assignee not a bona fide purchaser for value.

**Advances made by trustee.**

Cited in *Woodard v. Wright*, 82 Cal. 206, 22 Pac. 1118, holding trustee's right to reimbursement not dependent upon knowledge or consent of *cestui que trust*.

2 L. R. A. 766, *WESTERN U. TELEG. CO. v. BROWN*, 71 Tex. 723, 10 S. W. 323.

**Recovery for mental distress.**

Cited in *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 75, 54 L. R. A. 850, 60 N. E. 674, holding recovery cannot be had for mental anguish due to delay in delivering message; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 713, 6 C. C. A. 453, 13 U. S. App. 317, 57 Fed. 480, holding mental anguish no element in damages for delay in delivering message; *Western U. Teleg. Co. v. Wilson*, 93 Ala. 35, 30 Am. St. Rep. 23, 9 So. 414, holding nominal damages and damages for distress of mind recoverable for delay in delivering message; *Chapman v. Western U. Teleg. Co.* 88 Ga. 765, 17 L. R. A. 431, 30 Am. St. Rep. 183, 15 S. E. 901, holding sender of message cannot recover for mere pain and anguish of mind caused by nondelivery of message; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 759, 13 L. R. A. 863, 24 Am. St. Rep. 300, 9 So. 823, holding recovery cannot be had for mental suffering only due to lack of prompt delivery of message; *Western U. Teleg. Co. v. Ayers*, 131 Ala. 394, 90 Am. St. Rep. 92, 31 So. 78, holding father of dying child cannot recover damages for mental anguish arising from nondelivery of telegram summoning brother-in-law.

Cited in footnotes to *Western U. Teleg. Co. v. North Packing & Provision Co.* 52 L. R. A. 274, which holds agent purchasing live stock through delay in delivering telegram not required to resell before communicating with principal, to reduce damages; *Chapman v. Western U. Teleg. Co.* 17 L. R. A. 430, which denies recovery to person addressed for mental suffering from failure to deliver telegram; *Wilcox v. Richmond & D. R. Co.* 17 L. R. A. 804, which denies recovery for mental anguish from nonperformance of contract; *Connell v. Western U. Teleg. Co.* 20 L. R. A. 172, which denies recovery for mental distress for failure to deliver telegram; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810, which holds mental suffering not element of damage for failure promptly to deliver telegram; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 706, which denies recovery for mental anguish from delay in delivering telegram; *McPeck v. Western U. Teleg. Co.* 43 L. R. A. 214, which holds loss of reward offered for capture of criminal within damages recoverable for failure to deliver telegram; *Western U. Teleg. Co. v. Adams*, 6 L. R. A. 844, which holds ignorance of relations between parties to message does not excuse neglect in delivering; *Western U. Teleg. Co. v. Short*, 9 L. R. A. 744, which holds company prima facie liable for failure to deliver telegram.

Cited in notes (7 L. R. A. 583) on telegraph company; damages for neglect to deliver message; (13 L. R. A. 859, 860) on damages for mental anguish alone not recoverable; (9 L. R. A. 669) on telegraph company; degree of diligence required in delivery of message.

**Breach of contract.**

Cited in notes (6 L. R. A. 552; 11 L. R. A. 681) on damages for breach of

contract; (18 L. R. A. 386) on measure of damages for breach of implied warranty.

Overruled in *Western U. Teleg. Co. v. Carter*, 85 Tex. 585, 34 Am. St. Rep. 826, 22 S. W. 961, holding relationship of parties named in message not necessary to subject company to liability for failure promptly to deliver.

2 L. R. A. 768, *RE CHAPIN*, 148 Mass. 588, 20 N. E. 195.

**Effect of testamentary trust on real estate.**

Cited in *Hart v. Allen*, 166 Mass. 81, 44 N. E. 116, holding proceeds of sale of real estate subject to terms of testamentary trust.

2 L. R. A. 769, *COOK v. WALLING*, 117 Ind. 9, 10 Am. St. Rep. 17, 19 N. E. 532.

**Married woman's contracts.**

Cited in *Voreis v. Nussbaum*, 131 Ind. 273, 16 L. R. A. 48, 31 N. E. 70, holding note executed by married woman as surety for husband void in hands of bona fide purchaser; *Johnson v. Jouchert*, 124 Ind. 107, 8 L. R. A. 796, 24 N. E. 580, holding deed by married woman directly to husband void; *Ellison v. Branstator*, 153 Ind. 152, 54 N. E. 433, holding valid a deed of married woman executed through attorney, who omitted husband's name by mistake; *Essex v. Meyers*, 27 Ind. App. 639, 62 N. E. 96, holding specific performance of agreement to sell land by married woman in which her husband did not join not enforceable; *Shirk v. Stafford*, 31 Ind. App. 250, 67 N. E. 542, holding married woman's individual contract to sell land constitutes no consideration for purchase-money notes; *Bundy v. McClarnon*, 118 Ind. 166, 20 N. E. 718, stating married woman's deed in which husband not joined void.

Cited in footnote to *Roop v. Real Estate Investment Co.* 7 L. R. A. 211, which holds married woman not empowered to bind herself by judgment note.

Cited in notes (6 L. R. A. 559) on husband and wife; contracts between; (7 L. R. A. 640) on wife's capacity to contract; (8 L. R. A. 795) on mortgage to secure husband's debts.

**Estoppel.**

Cited in *Percifield v. Black*, 132 Ind. 386, 31 N. E. 955, holding married woman not estopped from setting up her incapacity to enter into parol contract to convey her land; *Chaplin v. Baker*, 124 Ind. 390, 24 N. E. 233, holding one not misled cannot plead estoppel; *Long v. Crosson*, 119 Ind. 5, 4 L. R. A. 784, 21 N. E. 450, holding married woman, with separate real estate transferred to husband to enable him to mortgage, she joining, estopped to deny title; *Dudley v. Pigg*, 149 Ind. 371, 48 N. E. 642, holding strangers to transaction cannot set it up as estoppel; *McKinney v. Lanning*, 139 Ind. 177, 38 N. E. 601, holding party claiming interest in land cannot set up estoppel by recitals in transfer to another to which he was not party or privy; *Hickman v. Green*, 123 Mo. 177, 29 L. R. A. 45, 27 S. W. 440, holding notice of defect in title to agent employed only to exchange land not binding on married woman; *Warner v. Watson*, 35 Fla. 421, 17 So. 654, holding married woman estopped, against husband's creditors, from setting up claim to property acquired with her money, but in husband's name.

Cited in footnotes to *Hunt v. Reilly*, 59 L. R. A. 206, which holds wife's failure to notify purchaser of rights after learning of forgery of her name to husband's deed does not estop her to claim dower; *Wilder v. Wilder*, 9 L. R. A.



97, which holds married woman estopped to claim vendor's lien by representing that one loaning to vendee should have first mortgage; *National Granite Bank v. Tyndale*, 51 L. R. A. 447, which holds relief by way of estoppel not available to holder of married woman's notes against defense that they are void because payable to husband, who indorsed them.

2 L. R. A. 770, *PEOPLE ex rel. JOHNSON v. EICHELROTH*, 78 Cal. 141, 20 Pac. 364.

**Regulations as to practice of medicine.**

Cited in footnotes to *State v. Pennoyer*, 5 L. R. A. 709, which holds void for discrimination act exempting old practitioners and nonresidents from requirements as to license; *State v. Bair*, 51 L. R. A. 776, which sustains statute requiring examination before state board of examiners, practice in the state for five years, or certificate from medical school, before practising medicine.

2 L. R. A. 772, *PEOPLE ex rel. COMMONWEALTH INS. CO. v. COLEMAN*, 112 N. Y. 565, 20 N. E. 389.

**Taxation of corporations.**

Cited in *People ex rel. Second Ave. R. Co. v. Barker*, 72 Hun, 131, 25 N. Y. Supp. 340, and *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 204, 55 N. E. 927, holding indebtedness of corporation should be deducted in assessment of personal property.

Cited in note (58 L. R. A. 613) on practice and procedure of assessors in taxation of capital stock of corporation in United States.

2 L. R. A. 773, *TRACY v. REED*, 13 Sawy. 622, 38 Fed. 69.

**To whom property assessed.**

Cited in *Allen v. Portland*, 35 Or. 442, 58 Pac. 509, holding assessment valid if petition for improvement signed by beneficial, though not record, owner; *State Trust Co. v. Chehalis County*, 24 C. C. A. 588, 48 U. S. App. 190, 79 Fed. 286, holding assessors can assess rails against the apparent owner; *Leigh v. Green*, 62 Neb. 353, 89 Am. St. Rep. 751, 86 N. W. 1093, holding word "owner" was used in popular sense in provision to foreclose tax liens.

Cited in footnote to *Minneapolis & N. Elevator Co. v. Traill County*, 50 L. R. A. 267, which sustains statute taxing grain in elevators, etc., in proprietor's name.

**Who is an "owner."**

Cited in *Re Fifth Street*, 22 Pa. Super. Ct. 218, holding vendee in land contract not an owner entitled to damages for change of grade in street before receiving deed.

**Foreclosure of tax liens.**

Cited in *Wells v. Johnston*, 55 App. Div. 487, 67 N. Y. Supp. 112, holding tax sale by treasurer under county act subject to prior vested rights of people.

**What law determines validity of tax sale.**

Cited in *Sheafer v. Mitchell*, 109 Tenn. 211, 71 S. W. 86, holding tax sale, valid by law then existing, cannot be affected by subsequent legislation.

2 L. R. A. 779, *ATTRILL v. HUNTINGTON*, 70 Md. 191, 14 Am. St. Rep. 344, 16 Atl. 651.

**By what court corporation charter forfeited.**

Cited in *Com. ex rel. Kirkpatrick v. Western U. Teleg. Co.* 1 Dauphin Co. Rep. 150, holding Federal courts have no jurisdiction of actions by state to forfeit corporation charter.

**Enforcing statute of another state.**

Cited in *Jones v. Fidelity Loan & T. Co.* 7 S. D. 132, 63 N. W. 553, holding penal laws of state not binding on residents of another state.

Cited in footnote to *Midland Co. v. Broat*, 17 L. R. A. 312, which holds contracts valid where made enforceable in other state.

Cited in notes (8 L. R. A. 269) on foreign judgments not subject to collateral impeachment; (4 L. R. A. 132) on constitutional law; effect and validity of foreign judgments.

**Statute of limitations.**

Cited in footnote to *State Sav. Bank v. Johnson*, 33 L. R. A. 552, which holds action to enforce liability of corporate trustees for failure to make reports one for penalty, within rule as to limitations.

Disapproved in *Kilton v. Providence Tool Co.* 22 R. I. 614, 48 Atl. 1039, holding action against stockholders to enforce debt of company barred only by twenty years' statute of limitations.

2 L. R. A. 784, *BENTZ v. NORTHWESTERN AID ASSO.* 40 Minn. 202, 41 N. W. 1037.

**Claim against mutual accident company.**

Cited in *Union Mut. Acci. Asso. v. Frohard*, 134 Ill. 239, 10 L. R. A. 386, 23 Am. St. Rep. 664, 25 N. E. 642, holding presumption is that claim would have been paid in full had assessment been made by mutual accident association.

Cited in notes (44 L. R. A. 855) on mutual benefit association; remedy for refusal to levy assessment to meet death claims; (8 L. R. A. 116) on contract of mutual benefit association; (2 L. R. A. 788) on actions on certificate of mutual benefit association.

**Estoppel of insured or beneficiary.**

Cited in *Modern Woodmen v. Davis*, 184 Ill. 238, 56 N. E. 300, holding beneficiary not estopped, by affidavit of physician filed by her, to show true cause of death; *Hogan v. Metropolitan L. Ins. Co.* 164 Mass. 449, 41 N. E. 663, holding beneficiary in policy not estopped to show deceased did not have disease at time of application.

Cited in note (44 L. R. A. 855) on conclusiveness of proof of loss as against insured or his beneficiaries.

2 L. R. A. 786, *JACKSON v. NORTHWESTERN MUT. RELIEF ASSO.* 73 Wis. 507, 41 N. W. 708.

**Legal action to compel benefit society to make assessment.**

Cited in *Silvers v. Michigan Mut. Ben. Asso.* 94 Mich. 47, 53 N. W. 935; *Covenant Mut. Life Asso. v. Kentner*, 89 Ill. App. 498; *O'Brien v. Home Benefit Soc.*

117 N. Y. 319, 22 N. E. 954, — holding action at law maintainable upon refusal of benefit society to make assessment.

Cited in footnote to *Bentz v. Northwestern Aid Asso.* 2 L. R. A. 784, which holds action at law remedy for breach of contract to make death assessments.

Cited in notes (4 L. R. A. 382; 7 L. R. A. 189) as to remedy for refusal to levy assessment; (8 L. R. A. 115) as to damages for neglect to make assessment.

**Sufficiency of complaint.**

Cited in *Johns v. Northwestern Mut. Relief Asso.* 87 Wis. 113, 58 N. W. 76, holding complaint states facts entitling plaintiff to money judgment on contract for substantial damages.

2 L. R. A. 789, *ASTOR v. NEW YORK ARCADE R. CO.* 113 N. Y. 93, 20 N. E. 594.

**Title of statute.**

Followed without opinion in *Bailey v. New York Arcade R. Co.* 113 N. Y. 615.

Cited in *Parker v. Elmira, C. & N. R. Co.* 165 N. Y. 278, 59 N. E. 81, holding "to authorize railroad company to extend road, and confirm purchase, and for other purposes" covers provision for maximum rate chargeable per mile; *Re Clinton Ave.* 57 App. Div. 169, 68 N. Y. Supp. 196, holding "in relation to Clinton avenue" covers proper provisions relating to increase in width of street; *Van Brunt v. Flatbush*, 128 N. Y. 54, 27 N. E. 973, holding "local improvements in town of Flatbush" sufficient to cover provision for necessary construction of outlet trunk sewer through town of Flatlands; *Sweet v. Syracuse*, 129 N. Y. 332, 27 N. E. 1081, holding "establish and maintain water department in and for Syracuse" to embrace establishment and detailed organization of water department; *People v. Doxtater*, 75 Hun, 479, 27 N. Y. Supp. 481, holding "to prevent taking fish from waters of Lake Ontario adjacent to shore or inland waters of county" covers private lake in county; *Curtin v. Barton*, 139 N. Y. 513, 34 N. E. 1093, holding "establish municipal court" embraces abolition of justice of peace and justice's court; *Sweet v. Syracuse*, 60 Hun, 33, 14 N. Y. Supp. 421, holding "establish and maintain water department" covers provisions for supplying city with water; *New York v. Gorman*, 26 App. Div. 193, 49 N. Y. Supp. 1026, holding "in relation of office of sheriff" covers new system of management and administration of office; *Wilcox v. Baker*, 22 App. Div. 303, 47 N. Y. Supp. 900, holding "to facilitate construction of railroad and to authorize towns to subscribe to capital stock thereof" covers amendment providing for continued assessment of property subject to tax at time of original act; *People ex rel. Dee v. Backus*, 11 App. Div. 149, 42 N. Y. Supp. 899, holding "in relation to office of district attorney, providing for election of district attorney," etc., covers express repeal of act creating office of county detective; *Dyker Meadow Land & Improv. Co. v. Cook*, 3 App. Div. 168, 38 N. Y. Supp. 222, holding "amendment of title and act 'relating to assessment of real property in Brooklyn'" covers exemption of any land in county of Kings; *State ex rel. Standish v. Nomland*, 3 N. D. 432, 44 Am. St. Rep. 572, 57 N. W. 85, holding "creating office of state board of auditors and prescribing duties thereof" not indicative of provision for security and augmentation of state funds; *Fort v. Cummings*, 90 Hun, 485, 36 N. Y. Supp. 36, holding legislature authorized to pass any act germane to subject intrusted to its supervision by Constitution; *Re Buffalo*, 46 N. Y. S. R. 85, 18 N. Y. Supp. 771,

holding "select and locate grounds desirable for park" not indicative of provision changing method of procedure in exercise of right of eminent domain under charter; *Coxe v. State*, 144 N. Y. 409, 39 N. E. 400, holding "drain marsh lands" not indicative of grant of lands under water; *Rogers v. Union R. Co.* 10 Misc. 59, 30 N. Y. Supp. 855, holding "to amend act," etc., "as subsequently amended" not indicative of ratification of all proceedings under the act; *Lindsay v. United States Sav. & L. Asso.* 120 Ala. 173, 42 L. R. A. 788, 24 So. 171, holding "to regulate business of building and loan association" not indicative of legalization of past transactions of associations; *Coiscadden v. Haswell*, 41 Misc. 62, 82 N. Y. Supp. 347, holding provision for removal of superintendent of penitentiary not within title purporting to relate to his salary only.

Cited in footnotes to *Judson v. Bessemer*, 4 L. R. A. 742, which holds provision authorizing issue of municipal bonds within title; *Thomas v. Wabash, St. L. & P. R. Co.* 7 L. R. A. 145, which holds provision limiting rights in water to railroad companies owning landings not within title; *Millvale v. Evergreen R. Co.* 7 L. R. A. 369, holding title referring merely to title of prior act sufficient where subject-matter merely supplemental; *Hronek v. People*, 8 L. R. A. 837, holding statute regulating manufacture, as well as prohibiting same for certain purpose, not invalid.

#### **Grant of new rights under guise of amendment.**

Cited in *Auchincloss v. Metropolitan Elev. R. Co.* 69 App. Div. 69, 74 N. Y. Supp. 534, holding act conferring upon railroad company right to lay tracks in addition to those authorized by charter acquired by it from previous company unconstitutional.

Distinguished in *Re Third Ave. R. Co.* 121 N. Y. 541, 9 L. R. A. 126, 24 N. E. 951, holding statute authorizing change of motor power not in conflict with constitutional provision that consent of local authorities be obtained for "construction" of railway.

2 L. R. A. 795, *LIBBEY v. MASON*, 112 N. Y. 525, 20 N. E. 355.

#### **Special proceeding — Final order.**

Cited in *Tilden v. Aitkin*, 37 App. Div. 30, 55 N. Y. Supp. 735, to point, proceeding to compel accounting by administrator is a special proceeding; *Re Board of Education*, 34 N. Y. S. R. 493, 11 N. Y. Supp. 780, holding proceeding to acquire lands for school purposes a special proceeding, terminating in final order.

#### **Necessity of entry of judgment.**

Cited in note (28 L. R. A. 629) as to what entry necessary to complete judgment.

#### **Right to letters of administration.**

Cited in *Re Moulton*, 32 N. Y. S. R. 637, 10 N. Y. Supp. 717, holding widow has prior statutory right to letters of administration.

2 L. R. A. 796, *TILGE v. BROOKS*, 124 Pa. 178, 16 Atl. 746.

#### **Nature of partnership association.**

Cited in footnote to *Edwards v. Warren Linoline & Gasoline Works*, 38 L. R. A. 791, which holds partnership association organized under laws of Pennsylvania regarded as partnership, instead of corporation, in Massachusetts.

2 L. R. A. 798, *COM. v. DELAWARE DIVISION CANAL CO.* 123 Pa. 594, 16 Atl. 584.

Followed without discussion in *Com. v. J. Langdon & Co.* 1 Dauphin Co. Rep. 125; *Com. v. Chester*, 123 Pa. 640, 16 Atl. 591; *Com. v. Hillside Coal & I. Co.* 1 Pa. Dist. R. 742.

**Collection of tax by corporation.**

Cited in *Com. v. Delaware & H. Canal Co.* 150 Pa. 249, 24 Atl. 599; and *Com. v. Union Traction Co.* 192 Pa. 514, 43 Atl. 1010, holding corporation responsible for collection of tax; *Com. v. Wilkes-Barre & S. R. Co.* 14 Pa. Co. Ct. 210, and *Com. v. Lehigh Valley R. Co.* 129 Pa. 457, 18 Atl. 406, holding corporation responsible for failure of its treasurer to collect and pay over to state the tax on loans; *Com. v. Union Traction Co.* 1 Dauphin Co. Rep. 177, to point that act June 30, 1885, makes corporations responsible for collection of tax by deducting it from interest paid by its treasurer upon evidences of indebtedness issued by corporation; *Com. v. Lehigh Valley R. Co.* 186 Pa. 246, 40 Atl. 491, holding corporation chargeable as collector, and upon failure to collect; *Com. v. Pennsylvania Salt Mfg. Co.* 145 Pa. 55, 22 Atl. 215, to point that corporate treasurer may be required by statute to assess tax; *Wilkes-Barre Deposit & Sav. Bank v. Wilkes-Barre*, 148 Pa. 603, 24 Atl. 111, holding corporate treasurers required by statute to assess and collect tax; *Com. v. Philadelphia & R. Coal & I. Co.* 137 Pa. 491, 20 Atl. 531, Affirming 2 Dauphin Co. Rep. 405, holding it duty of treasurer of corporation in hands of receiver to assess tax, and of receiver to pay it; *Com. v. Philadelphia*, 33 W. N. C. 107, holding municipal corporation liable for the failure of its treasurer to collect and pay tax on loans; *Com. v. Wilkes-Barre & S. R. Co.* 162 Pa. 619, 29 Atl. 696, to point that same tax assessed by corporation should be retained and paid to state; *Com. v. New York, L. E. & W. R. Co.* 150 Pa. 239, 24 Atl. 609, holding statute requiring deduction of state tax by corporate officers on payment of interest on bonds constitutional; *Com. v. Jarecki Mfg. Co.* 204 Pa. 40, 53 Atl. 517, holding act exempting companies holding bonds as part of capital stock from tax thereon relieves debtor company from duty to deduct tax from interest; *Coal Ridge Improv. & Coal Co. v. Jennings*, 127 Pa. 399, 17 Atl. 986, holding act 1885, requiring corporation to collect tax on its securities, does not violate uniformity rule.

**Classification of subjects of taxation.**

Cited in *Com. v. Westinghouse Electric Mfg. Co.* 151 Pa. 272, 24 Atl. 1107; *Williamsport v. Wenner*, 172 Pa. 182, 33 Atl. 544; *Western U. Teleg. Co. v. State*, 146 Ind. 61, 44 N. E. 793,—holding legislature has power to classify subjects for taxation; *Com. use of Titusville v. Clark*, 195 Pa. 639, 57 L. R. A. 350, 86 Am. St. Rep. 694, 46 Atl. 286, holding that classification for taxation should avoid gross inequality.

**— Classification of corporations.**

Cited in *Com. v. Germania Brewing Co.* 145 Pa. 87, 22 Atl. 240, Affirming 4 Dauphin Co. Rep. 56, holding exception of classes of corporations from taxation does not violate uniformity; *Com. v. Sharon Coal Co.* 164 Pa. 304, 30 Atl. 127, holding that legislature cannot discriminate between corporations in same class.

Cited in note (60 L. R. A. 340, 341, 345, 348, 353) on classification of corporations for purpose of taxation.

**— Dealers or peddlers.**

Cited in *Knisely v. Cotterel*, 196 Pa. 619, 50 L. R. A. 90, 46 Atl. 81, Affirming 3 Dauphin Co. Rep. 123, holding vendors or dealers in merchandise may, for purposes of taxation be classified as wholesalers and retailers; *Com. use of Titusville v. Clark*, 195 Pa. 638, 57 L. R. A. 350, 86 Am. St. Rep. 694, 46 Atl. 286, Affirming 21 Pa. Co. Ct. 500, 10 Pa. Super. Ct. 511, upholding classification for taxation of wholesale and retail dealers in accordance with amount of business transacted; *New Castle v. Cutler*, 15 Pa. Super. Ct. 624, holding classification of peddlers for taxation according to amount of goods carried, with additional tax upon horse and wagon, except gardeners, does not violate constitutional requirement of uniformity.

**— Lodging houses.**

Cited in *Com. v. Muir*, 1 Pa. Super. Ct. 581, 38 W. N. C. 331, upholding right to classify lodging houses for purpose of taxation.

**— Tax on capital stock.**

Cited in *Com. v. Brush Electric Light Co.* 145 Pa. 154, 22 Atl. 844, holding act 1879, § 4, as to method of rating corporate stock for taxation, does not violate uniformity; *Com. v. National Oil Co.* 167 Pa. 523, 27 Atl. 374, holding statute making capital stock distinct class of investments for taxation does not violate uniformity; *Com. v. Delaware & H. Canal Co.* 1 Dauphin Co. Rep. 274, holding tax on capital stock imposed by acts 1877, 1879, not objectionable for want of uniformity; *Com. v. Merchants' & M. Nat. Bank*, 168 Pa. 314, 31 Atl. 1065, holding provision exempting from local taxation banks paying specified state tax on par value of their shares, but imposing on those which do not tax upon actual value of shares, not unconstitutional for want of uniformity.

**Corporate liability to taxation.**

Followed in *Com. v. Philadelphia & R. Coal & I. Co.* 137 Pa. 491, 20 Atl. 531, as to liability of corporation to taxation.

Cited in *Com. v. William Cramp & Sons, Ship & Engine Bldg. Co.* 2 Dauphin Co. Rep. 399, holding indebtedness due to and held by Pennsylvania corporations in their own right not taxable; *Com. v. Thirteenth & F. Streets Pass. R. Co.* 2 Dauphin Co. Rep. 393, holding corporation liable to tax upon whole amount of indebtedness upon treasurer's failure to show any part due to non-residents.

Cited in footnotes to *Re Whiting*, 34 L. R. A. 232, which holds bonds of foreign corporation within state, though owned by nonresident, subject to transfer tax; *Vermont & C. R. Co. v. Vermont C. R. Co.* 10 L. R. A. 562, which holds railroad lessor liable for gross earnings tax; *State, Singer Mfg. Co., Prosecutor, v. Heppenheimer*, 32 L. R. A. 643, which holds company exempt from taxation under exemption of its shares.

Cited in note (57 L. R. A. 87) on conditions upon privilege of exercising corporate franchises.

**Pennsylvania revenue system.**

Cited in *Perry County v. Troutman*, 8 Pa. Co. Ct. 428, Affirmed in 144 Pa. 362, 22 Atl. 705, to point that act of 1844 is beginning of present Pennsylvania revenue system.

**When tax payable.**

Cited in *Com. v. Lehigh Valley R. Co.* 129 Pa. 447, 18 Atl. 406, holding statute requiring annual payment of state tax refers to calendar year if no date set for its commencement.

**Taxation of judgments.**

Cited in footnote to *Hamilton v. Wilson*, 48 L. R. A. 238, which holds void statute for taxation of personal judgments with specified exceptions.

2 L. R. A. 805, *UNITED STATES v. HUTCHESON*, 39 Fed. 540.

**Adjustment of postmaster's accounts.**

Cited in *United States v. Miller*, 8 Utah, 34, 28 Pac. 957, holding postmaster's compensation cannot be withheld after his accounts have been adjusted; *United States v. Case*, 49 Fed. 271, holding Postmaster General cannot charge postmaster with commission on false returns when accounts have been allowed; *Norton v. United States*, 26 C. C. A. 639, 52 U. S. App. 296, 81 Fed. 821, holding postmaster can defend suit on bond by showing that money never came to his hand, without having same disallowed by auditor.

2 L. R. A. 808, *WHEELER v. MCGUIRE*, 86 Ala. 398, 5 So. 190.

**Liability of principal.**

Cited in *Sweetser v. Shorter*, 123 Ala. 522, 26 So. 298, holding principal bound by agreement of general agent to construct houses; *Kansas City, M. & B. R. Co. v. Higdon*, 94 Ala. 290, 14 L. R. A. 518, 33 Am. St. Rep. 119, 10 So. 282, holding railroad responsible for loss of dog accepted by baggage master for conveyance; *Drennan v. Boice*, 19 Misc. 643, 44 N. Y. Supp. 394, holding action against agent after disclosure of principal barred action against principal; *Fowle v. Outcalt*, 64 Kan. 358, 67 Pac. 889, holding owner of note who allowed another to collect moneys on it bound by payments; *Continental F. Ins. Co. v. Brooks*, 131 Ala. 620, 30 So. 876, holding waiver by general agent of insurance company, with power, binding, where party ignorant of termination of agency.

Cited in footnote to *Slater v. Capital Ins. Co.* 23 L. R. A. 181, which holds binding on company waiver of proofs of loss as to building, by adjuster sent to adjust loss on contents.

Cited in notes (8 L. R. A. 74) on what constitutes waiver of conditions in fire insurance; (2 L. R. A. 749) on principal not liable when credit given exclusively to agent.

**Constructive notice to principal.**

Cited in *Goodbar v. Daniel*, 88 Ala. 590, 16 Am. St. Rep. 76, 7 So. 254, holding knowledge of husband of fraudulent deed, while agent of wife, constructively imputed to her.

**Agent's authority.**

Cited in *Montgomery Furniture Co. v. Hardaway*, 104 Ala. 115, 16 So. 29, holding general agent's authority prima facie coextensive with employment; *Aldrich v. Wilmarth*, 3 S. D. 528, 54 N. W. 811, holding agent had ostensible authority to order work, and contractor justified in believing him authorized; *Insurance Co. of N. A. v. Thornton*, 130 Ala. 237, 55 L. R. A. 551, 89

Am. St. Rep. 39, 30 So. 614 (dissenting opinion), majority holding that general agent for prescribed area cannot bind company outside of it.

Cited in footnote to *Fay v. Slaughter*, 56 L. R. A. 564, which denies authority of agent, empowered to indorse principal's checks for deposit, to ratify deposit of checks received for securities on which agent has forged transfers.

Cited in note (2 L. R. A. 824) on private restrictions on agent's authority not to affect third persons.

Distinguished in *Witcher v. Gibson*, 15 Colo. App. 170, 61 Pac. 192, holding power inferred from what principal knowingly permitted agent to do.

#### **Ratification of agent's acts.**

Cited in *Sullivan v. Louisville & N. R. Co.* 128 Ala. 104, 30 So. 528, holding unauthorized acts of agent not shown to have been ratified.

Cited in footnotes to *Daniels v. Brodie*, 11 L. R. A. 81, which holds agent's acceptance of goods ratified by keeping part of same; *Thompson v. New South Coal Co.* 62 L. R. A. 551, holding principal's acceptance of portion of purchase money no ratification of agent's unauthorized sale.

Cited in note (7 L. R. A. 405) on principal and agent; effect of ratification of acts of agent.

#### **Admissibility of evidence.**

Cited in *Cawthon v. Lusk*, 97 Ala. 676, 11 So. 731, holding usages of trade admissible to interpret powers under written instrument of agency; *Western U. Teleg. Co. v. Cunningham*, 99 Ala. 317, 14 So. 579, holding private instructions by telegraph company to agent, forbidding him to waive payment for message till following day, inadmissible; *Lytle v. Bank of Dothan*, 121 Ala. 218, 26 So. 6, holding the giving of other notes competent to show agent's implied power to give notes in suit; *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 257, 19 So. 318, holding secret instructions to general manager to rent by month only inadmissible.

#### **Agent's liability.**

Cited in note (12 L. R. A. 346) on responsibility of agent on his contracts.

2 L. R. A. 813, *BIELLENBERG v. MONTANA UNION R. CO.* 8 Mont. 271, 20 Pac. 314.

Followed without discussion in *Thompson v. Northern P. R. Co.* 8 Mont. 283, 21 Pac. 25.

#### **Validity of statutes making railroad company absolutely liable for injury.**

Cited in *Cateril v. Union P. R. Co.* 2 Idaho, 543, 21 Pac. 416, *Denver & R. G. R. Co. v. Outcalf*, 2 Colo. App. 405, 31 Pac. 177; *Jensen v. Union P. R. Co.* 6 Utah, 258, 4 L. R. A. 726, 21 Pac. 994,—holding act making railroad company liable for killing animals on track invalid; *Oregon R. & Nav. Co. v. Smalley*, 1 Wash. 211, 22 Am. St. Rep. 143, 23 Pac. 1008, holding act making railroad companies liable for killing animals on track, unless fence maintained, invalid; *McCauley v. Montana C. R. Co.* 11 Mont. 485, 28 Pac. 730, holding railroad company which took cow injured by its train, killed, and sold it, prima facie liable.

Cited in footnote to *Wadsworth v. Union P. R. Co.* 23 L. R. A. 812, which



holds unconstitutional act creating absolute liability for stock killed or injured by trains.

Cited in notes (5 L. R. A. 359) on due process of law; (25 L. R. A. 162) on constitutionality of statutes making railroad companies absolutely liable for damage by fires set by them, or stock killed by them, irrespective of negligence.

Distinguished in *Sullivan v. Oregon R. & Nav. Co.* 19 Or. 327, 24 Pac. 408, holding act making railroad company liable for killing animals on unfenced track valid; *Central R. Co. v. Murphey*, 116 Ga. 869, 60 L. R. A. 820, 43 S. E. 265, sustaining statute making initial carriers liable for lost or damaged freight on which they fail to report within thirty days after application.

**Negligence.**

Cited in *Hopkins v. Butte & M. Commercial Co.* 13 Mont. 225, 40 Am. St. Rep. 438, 33 Pac. 818, holding negligence must be shown in actions for submerging land by log jam.

2 L. R. A. 816, *McCLINTOCK v. LOISSEAU*, 31 W. Va. 865, 8 S. E. 612.

**When trust shown.**

Cited in *Deck v. Tabler*, 41 W. Va. 335, 56 Am. St. Rep. 837, 23 S. E. 721, holding no resulting trust in favor of husband by conveyance to wife of land purchased with his money.

Cited in note (12 L. R. A. 566) on doctrine of advancements to heirs.

**Evidence to show resulting trust.**

Cited in *Lahey v. Broderick*, 72 N. H. 182, 55 Atl. 354, holding presumption of gift arising from deed to wife of land paid for by husband rebuttable by parol evidence.

**Fraudulent conveyance.**

Cited in *Edgell v. Smith*, 50 W. Va. 355, 40 S. E. 402, holding deed to hinder creditors void; *Urpman v. Lowther Oil Co.* 53 W. Va. 512, 97 Am. St. Rep. 1027, 44 S. E. 433, holding equity will not decree specific performance of agreement made to defraud creditors.

Cited in note (6 L. R. A. 458) on no relief in law or equity in case of fraudulent contracts.

Distinguished in *Goldsmith v. Goldsmith*, 46 W. Va. 431, 33 S. E. 266, holding there must be liability chargeable on the land to prevent cancelation of a deed alleged to have been given in fraud of creditors for grantee's failure to keep agreement.

**Contracts against public policy.**

Cited in footnotes to *Leonard v. Poole*, 4 L. R. A. 728, which holds one engaging in plot to raise price of lard cannot be aided by court as against co-plotter; *Wassermann v. Sloss*, 38 L. R. A. 176, which holds illegality of transfer of stock to president for corrupting government officials does not prevent recovery where taken by president for own use instead.

Cited in note (6 L. R. A. 615) on contracts against public policy void.

2 L. R. A. 820, *PENNSYLVANIA R. CO. v. MacKINNEY*, 124 Pa. 462, 10 Am. St. Rep. 601, 17 Atl. 14.

**Carrier's liability to passenger injured by missile.**

Cited in *Fewings v. Mendenhall*, 88 Minn. 342, 60 L. R. A. 604, 97 Am. St.

Rep. 519, 93 N. W. 127, denying street railroad's liability to passenger injured by missile thrown into car by strike sympathizer.

**Presumption of negligence.**

Cited in *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 182, 15 L. R. A. 417, 30 W. N. C. 10, 23 Atl. 989, holding no presumption of negligence where passenger is injured by missile in unexplainable manner; *Keller v. Hestonville, M. & F. Pass. R. Co.* 149 Pa. 68, 30 W. N. C. 417, 24 Atl. 159, Affirming 1 Pa. Dist. R. 198, holding mere fact that passenger was injured not presumption of negligence, so as to shift burden of proof; *Herstine v. Lehigh Valley R. Co.* 151 Pa. 253, 31 W. N. C. 52, 25 Atl. 104, holding burden of proving negligence is on passenger injured in car by jolt caused by coupling; *Fredericks v. Northern C. R. Co.* 157 Pa. 124, 22 L. R. A. 312, 27 Atl. 689, holding carrier not liable for wrongful acts of strangers, not reasonably preventable; *Bernhardt v. West Pennsylvania R. Co.* 159 Pa. 364, 28 Atl. 140 holding negligence not presumed in injury to passenger by stepping on small piece of wood on station platform; *Benedick v. Potts*, 88 Md. 56, 41 L. R. A. 480, 40 Atl. 1067, holding mere fact that passenger fell from car on switchback railway not sufficient evidence of negligence; *Whalen v. Consolidated Traction Co.* 61 N. J. L. 610, 41 L. R. A. 837, 68 Am. St. Rep. 723, 40 Atl. 645, holding nonsuit improper where passenger was knocked off car and injured by conductor stumbling against him; *Nelson v. Lehigh Valley R. Co.* 25 App. Div. 545, 50 N. Y. Supp. 63, holding presumption of negligence not raised by tipping of passenger out of chair in rounding curve, others keeping their seats; *Western Maryland R. Co. v. State*, 95 Md. 652, 53 Atl. 969, holding instruction that fact that person was killed while a passenger is prima facie evidence of carrier's negligence, erroneous; *Denver & R. G. R. Co. v. Fotheringham*, 17 Colo. App. 416, 68 Pac. 978, holding fact that passenger was injured by swinging shut of car door not prima facie evidence of carrier's negligence.

Cited in note (15 L. R. A. 38) on presumption of negligence from occurrence of accidents.

Distinguished in *Long v. Pennsylvania R. Co.* 147 Pa. 347, 14 L. R. A. 743, 29 W. N. C. 377, 30 Am. St. Rep. 732, 23 Atl. 459, holding no presumption of negligence where baggage is lost through unprecedented flood; *Buehler v. Union Traction Co.* 200 Pa. 179, 49 Atl. 788, holding company liable for injury to passenger from falling wall, through employee's disregard of timely warning.

2 L. R. A. 823, *HUBBARD v. TENBROOK*, 124 Pa. 291, 10 Am. St. Rep. 585, 16 Atl. 817.

**Liability of principal for acts of agent.**

Cited in *Wachter v. Phoenix Assur. Co.* 132 Pa. 439, 19 Am. St. Rep. 600, 19 Atl. 289, holding principal bound by acts or conduct of agent within scope of apparent authority, to one without notice; *Romeo v. Martucci*, 72 Conn. 516, 47 L. R. A. 607, 77 Am. St. Rep. 327, 45 Atl. 199 (dissenting opinion), majority holding consignor of goods may assert title against bona fide purchaser under fraudulent sale; *Lamb v. Thompson*, 31 Neb. 453, 48 N. W. 58, and *Steele Smith Grocery Co. v. Potthast*, 109 Iowa, 417, 80 N. W. 517, holding undisclosed principal liable for goods sold agent in latter's name.

Cited in footnote to *Slater v. Capital Ins. Co.* 23 L. R. A. 181, which holds

binding on company waiver of proofs of loss as to building by adjuster sent to adjust loss on contents.

Cited in notes (2 L. R. A. 810, 811) on general and special agents, as to liability of principal for acts of agent; (2 L. R. A. 749) on nonliability of principal when credit is given exclusively to agent; (10 L. R. A. 355) on principal bound by acts of agent; (12 L. R. A. 346) on responsibility of agent on his contracts.

Distinguished in *Brown v. German-American Title & T. Co.* 174 Pa. 448, 34 Atl. 335, holding assignment of building contract to surety does not constitute such assignee undisclosed principal.

2 L. R. A. 825, *Re HOWE*, 112 N. Y. 100, 19 N. E. 513.

#### **Succession and inheritance taxes.**

Cited in *Re Sherwell*, 11 N. Y. Supp. 897, holding under inheritance tax law of 1887, taxable legacies exempt to extent of \$500; *Taylor's Estate*, 6 Misc. 280, 27 N. Y. Supp. 232; *Re Hall*, 88 Hun, 70, 34 N. Y. Supp. 616; *Re Corbett*, 171 N. Y. 518, 64 N. E. 209; *Re Hoffman*, 143 N. Y. 330, 38 N. E. 311, Modifying 76 Hun, 403, 27 N. Y. Supp. 1086,—holding transfer tax of 1892 is imposed upon aggregate of property descending from decedent; *Re Clark*, 1 Connoly, 433, 5 N. Y. Supp. 199, holding tax on contingent remainder under act of 1885 remains suspended until estate takes effect; *State v. Alston*, 94 Tenn. 681, 28 L. R. A. 180, 30 S. W. 750, holding inheritance tax one on the privilege of receiving by inheritance or will; *Black v. State*, 113 Wis. 212, 90 Am. St. Rep. 853, 89 N. W. 522, holding unconstitutional inheritance tax law exempting legacies of less than \$10,000.

Cited in footnotes to *People v. Sherwood*, 3 L. R. A. 464, which holds non-resident not subject to succession tax; *Re Stewart*, 14 L. R. A. 836, which authorizes succession on contingent interests under power of appointment after vesting of same; *Re Swift*, 18 L. R. A. 709, as to what is subject to succession tax.

Cited in notes (3 L. R. A. 372) on collateral inheritance tax; (4 L. R. A. 171) on exemption from general taxation, as to succession or inheritance tax not being tax on property; (10 L. R. A. 241) on collateral inheritance tax under laws of Pennsylvania.

Distinguished in *Dixon v. Ricketts*, 26 Utah, 222, 72 Pac. 947, holding collateral inheritance tax imposable on estate exceeding, though each legacy is less than, amount exempt; *Stellwagen v. Wayne Probate Judge*, 130 Mich. 169, 89 N. W. 728, holding exemption from inheritance tax applies to entire estate, and not to each share.

Disapproved in *Howell's Estate*, 147 Pa. 168, 23 Atl. 403, Affirming 48 Phila. Leg. Int. 296, 10 Pa. Co. Ct. 238, 28 W. N. C. 275, holding collateral inheritance tax of 1887 to be ascertained by aggregate of decedent's taxable estate; *McGhee v. State*, 105 Iowa, 14, 74 N. W. 695, holding collateral inheritance tax on estates in excess of \$1,000 applies to aggregate of decedent's taxable estate.

#### **Time statutes take effect.**

Cited in *Lane v. Kolb*, 92 Ala. 661, 9 So. 873 (dissenting opinion), majority holding statute changing appointive to elective office, providing dates of election, did not take effect until date of first election named.

Distinguished in *People ex rel. Onondaga County Sav. Bank v. Butler*, 147 L. R. A. 44.—VOL. I.—19.

N. Y. 176, 41 N. E. 416, holding salary act taking effect on certain date applied to official taking office on that date.

**Statutory construction.**

Cited in *People v. England*, 91 Hun, 156, 36 N. Y. Supp. 534, holding intent of legislature governs in determining effect on previous offense of statute changing punishment for crime.

**Constitutionality of succession or transfer tax statutes.**

Cited in *State v. Alston*, 94 Tenn. 681, 28 L. R. A. 180, 30 S. W. 750, holding inheritance tax constitutional.

Cited in footnotes to *State v. Hamlin*, 25 L. R. A. 632, which holds succession tax valid; *State ex rel. Schwartz v. Ferris*, 30 L. R. A. 218, which holds void, for lack of uniformity, act exempting estates less than \$20,000 in value; *Ferry v. Campbell*, 50 L. R. A. 92, which holds succession tax void for want of notice of proceedings to fix amount of tax; *Billings v. People*, 59 L. R. A. 807, which sustains transfer tax on lineal descendants to whom life estate given with remainder to lineal descendants, but exempting lineal descendants taking fee.

Cited in note (12 L. R. A. 402, 407) on right of legislature to impose succession and collateral inheritance taxes.

2 L. R. A. 828, *JOHNSTON v. WALLIS*, 112 N. Y. 230, 8 Am. St. Rep. 742, 19 N. E. 653.

**Suits by or against foreign executors, etc.**

Cited in *Flandrow v. Hammond*, 13 App. Div. 326, 43 N. Y. Supp. 143, holding suit cannot be continued against foreign executrix appointed pending suit to recover money paid deceased without consideration; *Le Fevre v. Matthews*, 39 App. Div. 234, 57 N. Y. Supp. 128, holding foreign receiver subject to action by resident on agreement with former in official capacity within state; *Lee v. Terbell*, 40 Fed. 44, holding special commissioners appointed by foreign court to sell realty may maintain action on purchase-money bonds taken in official capacity, without obtaining ancillary letters; *Hopper v. Hopper*, 125 N. Y. 403, 12 L. R. A. 238, 26 N. E. 457, holding foreign executor subjects himself to suit as domestic executor by taking out local ancillary letters of administration; *Hentz v. Phillips*, 23 Abb. N. C. 22, 6 N. Y. Supp. 16, holding foreign administratrix not proper party to proceeding by creditors of decedent to reach fund derived from sale of realty in jurisdiction; *Jefferson v. Beall*, 117 Ala. 439, 67 Am. St. Rep. 177, 23 So. 44, holding judgment in foreign jurisdiction against local administrator in representative capacity void and unenforceable in local courts.

Cited in notes (9 L. R. A. 218) on ancillary administration of estates; (9 L. R. A. 245, 246) on power and authority of foreign executors and administrators; (27 L. R. A. 102) on general rule as to foreign judgments against executor or administrator.

**Agreements in behalf of estate.**

Cited in *Eames v. Bagg*, 8 App. Div. 545, 40 N. Y. Supp. 858, holding stipulation by assignee for creditors, in action on promissory note, binding upon estate; *Sanford v. Story*, 15 Misc. 542, 38 N. Y. Supp. 104, holding executor's agreement to release debt may be specifically enforced.

2 L. R. A. 829, DIEFFENBACH v. ROCH, 112 N. Y. 621, 20 N. E. 560.

**Limitation of justices' judgment.**

Cited in *Herrman v. Stalp*, 15 Daly, 293, 6 N. Y. Supp. 514, holding execution, as well as action on docketed judgment, barred; *Warner v. Bartle*, 22 Misc. 490, 50 N. Y. Supp. 940, holding bar of Code Civ. Proc. § 382, applies to "special proceedings," as well as to "action" to enforce judgment; *Re Warner*, 39 App. Div. 93, 56 N. Y. Supp. 585, holding special proceeding to enforce docketed judgment of justice of peace barred by six years' limitation to "action" thereon; *Re Depuy*, 28 N. Y. S. R. 42, 8 N. Y. Supp. 229, holding proceeding in surrogate's court to enforce judgment barred as an "action," within meaning of Code Civ. Proc. § 382; *Re Guttroff*, 39 Misc. 484, 80 N. Y. Supp. 219, holding judgment of city district court, docketed in county clerk's office, barred in six years; *Pierce v. Davidson*, 58 Mo. App. 111, holding that filing of justice's judgment in office of court of record does not increase period of limitation; *Gray v. Seeber*, 53 Hun, 613, 6 N. Y. Supp. 802, holding Code Civ. Proc. § 376, which declares presumption of payment of judgment from lapse of twenty years to be statute of limitations; *Agar v. Tibbets*, 56 Hun, 276, 9 N. Y. Supp. 591, holding plaintiffs, discontinuing in consequence of unexpected decision, bound to pay costs to date of application.

Cited in note (8 L. R. A. 481) on application of statute of limitations to equitable actions.

Cited as nullified in *Andrews v. Mastin*, 22 Misc. 265, 49 N. Y. Supp. 1118, holding duration of lien runs, by virtue of chap. 342, Laws 1892, from date of filing transcript.

Distinguished in *Raphael v. Mencke*, 28 App. Div. 92, 50 N. Y. Supp. 920; *Agar v. Curtiss*, 8 App. Div. 339, 40 N. Y. Supp. 815; *Bolt v. Hauser*, 57 Hun, 568, 11 N. Y. Supp. 366; *Becker v. Porter*, 17 App. Div. 184; *Brown v. Hyman*, 27 N. Y. Supp. 437; *Townsend v. Tolhurst*, 57 Hun, 42, 10 N. Y. Supp. 378; *Anderson v. Porter*, 7 Misc. 220, 27 N. Y. Supp. 646,—holding execution may issue on municipal or district court judgment docketed in clerk's office, though action thereon barred; *Bolt v. Hauser*, 10 N. Y. Supp. 398, holding supplementary proceedings available to enforce judgment after expiration of six years within which action thereon allowed.

**Effect of docketing judgment in clerk's office.**

Cited in *Re Phelps*, 6 Misc. 402, 1 Power, 545, 56 N. Y. S. R. 629, 26 N. Y. Supp. 774, holding only effect of docketing justice's judgment in county clerk's office to enlarge scope of enforcement; *Daniels v. Southard*, 23 Misc. 238, 51 N. Y. Supp. 1136, holding sphere of enforcement of justice's judgment enlarged by docketing with clerk, to include all processes available in case of county-court judgment; *Andrews v. Mastin*, 22 Misc. 265, 49 N. Y. Supp. 1118, holding no additional force as lien on realty given to docketed transcript by chap. 342, Laws 1892, extending period of duration; *Baldinger v. Turkowsky*, 36 Misc. 822, 74 N. Y. Supp. 897, holding docketing of district court judgment in clerk's office does not render necessary leave to sue thereon in municipal court; *Harris v. Clark*, 65 Hun, 363, 20 N. Y. Supp. 232, holding prohibition of Code Civ. Proc. § 1913, against action on judgment rendered in court of record, not applicable to judgment of justice, though docketed in clerk's office; *Johnson v. Manning*, 75 App. Div. 286, 78 N. Y. Supp. 96, holding while supreme court has not power to vacate municipal-court judgment docketed with county clerk,

it may set aside proceedings to enforce same; *Erb v. Hendricks Co.* 50 W. Va. 32, 40 S. E. 338, raising, without deciding, question whether justice of peace may issue execution on judgment certified to clerk of circuit court.

Distinguished in *Sill Stove Works v. Scott*, 62 App. Div. 571, 71 N. Y. Supp. 181, holding jurisdiction of justice *prima facie* established by proof of filing transcript of judgment in county clerk's office.

2 L. R. A. 832, *HUNTER v. COOPERSTOWN & S. VALLEY R. CO.* 112 N. Y. 371, 8 Am. St. Rep. 752, 19 N. E. 820.

Subsequent appeal in 126 N. Y. 24, 12 L. R. A. 430, 26 N. E. 958.

#### **Contributory negligence.**

Cited in *Myers v. New York C. & H. R. R. Co.* 82 Hun, 38, 31 N. Y. Supp. 153, holding party attempting to board moving train after it has left station guilty of contributory negligence; *Walthers v. Chicago & N. W. R. Co.* 72 Ill. App. 363, holding it negligence *per se* for party to attempt to board moving train at point beyond platform; *Scully v. New York, L. E. & W. R. Co.* 80 Hun, 199, 30 N. Y. Supp. 61, holding passenger alighting in disregard of conductor's warning, from train moving, 6 to 10 miles an hour after passing station, guilty of contributory negligence; *Lewis v. Delaware & H. Canal Co.* 80 Hun, 195, 30 N. Y. Supp. 28, holding it negligence *per se* for passenger to alight from moving train on wrong side, though at conductor's suggestion; *Worthington v. Central Vermont R. Co.* 64 Vt. 114, 15 L. R. A. 328, 23 Atl. 590, holding negligence *per se* to stand on platform of rapidly moving train on rough road, though interior of car crowded; *Redmond v. Rome, W. & O. R. Co.* 31 N. Y. S. R. 368, 10 N. Y. Supp. 330, holding conductor standing on tracks in car yard watching brakeman, struck by backing engine, guilty of contributory negligence; *Salmon v. New York C. & H. R. R. Co.* 1 Silv. Sup. Ct. 240, 5 N. Y. Supp. 225, holding pedestrian crossing tracks in disregard of attendant's warning, and lowered gates, guilty of contributory negligence; *Sias v. Rochester R. Co.* 92 Hun, 148, 36 N. Y. Supp. 378, holding it not negligence *per se* to ride upon platform or to lean out beyond side of trolley car; *Walker v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 806, 7 L. R. A. 117, 17 Am. St. Rep. 417, 6 So. 916 (dissenting opinion), majority holding it contributory negligence to alight from train moving from station before giving time for passengers to alight; *Bertram v. Peoples R. Co.* 154 Mo. 665, 52 S. W. 1119 (dissenting opinion), majority holding it not negligence *per se* to board slowly moving grip car near pile of bricks.

Cited in footnote to *Western Maryland R. Co. v. Herold*, 14 L. R. A. 75, which holds entering of car with brakes set before time for starting not negligence *per se*.

Cited in notes (8 L. R. A. 674) on contributory negligence of passenger; (11 L. R. A. 396) on passenger's negligence in alighting from moving train; (21 L. R. A. 356) on injuries in boarding moving train.

Distinguished in *Lewis v. Delaware & H. Canal Co.* 145 N. Y. 516, 40 N. E. 248, holding it not contributory negligence, as matter of law, to alight from slowly moving train at request of conductor; *Distler v. Long Island R. Co.* 151 N. Y. 427, 35 L. R. A. 764, 765, 45 N. E. 937, holding it not negligence *per se* to board train moving at rate of 2 or 3 miles an hour at invitation of conductor; *Weiler v. Manhattan R. Co.* 53 Hun, 377, 6 N. Y. Supp. 320, holding it not

negligence *per se* to alight, at conductor's invitation, from blocked elevated train at short distance from station, and proceed along narrow walk to reach stairway; *Van Fleet v. New York C. & H. R. R. Co.* 27 N. Y. S. R. 67, 7 N. Y. Supp. 636, holding it not negligence *per se* for track hand to board slowly moving train under order of foreman to "hurry up;" *Reid v. New York*, 68 Hun, 112, 22 N. Y. Supp. 623, holding it not negligence *per se* for passenger of cable car to get off in response to conductor's warning to "hurry up or he would start;" *Northern P. R. Co. v. Egeland*, 163 U. S. 99, 41 L. ed. 86, 16 Sup. Ct. Rep. 975, Affirming 5 C. C. A. 473, 12 U. S. App. 271, 56 Fed. 202, holding it not negligence *per se* for track laborer to jump, in compliance with conductor's orders, from train moving 4 miles an hour.

Disapproved in *Murphy v. St. Louis, I. M. & S. R. Co.* 43 Mo. App. 349, holding it not negligence *per se* to board slowly moving train at invitation of conductor.

2 L. R. A. 836, *EAST BIRMINGHAM LAND CO. v. DENNIS*, 85 Ala. 565, 7 Am. St. Rep. 73, 5 So. 317.

**Usage contrary to legal right.**

Cited in *Davis v. State*, 92 Ala. 26, 9 So. 616, holding custom of parties to enter neighbor's house uninvited not admissible in evidence to justify trespass against express orders to keep out; *Becker v. Hall*, 116 Iowa, 593, 56 L. R. A. 575, 88 N. W. 324, holding unreasonable custom as to appropriation of ice in public waters not sustained; *Pennsylvania R. Co. v. Naive* (Tenn.) 64 L. R. A. 448, 79 S. W. 124, holding custom to suspend business on 4th of July excuses carrier from immediately notifying consignee of arrival of perishable goods.

Cited in notes (10 L. R. A. 785) on validity of usage; (3 L. R. A. 860) on binding force of usage and custom; (10 L. R. A. 366) on custom and usage on question of negligence; (13 L. R. A. 438, 439) on usage and custom in conflict with rules of law.

**Fraudulent transfer of stock.**

Cited in *Farmers' Bank v. Diebold Safe & Lock Co.* 66 Ohio St. 377, 58 L. R. A. 624, 90 Am. St. Rep. 586, 64 N. E. 518, holding owner of stock assigned in blank by original holder entitled thereto as against bona fide pledgee for value from one fraudulently obtaining possession of same without assignee's negligence.

Distinguished in *Winter v. Montgomery Gaslight Co.* 89 Ala. 550, 7 So. 773, holding purchase in good faith for value of stock sold in breach of trust, not apparent from face of certificate, good as against beneficiary, though transfer not registered; *Nelson v. Owen*, 113 Ala. 380, 21 So. 75, holding purchaser for value without notice from pledgee, of stock indorsed in blank by pledgeor, owner thereof as against pledgeor.

2 L. R. A. 839, *ST. LOUIS, A. & T. R. CO. v. WELCH*, 72 Tex. 298, 10 S. W. 529.

**Who are fellow servants.**

Cited in *Texas & P. R. Co. v. Rogers*, 6 C. C. A. 406, 13 U. S. App. 547, 57 Fed. 381, holding laborer acting as temporary foreman fellow servant with

laborer in gang; *Ell v. Northern P. R. Co.* 1 N. D. 349, 12 L. R. A. 101, 26 Am. St. Rep. 621, 48 N. W. 222, holding train hand and foreman fellow servants; *St. Louis, S. W. R. Co. v. Henson*, 61 Ark. 307, 32 S. W. 1079, holding foreman of bridge-building gang and engineer, fellow servants; *Austin & N. W. R. Co. v. Beatty*, 6 Tex. Civ. App. 652, 24 S. W. 934, holding brakeman and man employed to nail numbers on bridges fellow servants; *Galveston, H. & S. A. R. Co. v. Farmer*, 73 Tex. 87, 11 S. W. 156, holding brakeman and station agent fellow servants; *Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 406, 48 L. R. A. 408, 77 Am. St. Rep. 721, 55 S. W. 108, holding fireman, conductor, and engineer fellow servants; *Wells, Fargo & Co. v. Page*, 29 Tex. Civ. App. 490, 68 S. W. 528, holding express messenger and guard fellow servants; *Direct Nav. Co. v. Anderson*, 29 Tex. Civ. App. 67, 69 S. W. 174, holding deck hands on tugboat, serving in different watches, fellow servants; *International & G. N. R. Co. v. Ryan*, 82 Tex. 570, 18 S. W. 219, holding carpenter at rest in caboose after working hours, fellow servant with switchman; *Dishon v. Cincinnati, N. O. & T. P. R. Co.* 126 Fed. 200, holding section hand, living in section house, leaving it after working hours, a fellow servant of train operatives by whose negligence he was injured; *Oriental Investment Co. v. Sline*, 17 Tex. Civ. App. 695, 41 S. W. 130, holding chambermaid and elevator man fellow servants in hotel where both employed.

Cited in notes (5 L. R. A. 735) on who are fellow servants; (18 L. R. A. 796) on what constitutes "common employment;" (50 L. R. A. 426) on diversity of duty as affecting common employment; (50 L. R. A. 428) on contiguity as factor in common employment; (18 L. R. A. 797) on servants not on duty as fellow servants; (50 L. R. A. 462) on control by master as factor in determination of relation of master and servant; (50 L. R. A. 433) on illustrations of common employment.

2 L. R. A. 841, *MERRILL LODGE, NO. 299, I. O. G. T. v. ELLSWORTH*, 78 Cal. 166, 20 Pac. 399.

**Mutual benefit association.**

Cited in notes (7 L. R. A. 189) on transfer of mutual benefit certificate; (4 L. R. A. 382) on benefit association, enlarged powers conferred by statute.

2 L. R. A. 843, *FLUKER v. GEORGIA R. & BKG. CO.* 81 Ga. 461, 12 Am. St. Rep. 328, 8 S. E. 529.

**Dominion of railroad company over its property.**

Cited in *Kates v. Atlanta Baggage & Cab Co.* 107 Ga. 646, 46 L. R. A. 435, 34 S. E. 372, holding railroad company may grant exclusive privilege of entering depot for purpose of handling baggage on claim checks; *Brown v. New York C. & H. R. R. Co.* 75 Hun, 362, 27 N. Y. Supp. 69, holding railroad company may grant exclusive privilege to cab company of soliciting patronage on trains and in yards of railroad.

Distinguished in *State v. Reed*, 76 Miss. 222, 43 L. R. A. 136, 71 Am. St. Rep. 528, 24 So. 308, holding grant by railroad company to hackman of exclusive privilege of entering depot grounds to solicit patronage unlawful; *Memphis News Pub. Co. v. Southern R. Co. (Tenn.)* 63 L. R. A. 155, 75 S. W. 941, denying right of railroad company to exclude others from use of newspaper train established upon certain publisher's guarantee of minimum revenue.



**— Over depot grounds.**

Cited in *Cosgrove v. Augusta*, 103 Ga. 839, 840, 42 L. R. A. 714, 68 Am. St. Rep. 149, 31 S. E. 445, holding city ordinance prohibiting drummers and cabmen from entering union passage depot to solicit custom invalid; *Godbout v. St. Paul Union Depot Co.* 79 Minn. 198, 47 L. R. A. 536, 81 N. W. 835, holding railroad company may prohibit hackman from soliciting patronage within depot building; *Lucas v. Herbert*, 148 Ind. 66, 37 L. R. A. 377, 47 N. E. 146, holding railroad company may designate places cabs and omnibuses shall occupy on depot grounds; *Donovan v. Pennsylvania Co.* 61 L. R. A. 143, 57 C. C. A. 364, 120 Fed. 217, and *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 224, 49 Atl. 965, holding railroad company may exclude from station all hackmen soliciting passengers without its license; *Hedding v. Gallagher*, 72 N. H. 394, 64 L. R. A. 821, 57 Atl. 225, holding railroad company may grant to teamster exclusive right to solicit baggage in depot.

Cited in note (8 L. R. A. 754) on dominion of railroad company over its stations and grounds.

**Prohibition against use of elevator.**

Cited in *Springer v. Byram*, 137 Ind. 27, 23 L. R. A. 250, 45 Am. St. Rep. 159, 36 N. E. 361, holding proprietor of elevator not bound to carry newsboy, although permitted to enter building.

2 L. R. A. 844, *RITTLER v. SMITH*, 70 Md. 261, 16 Atl. 890.

**Insurance; insurable interest.**

Cited in footnotes to *Adams v. Reed*, 35 L. R. A. 692, which holds that woman has insurable interest in life of son-in-law; *Hurd v. Doty*, 21 L. R. A. 746, which denies right of trustee receiving proceeds of insurance policy to refuse payment to beneficiaries as having no insurable interest; *Exchange Bank v. Loh*, 44 L. R. A. 372, which holds creditor's insurable interest limited to amount of indebtedness.

Cited in notes (6 L. R. A. 136, 7 L. R. A. 219) on who has insurable interest in life of another; (13 L. R. A. 433, 434) on insurable interest essential to validity of policy.

**Nature of contract for life insurance.**

Cited in *Cahill v. Maryland L. Ins. Co.* 90 Md. 347, 47 L. R. A. 617, 45 Atl. 180, holding contract for life annuity is mere chose in action for payment of money.

**Endowment policy as asset.**

Cited in *Re Slingluff*, 106 Fed. 156, holding policy payable to insured if he survives term, and which in terms is assignable, passes to trustee in bankruptcy.

**Assignment of life-insurance policy.**

Cited in *Preston v. Connecticut Mut. L. Ins. Co.* 95 Md. 114, 51 Atl. 838; *Nye v. Grand Lodge, A. O. U. W.* 9 Ind. App. 146, 36 N. E. 429; *Steinback v. Diepenbrock*, 158 N. Y. 30, 44 L. R. A. 419, 70 Am. St. Rep. 424, 52 N. E. 662; *Souder v. Home Friendly Soc.* 72 Md. 516, 20 Atl. 137, — holding assignment to one without insurable interest valid when policy taken out by insured or by one having insurable interest; *Clement v. New York L. Ins. Co.* 101 Tenn. 36,

42 L. R. A. 251, 70 Am. St. Rep. 650, 46 S. W. 561, holding assignment must be in good faith, and not as colorable evasion of wagering contract; *Clogg v. McDaniel*, 89 Md. 422, 43 Atl. 795, holding assignment to creditor of certificate in benefit association not wager, although debt canceled thereby; *Hewlett v. Home for Incurables*, 74 Md. 354, 17 L. R. A. 448, 24 Atl. 324, holding assignment in consideration of advances in money and hospital treatment to beneficiary valid; *Farmers & T. Bank v. Johnson*, 118 Iowa, 286, 91 N. W. 1074, sustaining assignment of insurance policy to beneficiary's creditor, without insurable interest in life of insured; *Mechanics' Nat. Bank v. Comins*, 72 N. H. 19, 55 Atl. 191, sustaining assignment of life-insurance policy to secure corporation's creditor without insurable interest in insured's life.

Cited in footnotes to *Steinback v. Diepenbrock*, 44 L. R. A. 417, and *Chamberlain v. Butler*, 54 L. R. A. 338, which sustain right to assign policy to one without insurable interest; *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761, which holds assignee's insurable interest as creditor not condition to recovery on policy; *Steele v. Catlin*, 59 L. R. A. 129, which holds complete gift not made by verbal assignment of life policy accompanied with words indicating intent to give, and delivery of policy; *Opitz v. Karel*, 62 L. R. A. 982, which holds valid gift of proceeds of policy payable to insured's personal representative made by delivery of policy; *American Mut. L. Ins. Co. v. Bertram*, 64 L. R. A. 935, holding bona fide assignee of life insurance policy taken by one without insurable interest may recover premiums.

Cited in note (9 L. R. A. 660) on assignability of life policies.

**Amount to which assignee of policy entitled.**

Cited in *Hays v. Lapeyre*, 48 La. Ann. 758, 35 L. R. A. 654, 19 So. 821 (dissenting opinion), majority holding assignee not entitled to take more than amount invested.

Cited in footnotes to *Morris v. Georgia Loan, Sav. & Bkg. Co.* 46 L. R. A. 506, which holds creditor taking assignment of policy entitled to retain from proceeds sufficient to pay debt and advances only; *McQuillan v. Mutual Reserve Fund Life Asso.* 56 L. R. A. 233, which upholds provision that assigned policy shall be void as to all above debt due assignee.

Disapproved in *Exchange Bank v. Loh*, 104 Ga. 453, 44 L. R. A. 376, 31 S. E. 459, and *Cheeves v. Anders*, 87 Tex. 293, 47 Am. St. Rep. 107, 28 S. W. 274, holding creditor, as assignee, may recover only amount of debt and interest, and amount paid to keep policy alive, with interest.

2 L. R. A. 847, *McCROY v. TONEY*, 66 Miss. 233, 5 So. 392.

**Parol lease for one year.**

Cited in *Higgins v. Gager*, 65 Ark. 607, 47 S. W. 848, holding parol lease for a year, to begin at subsequent date, valid.

Cited in note (8 L. R. A. 221) on tenancy from year to year.

Disapproved in *A. G. Rhodes Furniture Co. v. Weeden*, 108 Ala. 255, 19 So. 318, holding possession under contract and part payment renders agreement valid.

2 L. R. A. 848, *COFFMAN v. HEATNOLE*, 85 Va. 459, 17 Am. St. Rep. 69, 8 S. E. 672.

**Intention of testator to disinherit heirs.**

Cited in *Hurst v. Von De Veld*, 158 Mo. 247, 58 S. W. 1056; *Zimmerman*

v. Hafer, 81 Md. 357, 32 Atl. 316; Lawrence v. Smith, 163 Ill. 166, 45 N. E. 259,—holding mere intention of testator to disinherit, although clearly expressed, not sufficient; Todd v. Gentry, 109 Ky. 708, 60 S. W. 639, holding will limiting heir's inheritance to \$2 does not disinherit him as to property undistributed of by will.

Cited in note (11 L. R. A. 767) on "disinheritance."

Distinguished in Murphy's Estate, 104 Cal. 567, 38 Pac. 543, upholding holographic will disinheriting part of children, but devising property to others.

2 L. R. A. 853, SOUTH NASHVILLE STREET R. CO. v. MORROW, 87 Tenn. 406, 11 S. W. 348.

#### **Legislative control of taxation.**

Cited in Adams v. Kuykendall, 83 Miss. 594, 35 So. 830, sustaining statute authorizing state revenue agent to assess municipal taxes on property omitted by municipal officers; Pryor v. Bryan, 11 Okla. 366, 66 Pac. 348, holding statute exempting property on Indian reservation from taxation, except for territorial and court funds, not unconstitutional.

#### **Taxation of corporation — Franchise.**

Cited in State *ex rel.* Milwaukee Street R. Co. v. Anderson, 90 Wis. 566, 63 N. W. 746, holding franchise property, included with personalty, taxable as entirety where statute fails to specify manner of valuation and taxation; Africa v. Knoxville, 70 Fed. 734, holding easement in street acquired under railway franchise taxable as property; Detroit Citizens' Street R. Co. v. Detroit, 125 Mich. 687, 84 Am. St. Rep. 589, 85 N. W. 96, holding franchise property included under statute requiring assessment of street railway "tracks."

Cited in notes (57 L. R. A. 37, 38) on nature of franchises as subjects of taxation; (57 L. R. A. 40) on taxability of franchises; (58 L. R. A. 564) on taxation of corporate franchises; (60 L. R. A. 333) on taxation of franchises, privileges, and occupations.

#### **— Stock.**

Cited in Memphis v. Union & Planters' Bank, 91 Tenn. 550, 19 S. W. 758, holding that payment of tax on shares of stock "in lieu of all other taxes" under charter exempts capital stock from taxation; Memphis v. Memphis City Bank, 91 Tenn. 578, 19 S. W. 1045, and Memphis v. Home Ins. Co. 91 Tenn. 561, 19 S. W. 1042, holding payment of tax on "amount of capital actually paid in" under charter exempts capital stock from further taxation, but not shares of stock; State v. Bank of Commerce, 95 Tenn. 227, 31 S. W. 993, holding tax on capital stock in lieu of all other taxes does not exempt shares of stock, surplus, or undivided profits; German American Sav. Bank v. Burlington, 118 Iowa, 86, 91 N. W. 829, holding bank cannot deduct from shares of its stock assessed to it, government bonds held as part of capital.

Cited in notes (58 L. R. A. 590) on double taxation of corporation and stockholder; (60 L. R. A. 367) on double taxation; (58 L. R. A. 588) on duty of corporation to collect tax on share stock.

Not followed in Stroh v. Detroit, 131 Mich. 116, 90 N. W. 1029, holding taxation of shares in foreign corporation whose property is situated and taxed in state double.

**Exemptions.**

Cited in *Union & Planters' Bank v. Memphis*, 101 Tenn. 159, 46 S. W. 557, holding exemption of capital stock constitutional, but not exemption of shares of stock; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 697, 53 L. R. A. 927, 43 S. W. 115, holding franchise and surplus fund not included in exemption of capital stock, road, fixtures, etc.; *Grundy County v. Tennessee Coal, I. & R. Co.* 94 Tenn. 304, 29 S. W. 116, holding suit properly brought by owner, if valuation contested, but by collector, if right to assess denied.

**Valuation for taxation.**

Cited in *Carroll v. Alsop*, 107 Tenn. 293, 64 S. W. 193, holding actual cash value proper basis of assessment; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 161, 34 L. R. A. 728, 36 S. W. 1041, holding Acts 1895, Ex. Sess. chap. 1, §§ 6, 21, unconstitutional for disregard of requirement of taxation according to value; *State v. Weyerhauser*, 68 Minn. 368, 71 N. W. 265, upholding validity of statute providing for reassessment of undervalued property and enforcement of additional tax; *Railroad & Teleph. Co. v. Board of Equalizers*, 85 Fed. 317, enjoining collection of tax where assessment unequal, though complainants' property not overvalued.

Cited in footnote to *State ex rel. Davis & S. Lumber Co. v. Pors*, 51 L. R. A. 917, which authorizes reassessment of personalty omitted in previous year, though no longer in existence.

Denied in *Galusha v. Wendt*, 114 Iowa, 611, 87 N. W. 512, suggesting reassessment of mistakenly undervalued property in same year unjust in view of honest diversity of opinion.

**Definition of "capital stock."**

Cited in *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* 95 Tenn. 656, 31 L. R. A. 600, 49 Am. St. Rep. 943, 32 S. W. 1097, holding limit to amount of capital stock does not restrict amount of property that corporation may acquire.

**Situs of personalty for taxation.**

Cited in *Jack v. Walker*, 79 Fed. 142, holding bond and mortgage owned by nonresident not taxable, though in hands of resident agent for collection; *Minneapolis & N. Elevator Co. v. Traill County*, 9 N. D. 221, 50 L. R. A. 271, 82 N. W. 727, holding elevator company taxable for grain therein, though owners nonresidents; *Western Assur. Co. v. Halliday*, 61 C. C. A. 273, 126 Fed. 259, upholding taxation of municipal bonds deposited with superintendent of insurance by foreign insurance company.

**— Stock.**

Cited in *State v. Kidd*, 125 Ala. 421, 28 So. 480, holding situs of stock of foreign corporation at owner's domicile, unless otherwise fixed by statute; *Greves v. Shaw*, 173 Mass. 208, 53 N. E. 372, holding stock of domestic corporations and national banking corporations located in state subject to taxation under general tax law; *Augusta v. Kimball*, 91 Me. 607, 41 L. R. A. 476, 40 Atl. 666, holding stock in foreign corporation held by nonresident trustees for resident beneficiaries not subject to taxation.

Cited in note (58 L. R. A. 582) on taxation of stock in domestic corporation held by nonresident.

2 L. R. A. 863, *HAWES v. NICHOLAS*, 72 Tex. 481, 10 S. W. 558.

**Revocation of will.**

Cited in footnotes to *Miles's Appeal*, 36 L. R. A. 176, which holds erasure of specific legacy from will not revocation of legacy; *Billington v. Jones*, 56 L. R. A. 654, which holds will revoked by writing on it statement that it is void, stating that it is killed, and filing it away; *Cutler v. Cutler*, 57 L. R. A. 209, which holds will revoked by adopting mutilations by vermin.

Cited in notes (7 L. R. A. 486) on revocation, revival, and republication of will; (37 L. R. A. 577) on revocation of will by subsequent will, and revival of former by destruction of the latter; (38 L. R. A. 439) on evidence to establish lost or destroyed wills.

**Revival of earlier will by destruction of later testament.**

Disapproved in *Re Gould*, 72 Vt. 318, 47 Atl. 1082, holding destruction of subsequent revoking will may revive former will without republication, if so intended; *Stetson v. Stetson*, 200 Ill. 608, 612, 61 L. R. A. 262, 66 N. E. 262, holding destruction of will revives former will therein revoked, if uncanceled.

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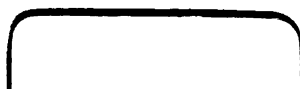
















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